



A powerful and balanced voice for business

International Bar Association Global Employment Institute and International Organisation of Employers

International Labour Standards in the Contemporary Global Economy



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Acronyms and abbreviations

Acronyms

CAS	ILO Conference Committee on the Application of Standards
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
CFA	ILO Committee on Freedom of Association
CSR	Corporate Social Responsibility
GB	ILO Governing Body
GEI	IBA Global Employment Institute
GFA	Global Framework Agreement
GUF	Global Union Federation
HR	human resources
IBA	International Bar Association
ICJ	International Court of Justice
IFA	International Framework Agreement
ILC	ILO International Labour Conference
ILO	International Labour Organization
ILS	ILO International Labour Standards
IOE	International Organisation of Employers
MNE	multinational enterprise
NGO	non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
UN	United Nations
UNHRC	United Nations Human Rights Committee

Abbreviations

1998 Declaration	ILO 1998 Declaration on Fundamental Principles and Rights at Work
Vienna Convention	Vienna Convention on the Law of Treaties

Introduction

The International Organisation of Employers (IOE) and the International Bar Association's Global Employment Institute (IBA GEI, GEI) have joined efforts to provide guidance on an area that is becoming increasingly relevant for companies.

It has become common to refer to International Labour Organization (ILO) Conventions, Recommendations and/or the ILO 1998 Declaration on Fundamental Principles and Rights at Work (1998 Declaration) in instruments like codes of conduct and in international framework agreements (IFAs). This trend has a direct impact on day-to-day management decisions and future business projects.

The lack of precise knowledge of what this means in practical terms could lead and has led to unintended consequences that could have been avoided. The most recent United Nations Framework for Business and Human Rights includes a due diligence approach which, even though not legally binding, affects the ILO Fundamental Principles and Rights at Work and makes references to ILO Fundamental Conventions even more relevant.

Being able to provide some guidance that clarifies what the purpose of ILO International Labour Standards (ILS) is and how they interact with national regulation is worthwhile and was one of the reasons this joint effort was undertaken. But more relevant was the need to understand broadly how the complex ILO supervisory system works and to what extent the outcome of the ILO supervisory system, in practice, can affect companies that refer to ILO Conventions, Recommendations and/or the 1998 Declaration in their codes of conduct, IFAs and/or other corporate social responsibility (CSR) voluntary initiatives. The distinction between areas of ILS Supervision where tripartite consensus exists and areas where divergent and controversial perspectives arise is also critically important for companies referring to ILO Conventions.

The recent controversy on the right to strike and Convention 87 has been used as an example to illustrate why, when referring to a Convention, companies could be unconsciously affected by the non-binding opinions and guidance provided by some of the ILO supervisory bodies on such Convention.

This exercise does not aim at providing an exhaustive explanation of all the ILO instruments and supervisory mechanisms; and it does not seek either to analyse all the references to ILS on IFAs and codes of conduct. It wants to provide an overview and to include some elements of reflection and cautiousness. When writing this report, the combination of expertise between law practitioners and experts on ILS has been complementary and therefore very useful.

The IOE is contributing to this Report with its knowledge of ILS and of the ILO supervisory system. The IOE is the largest network of the private sector in the world, with more than 150 national business and employer federations as members. For 100 years in social and employment debate taking place in the ILO, to which IOE is the sole business representative, and across the UN, G20 and other emerging processes, IOE is recognised for its unique expertise, advocacy and influence as a powerful and balanced voice for business worldwide. In its relations with the ILO, the IOE's member federations nominate employer representatives to participate in all the debates at the ILO, and particularly in the Governing Body (GB) and the International Labour Conference (ILC). In the current context of the ILO Future of Work initiative, the priority areas for the IOE include the promotion of international labour standards that are conducive for the creation of employment and healthy development of industrial relations. Most importantly, the IOE has consultative status with the United Nations and the ILO, and maintains working relations with many international governmental and non-governmental organizations dealing with issues that lie within its own field of competence. The importance and influence of the IOE have increased because it has acted since its establishment as the Secretariat for the Employers' Group in all of the ILO's tripartite bodies.

The GEI is part of the IBA, the largest international organisation of lawyers, and was established in 2009 as a global think tank for leading international employment and immigration lawyers, to develop projects of interest to and in collaboration with multinational enterprises (MNEs), international institutions and world organisations.

The subject matter of this Report is considered by the GEI to be a prime example of the type of area of international law where international lawyers should collaborate with world organisations for mutual benefit and for the benefit of clients.

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1 Purpose of the Report

- 1.1 The IOE, the largest network in the world of employer and business organisation members, and the IBA GEI have joined forces to produce this report on ILS.
- 1.2 The Report explores a number of the ways in which ILS generated by the ILO impact on companies, particularly MNEs.
- 1.3 ILS are instruments that set out basic principles and rights at work and are drawn up by the three constituents of the ILO: (1) governments; (2) employers; and (3) workers. They are included either in Conventions, which are instruments that on ratification create legal obligations; or in Recommendations, which are instruments not open to ratification, but give guidance as to policy, legislation and practice. It is important to stress that ILS are addressed to states, not to individuals or companies. Therefore, commitments to respect ILO Conventions should come from states, and individuals or companies cannot adhere formally to any ILO Convention. Both kinds of instrument are adopted by the International Labour Conference (ILC). Once adopted at the ILC, governments are required to submit the given instrument to their competent national authorities (such as a parliament) for consideration. A member state can then ratify a Convention or decide not to ratify it. If a member state ratifies a Convention, companies are then directly affected by national laws and regulations, court decisions, arbitration awards and collective agreements that give effect to the ILS included in that Convention. However, even if an ILO member state has decided not to ratify a Convention, there are still circumstances where an ILS within such an instrument can have legal implications for a company. Two examples can be given: the first is self-evident but the second may not be so obvious and, importantly, the legal implications are far from straightforward. First of all, it may be the case that, under the national law, unratified Conventions (and Recommendations) influence national law. If such national law is binding on companies, then companies will be affected. Second, a company may refer in its own documents to, say, an ILS (or a part of one) or the ILO 1998 Declaration on Fundamental Principles and Rights at Work (the '1998 Declaration'). We concentrate on this second example throughout this Report.
- 1.4 In particular, the Report focuses on:
 - what ILS are and how they are implemented, supervised and interpreted (Section 2);
 - examples of references to ILS in corporate initiatives such as IFAs and codes of conduct (Sections 3, 5 and 6 and Annex II);
 - whether ILO Convention No 87 on the Freedom of Association and Protection of the Right to Organise of the ILO contains a 'right to strike' (Section 4); and
 - the legal challenges companies face when references are made to ILS in national law or in agreements (IFAs) or codes of conduct (Section 6).

- 1.5 This Report will provide employers with a deeper understanding of ILS and particularly offer some food for thought about the consequences of referring to ILS in an IFA or code of conduct.
- 1.6 This Report is timely because a considerable number of IFAs (and codes of conduct) still refer to ILS and/or the 1998 ILO Declaration and also the non-binding opinions and guidance of ILS given by ILO bodies, especially in the context of Convention No 87. This causes concern for MNEs.
- 1.7 Increasingly, we have seen ILO Conventions, Recommendations and/or the 1998 ILO Declaration referred to in companies' business agreements and policies such as IFAs and corporate codes of conduct. For example, a company may state in an IFA that it is committed to 'give effect to' or 'act in compliance with' an ILS. Such a reference to an ILS raises two potential concerns: first, sometimes only a general reference is made to a Convention or ILS and this can lead to uncertainty as to the extent to which the company has legally bound itself to an ILS; and second, there is a risk that the companies concerned have not given full consideration to the extensive non-binding guidance given to some ILO Conventions and Recommendations through the ILO supervisory system. The legality and legal implications of such non-binding guidance is complex and, in some cases, controversial.
- 1.8 A particularly important example concerns Convention No 87. There is an increasing view among the international business community that ILO Convention No 87 has been broadly interpreted without any mandate or legal basis, especially by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). In our opinion, the CEACR's observations and direct requests sometimes go beyond the original purpose and meaning of the Convention and thus may create new obligations for ratifying member states. There is a particular area where the CEACR has developed broad non-binding guidance that has raised concerns for the business community. In the context of Articles 3, 8 and 10 of Convention No 87, the CEACR assumes that the provisions on the right to organise include an international right to strike. In consequence, it has provided detailed and extensive non-binding guidance on the scope and modalities on the right to strike and it has requested governments that ratified Convention 87 to align their laws and practices to its own rules on the right to strike. However, governments have no obligation under Convention 87 to adhere to the CEACR's rules on the right to strike.
- 1.9 The non-binding guidance by the CEACR does matter. On the one hand, we maintain that such advice is non-binding on ILO member states. On the other hand, there is at least one scenario where there could be legal implications for a company. Consider the case of a company that has in an IFA, code of conduct or other document expressed a commitment to comply with Convention No 87. Here, the CEACR's advice could become of considerable importance for that employer. For example, it is conceivable that a national

court asked to determine the extent of the legal obligations of the company by virtue of the reference to Convention No 87 will have regard to the CEACR's non-binding guidance. The significance of this is that non-binding guidance would have indirectly acquired legal implications for the company.

- 1.10 Of course, this scenario does beg the question on the legal status of the IFA, corporate code of conduct or other document in which the reference is included. But even if a company is not legally bound by Convention No 87, the CEACR guidance could still be potentially of some relevance. If a company has committed to 'comply with' Convention No 87, then it could be expected for workers' organisations to call upon the company to comply with non-binding guidance of ILO bodies more favourable to workers. It follows that employers have an interest in knowing what such bodies have said and challenging them when they go beyond their mandate. In this context, it is therefore of some importance for MNEs to know that recent new developments at the ILO Governing Body (GB) level have helped to understand better the non-binding nature of the CEACR guidance and that there is no agreement among the ILO's three constituents that a 'right to strike' is contained in Convention No 87. Of particular importance in this debate is the Government Group statement in the March 2015 GB session that 'the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level'.¹
- 1.11 It is too simplistic to think that ILS and their non-binding guidance by ILO supervisory bodies are not a matter of concern for MNEs. As we explore in this Report, companies may be unintentionally signing up to ongoing and more stringent obligations than they appreciate and so they need to understand the legal significance of ILS (including when referred to in an IFA or code of conduct) and to be aware of the extensive reading of ILS by ILO supervisory bodies (especially the CEACR's pronouncements on the right to strike in relation to Convention 87).

1 www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf, Annex II p 4, para 5.

2 The ILO and its ILS (Conventions and Recommendations)

ILO

- 2.1 The ILO is a UN agency devoted to promoting social justice and labour rights, pursuing its mission that labour peace is essential to prosperity. It is also the only tripartite UN agency with representatives of governments, employers and workers in its governance structure. This tripartite structure makes the ILO a unique forum in which governments and social partners of its 187 member states can freely and openly debate to stimulate decent employment growth, promote rights at work, enhance social protection and strengthen social dialogue. In support of these goals and through its 100 years of existence, the ILO has achieved expertise and knowledge about labour and employment conditions around the world. Among other issues, it has served and still serves all the member states in defining ILS, which are backed by a system in charge of supervising their actual application, as will be further analysed in this Report.
- 2.2 The International Labour Office is the ILO's permanent secretariat. It is the focal point for the ILO's overall activities, which it prepares under the scrutiny of the GB.²
- 2.3 The GB is the ILO's executive body. It meets three times a year. It takes decisions on ILO policy, decides the agenda of the ILC, adopts the draft programme and budget of the organisation for submission to the ILC, and elects the Director-General. It is composed of 56 titular members (28 governments, 14 employers and 14 workers) and 66 deputy members (28 governments, 19 employers and 19 workers). Ten of the titular government seats are permanently held by member states of industrial importance (Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States). The other government members are elected by the ILC every three years (the last elections were held in June 2017). The employer and worker members are elected in their individual capacity.³
- 2.4 The ILO tripartite constituents meet at the ILC, which is held every June in Geneva. Each member state is represented by a delegation consisting of at least two government delegates, an employer delegate, a worker delegate and their respective advisers. The ILC, which is often called an international parliament of labour, has several main tasks. First, it is tasked with the drafting and adoption of new ILS and the revision, withdrawal and abrogation of outdated ILS. The ILC also supervises in the CAS application of Conventions and Recommendations at the national level. In addition, the Conference is a forum where social and labour questions of importance to the entire world, such as the Future of Work, are

2 www.ilo.org/global/about-the-ilo/who-we-are/international-labour-office/lang--en/index.htm.

