

COLLECTIVE BARGAINING:

ILO standards and the principles of the supervisory bodies*

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1. Introduction

The “common welfare”, in the sense of the “material well-being” and “spiritual development” of all human beings, and the “war against want” and against “injustice, hardship and privation” are fundamental and universal values and objectives set out in the ILO Constitution for the purpose of achieving the Organization’s most specific and genuine objective, namely social justice. They must therefore constantly guide the measures envisaged by the Constitution for the achievement of this objective, which include: national and international decisions, measures and agreements; policies, programmes and regulations; and, clearly, *the effective recognition of the right to collective bargaining*. The same can be said of the measures taken to give effect to the ILO’s Conventions and Recommendations.

For the purposes of this paper, it should be emphasized that the social standards contained in national regulations and in the agreements concluded through collective bargaining – which always embody a certain intent and values – must not overlook in their substance the values embodied in the ILO Constitution or, in particular, the provisions of ILO Conventions.

In this respect, just as there is no general acceptance of the concept of the market as an invisible hand regulating the economy without any external interference, the content of labour legislation and collective agreements (particularly those of a more general nature) must not be determined without reference to the values and objectives set out in the Constitution, and especially not by claiming that an unguided clash of interests determines the content and justice of labour standards. By their very existence, the values established in the ILO Constitution exclude the possibility of relativity in social matters and permit the assumption that situations of injustice are “unconstitutional” – in this respect, in the field of collective bargaining, reference may be made, for example, to the racist clauses contained in certain collective agreements which were in force until not long ago, as well as discriminatory provisions between men and women. The ILO’s values are designed to attain

more “humane conditions of labour” (as stated in the ILO Constitution), and a framework in which they are to be carried out, all of which cannot be dissociated in a democratic society from basic human rights, which must be respected within and outside the workplace.

As a result, corporate interests, profit and efficiency cannot be the only criteria for collective bargaining, since primacy has to be given to basic human rights, the adoption of more humane conditions of labour and respect for human dignity within a process which takes into account considerations of general interest or, in the terms of the ILO Constitution, the common welfare.

Moreover, by its very essence, collective bargaining requires the parties, which are well aware of their needs, possibilities and priorities, to adapt to the changing circumstances of the specific context in which work is carried out and to make mutual concessions and identify satisfactory outcomes for each party. Collective bargaining is not therefore in any way impervious to the major and far-reaching political, economic and social changes experienced in the world.

Indeed, in the second half of the twentieth century, and particularly over the past 25 years, a series of events has occurred which have affected collective bargaining in different ways, with diverse implications for the levels of social justice in the world. Without attempting to be exhaustive, reference may be made in this respect to the general acceptance of the market economy following the fall of the Berlin Wall, combined with the new debate on the role and size of the State, which have affected processes of economic rationalization and restructuring, and which have in turn resulted in drastic cutbacks in the public sector and greater flexibility/deregulation of the economy and of the world of work. The increasingly far-reaching process of economic globalization, based on the trade policy of the World Trade Organization, has resulted in harsher competition in a context of constant technological innovation, the repeated merger of enterprises, the creation of industrial conglomerates and the delocalization of production. Very important processes of regional integration have been set in motion. Monetarism has been reaffirmed as an effective means of combating inflation, and has gone hand in hand with budgetary reduction policies and the influence of the International Monetary Fund and the World Bank over national economic and financial

policy. The dichotomy persists between the European model of employment and the North American system, with their different attitudes towards dismissals, the scope of social protection and the difficulties involved in reducing to reasonable levels the very high levels of unemployment experienced in many parts of the world. The informal sector and non-standard forms of employment relationship have developed, with the proliferation of short-term contracts, often through temporary work agencies, and the expansion of export processing zones, which often discourage trade unionism.

However, at the same time, awareness has been increasing of human dignity and the basic principles of democracy, combined with a progressively deeper awareness of matters relating to human rights, with particular reference to equality between men and women, and the situation of the most underprivileged categories and, from a multicultural perspective, of minorities. Trade unions have also been gaining greater autonomy in relation to political parties and the public authorities, based on a process of realism, flexibility, pragmatism and maturity, and have integrated macroeconomic considerations into their claims. The tertiary sector has been growing more rapidly and the development of the ecological movement has led to greater emphasis being placed on environmental policies.