3 www.ilo.org/gb/about-governing-body/lang--en/index.htm.

discussed. Furthermore, the ILC can pass resolutions that provide guidelines for the ILO's general policy and future activities. Finally, every two years, the ILC adopts the ILO's biennial work programme and budget, which is financed by member states.⁴

ILS

- 2.5 ILS are instruments that are drawn up and adopted by the ILO's three constituents during the annual ILC. They require a two-thirds majority of the ILC for adoption. ILS set international rules on social and working conditions and they are either Conventions or Recommendations. There is an important legal difference between the two: Conventions (and their respective protocols), when ratified by ILO member states, create binding legal obligations to give effect to their provisions in national policy, legislation and practice; whereas Recommendations are not open to ratification, but rather simply provide guidance for national policy, legislation and practice. They are self-contained instruments. However, in the past, a Convention and a more descriptive Recommendation on the same issue have been adopted at the same time.
- 2.6 ILS have grown into a comprehensive system of instruments on work and social policy, backed by a supervisory system designed to address all sorts of problems in their application at the national level. In today's globalised economy, ILS play an important role in the context of growth in the global economy by enabling the respect of rights at work.
- 2.7 By the end of June 2018, the ILO had adopted 189 Conventions, 205 Recommendations and six Protocols covering a broad range of work issues. Areas covered by ILS include: basic human rights, occupational safety and health, wages, working time, employment policy and promotion, vocational guidance and training, specific categories of workers, training and skills development, labour administration and inspection, maternity protection and social security, indigenous and tribal people, and migrant workers.

Fundamental ILO Conventions and the 1998 Declaration

- 2.8 The GB has identified eight Conventions as 'fundamental', covering the following subjects that are considered as fundamental principles and rights at work – 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.

4 www.ilo.org/ilc/AbouttheILC/lang--en/index.htm.

The eight fundamental Conventions are:

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

2.9 The principles referred to in these fundamental Conventions are also covered in the 1998 Declaration. The 1998 Declaration calls on ILO member states to respect and promote: (1) freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of forced or compulsory labour; (3) the abolition of child labour; and (4) the elimination of discrimination in respect of employment and occupation, whether or not they have ratified the relevant Conventions from which these principles are drawn. The Declaration makes clear that these principles are universal and that all ILO member states, regardless of their level of economic development, should work towards their realisation.

2.10 A clear distinction must be made between the fundamental principles as set out in the 1998 Declaration and the eight core Conventions. The fundamental principles are enshrined in the ILO Constitution, which is itself an international treaty signed by member states. These principles inspired the creation of the eight core Conventions which, when ratified, transform those 'promotional' principles into specific legal obligations. Therefore, the political commitments required to promote, achieve and realise the principles under the Constitution – and, by extension, the 1998 Declaration – must remain distinct from the specific legal obligations that are undertaken through the ratification of the core Conventions.

Implementation of ILO Conventions

2.11 Once a member state has ratified a Convention, it commits itself to incorporate that Convention's provisions into national law and practice, and to report on its application to the ILO supervisory system. A Convention generally comes into force in a country one year from the date of ratification.

2.12 Ratification is voluntary. Not all countries ratify all Conventions. Member states may decide not to ratify but this does not necessarily mean that the member state disagrees with the main objectives of the Convention. Minor disparities or peculiarities in domestic law and practice, such as the distribution of legislative competence in federal states, often lead to a government's decision not to ratify. A member state can decide not to ratify because of the (in its opinion too) extensive guidance on (certain) provisions of an ILO Convention by the ILO supervisory system (see below: Supervision of International Labour Standards) creating 'de facto' additional obligations for the member state that were not foreseen nor sought at the time of adoption of the Convention.

Relevance of ILS for companies

2.13 ILS are relevant to companies in a number of ways. Companies are affected by ILS through national legislation. When a member state ratifies a Convention, the content of it can set the framework for national law and practice on the particular topic. If existing national law or practice does not comply with the Convention, this may result in new labour laws, amendments of existing laws or new implementation directives. Consequently, companies and businesses may be required to change their labour practices, which can involve significant administrative measures and costs. Even if ILS are not implemented in national law, their content may be inspiring for other actors. ILS can be a relevant source of practical guidance for business in areas not covered by national law or collective agreements. Also, although addressed to member states, the 1998 Declaration and its principles have been taken up by other bodies. They now form a reference point in the UN Guiding Principles on Business and Human Rights, are referenced in the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, constitute the four labour principles of the UN Global Compact and can be found in the International Organization for Standardization (ISO) 26000 Guidance Standard on Social Responsibility. Companies are also referring to ILO Conventions in their corporate codes of conduct and human rights policies, as well as supply chain policies and CSR statements.

Supervision of ILS and constitutional principles of freedom of association and effective recognition of the right to collective bargaining

2.14 ILS are supported by a supervisory system to monitor and promote the proper and balanced implementation of Conventions ratified by member states to ensure adequate protection for workers and, at the same time, to ensure an enabling environment for business creation and development. ILS supervision comprises legal assessment, tripartite scrutiny and, where appropriate, direct contact with, and technical support to, member states on the basis that optimal implementation will be achieved through dialogue, encouragement, advice and assistance. The ILO supervisory mechanisms exist primarily to serve the needs of the constituents. Representatives of

governments, employers and workers also play a vital role as members of supervisory committees established to examine the application of Conventions.

- 2.15 Central to this process are the ILO regular supervisory procedures undertaken by the CEACR, composed of 20 legal experts from around the world and the tripartite Committee on the Application of Standards (CAS). The CEACR is mandated to provide a non-binding, impartial and technical assessment of the application of ILS by examining governments' reports to the ILO on the effect given, in law and practice, to the ratified Conventions, as well as the comments of employers' and workers' organisations. The CEACR issues observations on the application of a particular Convention, or directs requests relating to questions seeking clarification or further information. The CEACR does not create legal jurisprudence from its observations. A report of the observations submitted to governments is published annually in February/March and is an important basis for the CAS discussions at the ILC in June. The CEACR report, in essence, contains the experts' assessments of compliance by ratifying countries with ratified Conventions. In recent years, employers' organisations and a number of governments at the ILO have criticised the CEACR for exceeding its technical mandate by trying to create new obligations for member states that have ratified Conventions through undue and extensive non-binding guidance on provisions of certain Conventions, especially Convention No 87.
- 2.16 The CAS is a standing committee of the ILC mandated to monitor in a tripartite manner the application of ILO standards. Its work is based on the CEACR's reports, and the submissions of CAS members that – through their own legal evaluation, their intimate understanding of the economic and social situation in the respective countries, their knowledge of the latest developments and their experience regarding practical and feasible solutions – contribute to the final supervisory assessment, as reflected in the conclusions of the CAS. The work of the CAS involves drawing up a list of individual national cases for examination by ILO constituents. The government concerned is invited to respond orally before other member states. Employers and workers intervene in the ensuing CAS debate. In many cases, the CAS draws up conclusions recommending that the government in question takes specific steps to remedy a problem or to invite ILO missions or technical assistance. The discussions and conclusions are published in the CAS report. Given the view that the observations of the CEACR may contain undue non-binding guidance on provisions of some of the Conventions to which ILO constituents do not agree, CAS conclusions reflect consensus recommendations only. Where there is no consensus, there are no conclusions and divergent views of the ILO Constituents reflected in the CAS record of proceedings.⁵
- 2.17 The regular supervision of ratified Conventions explained above is also complemented by two special procedures and the Committee on Freedom of Association (CFA). Compared to the rather 'promotional' nature of regular

5 www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf, Annex I, pp 1–2.

supervision, the special procedures are so-called 'contentious' procedures as they are based on specific 'complaints' or 'representations'.

Representations

- 2.18 Under Article 24 of the ILO Constitution, any organisation of employers and/or workers may make a representation to the ILO GB against any member state that it deems has failed to apply a ratified Convention. A tripartite committee may be set up by the GB to examine the representation and the relevant government's response. The committee then submits a report to the GB with the legal and practical aspects of the case, along with conclusions and recommendations. Where the government's response is not considered satisfactory, the GB is entitled to publish the representation and the response.

Complaints

- 2.19 Under Article 26 of the ILO Constitution, any ILO member state that has ratified a certain Convention, or a delegate to the ILC or the GB in its own capacity, may lodge a complaint against a member state for non-compliance with a Convention that both member states have ratified. A Commission of Inquiry may be set up by the GB to carry out an investigation and make recommendations to address the problems raised. If these recommendations are not accepted, the matter may be brought to the International Court of Justice (ICJ). If the government of a member state fails to carry out the recommendations of the Commission of Inquiry or the ICJ, the GB may refer the case to the ILC. A Commission of Inquiry is the ILO's highest-level investigative procedure. It is set up when a member state is accused of persistent and serious violations that it has repeatedly refused to rectify.⁶

CFA

- 2.20 Workers' and employers' organisations may lodge a complaint before the Committee on Freedom of Association (CFA) against members states for violation of the principles of freedom of association and collective bargaining as contained in the ILO Constitution. The CFA is to examine the allegations and engage governments concerned in tripartite conciliation, guided by the principles of freedom of association and effective recognition of the right to collective bargaining. The fact that the CFA engages in the promotion of constitutional principles and is not bound to the application of any specific Convention allows workers' and employers' organisations to make use of this special procedure also with regard to member states that have *not* ratified the relevant freedom of association Conventions. For this reason, its recommendations cannot be deemed to be 'case law' in the sense of an interpretation of the standards laid down in Conventions, nor does the CFA have the authority to do so. The CFA is composed of an independent chairperson

⁶ ILO, *Rules of the Game: a brief introduction to International Labour Standards* (Revised edition, 2014).

and three titular and three deputy representatives in their personal capacity who are derived from governments, and employers' and workers' organisations. It receives the complaints and, after clarifying the facts with the relevant government, submits a report to the GB containing consensual conclusions and recommendations for action. Relevant governments are subsequently requested to report on implementation of these recommendations. The CFA is not a court and does not have a judicial mandate; it does not create legal jurisprudence. The CFA non-binding guidance to governments is meant to promote the Constitutional principles of freedom of association and the ILO's constitutional authority.

ILO supervisory mechanisms in practice

- 2.21 The ILO supervisory system aims to influence government action towards proper and balanced implementation of ratified Conventions, or of freedom of association principles. With the non-binding CEACR's comments, the conclusions of the CAS, and the recommendations resulting from one of the special supervisory procedures being addressed to governments, the immediate relevance for businesses may sometimes be underestimated. However, it is important to keep in mind that ILS are implemented through national legislation, which may directly affect businesses. National social partners play a central role in the formulation of national regulations and in helping the ILO to assess and improve national regulations that are not in compliance with ILO Conventions.
- 2.22 In addition, the supervision undertaken by the CEACR is based on the collection of relevant information through the reports of governments and comments from employers' and workers' organisations. It is essential that the private sector, through employers' organisations, articulate the business perspective to the ILO so that the information is as complete and balanced as possible. The participation of employers in the ILO supervisory system may, for instance, give rise to recommendations to amend national legislation affecting business, or help to neutralise comments filed by trade unions.
- 2.23 During the CAS session, governments, employers and workers make a technical and political assessment of the application of ILO standards. Within the CAS, employers and workers can publicly denounce alleged abuses and criticise unsatisfactory national policies. The attention focused on governments who persistently ignore their ILO obligations creates public pressure. Employers' and workers' participation, including in drafting the conclusions of CAS discussions, is therefore influential.
- 2.24 In addition, the 'representation' and 'complaints' special procedures (see above) provide an opportunity for employers' and workers' organisations to draw the attention of the GB to the failure by member states to apply a ratified Convention. A 'representation' is filed to obtain a tripartite recommendation to resolve the specific situation of non-compliance. The Commission of Inquiry set up following a complaint undertakes a first-hand investigation of alleged violations and is perceived as an alarm bell signalling very serious situations that may affect the business world.

- 2.25 Through the procedure followed by the CFA, employers' and workers' organisations can denounce attitudes of governments or regulations that are considered hostile to employers or workers, and violations of the principles of freedom of association and collective bargaining as set forth in the ILO Constitution. In recent years, trade unions have been filing complaints with the CFA focusing on specific well-known public or private companies in different sectors of the economy even though formally the complaints could only be lodged against specific governments. Trade unions are increasingly using this tool to question the reputation of companies at an international level in the social and labour field.
- 2.26 In that sense, it is also important to notice a growing trend of using the ILO supervisory system as a way for trade unions to put pressure on individual companies. CFA complaints, the discussion of the list of cases in the CAS or observations and comments transmitted to the CEACR, often become a platform to echo internal disputes with individual companies. Employers strongly object to the naming and shaming of companies but this does not avoid that a specific complaint, observation or representation focus on a specific dispute affecting individual companies.