The above phenomena have had a very significant impact and point to the development of a new orientation in the world of work. They have already resulted in collective bargaining taking new directions. Collective bargaining has become more dynamic as greater flexibility and the deregulation of the labour market have taken hold. It has also gained in prestige as new economic policies have begun to bring an end to the unbridled inflation suffered by many countries until recently. It has progressively, although intermittently, through bipartite or tripartite central agreements covering the national situation, succeeded in occupying spaces which go beyond the determination of working and living conditions in the sector or enterprise and which were previously considered, as a maximum, to be the exclusive domain of consultations. It has thereby, in certain cases, been extended to aspects of social and economic policy which have an impact on living and working conditions and has touched upon subjects such as employment, inflation, training, social security and the content of certain legislation of a social nature.

At the same time, the scope of collective bargaining in terms of the categories covered has changed in various ways. Although it has certainly diminished in scope, due among other factors to the high levels of unemployment and the growth of the informal sector, subcontracting and the various forms of non-standard employment relationships (which make unionization more difficult), this deficit has been attenuated by a certain tendency towards the development of collective bargaining in the public service.

Collective bargaining has also lost some of its margin for manoeuvre as a result of the successive economic crises and the subjection of national economic policy to processes of economic integration and agreements with the Bretton Woods institutions. From another point of view, the increasingly harsh competition brought about by technological innovation and globalization has led to a reduction in the influence exercised in many countries by sectoral agreements and has given added importance to collective bargaining at the enterprise level (and at lower levels, such as the work unit, the factory or the workplace), strictly taking into account the criteria of productivity and output. This phenomenon is occurring in parallel with the increased importance of more general centralized agreements, which are becoming necessary in view of the fact that, on certain matters, the general interest cannot be adequately taken into account at the enterprise level, particularly where there are significant differences in the development of the regions or sectors in a country.

The question arises as to whether this picture will be completed in the fairly near future by the emergence of collective bargaining at the international level in the context of multinational enterprises¹ and/or processes of regional economic integration. Up

¹ During the preparatory work for Convention No. 154, an amendment submitted by the Worker members of the Committee on Collective Bargaining which envisaged international collective bargaining was withdrawn for lack of sufficient support. According to the *Record of Proceedings*, "The purpose of this proposed change had been to open the way to collective bargaining between multinational enterprises and trade unions organised at the international level. They expressed their profound concern over the problems created by the operation of multinational enterprises, especially in developing countries. In their view, multinational enterprises were in a position to flout the will of individual governments and to undermine the effectiveness of traditional collective bargaining arrangements. Multinationals challenged the authority of governments and were able to exploit workers. New international methods of regulation were needed, including the development of collective bargaining beyond national boundaries. For collective bargaining to be truly effective with such enterprises, it had to be carried out at the international level. They believed that support for this principle was on the increase and that at some point in the not too distant future many governments would align themselves with the position put forward by the Worker members." [ILC, *Record of Proceedings*, 66th Session, 1981, p. 22/11].

to now, experiences of international collective bargaining have been relatively uncommon and have occurred only in a certain number of transnational enterprises. However, it should be noted that the Council of Europe's Directive of 22 September 1994 regulates collective bargaining in nationally based enterprises and groups which have branches in Europe. Various agreements or framework agreements have also been concluded in the context of the European Union.

Attention is drawn to these trends with a view to highlighting two factors. In the first place, the International Labour Organization, through its standards and technical cooperation activities in many countries, has not only played a very important role in promoting collective bargaining, but has also promoted the development of certain types of bargaining procedures, particularly in a tripartite context. In the second place, based on the content of its standards and the principles developed by its supervisory mechanisms, it has contributed to the universal consolidation of the framework within which collective bargaining must take place if it is to be viable, effective and maintain its adaptability in times of economic, political and social change, while guaranteeing an equilibrium between the parties and opportunities for social progress. This framework is based on the principle of the independence and autonomy of the parties and the free and voluntary nature of negotiations. In all the various systems of collective bargaining, it requires the minimum possible level of interference by the public authorities in bipartite negotiations and gives primacy to employers and their organizations and workers' organizations as the parties to bargaining. This framework has retained its validity ever since the adoption of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), despite the subsequent radical transformations which have occurred in the world.