Interpretation of ILS

- 2.27 Article 37, paragraph 1 of the ILO Constitution states that the only body competent to give authoritative interpretations of ILO Conventions is the ICJ. So far, however, the ICJ has never been invoked. A single appeal was made to its predecessor, the Permanent Court of International Justice, on one occasion in 1932.
- 2.28 In the reports of the CEACR and the CAS, non-binding guidance of ILS is provided. Upon request, the ILO secretariat can give informal opinions on the meaning of ILS, which are published in the *Official Bulletin* in the form of a 'Memorandum by the International Labour Office' if they are of general interest. It must be emphasised once again that neither the ILO supervisory system nor the secretariat are competent to interpret Conventions in an authoritative and binding manner.
- 2.29 In interpreting ILS, the constitutional rules of the ILO must be observed. For instance, it follows from Article 19, paragraph 3 of the ILO Constitution that provisions of ILO Conventions must be interpreted in a uniform manner. It is, therefore, not possible to give diverging interpretations for different countries, for example, to interpret the requirements of a Convention for developing countries less strictly than for industrialised countries. In the absence of other ILO interpretation rules, the employers in the CAS have consistently taken the view that interpretations and explanations given by the ILO supervisory system have to be in line with the provisions of the Vienna Convention on the Law of Treaties (the 'Vienna Convention'). This Convention 'applies to... any treaty adopted within an international organisation...' (Article 5, Vienna Convention). The CEACR explicitly confirmed the applicability... of the Vienna Convention in its *General survey* of 1990 (paragraph 244, footnote 13) on Convention No 147 concerning Merchant Shipping

(Minimum Standards). Since the Vienna Convention reflects generally applicable international customary law, its rules apply even to those ILO Conventions that entered into force before it became effective in 1980 (Article 4, Vienna Convention). According to the Vienna Convention, 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' (Article 31, paragraph 1, Vienna Convention). The context shall comprise 'any agreements or any instruments made in connection with the conclusion of the treaty' (Article 31, paragraph 2, Vienna Convention). Together with the context, any 'subsequent agreement regarding the interpretation of the treaty and any subsequent practice which establishes such an agreement between the parties' shall be taken into account (Article 31, paragraph 3, Vienna Convention).

- 2.30 As supplementary means of interpretation, recourse may also add to the 'preparatory work and the circumstances of the conclusion' of the treaty (Article 32, Vienna Convention). Apart from the Vienna Convention, other rules of international common law, such as the principle *in dubio mitius*, must be observed in interpreting ILO Conventions. The principle *in dubio mitius* requires that the least far-reaching interpretation be applied to the member state bound by the treaty in cases where there are several possible interpretations.
- 2.31 For many years, a contentious issue has been the undue extensive guidance given by the CEACR on Convention No 87 regarding the 'right to strike' with all the rules regarding modalities and practices of the exercise of the right to strike that have followed this undue non-binding guidance. In 2011, the employers' group at the ILO, through the IOE, during the preparation by the CEACR of the General Survey on Fundamental ILO Conventions, made a comprehensive submission challenging the CEACR's reading of a right to strike within the scope of the Freedom of Association Convention No 87 (Annex I). This raised a number of interesting legal questions with regard to the lack of a CEACR mandate to interpret provisions of ILO Conventions. Although the CEACR has provided some general responses over the years, these questions remain unanswered to date. After the deadlock that took place at the 2012 ILC, caused by diametrically opposed positions between the employers and the workers as to whether an international recognition of a right to strike exists in Convention No 87, a joint statement was published by employers and workers in February 2015 for consideration by the GB in March 2015 as a way to move forward. The joint statement declared that 'the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organization'.⁷ This general recognition did not constitute a change of position by the employers towards the recognition of a right to strike in Convention No 87. The different perspectives of what Convention No 87 means in relation to a right to strike remains; that is, the employers' and workers' groups did not change their respective positions

7 www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf; see Joint Statement in Annex I.

vis-à-vis the recognition of a right to strike in Convention No 87. Rather, the recognition of a general right to industrial action was intended to prevent this divergence of views on Convention No 87 becoming a blocking point not only in the work of the CAS, but also in the process of improving the functioning of the entire ILO supervisory system. In addition, a particularly important issue to this debate is the government statement at the March 2015 GB stating that 'the right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level'.⁸ The government statement should be read as challenging the CEACR's undue extensive and detailed non-binding guidance on the scope and modalities of the right to strike given that there is a wide variety of diverging rules, practices, perceptions and views regarding industrial action in ILO member states, which are often not in line with the CEACR's non-binding guidance.

8 www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf, see Annex II, Government Group Statement.

3 References to ILS in IFAs and codes of conduct

- 3.1 As indicated, the 1998 Declaration and ILS are increasingly being referred to in IFAs, company codes of conduct and other corporate instruments such as handbooks and CSR codes. Moreover, many MNEs have signed the UN Global Compact,⁹ which refers to the ILO Fundamental Principles and Rights at Work as set out in the 1998 Declaration. This has an increasing impact on day-to-day management decisions in companies and future business projects. The many uncertainties concerning the legal status of these references to the 1998 Declaration and/or ILS have given rise to companies questioning in particular the meaning and scope of certain provisions of ILS (both in Conventions and Recommendations).
- 3.2 While we have seen more and more companies referring to ILS in corporate instruments, as stated above, ILS are primarily addressed to ILO member states. To become legally binding for companies, ILS must be implemented into national legislation and regulation.
- 3.3 At the same time, in recent years, the need to promote respect for the 1998 Declaration has grown within and outside the ILO. A number of multinational institutions have incorporated references to the ILO Fundamental Principles and Rights at Work as set out in the 1998 Declaration into instruments that apply to companies. These include the UN Global Compact and the UN Guiding Principles on Business and Human Rights, the OECD Guidelines and the ISO 26000 Standard. Global unions and non-governmental organisations (NGOs) have sought to apply the eight fundamental ILO Conventions (see above at 2.8) directly to employers through initiatives such as IFAs and multi-stakeholder CSR initiatives. Companies have also referred to Fundamental Principles and Rights at Work as set out in the 1998 Declaration or ILO Conventions in their codes of conduct, handbooks, CSR codes and other internal policies.
- 3.4 Annex II of this Report contains examples of references to fundamental ILO Conventions and specific ILS and the 1998 Declaration in IFAs and MNEs' codes of conduct. Below, we make some general observations on such references and then address the legal implications of making such references with examples of IFAs and codes of conduct that contain arbitration and other enforcement mechanisms. However, before this we examine the purported 'right to strike'.

⁹ www.unglobalcompact.org.

4 How the ILO supervisory machinery can impact on ILS: particularly Convention No 87 and the right to strike

- 4.1 The CEACR, in assessing a country's application of a ratified ILO Convention, might create uncertainty where a company has referenced a particular Convention in one of its agreements or codes of conduct. One such example involves the controversy concerning whether or not Convention No 87 contains a 'right to strike'. Despite this controversy, a major part of the CEACR's comments on Convention No 87 concerns the right to strike. More precisely, in its 2016 Report, 40 out of the 56 observations and 41 out of the 50 direct requests to governments relating to Convention No 87 dealt partly or wholly with the right to strike. In the CEACR's 2017 report, out of the 64 observations on Convention 87, 45 observations (or around 70 per cent) and 51 (82 per cent) out of 62 direct requests on Convention 87 dealt in one way or the other with the right to strike. Similarly, in the CEACR's 2018 report, out of the 49 observations on Convention 87, 33 observations (67 per cent) and 47 (90 per cent) out of 52 direct requests on Convention 87 dealt with the right to strike.
- 4.2 If Convention No 87 contains a 'right to strike', then it seems that there are only a few ratifying countries that fully live up to the 'obligation' to legislate a 'right to strike' in the terms expected by the CEACR. Thus, there is a significant discrepancy between the CEACR's views and the reality of industrial relations systems. It may well be that CEACR's detailed non-binding guidance on a 'right to strike' is the reason why some countries have not ratified Convention No 87. It is notable that, while most other fundamental ILO Conventions have gradually increased their ratification rate and have now been ratified by more than 170 countries, in the case of Convention No 87, there have been 'only' 155 ratifications and it seems unlikely at present that there will be many more. Further, it is of some significance that the 155 member states that ratified Convention 87 do not include many of the major industrialised countries in the world, which means that half of the world's workforce is not covered by Convention No 87. It is therefore worth considering whether or not there is a case for saying that Convention No 87 includes such a right. Also in this context, it is worth commenting on the role of the CEACR: is the CEACR's view that Convention 87 contains rules on the right to strike in line with applicable interpretation rules, such as those contained in the Vienna Convention on the Law of Treaties? In requesting governments to adhere to its self-made rules on the right to strike, rather than only to rules set in ILO Conventions, has it overstepped its mandate?
- 4.3 ILO Convention No 87 on Freedom of Association and Protection of the Right to Organise of 1948 is one of the fundamental ILO Conventions. The Convention deals with various aspects of freedom of association and the protection of the right to organise.

- 4.4 The relevant provisions of Convention No 87 are set out below. It is worthwhile considering them in order to better understand this controversy:

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

- (1) *Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*
- (2) *The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of Articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 hereof.

Article 8

- (1) *In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.*

- (2) *The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.*

Article 9

- (1) *The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.*
- (2) *In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.*

Article 10

In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.'

- 4.5 As noted, 155 member states¹⁰ have ratified Convention No 87 and the issue of whether or not a 'right to strike' is contained expressly or implicitly in Convention No 87 has long been an area of contention. It remains one of the most controversial issues in the area of ILS among the ILO tripartite constituents.
- 4.6 In many countries, national legal provisions recognise a right to strike and these provisions – as well as case law in some instances – provide guidance on how it can be used. It is standard practice for a country to legislate as it sees fit according to its national social, economic and political contexts and for national courts to interpret the legislation. However, it is important to appreciate the distinction between the content of an ILO Convention and the creation and interpretation of national laws on a right to strike. National courts and national legislatures deal with national law, but in a globalised world, other actors, including companies, may mistakenly consider the views of CEACR as the final international legal reference point on obligations arising from ILO Conventions. It is the view of many employers' organisations (including IOE) that the right to strike has no legal basis in Convention No 87 according to all applicable methods of interpretation

¹⁰ As of June 2018, 155 member states have ratified Convention 87: www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232.

of the Vienna Convention, as employers have consistently and repeatedly reminded the CEACR. They believe that this is not an omission; they say that there is no agreement among ILO tripartite constituents in relation to the right to strike and the modalities and practices of strike action in any ILO Convention or Recommendation. Significantly, at the time of the negotiation of Convention No 87, ILO constituents deliberately excluded such a right and have not subsequently agreed to include one in any subsequent international labour standard. Despite this, the CEACR has provided non-binding guidance over the years, expanding and defining a 'right to strike', including its scope and modalities and its application within Convention No 87. However, the agreed mandate of the experts in the CEACR is to provide a technical non-binding assessment on the application of ratified Conventions; it is not to interpret or create new legal obligations regarding any Convention. Employers have for many years objected to this 'extension of the mandate' of the CEACR. For example, in June 2012, the employers' group called a halt to this practice and reacted strongly as a direct result of the CEACR's comments in their 2012 General Survey concerning Convention No 87.¹¹ The employers at the ILO continue to make plain they did not accept as legitimate CEACR's practice of continuing to elaborate upon a right to strike and that any requests by the CEACR to governments to align their law and practice to its own rules on the right to strike are not only non-binding but also outside the scope of ILO standards supervision as they have no basis in the Convention.¹²

Claims of a right to strike included in Convention No 87

- 4.7 To support the claim that Convention No 87 recognises a right to strike, proponents have relied on both implicit reasoning and explicit construction. In terms of implicit reasoning, proponents look to the legislative history and alleged omissions as a foundation for a right to strike. In an attempt to show that the right to strike exists explicitly (even though there is no written reference to the right to strike anywhere in the Convention language), the ILO's supervisory system combines language from different articles to validate its assertion. The arguments are examined in more detail below.

Implicit reasoning

- 4.8 From an implicit perspective, proponents assert that a history of established practices and deeply rooted so-called ILO jurisprudence has recognised and supported the existence of a 'right to strike'. The most frequently expressed argument is that the 'right to strike' is a fundamental right deriving from the right to freedom of association because one cannot exist without the other. As such, it must be exercised peaceably and applied to employers in both the private and public sectors.

11 www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_174846.pdf, p 46.

12 The International Organisation of Employers (2013), *Commentary for Employers on ILO Convention 87*. Also see IOE submissions to the CEACR on Convention No. 87 in 2013, 2014, 2015, 2016, 2017 and 2018.

Proponents also cite other different ILO mechanisms, like the ILO Constitution, subsequent resolutions, and other Conventions and Recommendations as the basis for recognition of the fundamental nature of such a right.

- 4.9 In addition, it is contended that the existence of a 'right to strike' has been the consistent view of the ILO supervisory mechanisms for many years. This assertion is supported by a claim that no challenge or lobbying efforts have been made to contest such a right (further, proponents of the existence of a 'right to strike' make reference to the Vienna Convention and the fact that the CEACR mandate from the ILO has evolved over the years as a means to show that there should be consideration from the content and meaning of provisions of Conventions). Furthermore, in relation to the ILO's monitoring and enforcement mechanisms, proponents say that, to the extent there is discord between the committees that make up the mechanism, this is because of the constituents, specifically the employers.
- 4.10 Proponents also assert a number of public policy arguments to validate a 'right to strike' in the Convention. For example, proponents claim that not having an international right to strike weakens the ILO and subjects developing countries to abuse and dangerous working conditions. Plus, proponents analogise that the number of ratifications is a means to show support for a 'right to strike'. The reasoning is that, because the vast majority have adopted the Convention, this is an important indicator of acceptance and usefulness, and also more reason for a 'right to strike'. Finally, proponents express that, since other countries have adopted laws and written constitutions protecting a 'right to strike', this inherently creates the same guarantee at the international level.

Explicit reasoning

- 4.11 To show a clear 'right to strike', the CEACR and proponents maintain that a 'right to strike' is based on combined provisions of the Convention. The argument appears to be that these provisions explicitly recognise that workers may defend their interests and that incorporates taking strike action.
- 4.12 CEACR takes Article 3 of the Convention statement that 'workers' and the employers' organisations shall have the right... to organise their... activities' and combines this with Article 10's definition of 'organisation', which states that 'any organisation of workers... for furthering and defending the interests of workers'.
- 4.13 The next step is to recognise that this definition of 'organisation' is very broad. If one then refers back to 'activities' in Article 3 and remembers that Article 10 refers to 'furthering and defending the interests of workers', it is said to be clear that putting it together they provide a right to any 'activity' aimed at 'furthering and defending the interests of workers'. Finally, it is argued that obviously 'activity... defending the interests of workers' includes

strike action and so it follows there is a 'right to strike' expressly set out in Convention No 87.

No right to strike included in Convention No 87

- 4.14 The Employers Group in the GB and the ILC were clear. They recognise the right of workers and employers to take industrial action in support of their legitimate industrial interests, but the scope and modalities of its exercise must be in accordance with the national regulations. The Employers Group in the ILO was not against the right to strike per se, as this right was recognised in many national jurisdictions. However, the Employers, as well as many governments, continue to disagree with the link that CEACR makes between Convention 87 and the right to strike. The extensive, undue and detailed non-binding guidance developed by the CEACR on the basis that the CEACR continues to request governments to bring their law and practice in line with its own rules on the right to strike.¹³ The IOE contends that no ILO Convention or Recommendation recognises and regulates a 'right to strike' as a matter of international law. Employers have consistently asserted this and have rebutted any claims to the contrary ever since the ILO's supervisory mechanism has suggested otherwise. IOE argues that Convention No 87 contains no explicit or implicit text on a 'right to strike' for the reasons set out in the next three paragraphs.¹⁴
- 4.15 When Convention No 87 was negotiated and adopted in 1948, there was discussion about the inclusion of a 'right to strike' and in each discussion the decision was taken not to include the right in the Convention. Furthermore, there is also a public policy issue involved. The international community relies on ILO Conventions to provide clear guidance; therefore, if text can subsequently be implied in an extensive detailed manner that was not set out at the time of adoption, the international community cannot have faith in the text being clear. This is undesirable.
- 4.16 A right to strike is an emotive issue and the ability to withhold services will always be a key issue in the employee relations system of any legal jurisdiction. The fact that it is deliberately omitted from Convention No 87 seemingly reflects the conventional wisdom that this is an issue best determined by local law and circumstances. That some national governments have recognised a right to strike does not mean that the Convention contains such a right. It means that local law in many cases is entirely at liberty to define the scope and conditions to implement this right. Minimum standards generally form a safer platform for international instruments of this nature, due to cultural, social and legal variances between nations on these issues.

13 See Annexes I and II Outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf.

14 See Annex I.

4.17 As far as textual analysis is concerned, three points can be made: (1) there is no text in the Convention containing reference to the word 'strike' or a 'right to strike'; (2) there has been no subsequent agreement among the tripartite constituents in the ILC to revise Convention No 87 to include a right to strike despite several proposals by the Employers to this effect; and (3) the preparatory works and the circumstances of the conclusion of the Convention clearly establish the intention to exclude the 'strike' issue from the standard setting. In the preparatory report, it is explained that the proposed Convention should relate only to freedoms of association and not to the right to strike. This over-extensive reading of a particular Convention can almost be considered as creating a new standard. However, it is only the tripartite ILC, and no other body, that has the power to create new ILO standards.

5 General observations on references to ILS in IFAs and codes of conduct

Examples of references to ILS in IFAs and codes of conduct

5.1 References to ILS, including to ILO Convention No 87, can be found in various forms in IFAs and codes of conduct. Sometimes, the reference is of a general nature to one or several ILO Conventions and the 1998 Declaration. Most IFAs, however, refer explicitly to ILO Convention No 87. Some IFAs only mention the ILO Convention while others (re)formulate the basic right that is protected. Sometimes reference is made to the relation between one or more specific ILS and national law. In Annex II to this Report, a number of examples of IFAs and codes of conduct are set out, referring to specific ILS, including ILO Convention No 87.

References in IFAs

5.2 Trade unions have been exercising considerable pressure on MNEs to sign IFAs. These IFAs are negotiated between a global union federation and an MNE to apply to that company's global operations and, increasingly, to their supply chain. Some common features of IFAs include:

- incorporation of respect for or adherence to fundamental ILO Conventions;
- recognition of the union and its affiliates;
- references to wages, overtime and working hours;
- dispute resolution mechanisms; and
- regular global dialogue forums.

5.3 For trade unions, IFAs are a way of promoting recognition of their organisation and worker rights at the global level, especially in regions and countries where national legislation is inadequate or not enforced and union density is low. Through IFAs, they gain new possibilities to organise and exert influence at the company level. For companies, a potential benefit of IFAs is the improvement of a dialogue with local trade unions, which can be an advantage, especially in countries where there are no regular local workers' representatives or trade union partners, or where there are difficulties in obtaining regular interlocution and commitments of unions or workers' representatives at the local level. Furthermore, an IFA can help to strengthen corporate identity and the cohesion of a geographically disparate company can be seen as positive for businesses with high reputational risks on social and labour issues. However, these potential advantages are also sometimes questioned, among other reasons because local workers' representatives and trade unions do not always share convergent interests with the so-called Global Union Federation (GUF) and

also because of the diversity of industrial relation models, which do not always fit the purpose of a single pro-unionisation approach.

- 5.4 While the legal status of an IFA and its terms have yet to be tested, it is clear that, by signing an IFA, the company will assume new (not necessarily legal) obligations for its different business locations and often with regard to its suppliers. A company therefore needs to be fully aware of what IFAs are, their likely content and the effects they may have on the company's business, its strategy and goals.
- 5.5 The first IFA was concluded by Danone in 1988, but the majority of IFAs have been concluded since 2000.¹⁵ Today, over 100 IFAs have been signed. The majority of IFAs have been concluded by MNEs based in the European Union. There is significant variation between some IFAs, but a common feature seems to be that the main focus of all IFAs is the protection of labour rights.¹⁶ According to a 2008 study, 69 per cent of all IFAs refer to the ILO in general and 55 per cent of all IFAs refer to the fundamental ILO Conventions.¹⁷ Another similar feature is that the scope of these agreements is generally worldwide. Differences can be found, however, with respect to whether and, if so, in which way the IFA in question establishes any commitment, for example, towards suppliers of the MNE in question to respect certain principles. Most IFAs do not refer to any commitment of the MNE involved in notifying its subcontractors or suppliers of the principles in the IFA, while others do in varying degrees. Norske Skog ASA, in its IFA of 2013, for example, commits itself to 'notify its subcontractors and suppliers of this Agreement and encourage compliance with the standards set out in [this Agreement].'
- 5.6 The Global Framework Agreement (GFA) on CSR and International Industrial Relations of Lafarge Group of 2013 provides a much stronger commitment:

'Lafarge requires from its suppliers and subcontractors to respect the law and statutory regulations, as well as the fundamental human rights mentioned in the present agreement.

Lafarge also requires from its suppliers and subcontractors to give their workers oral and written information regarding their working conditions.

Any serious breach of the legislation concerning the health and safety of direct or indirect employees, the protection of the environment or basic human rights, which is not corrected after a warning, will result in the termination of relations with the concerned company, subject to contractual obligations.'

15 Key issues for management to consider with regard to Transnational Company Agreements (TCAs) (December 2010): www.itcilo.org/en/the-centre/programmes/employers-activities/hidden-folder/TCAs_Booklet_ENG_final.pdf; www.itcilo.org/en/the-centre/programmes/employers-activities/hidden-folder/TCAs_Booklet_FR_final.pdf.

16 European Foundation for the Improvement of Living and Working Conditions, *European and international framework agreements: Practical experiences and strategic approaches* (2009) 6: www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2008/102/en/2/EF08102EN.pdf.

17 European Foundation for the Improvement of Living and Working Conditions, *Codes of conduct and international framework agreements: New forms of governance at company level* (2008) 25.

References in corporate codes of conduct

- 5.7 Corporate codes of conduct are rules that companies set for themselves in order to embed their environmental and social principles and values systematically within the company. Many codes of conduct also relate to the company's supply chain. In contrast to IFAs, codes of conduct are formulated by individual companies or groups on their own. Codes of conduct can be very helpful to companies for systematically incorporating compliance with social standards in their business policy. But, they must be geared to the individual situation of a company. When a code of conduct is being conceived, a number of aspects need to be taken into account as they may not have the same significance in countries with differing legal systems and traditions.

6 Legal implications of references to ILS in IFAs and codes of conduct

- 6.1 ILO Conventions are directed to governments and only member states that have ratified these Conventions are bound by them.¹⁸ According to some, ILO Conventions cannot create direct obligations for companies, that is, employers,¹⁹ and as a result, references to ILO Conventions or to ILS they contain cannot have any binding effect on the company concerned. Others, for example, NGOs, do consider – without explicitly stating that references to ILO Conventions are legally enforceable – that MNEs should adhere to ILO Conventions to which they refer. These references should be upheld in their view, even if this goes beyond the requirements of the national law of the country in which they operate.²⁰ Even if an agreement can be invoked before a court and apart from the discussion whether MNEs can be bound at all by ILO Conventions, the fundamental question to be answered is whether a reference to an ILO Convention is specific enough to be considered a contractual obligation. One study indicates with regard to IFAs that: ‘the company’s commitments are formulated as declarations, principles and aims, and even if they concern individual rights such as freedom of association, right to equal treatment and access to training, as a general rule, they don’t include the type of detailed provisions on employment conditions which are susceptible of having normative effects for the individual worker’.²¹ For example, Article 2 of ILO Convention No 98 refers to ‘adequate protection’, a norm that is too vague to be enforced. As an additional complementary point, it is also relevant to notice that some provisions in ILO Conventions require state action for their implementation and a company as a private actor will not be able to implement them directly if an additional regulatory development does not take place.
- 6.2 Following the above, it can be argued that indeed most ‘rights’ are described in a rather general manner in the ILO Conventions and provide aspirations rather than legally binding ‘rights’. Often the words ‘respect’ and ‘acknowledge’ are used rather than contractual language, such as ‘bound by’ or ‘comply’. We will have to await the situation in which a national court will have to decide on this issue based on a specific reference to a particular ILS in an IFA or code of conduct, and whether they create any enforceable rights for trade unions or employees under the rules of the applicable national law.

18 The International Organisation of Employers, *International Labour Standards and Companies, A Guide for Business* (October 2012) 2: www.ioe-emp.org/fileadmin/user_upload/_GIRN_MICROSITE/meetings_documents/2012-10-23-Employers-Guide-to-International-Labour-Standards-FINAL-version.pdf.

19 The International Organisation of Employers, *A response by the International Organisation of Employers to the Human Rights Watch Report – ‘A Strange Case: Violations of Workers’ Freedom of Association in the United States by European Multinational Corporations’* (2011): <http://business-humanrights.org/sites/default/files/media/documents/ioe-response-hrwreport-17-5-2011.pdf>.

20 See, for example, the Human Rights Watch Report, *A Strange Case: Violations of Workers’ Freedom of Association in the United States by European Multinational Corporations (2010)*: www.hrw.org/sites/default/files/reports/bhr0910web_0.pdf.