With regard to the manner in which the Organization has promoted certain methods of collective bargaining, there is a parallel between the ILO Conventions adopted by representatives of workers, employers and governments in the International Labour Conference and certain tripartite national agreements, particularly those adopted in the second half of the twentieth century. Such national tripartite agreements have been envisaged at the international level since the adoption in 1944 of the Declaration of Philadelphia, which forms part of the ILO Constitution. Paragraph

I(d) of the Declaration of Philadelphia (“fundamental principles on which the Organization is based”) states that:

The war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

The validity of the ILO’s principles on collective bargaining is reinforced by the high number of ratifications of Convention No. 98, which totalled 141 as of 1 August 1999 and which has not ceased to rise over the years. It is also sustained by the fact that the law and practice in most ILO member States are adapted to the principles set out in the ILO’s standards on collective bargaining.

It should also be noted that the political, economic and social transformations referred to in previous paragraphs, which remain just as influential as we reach the year 2000, have not diminished the importance, significance, functions or purpose of collective bargaining, nor its role in industrial relations. Although a radical current of thought in recent years has advocated abandoning labour law and replacing it with civil and commercial rules, and certain national practices have promoted systems under which individual contracts, agreements with non-unionized workers and collective agreements coexist in separate areas and on an equal footing within the enterprise, these ideas and practices are advocated by a small minority, have had a very limited impact and have not undermined the fundamental principles of collective bargaining at the global level.

The purpose of this publication is to set out the ILO’s principles of collective bargaining as they emerge from the various international standards adopted by the Organization and the comments made by its supervisory bodies (particularly the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association) when examining the application of these standards.

In 1944, the Declaration of Philadelphia recognized “the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (...) the effective recognition of the right of collective bargaining” and noted that this principle is “fully applicable to all peoples everywhere”. In 1949, the International Labour Conference adopted the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

More recently, in June 1998, the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the Conference has reaffirmed that all Members of the ILO, in joining the Organization, “have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia”, which include as fundamental rights and principles the effective recognition of the right to collective bargaining, alongside freedom of association, the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. The Declaration also “declares that all Members (...) have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights”. In this respect, as the International Labour Organization completes 80 years of existence, it is right and proper to emphasize its contribution to a vision of the essential principles of collective bargaining which finds expression in many countries in a broad network of collective agreements at different levels with very broad coverage.

2. COLLECTIVE BARGAINING: DEFINITION AND PURPOSE

Collaboration between organizations of employers and workers, as well as between both of these types of organizations and the public authorities, is based fundamentally on ILO instruments: (1) in respect of consultations at the enterprise,¹ sectoral and national levels² and on matters relating to the activities of the ILO,³ or other activities; and (2) in bipartite⁴ and tripartite collective bargaining.^{5,6}

In the ILO's instruments, collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. In Recommendation No. 91, collective agreements are defined as "all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations" (Recommendation No. 91, Paragraph 2), on the understanding that "collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded" and that "stipulations in such contracts of employment which are contrary to a collective agreement should

¹ Co-operation at the Level of the Undertaking Recommendation, 1952 (No. 94).

² Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).

³ Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152).

⁴ Collective Agreements Recommendation, 1952 (No. 91), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Rural Workers' Organisations Recommendation, 1975 (No. 149), Labour Relations (Public Service) Convention, 1978 (No. 151), Labour Relations (Public Service) Recommendation, 1978 (No. 159), Collective Bargaining Convention, 1981 (No. 154), and Collective Bargaining Recommendation, 1981 (No. 163).

⁵ Paragraph I (d) of the Declaration of Philadelphia.

⁶ The texts of the Conventions and Recommendations concerning collective bargaining referred to in the above footnotes can be found in: *ILO law on freedom of association: Standards and procedures*, ILO, Geneva, 1995.

be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement”. However, “stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement” (Recommendation No. 91, Paragraph 3(1), (2), and (3)).