21 European Commission Expert Group, *Transnational Company Agreements Report* (January 2012) 147.

- 6.3 However, before a court can answer that question, there is a preliminary issue to resolve. Can an IFA or code of conduct be enforced in a court of law? A distinction should be made between situations involving ILO member states that have ratified a Convention and situations involving countries that have not. As indicated, countries that have ratified an ILO Convention must make sure that national law conforms to the terms of the ratified Convention. If they have, then a commitment to comply with the terms of a Convention, this equates to a commitment to comply with that country's national law.
- 6.4 Although private parties often use them as guidance, ILO Conventions are not designed to apply to companies and businesses, and never have been.²² As we have noted, it is nevertheless quite common for companies to enter into IFAs or other types of agreement, or to issue codes of conduct that contain references to ILO Conventions or even have ILS included in it.
- 6.5 Companies are free to contract as they see fit, provided the terms of such contracts are not unlawful within the jurisdictions in which they operate. Under certain circumstances, MNEs are also free to make commitments in which they agree to engage in labour practices that confer rights upon workers that may exceed those available under national law. In most cases, making such a commitment does not pose a problem because, by doing so, the company does not violate national law. This is generally the case with commitments under most of the eight fundamental ILO Conventions (see 2.8). Of the four themes covered by the fundamental Conventions, three are prescriptive and designed to eliminate problems in the labour market. Conventions No 138 and No 182 deal with the eradication of child labour; Conventions No 29 and No 105 deal with the elimination of forced labour; and Conventions No 100 and No 111 deal with the elimination of discrimination in employment and occupation. With each of these Conventions, it is generally not difficult for employers to comply with a private commitment in an IFA or code of conduct and not violate national law. For example, Article 2 of Convention No 138 sets a minimum age of 15 for the performance of certain types of employment. Yet, there is nothing to prevent an employer from establishing a policy that prohibits the employment of individuals under the age of 18, even if national law would permit youth employment.²³ A company refusing to avail itself of certain aspects of national law would not amount to a violation of that law.
- 6.6 The ease of analysis ends when one addresses ILO Convention 87. This Convention contains affirmative rights upon workers, such as the right of free choice to be represented by a trade union of their own choosing or not.²⁴ Article 2 of Convention No 87 provides that 'workers and employers, without distinction

22 See n17 above, 5.

23 There is, perhaps, the risk that an employer could be held to violate national law by refusing to hire someone aged 15 if that person wanted a job, but such risks would seem to be limited.

24 While Convention No 87 does not include an express statement related to the choice of a worker not to be represented by a trade union, it is implicit in the text of the Convention and was not included in the text of the Convention precisely because of this fact. Moreover, Arts 20.2 and 23.4 of the UN Universal Declaration of Human Rights (www.un.org/en/documents/udhr) present the same doctrine.

whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation’.

- 6.7 Another example of where Convention No 87 confers the right to be represented or not exclusively upon the worker arises in the system built around how workers select their collective representative in countries that have not ratified the Convention. Again, looking at the plain language of Convention No 87, it is clear that it is the workers who enjoy the right whether or not to join a labour union of their choice. It does not confer the right to select a trade union upon the employer or the trade union. Yet, in certain jurisdictions, national law determines which trade union is deemed to represent the workers. For example, in China, only trade unions associated with the All China Federation of Trade Unions may represent workers. Similarly, in Brazil, the law establishes the principle of trade union unicity, according to which only a single union represents the workers for a specific sector and geographic area. A second principle provides that the ‘hard core’ economic activities of a business serve as the basis for the decision on which trade union will represent its employees. With regards to Mexico, there are complaints before the CFA related to the use of ‘employer protection collective bargaining agreements’, which exclude other less representative trade unions.²⁵
- 6.8 The provisions at issue in each of the legal systems described in these three countries arguably serve to benefit trade unions. In China and Brazil, union representation is established by law, and in certain states of the United States, membership can be compelled. Yet, such provisions could be considered by many as in contradiction with the plain language of Convention No 87, which leaves it to the worker to decide whether or not to be represented by a particular trade union, not the government or the union. Where a company commits to comply with the terms of Convention No 87, then, depending on how that commitment is made, it could be accused of not lawfully operating in the countries mentioned and still uphold the requirements of the Convention.
- 6.9 The complexities associated with this situation become that much more amplified when one looks at the direction IFAs are taking as they evolve. Drawing upon the model established by the Bangladesh Accord,²⁶ increasingly global union federations are looking at arbitration provisions for IFAs to enforce them irrespective of where a breach may have occurred.
- 6.10 While there has always been a debate about whether IFAs are legally enforceable contracts, those IFAs that include an arbitration provision raise an additional layer of complication. To begin, such provision subjects interpretation of the standards included in an IFA to a private arbitrator. In addition, under some legal systems, an arbitrator’s decision is insulated from appeal. However, if an arbitrator’s decision is subject to appeal, to what extent will a court impose its own interpretation?

25 CFA, Case No 2694 against Mexico on the use of ‘employer protection collective bargaining agreements’.

26 www.bangladeshaccord.org.

Pair this extrajudicial enforceability with a commitment to comply with ILO Conventions, and one is left with an instrument that could create a major problem for the signatory employer.

- 6.11 Any company considering whether or not to enter into an agreement of whatever type, or establish a policy or code of conduct, should take great care to ensure that the commitments these instruments contain do not place the company in a situation where it creates obligations that conflict with the national law of any country in which it is doing business.
- 6.12 It is generally accepted that codes of conduct cannot be enforced in legal proceedings. Their enforcement is in the hands of the relevant MNE and thus enforcement depends on whether the MNE provided an enforcement mechanism in the code of conduct itself and, if so, what exactly is provided. However, if a code of conduct has become part of an individual labour contract, for example by explicit incorporation of its provisions into the contract, an employee could try to enforce the provisions of the code of conduct in legal proceedings based on the individual contract of employment. Whether such proceedings would be successful will depend on the applicable (national) law and the way in which the reference to the code of conduct in the employment contract was phrased. Success would also depend on whether a court of law can be found that has jurisdiction over the matter.
- 6.13 The position is different with regard to IFAs, because IFAs are agreements between an MNE and one or more global unions. The first issue that needs to be considered in any discussion on the legal enforcement of IFAs (without an arbitration provision) is which court of law would have jurisdiction and what law would be applied by that court. A striking feature of many IFAs – if not most – is that they do not include a clause on jurisdiction and/or applicable law.²⁷ This in itself can be an indication that at least the parties to the IFA do not consider the agreement enforceable in a court of law. A rare example of an IFA that does have a jurisdiction clause and a choice of law clause is Umicore’s Sustainable Development Agreement of 2011. Chapter 6 of the agreement provides: ‘This agreement is governed by Belgian law. Consequently, any disputes will fall within the exclusive competence of the Belgian courts.’
- 6.14 Which courts have jurisdiction and which law will be applied will in most cases have to be determined on the basis of private international law rules. Since there is no specific legal framework for the legal enforcement of IFAs at the international or European level, the question whether or not an IFA is legally enforceable will have to be determined on the basis of national law; that is, the law applied by the court ‘adhered’.²⁸ Some argue that, in certain cases, an IFA

27 Labour Asociados, *Study on the characteristics and legal effects of agreements between companies and workers’ representatives, Final Report, DG Employment, Social Affairs & Inclusion* (2011) 149.

28 A van Hoek and F Hendrickx, *International private law aspects and dispute settlement related to transnational company agreements* (2009).

can qualify under national law as a collective (labour) agreement. If collective (labour) agreements are legally enforceable in that jurisdiction, the argument runs that the IFA will be legally enforced.²⁹ Whether that argument can be sustained would seem to turn on the criteria under the relevant national law as to what qualifies as a collective (labour) agreement. Even if an IFA does not qualify, there are those who argue it may still be legally enforceable. Others, however, argue that, generally speaking, not only are IFAs by their nature unenforceable by reason of being more of a 'political character and not a legal one',³⁰ but also IFAs are 'primarily designed to operate as "soft law" by creating a mechanism for collaborative effort through social dialogue'.³¹

- 6.15 The question whether an IFA can thus be enforced in a court of law is still a matter of debate and depends very much on its content and the requirements of the applicable national law applied. The general thought seems to be – which is sometimes explicitly stated in the IFAs – that an IFA is a means to create a social dialogue framework rather than a strict contractual obligation that can be enforced in court.³² However, from a business perspective, IFAs should be carefully drafted clarifying that its statements cannot be legally enforced. Some IFAs are indeed clear on this point.

Examples of enforcement mechanisms in IFAs

- 6.16 Many IFAs refer in some way or another to what can or cannot be done in case of discussion on the interpretation or implementation. The enforcement mechanisms found in some IFAs differ widely. Many IFAs indicate that, in case of discussion on the interpretation or implementation of the IFA, the parties will enter into a dialogue to solve the problem. This is, for example, the case for the IFAs of Brunel, Ford, Mizuno, Petrobas and Prym Group. Other IFAs contain more elaborate provisions on the enforcement of the IFA. The IFAs of, for example, Chrysler, Daimler, LEONI and ZF Friedrichshafen AG provide a provision that indicates that the compliance with the principles laid down in the IFA will be part of an internal auditing process. Other IFAs provide for a comprehensive procedure that should be followed in case of a complaint or infringement of the IFA. The IFAs of Aker ASA and Lafarge Group contain more detailed provisions.

- 6.17 In the GFA on CSR and International Industrial Relations of 2013 of the Lafarge Group, a procedure for the settlement of disputes is provided:

'In the event of a complaint or breach of a provision of this agreement, the procedure below will normally be followed:

²⁹ European Commission Expert Group, *Transnational Company Agreements Report* (January 2012) 35.

³⁰ European Foundation for the Improvement of Living and Working Conditions, *European and international framework agreements: Practical experiences and strategic approaches* (2009) 39: www.eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2008/102/en/2/EF08102EN.pdf.

³¹ A L Goldman, *Enforcement of international framework agreements under US law* (2011) 606.

³² The International Organisation of Employers, *International Labour Standards and Companies, A Guide for Business* (October 2012) 7: www.ioe-emp.org/fileadmin/user_upload/_GIRN_MICROSITE/meetings_documents/2012-10-23-Employers-Guide-to-International-Labour-Standards-FINAL-version.pdf.

- a) In the first instance, the complaint should be referred to local management.
- b) If the problem is not resolved by local management, it will have to be referred to the appropriate national union, which will raise the issue with the local company.
- c) If the dispute is not resolved, the reference group will address the issue and propose appropriate action in connection with regional coordinators of BWI and IndustriALL Global Union.
- d) If a dispute is not resolved and that the provisions of this agreement continue to be breached, the termination of the [Global Framework Agreement] will occur only as a last resort.

The signatories agree that any difference arising from the interpretation or application of this agreement will be jointly discussed with a view to its clarification.'

6.18 The GFA for the development of good working relations in companies that are part of Aker of 2012 Article 4 provides the procedure in case of infringements:

'In the event of a complaint or an infringement of the agreement the following procedure will normally apply:

- a) Firstly, the complaint should be raised with the local site management.
- b) If the complaint is not resolved with local management, it should be referred to the appropriate national union who will raise the issue with the company's regional president.
- c) If still unresolved, the complaint will be referred to Aker's Chief Shop Steward who will take the issue to Aker's Chairman and CEO.
- d) Ultimately, if still unresolved, the complaint will be referred to a monitoring group, consisting of an equal number of (company) management and union (including IndustriALL) representatives (3+3). In case of deadlock, arbitration will be handled by the ILO or a neutral party agreed upon by (company) management and the union side.
- e) After this process has been exhausted failure to reach a consensus will mean a termination of the agreement.'

6.19 The different procedures lead to different results, in the sense that some lead to arbitration, while others could end in the termination of the agreement. If an IFA does provide an enforcement mechanism, parties will have to adhere to it.

Examples of references to the legal status of an IFA

6.20 As indicated, the theoretical discussion on the legal implications of an IFA is not yet settled. Some IFAs are, however, rather clear on its legal implications. Below are three examples explicitly covering legal rights and/or remedies.

6.21 The IFA of MAN Group of 2012, for example, provides that:

'Above and beyond this [reference to internal mechanism of dealing with incidents] no claims against MAN SE or its group companies or against their employees or executive bodies may be derived from this joint declaration of intent on any legal grounds, either from within the Company or by third parties.'

6.22 The Declaration on Social Rights and Industrial Relationships of LEONI of 2002 in Article 2.5 provides that: 'third parties cannot derive or enforce any rights from this declaration'. A similar provision has been included in, among others, the IFAs of Volkswagen and Mann & Hummel.

6.23 The Sodexo-IUF International Framework Agreement of 2011 explicitly excludes any remedies other than the procedures set forth in the IFA:

'The procedures for resolution of differences set forth above shall be the exclusive remedy available to the parties, and nothing in this agreement shall provide the basis for any cause of action of any kind in any court or administrative body by "IUF", "Sodexo", or any other entity or individual.'