In 1951, Recommendation No. 91 set out the binding nature of collective agreements and their precedence over individual contracts of employment, while recognizing the stipulations of individual contracts of employment which are more favourable for workers covered by the collective agreement. Years later, in 1980, during the preparatory work for Convention No. 154, the discussions in the Committee on Collective Bargaining reached consensus in this respect: “there was broad agreement within the Committee that it should be possible, through collective bargaining, to fix conditions more favourable for workers than those foreseen under the law.”⁷ With regard to the binding nature of collective agreements, in the preparatory work for Recommendation No. 91, the Committee on Industrial Relations “admitted that the desired result might be achieved quite as well by means of legislation as by agreement, according to the method followed in each country.”⁸

Convention No. 98 does not contain a definition of collective agreements, but outlines their fundamental aspects when it establishes that negotiation takes place with a view to “the regulation of terms and conditions of employment by means of collective agreements” and advocates encouraging and promoting “the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations” for that purpose. In the preparatory work for Convention No. 151 which, among other matters, addresses collective bargaining in the public service, the Committee on the Public Service accepted the interpretation of the term “negotiation” as “any form of discussion, formal or informal, that was designed to reach agreement” and emphasized the need to endeavour to secure agreement.⁹ Article 2 of Convention No. 154 defines collective bargaining as “all negotiations which take place between

⁷ ILC, *Record of Proceedings*, 1980, p. 41/7.

⁸ ILC, *Record of Proceedings*, 1951, Appendix VIII, p. 603.

⁹ ILC, *Record of Proceedings*, 1978, p. 25/9, paras. 64 and 65.

an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other, for: (a) determining working conditions and terms of employment; and/or (b) regulating relations between employers and workers; and/or (c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations".

In ILO instruments, the scope of consultations is normally wider than that of collective bargaining. Consultations cover matters of common interest to workers and employers and allow their joint examination with a view to identifying, in so far as possible, appropriate solutions which are commonly agreed to and enabling the public authorities to receive opinions, advice and assistance from organizations of employers and workers on the preparation and application of legislation on matters relating to their interests, such as the composition of national bodies and the preparation and implementation of economic and social development plans. In contrast, collective bargaining is normally confined to determining terms and conditions of employment and relations between the parties.

It is also interesting to note that in a considerable number of countries, certain important areas which were traditionally covered exclusively by consultations have come, although generally in an intermittent manner depending on the situation, within the scope of tripartite central agreements on important aspects of economic and social policy, as well as on certain working and living conditions, in accordance with paragraph I(d) of the Declaration of Philadelphia. This is illustrated not only by tripartite agreements, but also by a considerable number of national experiences of the negotiation of changes in labour legislation and the legislation applicable to public servants. This is due to the emergence of civil society in areas of decision-making which were previously the exclusive domain of the political authority and which have come to be shared by the social partners, as a result of the type of democratic society currently found in the most developed countries and in certain developing countries. These major agreements and the tripartite negotiation of draft labour legislation for submission to Parliament offer substantial political and technical benefits, since they enjoy the support of those who are directly affected by the conditions which are determined and can lay claim to the legitimacy of the social democratic process.

3. THE PARTIES TO COLLECTIVE BARGAINING AND RECOGNITION OF THE MOST REPRESENTATIVE ORGANIZATIONS

The texts referred to above clearly establish that the parties to collective bargaining are employers or their organizations, on the one hand, and workers' organizations, on the other. Only in the absence of workers' organizations may the workers concerned and their representatives participate in collective bargaining.