7 Concluding remarks

- 7.1 Although ILS are not addressed to MNEs but to governments to implement national legislation that conforms to them, ILS have become relevant to companies in many ways, not only because the country in which the company is doing business did indeed ratify the particular ILO Convention and enacted legislation to conform to its content. Companies may have signed IFAs referring to the 1998 Declaration, ILO Conventions, Recommendations or to specific provisions included in them, or have referred to ILS in their codes of conduct, policy, a handbook, CSR initiative or other instrument. Moreover, a number of multinational institutions have incorporated references to ILO Fundamental Principles and Rights at Work established in the 1998 Declaration in instruments such as the UN Global Compact and the UN Guiding Principles on Business and Human Rights, the OECD Guidelines and the ISO 26000 Standard that do apply to companies directly.
- 7.2 This Report outlines the compelling arguments for the case that Convention No 87 on Freedom of Association and Protection of the Right to Organise does not contain a right to strike. It is argued that the purported 'right to strike' does not follow from the wording of the Convention, nor from any other subsequent agreement by ILO tripartite constituents in the ILC. Moreover, the preparatory works on, and the circumstances of, the conclusion of the Convention clearly establish the intention to exclude the issue of the right to strike from the standard setting. Therefore, the CEACR's view that Convention No 87 contains rules on the right to strike is not in line with applicable interpretation rules, as contained in the Vienna Convention on the Law of Treaties. In requesting governments to adhere to its self-made rules on the right to strike rather than only to rules set in ILO conventions, the CEACR oversteps its mandate. Any requests by the CEACR to governments to align their law and practice to its own rules on the right to strike are not only non-binding, but also outside the scope of ILO standards supervision. Governments have no obligation under Convention No 87 to adhere to the CEACR's rules on the right to strike.
- 7.3 On one hand, it seems that not all (often multinational) companies have been fully aware of what IFAs are, what the consequences can be of signing one and what effects they may have on a company's business strategy and goals. In some situations, there is a case for believing that a company has not sufficiently considered the exact wording of agreements or codes it has signed. It may well be that, in some instances, representatives of multinationals of certain departments, such as HR or industrial relations or CSR departments, have encouraged the signing of an IFA or other instrument without first considering the legal implications. It makes eminent sense to get input from legal internal units.
- 7.4 On the other hand, the language in ILO Conventions is rather general. The provisions of ILS refer to principles and rights at work describing them in a rather broad manner. Therefore, it must not be taken for granted that all references to ILS in IFAs will lead to specific legal consequences for a company in national jurisdictions. The issue remains an open one and may in the future be decided before a national court.

- 7.5 In addition, in the process of legal enforcement of IFAs, there are other significant hurdles and debates as to the exact legal status of IFAs. So far, there are no known examples of an IFA having been successfully enforced in court.
- 7.6 It is true that IFAs are not generally designed to be legally enforceable, but it cannot be totally ruled out that one day a court will consider itself competent to hear a case on the legality or interpretation of an IFA. If it does, one question it will have to resolve is what the applicable law might be. It is arguable that, in some jurisdictions, IFAs qualify under national law as collective agreements of some kind, and so are legally enforceable by the court on that basis. In those few cases in which arbitration is agreed in the IFA, arbitrators will indeed declare their competence to arbitrate the IFA.
- 7.7 There is not much debate on the legal status of codes of conduct. They are self-regulatory and cannot in principle be enforced through legal proceedings. It is up to the company itself to decide in the code what 'rights' are given to employees. Many codes of conduct do not take ILS into consideration.
- 7.8 Furthermore, there is an argument that a commitment to comply with ILO Convention No 87 could place companies under challenging pressure by those that consider the Convention as incompatible with the fulfilment of national law (such as recognising a particular union).
- 7.9 In our rapidly changing global economy, the current body of ILS and the ILO supervisory system needs to be a credible, balanced and current point of reference and continually adapt to the changing global circumstances taking into account not only the needs of workers protection, but also the needs of sustainable enterprises to create employment. The way companies refer to ILS needs to be carefully considered given the unintended consequences linked to the extensive non-binding guidance produced by some of the supervisory bodies of the ILO on certain subject areas. These unintended consequences are even more relevant due to the references to ILO Fundamental Principles and Rights at Work included in the OECD Guidelines, the Global Compact, the UN Guiding Principles and other initiatives affecting companies that act globally. It is clear that the CEACR and other ILO supervisory bodies need to provide non-extensive, non-binding, up-to-date, credible and balanced guidance on ILO Conventions in a way that is legally consistent, in order to reinforce the credibility of the system in the future.

Annex I: IOE comments for the General Survey 2012 on fundamental ILO Conventions

Comments on Conventions Nos 87 and 98

Employers' position on the 'right to strike': do Conventions Nos 87 and 98 include the right to strike?

The right to strike is not provided for in either Convention 87 or 98 and was not intended to be. The legislative history of Convention No 87 is indisputably clear that 'the proposed convention relates only to freedom of association and not to the right to strike'.¹ Furthermore, as was emphasised by the Employers' spokesperson during the final discussion of Convention No 98 in 1949, 'the Conference chairman declared unreceivable the two amendments aimed at incorporating a guarantee for the right to strike as they were not within the scope of the Convention. The speaker thus expressed the opinion that the passage in question constituted a factual error with respect to the historical basis of the right to strike being fundamentally inherent in these conventions'.²

Despite this background, the CEACR maintains that the right to strike is based on Article 3 of Convention No 87, which states that 'Workers' and employers' organizations shall have the right... to organize their administration and activities and to formulate their programmes', taken with Article 10 of the Convention, which defines 'organisation' within the meaning of the Convention as any organisation 'for furthering and defending the interests of workers or of employers'.³

The CEACR mentioned the right to strike for the first time in its third General Survey on the subject in 1959, in only one paragraph and only with respect to the public service. In the following surveys, the CEACR gradually expanded its views on the matter to seven paragraphs in 1973, then 25 in 1983 and with a separate chapter of no fewer than 44 paragraphs in 1994, including a number of new subjects. Worryingly, the CEACR in its 1994 General Survey paragraph 145 stated that: 'in the absence of an express provision on the right to strike in the basic text, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject'.

1 ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 129.

2 ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 129. ILC: 32nd Session, 1949, Record of Proceedings, Third part, Appendix VII p 468.

3 See in detail CEACR General Survey 1994, paras 136-179.

On the basis of this interpretation, every year, the CEACR looks into numerous cases involving specific national provisions or practices restricting strike action. In approximately 90–98 per cent of all these cases, the experts conclude that restrictions on the right to strike, be they *de facto* or *de jure*, are not compatible with the Convention.⁴ Thus, they have formulated a comprehensive corpus of a minutely-detailed strike law that amounts to a far-reaching, almost unrestricted freedom to strike.⁵ The occasional, theoretical restrictions are regarded as being hardly ever applicable to the actual situations reviewed.

However, to take Article 3 of Convention No 87, which states in very general terms that ‘Workers and Employers’ organizations shall have the right ...to organize their... activities and to formulate their programmes’ as a basis for establishing very detailed rules regarding a right to strike is very subjective and highly questionable. It is also surprising, as one would have expected to find, for a right as fundamental as the right to strike, an express provision in the text of the Convention itself. If one adheres, even if only loosely, to the applicable principles of interpretation in the Vienna Convention,⁶ the right to strike cannot be adduced from the Convention.

As the CEACR concedes, the wording of the Convention, the preamble of the ILO Constitution and the Declaration of Philadelphia do not refer to strikes. No wording, or any other instrument within the meaning of Article 31, paragraphs 1 and 2, of the Vienna Convention can be said to aim at such an understanding between the parties to the Convention. Similarly, there is no subsequent practice in the application of the Convention that establishes the agreement of the tripartite contracting Parties to interpret its provisions as enshrining the right to strike (Article 31, paragraph 3, Vienna Convention).⁷ The International Labour Conference itself, at its 88th Session in 2000, pointed out that the Vienna Convention of 1969 was to be applied to the interpretation of ILO Conventions.⁸

Nevertheless, questions connected with freedom of association do occupy an inordinate amount of the CEACR’s report every year, with strikes figuring prominently among these questions. The ideal type of industrial action fitting the experts’ detailed notions is reflected in hardly any national rules on industrial action, or in practice. In these circumstances, it cannot be assumed that a customary right has developed for a particular concept of the right to strike.

4 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 283; see also Wisskirchen/Hess, *Employers’ handbook on ILO standards-related activities*, Geneva 2001, p 35.

5 The most recent General Survey on this subject (1994) devotes 44 paragraphs to strikes. By contrast, in their 1959 report the experts referred to the possibility of a right to strike in only one paragraph, ILC, 43rd Session, 1959, Report III (Part IV), para 68.

6 Of 23 May 1969, United Nations, Treaty Series, Vol 1155, p 331.

7 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 284.

8 ILC, 88th Session, 2000, Record of Proceedings, Vol I, pp 5/2-5/3, paras 7 and 11.

Interpretation according to Article 31 of the Vienna Convention therefore leads to the conclusion that strikes are not regulated in Convention No 87. This conclusion is confirmed by the preparatory work of the Treaty and the circumstances of its conclusion. It is rightly pointed out by the Experts in the 1994 General Survey that the right to strike was referred to several times during the preparatory work, but no explicit proposal on that subject was put forward during the debate in Conferences.⁹ However, the Experts' comments on the genesis of the Convention are incomplete, as the Office's preparatory report on the planned Convention on freedom of association excluded regulation of the right to strike after analysing governments' answers.¹⁰

'Several governments, while giving their approval to the formula, have nevertheless emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association'.¹¹

This was again confirmed during debates in plenary. 'The Chairman stated that the Convention was not intended to be a "code of regulations" for the right to organise, but rather a concise statement of certain fundamental principles.'¹²

When the Right to Organise and Collective Bargaining Convention No 98 was adopted in 1949, this subject was again examined *expressis verbis*. In the course of the subsequent discussions, two workers' delegates and one government delegate vainly tabled proposals to have the right to strike guaranteed in the Convention. Both proposals were rejected. The record of proceedings noted: 'The Chairman ruled that this amendment was not receivable, on the ground that the question of the right to strike was not covered by the proposed text, and that its consideration should therefore be deferred until the Conference took up item V of its agenda relating, inter alia, to the question of conciliation and arbitration.'¹³ Paragraph 4 of the Voluntary Conciliation and Arbitration Recommendation No 92 of 1951 refers to strikes and lockouts in neutral language and does not attempt to regulate them.¹⁴

9 General Survey 1994, para 142.

10 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 284.

11 Report VII, 31st Session of the International Labour Conference, 1948, p 87.

12 ILC: 31st Session, 1948, Record of Proceedings, Appendix X, p 477.

13 ILC: 32nd Session, Record of proceedings, 1949, p 468.

14 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 285.

Lastly, in 1994, the CEACR made a very vague allusion to the fact that strikes are mentioned in other international instruments.¹⁵ In this respect, the Universal Declaration of Human Rights of 1948 is not relevant. Although it sets out many fundamental rights in general terms, these are only recommendations and compliance with them is not obligatory.¹⁶ Article 22, paragraph 1, of the International Covenant on Civil and Political Rights¹⁷ and Article 8, paragraph 1 (d), of the International Covenant on Economic, Social and Cultural Rights¹⁸ are more apposite. For several years, the texts of the two Covenants formed the subject of negotiations aimed at drafting a single UN human rights covenant. A motion to introduce a right to strike alongside freedom of association was, however, rejected. After the text was split into the two aforementioned covenants, Article 8 was given the wording quoted in footnote 15. On the whole, these rules have less binding force and the monitoring machinery is weaker than those of ILO Conventions.¹⁹ The UN Human Rights Committee (UNHRC), in its decision of 18 July 1986,²⁰ which expressly relied on the interpretation rules of the Vienna Convention, concluded that the right of freedom of association embodied in Article 22 of the International Covenant on Civil and Political Rights did not necessarily imply the right to strike and the authors of the Covenant did not have the intention of guaranteeing the right to strike. A comparative analysis of Article 8, paragraph 1 (d), confirmed that the right to strike could not be regarded as an implicit element of the right to form and join trade unions. And the right to strike under Article 8, paragraph 1, was clearly and expressly subordinated to the law of the country.²¹

In these proceedings before the UNHRC, the complainants asserted that ILO organs had arrived at the conclusion that, in the light of ILO Convention No 87, the right of freedom of association necessarily presupposed the right to strike. The UNHRC replied that every international treaty had a life of its own and must be interpreted by the body entrusted with the monitoring of its provisions. In addition to these clearly accurate observations, the UNHRC stated that 'it has no qualms about accepting as correct and just the interpretation of those treaties by

15 General Survey, 1994, para 143: Art 8 (1) of the International Covenant on Economic, Social and Cultural Rights refers to 'the right to strike, provided that it is exercised in conformity with the laws of the particular country'.

16 See Brupbacher, S, *Fundamentale Arbeitsnormen der Internationalen Arbeitsorganisation, Eine Grundlage der sozialen Dimension der Globalisierung*, Bern 2002, p 10.

17 United Nations: Human rights: A compilation of international instruments, Vol I (First Part), Universal Instruments, Centre for Human Rights, ST/HR/Rev. 5 (Vol. I/Part 1), Geneva, 1994, p 28. Art 22, para 1, reads 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.'

18 United Nations: Human rights: A compilation of international instruments, Vol I (First Part), Universal Instruments, Centre for Human Rights, ST/HR/Rev 5 (Vol I/Part 1), Geneva, 1994, p 11. Art 8, para 1 (d) reads: 'The States Parties to the present Covenant undertake to ensure: ... (d) The right to strike, provided that it is exercised in conformity with the laws of the particular countries.'