This point of view is set out in Paragraph 2(1) of the Collective Agreements Recommendation, referred to above, and is confirmed: (1) in the Workers' Representatives Convention, 1971 (No. 135), which provides in Article 5 that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives"; and (2) in Article 3, paragraph 2, of the Collective Bargaining Convention, 1981 (No. 154), which also provides that "the existence of these [workers'] representatives is not used to undermine the position of the workers' organisations concerned". The preparatory work for the Collective Agreements Recommendation, 1951 (No. 91), shows that the possibility for representatives of workers to conclude collective agreements in the absence of one or various representative organizations of workers is envisaged in the Recommendation, "taking into account the position of those countries in which trade union organisations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries".¹

The Committee on Freedom of Association, taking into account the provisions of these instruments, has emphasized that "direct negotiation between the undertaking and its employees, by-passing representative organisations where these exist, might in certain cases be detrimental to the principle that negotiation between employers and organisations of workers should be

¹ ILC, *Record of Proceedings*, 1951, Report VIII, p. 603.

encouraged and promoted”.² In one case, it also emphasized that “direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98”.³ Going into greater detail, in another case the Committee on Freedom of Association stated that “the possibility for staff delegates who represent 10 per cent of the workers to conclude collective agreements with an employer, even where one or more organizations of workers already exist, is not conducive to the development of collective bargaining in the sense of Article 4 of Convention No. 98; in addition, in view of the small percentage required, this possibility could undermine the position of the workers’ organizations, contrary to Article 3, paragraph 2, of Convention No. 154”.⁴ Nevertheless, the Committee on Freedom of Association has considered that “where an offer made directly by the company to its workers is merely a repetition of the proposals previously made to the trade union, which has rejected them, and where negotiations between the company and the trade union are subsequently resumed (...) the complainants have not demonstrated in such a situation that there has been a violation of trade union rights”.⁵ The Committee of Experts did not address these issues in its general survey on freedom of association and collective bargaining of 1994 on Conventions Nos. 87 and 98,⁶ although it has done so in observations on the application in certain countries of the Conventions on freedom of association and collective bargaining, in which it has expressed a similar point of view to that of the Committee on Freedom of Association with regard to collective agreements concluded with non-unionized groups of workers.⁷

It is important to emphasize that, for workers’ organizations to be able to fulfil their purpose of “furthering and defending the

² *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fourth (revised) edition, ILO, Geneva, 1996; para. 786 (hereinafter referred to as *CFA Digest*, 1996).

³ *ibid.*, para. 790.

⁴ *ibid.*, para. 788.

⁵ *ibid.*, para. 791.

⁶ *Freedom of association and collective bargaining*, Report III (Part 4B), International Labour Conference, ILO, Geneva, 1994 (hereinafter referred to as *General Survey*, 1994).

⁷ See, for example: ILC, Report of the Committee of Experts, Report III (Part 4A), 1993 and 1994, observations concerning Costa Rica, pp. 184-185 and 203-204.

interests of workers” (Convention No. 87, Article 10) through collective bargaining, they have to be independent and, in particular, must not be “under the control of employers or employers’ organisations” (Convention No. 98, Article 2) and must be able to organize their activities without any interference by the public authorities which would restrict this right or impede the lawful exercise thereof (Convention No. 87, Article 3). In this respect, the Labour Relations (Public Service) Convention, 1978 (No. 151), provides in Article 5, paragraph 1, that “public employees’ organisations shall enjoy complete independence from public authorities”, while the Collective Agreements Recommendation, 1951 (No. 91), indicates that “nothing in the present definition [of collective agreements] should be interpreted as implying the recognition of any association of workers established, dominated or financed by employers or their representatives.”

Another issue which should be examined is whether the right to negotiate is subject to a certain level of representativity. In this respect, it should be recalled, depending on the individual system of collective bargaining, that trade union organizations which participate in collective bargaining may represent only their own members or all the workers in the negotiating unit concerned. In this latter case, where a trade union (or, as appropriate, trade unions) represents the majority of the workers, or a high percentage established by law which does not imply such a majority, in many countries it enjoys the right to be the exclusive bargaining agent on behalf of all the workers in the bargaining unit.

The position of the Committee of Experts is that both systems are compatible with the Convention.⁸ In a case concerning Bulgaria, when examining the question raised by the complainant organization that some collective agreements apply only to the parties to the agreement and their members and not to all workers, the Committee on Freedom of Association considered that “this is a legitimate option – just as the contrary would be – which does not appear to violate the principles of freedom of association, and one which is practised in many countries.”⁹ The Committee of Experts has stated that “when national legislation provides for a compulsory

⁸ *General Survey, 1994*, op. cit., paras. 238 et seq.