19 Wiskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 286.

20 UNHRC: Report of the Human Rights Committee, General Assembly, 41st Session, Document A41/40, New York, 1986.

21 Wiskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 286.

the organs concerned'. Coming after the correct allusions of the UNHRC to the separate lives of international treaties and to the fact that they must be interpreted by the competent body, this remark about ILO standards can only be described as an amicable diplomatic statement without any binding force.²² It was an *obiter dictum* from a committee that was, by its own avowal, not competent to deal with this matter. This is all the more true given that, according to Article 37 of the ILO Constitution, the ICJ can alone give binding interpretation of ILO standards.

Nevertheless, the CEACR assumes that there is a general principle allowing an extensive right to strike. In its opinion, limitations require special justification that must be interpreted restrictively.²³ Two examples can be recalled in this connection: limitation of the right to strike by 'essential services' is regarded as permissible only when the interruption of these services endangers the personal safety or health of the whole population or sections of the population. Thus, the national legislator is denied the right, in respect of the consequences of strikes, to fulfill a wider duty to protect and provide for the welfare of its citizens extending beyond their life and health. While the CEACR basically considers the right to all forms of strikes to be guaranteed, it believes that an exception might be possible in the case of purely political strikes.²⁴ This wording is virtually meaningless in findings concerning actual cases. The CEACR contends that strikes against government policy should always be permissible and that, in practise, this right to strike also encompasses strikes against a law on the day it is discussed in parliament.²⁵ The Committee of Experts are silent about the questionable nature of strikes against a freely elected parliament in a state governed by the rule of law.

From time to time, the CEACR relies on statements from the CFA to underpin its views. This tripartite body was set up in 1951 by the GB. Its official duties are more or less identical to those of the Fact-Finding and Conciliation Commission on Freedom of Association, which was established in 1950. The latter consists of independent experts, but as it can act only with the consent of the government concerned, it has not gained particular importance.²⁶ Its job is to ascertain facts and to try to act as mediator and conciliator. The CFA also concerns itself with questions of freedom of association in member states that have not ratified the relevant Conventions; that is, Nos 87 and 98. For this reason, its recommendation cannot be deemed to be 'case law' in the sense of an interpretation of the standards laid down in Conventions. The work of the CFA is based on the call

22 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 286.

23 General Survey 1994, para 159.

24 In para 165 of the 1994 General Survey the CEACR stated: 'The Committee has always considered that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers...'

25 See Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 287.

26 Minutes of the 110th Session of the Governing Body, 3–7 January 1950, Appendix VI, para 4; ILC: 33rd Session, Record of Proceedings, 1950, pp 172 and 254–255.

in the ILO Constitution to recognise the principle of freedom of association.²⁷ Moreover, its members do not act as representatives of a constituent, but on their own personal responsibility. As had also been rightly pointed out by Nicolas Valticos, the conclusions of the CFA were not limited to determining the meaning of the freedom of association Conventions and that, not being bound by the terms of these Conventions but more generally inspired by the principle of freedom of association, the CFA was led to formulate the principles that on various points extended the express provisions of the Convention.²⁸ The regular reliance on decisions that went beyond anything contemplated by the provisions and legislative history of Conventions 87 and 98, undercut the credibility of the Committee of Experts.²⁹ In short, the CFA has a broader political brief and can in no sense be seen to be either legislating or restricting itself to the disciplines of interpretation that would establish jurisprudence or a true application of the Convention as enacted.

The Employers protested unambiguously at an early stage against incipient deviations.³⁰ For obvious reasons, no issue was made of this and many other differences during the long years of Cold War. This changed very fast after the great turning point in world politics. The Employers' spokesperson of the Applications Committee has repeatedly explained the Employers' position on this matter in the Conference Committee and in the plenary of the Conference and did so in very great detail in 1994 when the CEACR General Survey was discussed.³¹ At the time, it was suggested that, after careful preparation, this subject should be removed from the grey zone of non-binding *extra* or *contra legem* interpretations and officially submitted for discussion by the real legislator of the ILO, in other words, the full ILC. So far, this proposal has gone unanswered. It is also astonishing that the Experts have never addressed the numerous Employers' arguments regarding the subject, which have been put forward in ILO bodies and legal writings. Instead, the Experts persist in reiterating their observations from their earlier reports and General Surveys, which are quoted unchanged as if they were the texts of law.³²

In June 2011, the Employers' spokesperson in the Conference Committee on the Application of Standards in his plenary speech regretted the fact that the Experts continually ignore the Employers' representations on the right to strike and requested that this be rectified without further delay.

27 See Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 288.

28 Valticos N, '*Les méthodes de la protection internationale de la liberté syndicale*', in *Recueil des cours*, 1975, Vol I, pp 89–90, cited in J Hodges-Aeberhard and A Odero de Dios.

29 ILC: 81st Session, 1994, Record of Proceedings, pp 25/36, para 128.

30 See the statements of Mr Waline, International Labour Office, Minutes of the 121st Session of the Governing Body, 3–6 March 1953, pp 37 et seq.

31 ILC: 81st Session, 1994, Record of Proceedings, pp 25/31–25/37, paras 115–134 and pp 28/9–28/10.

32 Wisskirchen, A, The standard-setting and monitoring activity of the ILO, *International Labour Review*, Vol 144 (2005), No 3, p 288.

Final remarks

The right to strike has no legal basis in either Convention Nos 87 or 98 according to all applicable methods of interpretation, which Employers have consistently reminded the Committee of Experts of at every opportunity. Despite this fact, the CEACR has persisted in interpreting the right to strike as a fundamental right of workers and their organisations and has repeatedly and rigidly applied its broad interpretation of the right regardless of national, economic or political circumstances and of whether national laws provide for the right to strike. Through this submission, the IOE would respectfully like to request the Experts to:

- explain in detail in its 2012 General Survey how it has arrived at its interpretations related to a right to strike, using the applicable methods of interpretation as contained in the Vienna Convention;
- reflect in detail in the 2012 General Survey, as well as in the 2012 CEACR's report, the points of view of the Employers and others on the lack of legal basis of the right to strike in either Convention Nos 87 or 98; and
- review the circumstances that give rise to such sustained and profound inconsistency between the views of the Experts and the practice of governments and legislatures, with a view to assessing whether it is the rigid views of the Experts that contribute, at least in part, to the alleged levels of non-adherence to the so-called right to strike, which has been inferentially read by the Experts into the language of the Convention, despite evidence to the contrary in the historical record.

Antonio Peñalosa

Secretary-General

7 July 2011

ANNEX II: Examples of references to ILO Conventions and ILS

Examples of more general references to the ILO can be found in the IFAs of both Ford and Volkswagen:

Volkswagen

In the Declaration on Social Rights and Industrial Relationships at Volkswagen from 2002, no explicit reference is made to ILO Conventions No 87 and No 98. It is, however, stated in the preamble that:

'The social rights and principles described in this declaration take the Conventions of the International Labour Organisation concerned into consideration.'

In the chapter on the basic goals, Article 1.1 provides for the freedom of association (the IFA of Volkswagen does not explicitly refer to the right to collective bargaining):

'The basic right of all employees to establish and join unions and employee representations is acknowledged. Volkswagen, the unions and employee representatives respectively work together openly and in the spirit of constructive and co-operative conflict management.'

Ford Motor Company

The IFA of Ford Motor Company¹ of 2012 provides another example. Its preamble states that:

'The principles are based on a thorough review of labor standards espoused by various groups and institutions worldwide, including those outlined by the International Labour Organization and stand as a general endorsement of the following human rights frameworks and charters:

¹ Ford is one of the first US-based multinationals to sign an IFA: www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewiAoliExrnNAhWMbBoKHVirB6cQFggjMAA&url=http%3A%2F%2Fwww.global-unions.org%2FIMG%2Fpdf%2Fifa_ford.pdf&usq=AFQJCNEtQ-nAG5A1BGNFnuJxlchw6DDhwv.

[...]

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

[...]'

The IFA subsequently describes – in a comparatively elaborate manner – what in this context is understood to constitute the principles of Freedom of Association and Collective Bargaining:

'The achievement of business competitiveness, employee involvement and employment security are positively influenced by good relations and mutual trust between employees and management within the Company. This requires the on-going cooperation of management, unions, works councils, employee representatives and employees, ensuring that social dialogue at Ford be characterized by mutual respect and understanding. Procedures for information and consultation provide the opportunity for issues to be raised by either the management or employee representatives to ensure that the views of both parties are fully understood.

Ford recognizes and respects its employees' right to associate freely, form and join a union, and bargain collectively in accordance with applicable law. The Company will work constructively with employee representatives to promote the interests of our employees in the workplace. In locations where employees are not represented by a body of employee representation/unions, the Company will provide opportunities for employee concerns to be heard. The Company fully respects and supports workers democratic right to form a union and will not allow any member of management or agent of the Company to undermine this right or pressure any employee from exercising this right.

Cooperation with employees, employees' representatives and trade unions will be constructive. The aim of such cooperation will be to seek a fair balance between the commercial interests of the Company and the interests of the employees. Even where there is disagreement, the aim will always be to work out a solution that permits constructive cooperation in the long term.

Timely information and consultation is a prerequisite for successful communication between management and employee representatives. Information will be provided in good time to enable representatives to appropriately prepare for consultation.

Collective bargaining on conditions of work is the expression in practice of freedom of association within the workplace, a responsibility to bargain in good faith in order to build trust and productive workplace relations. Even when disagreement occurs, all parties will be bound by group collective and legislative requirements and the aim will be to reach adequate solutions.

The signatories respect the employees' democratic rights to determine representation and will not use tactics of harassment, or discrimination to influence employees' exercise of these rights.'

Short references to ILO Conventions No 87 and No 98

Below are some examples of IFAs in which only a short reference is made to the ILO Conventions No 87 and No 98.

Mizuno Corporation

The GFA of Mizuno Corporation of 2011 states in Article 2 that:

'All the parties shall undertake the shared responsibilities especially for appropriate implementation of the following eight ILO core Conventions.

[...]

ILO Convention 87 on Freedom of Association and Protection of the Rights to Organise

ILO Convention 98 on Right to Organise and Collective Bargaining'

Merloni Elettrodomestici SpA

The Statement of Agreement of Merloni Elettrodomestici SpA of 2001 states in Article 1 that:

'Merloni Elettrodomestici S.p.A undertakes in all of its plants to respect fundamental human rights and to eliminate the exploitation of child labor, and in particular to respect the principles enshrined in the following ILO Conventions:

[...]

No 87 adopted at San Francisco on 17.6.1948 on trade union freedom. The convention recognizes the right of workers to establish unions and to join a union;

No 98 adopted at Geneva on 8.6.1949 on the right to bargain. Workers and employers may bargain freely and independently, negotiating agreements of either limited or unlimited duration.'

More elaborate references to ILO Conventions No 87 and No 98

Other IFAs provide more elaborate references to the right to freedom of association and the rights to collective bargaining.

Lafarge Group

The Lafarge Group in its GFA on CSR and International Industrial Relations of 2013 states that:

'Lafarge recognizes the freedom of association and the effective recognition of the right to collective bargaining (ILO Conventions 87 and 98) and will engage in good faith bargaining, aim to achieve a collective agreement in a timely manner, and strive to produce a positive and constructive relationship with trade unions.'

Lafarge respects the right of its employees to form or join any trade union of their choice. Lafarge will remain strictly neutral concerning employee preference to join, remain with, transfer, or abandon their relationship with a trade union of their choice.'

PSA Peugeot Citroën

In a similar manner PSA Peugeot Citroën in its GFA – PSA Group's Social Responsibility of 2017 – states in Article 1.3:

'The PSA Group is open to trade union activities and recognizes the existence of trade unions throughout the world. It recognizes the right of employees to organize and establish trade unions of their own choosing, and ensures respect of trade union independence and pluralism (ILO Convention no. 87). It undertakes to respect strict neutrality regarding the decision of employees to create a trade union, to join an existing trade union organization, to move to another organization or to leave the organization. It also undertakes to ensure reasonable access within the workplace to trade union representatives from organisations which are signatories to this agreement.'

[...]

The PSA Group undertakes to promote collective bargaining, a key element of social dialogue (ILO Convention no. 98).'

Umicore

Another example can be found in the Sustainable Development Agreement of Umicore of 2015. Article 1.4 in the chapter on Human Rights provides:

'In accordance to ILO Conventions 87 and 98, Umicore recognises and respects the freedom of its employees to choose whether or not to establish or to associate with any employee organisation of their own choosing, including labour unions, without Umicore's prior authorization

Umicore will remain neutral concerning employee's free choice to join, remain with, change or abandon their relationship with a trade union of their choice. It shall prohibit any unfair communication aimed at influencing the decision of its employees as regards union representation. Umicore undertakes to ensure reasonable access of union representatives to all relevant workplaces.

The employment of a worker is not contingent upon the condition that he/she joins or not joins a union or be forced to relinquish trade unions membership. Furthermore, union membership shall not be the cause for the dismissal of – or otherwise prejudice against – a worker. Umicore will not interfere with or finance labour organisations or take other actions with the intent of placing such organisations under its control.'

References to the relationship between ILO Conventions and national law

It is interesting to note that, while some IFAs do not go into the meaning of adherence to international labour rights at all, other IFAs do define the rights guaranteed more precisely by outlining the relation with national law. Some IFAs even indicate that the rights will (only) be protected if they are not protected under the applicable national law. Some examples follow.

Ford Motor Company

In the IFA of Ford, as referred to above, reference is made in the preamble to the relation between the principles laid down in the IFA and the applicable national law. A clear limit is set to the application of the agreed principles of the IFA:

'The universe in which Ford operates requires that these Principles be general in nature. In certain situations national law, local legal requirements, collective bargaining agreements and agreements freely entered into by employees may be different than portions of these agreed upon Principles. If these principles set higher standards, the Company will honor these Principles to the extent which does not place them in violation of domestic law. Nevertheless, we believe these Principles affirm important, universal

values that serve as the cornerstone of the relationship between employees and management for us.'

MAN Group

The IFA of MAN Group of 2012 provides in its preface that:

'The principles that follow are based on the Conventions of the International Labour Organisation (ILO), particularly ILO Conventions [...] 87, 98 [...], which are known as the core labour standards. If national legislation, international legal provisions, industry standards and this policy cover the same topic, the stricter provisions are to be applied in each case unless related conduct would be illegal.'

Under the heading 'Rules', the IFA of the MAN Group continues as follows:

'MAN acknowledges the right to form labour unions. The Company and managers remain neutral during organisation campaigns; the labour unions and the Company comply with basic democratic principles, ensuring that employees can make their choice freely. MAN also respects the right of employees to elect bodies representing their interests in the workplace. Employees are granted access to all working premises, insofar as this is required to enable them to exercise their representative function. The right to engage in collective bargaining is respected.

National statutory regulation and existing agreements are to be taken into account when embodying this right. MAN supports the right to freedom of association, even in countries in which this right is not protected.'²

LEONI

A similar commitment can be found in the Declaration on Social Rights and Industrial Relationships of LEONI of 2002, which provides in Article 1.2:

'The basic right of all employees to establish and join unions and employee representations is acknowledged. Compliance with this human right must not, however, contravene national statutory regulations and existing agreements in so far as these do not violate ILO Conventions No. 87 (Freedom of Association and Protection of the Right to Organise) and No. 98 (Right to Bargain Collectively). The freedom of association and protection of the right to organise is also guaranteed in those countries in which freedom of association and the right to organise is not acknowledged as a right.'

2 A similar commitment can be found in the Social Responsibility Principles of Daimler Chrysler from 2002.

Examples can also be found of IFAs in which MNEs commit themselves to enter into a dialogue or find a solution if the principles in the IFA are contrary to national law. However, it is made clear by the MNEs that they are not committing to agree to solutions that might violate national law.

Sodexo

This is, for example, the case in the Sodexo-IUF IFA of 2011, which states in Article 3.1:

'For the application of this agreement, "Sodexo" and "IUF" acknowledge the obligation to respect, in the countries where "Sodexo" operates, the laws and regulations relative to work, along with the rights of employees concerning freedom of association and collective bargaining. "Sodexo" and "IUF" acknowledge that certain elements included in internationally defined principles may be contradictory to national laws. "Sodexo" and "IUF" will explore through dialogue the means to promote the principles in clause 3.2 [which refers among others to the ILO 1998 Declaration on Fundamental Principles and Rights at Work]. Nothing in this agreement is intended to require "Sodexo" to violate the laws of any of these countries, or to forego the rights afforded by those laws.'

Norsk Hydro ASA

Similarly, the GFA of Norsk Hydro ASA of 2010, which was extended in September 2016, provides – before listing the basic principles supported – a commitment to find a solution in line with national law. Chapter 2 on Basic Principles states as follows:

'To the extent the basic principles outlined here are not in accordance with national law and practice in the host country within which Hydro is located, Hydro aspires to find local solutions in accordance with applicable national legislation and Hydro's own CSR policies.'

The fundamental human rights include:

a) Freedom of association and collective bargaining; respecting the right of employees to be represented by a union of their own choice and the basic trade union rights as defined by ILO Convention 87 and 98, covering the freedom of association and the rights to organize and engage in collective bargaining.'

Examples of references to ILO Convention No 87 in codes of conduct

Some codes of conduct do not refer to ILO Conventions, not even Conventions in general, but refer to international human rights, including the freedoms of peaceful assembly and association. The code of conduct of Nokia provides such an example. General references to the standards set by the ILO can be found in the codes of conduct of, for example, Philips and the Coca Cola Company. Both codes of conduct mention the right to freedom of association and the right to collective bargaining, but do not explicitly refer to ILO Convention No 87 or ILO Convention No 98.

The Coca-Cola Company

The 2017 Human Rights Policy of The Coca-Cola Company only provides a general statement on international labour standards:

'This policy is guided by international human rights principles encompassed by the Universal Declaration of Human Rights, including those contained within the International Bill of Rights and the International Labor Organization's 1998 Declaration of Fundamental Principles and Rights at Work.'

The policy itself defines the right to freedom of association and collective bargaining without explicitly referring to ILO standards:

'The Company respects our employees' right to join, form or not to join a labor union without fear of reprisal, intimidation or harassment. Where employees are represented by a legally recognized union, we are committed to establishing a constructive dialogue with their freely chosen representatives. The Company is committed to bargaining in good faith with such representatives.'

Philips

The General Business Principles of 2014, which can be downloaded from the Philips website,³ provide a general statement on ILO Conventions:

'The following standards served, amongst others, as reference in the preparation of the Philips General Business Principles and may be a useful source of additional information: Universal Declaration of Human Rights, UN Guiding Principles on Business and Human Rights, The eight fundamental Conventions of the International Labour Organization, nos. 87, 98, 29, 105, 138, 182, 100 and 111, UN Global Compact, International Chamber

³ www.philips.com/a-w/about/investor/governance/business-principles.html.

of Commerce (ICC) Code of Advertising and Marketing Communication Practice, OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Guidelines for Multinational Enterprises, United Nations Council Resolutions on export controls.'

Subsequently, the General Business principles of Philips of 2014 define the right to organise and collective bargaining in Article 1.1:

'We recognize and respect the freedom of our employees to associate with any employee organization of their own choosing under local law without fear of reprisal, intimidation or harassment. Where employees are represented by a legally recognized union, we establish a constructive dialogue and engage in negotiations or consultation as required with their freely chosen representatives.'

IKEA/IWAY

The code of conduct of IKEA (called IWAY) from 2016 contains a general reference in the introduction to the eight fundamental ILO Conventions:

'IWAY is based on the eight core conventions defined in the Fundamental Principles of Rights at Work, ILO declaration June 1998, the Rio Declaration on Sustainable Development 1992, The UN Johannesburg Summit on Sustainable Development and the Ten Principles of the UN Global Compact 2000.'

The code of conduct also lists the rights to freedom of association and collective bargaining in more detail:

'13.3 Freedom of association

The Supplier respects the rights of Workers to join, form or not to join an association of their choice without fear of reprisal, interference, intimidation or harassment.'

'13.4 Collective bargaining

Workers are free to exercise collective bargaining without fear of reprisal, interference, intimidation or harassment.'

At the end of the document, a reference is made to ILO Conventions No 87 and No 98 without explicitly linking this to the rights listed in the code of conduct.

Tatonka

An example of an explicit reference to ILO Conventions No 87 and No 98 can be found in the code of conduct of Tatonka GmbH of 2015, which provides in Article 2:

'All personnel shall have the right to form, join, and organise trade unions of their choice and to bargain collectively on their behalf with the company. The company shall respect this right, and shall effectively inform personnel that they are free to join an organisation of their choosing and that their doing so will not result in any negative consequences to them, or retaliation, from the company. The company shall not in any way interfere with the establishment, functioning, or administration of such workers' organisations or collective bargaining. In situations where the right to freedom of association and collective bargaining are restricted under law, the company shall allow workers to freely elect their own representatives. The company shall ensure that representatives of workers and any personnel engaged in organizing workers are not subjected to discrimination, harassment, intimidation, or retaliation for reason of their being members of a union or participating in trade union activities, and that such representatives have access to their members in the workplace in accordance with ILO Conventions 11, 87, 98, 135 and 154.'

Hennes & Mauritz

Another example of an explicit reference to ILO Conventions No 87 and No 98 is to be found in the code of conduct of H&M (Hennes & Mauritz AB) of 2010, which reads in Article 4.1.4:

'All employees have the right to form or join associations of their own choosing, and to bargain collectively. H&M does not accept disciplinary or discriminatory actions from the employer against employees who choose to peacefully and lawfully organise or join an association.

(Refer to ILO Conventions 87, 98 and 135).'

Even though it is more difficult to find references to the ILO Conventions and more particularly to ILO Convention No 87 in codes of conduct than it is in IFAs, the references that can be found in codes of conduct are similar to the type of references that can be found in IFAs.

ANNEX III: Reading material

IOE, October 2014, *Do ILO Conventions 87 and 98 Recognise a Right to Strike?*, available at www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=111630&token=d3f4de458d8a4b740afa01b449c44cb11761654b.

IOE submissions to the CEACR on Convention No 87 in 2013, 2014, 2015, 2016, 2017 and 2018:

Text of the 2018 IOE submission: www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=134810&token=f3a17574ad8537081d462bae3143647c8fc7f756.

Text of the 2017 IOE submission: www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=134809&token=99f70e1f1a8984f13d6e524d129ab23025f9406f.

Text of the 2016 IOE submission: www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=132787&token=9711d854019f7405fd647951bfc2dce8b8e8aa4e.

Text of the 2015 IOE submission: www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=132784&token=e3586ede2ef5d687b4ea40a6c8e8bfa0acf6f5be.

Text of the 2014 IOE submission: [/www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=132786&token=51ee8b68c17c0ab42dfcb26600df79ceecd82339](http://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=132786&token=51ee8b68c17c0ab42dfcb26600df79ceecd82339).

Text of the 2013 IOE submission: www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=132785&token=8c3285ca48a1c15c486939715fb8546d24dd5d48.

Sustainability Reporting Handbook for Employers' Organisations, Revised Edition, 2016. Prepared by the IOE and project partners within the scope of the EU-funded project 'CSR for All': www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/_2016-03-10__CSR_for_All_Handbook_for_Employers__Organisations.PDF.

IOE, 2015, *Corporate Social Responsibility for All Best Practice Compilation*, available at www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/csr/EN/_2015-09-11__CSR_Best_Practice_Compilation.pdf.

IOE Factsheet on the ILO Supervisory System (2017): Article 24 Representation Procedure, available at www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/_2017-03-09__C-723_IOE_Factsheet_the_ILO_Supervisory_System_Article_24_Representation_Procedure.pdf.

Publication Guide on CSR and Human Rights – what does it mean for companies in supply chains? October 2015, available in English from: <http://tinyurl.com/zvqx7vs>.

eLearning Module on CSR, Business and Human Rights instruments, June 2015, available in English from: <http://lempnet.itcilo.org/TCAAs/material>.

IOE Factsheet for Business 2013: *How the International Labour Organization supervises international labour standards*, available at www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/_2013-08-12__FS_for_business_-_ILO_and_supervision_of_standards__edited_final_.pdf.

IOE Factsheet for Business 2013: *What Business should know about International Framework Agreements*, available in English from: www.ioe-emp.org.

IOE Factsheet for Business 2012: *International Labour Standards*, available at www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/2012_01_IOE_Factsheet_for_Business_-_ILS__final_.pdf.

D Stevis, ILO Working Paper, *International framework agreements and global social dialogue: Parameters and prospects*, 2010, available in English from: www.ilo.org/wcmsp5/groups/public/@ed_emp/documents/publication/wcms_122176.pdf.

Eurofound Publication: *European and international framework agreements: Practical experiences and strategic approaches*, 2009, available in English from: www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/international-framework-agreement.

European Commission staff working document: *Transnational company agreements: realising the potential of social dialogue*, 2012. Available at: <http://ec.europa.eu/social/BlobServlet?docId=8767&langId=en>.

European Trade Union Institute, *Transnational collective bargaining at company level. A new component of European industrial relations?*, 2012. Information available at: www.etui.org/Publications2/Books/Transnational-collective-bargaining-at-company-level.-A-new-component-of-European-industrial-relations.

IOE Factsheet 2012: *Business and Human Rights*, available at: www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2012-01-11__G-02_Fact_Sheet_for_Business_-_Business_and_Human_Rights.pdf.

IOE Guide for Employers 2012: *UN Guiding Principles on Business and Human Rights*, available at: www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2012-02__UN_Guiding_Principles_on_Business_and_Human_Rights_-_Employers__Guide.pdf.