⁹ *Official Bulletin*, Series B, Vol. LXXIX, No. 3, 1996, 305th Report, Case No. 1765 (Bulgaria), para. 100.

procedure for recognizing unions as exclusive bargaining agents [representing all the workers, and not just their members], certain safeguards should be attached, such as: (a) the certification to be made by an independent body; (b) the representative organization to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organization, which in a previous trade union election failed to secure a sufficiently large number of votes, to request a new election after a stipulated period; (d) the right of any new organization other than the certified organization to demand a new election after a reasonable period has elapsed.”¹⁰ However, it has also indicated that, “if no union covers more than 50 per cent of the workers, collective bargaining rights should be granted to all unions in this unit, at least on behalf of their own members.”¹¹

The Committee on Freedom of Association has upheld principles and decisions along the same lines as the Committee of Experts¹² and has considered that a provision which stipulates that a collective agreement may be negotiated only by a trade union representing an absolute majority of the workers in an enterprise “does not promote collective bargaining in the sense of Article 4 of Convention No. 98”. It therefore invited the Government “to take steps, in consultation with the organizations concerned, to amend the provision in question, so as to ensure that when no trade union represents the absolute majority of the workers, the organizations may jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members.”¹³

The Committee on Freedom of Association has also emphasized that “where, under the system in force, the most representative union enjoys preferential or exclusive bargaining rights, decisions concerning the most representative organization should be made by virtue of objective and pre-established criteria so as to avoid any opportunities for partiality or abuse.”¹⁴

The Collective Bargaining Recommendation, 1981 (No. 163), enumerates various measures designed to promote collective

¹⁰ *General Survey, 1994*, op. cit., para. 240.

¹¹ *ibid.*, para. 241.

¹² *CFA Digest, 1996*, op. cit., paras. 831 to 842.

¹³ *ibid.*, para. 831.

¹⁴ *ibid.*, para. 827.

bargaining, including the recognition of representative employers' and workers' organizations (Paragraph 3(a)).

Finally, it should be pointed out that, in accordance with the provisions of ILO instruments, the right to bargain collectively should be granted to workers' organizations in general including, as indicated by the supervisory bodies, first-level trade unions, federations and confederations.¹⁵

¹⁵ *ibid.*, paras. 781 to 783, and *General Survey, 1994*, op. cit., para. 249.

4. WORKERS COVERED BY COLLECTIVE BARGAINING

Convention No. 98 establishes the relationship between collective bargaining and the conclusion of collective agreements for the regulation of terms and conditions of employment (Article 4) and provides that “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.” It also states that “this Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way” (Article 6).¹ Under this Convention, only the armed forces, the police and the above category of public servants may therefore be excluded from the right to collective bargaining. With regard to this type of public servants, the Committee of Experts has stated the following:

Since the concept of public servant may vary considerably under the various national legal systems, the application of Article 6 [of Convention No. 98] may pose some problems in practice. The Committee has adopted a restrictive approach concerning this exception by basing itself in particular on the English text of Article 6 of the Convention which refers to “public servants engaged in the administration of the State” (in Spanish “los funcionarios públicos empleados en la administración del Estado” and in French “fonctionnaires publics”). The Committee could not allow the exclusion from the terms of the Convention of large categories of workers employed by the State merely on the grounds that they are formally placed on the same footing as public officials engaged in the administration of the State. The distinction must therefore be drawn

¹ With regard to public servants and employees of the public administration, Conventions Nos. 151 (1978) and 154 (1981), which followed the global trend towards an expansion of the scope of collective bargaining, contain provisions respecting collective bargaining in the public service which admit specific modalities of application. It should be recalled that the Collective Bargaining Convention, 1981 (No. 154), is broader in scope than Convention No. 98, since it applies to “all branches of economic activity” (Article 1), and that the Committee on Collective Bargaining, during the first stage of the preparatory work for Convention No. 154, confirmed that “it had given the widest possible meaning to the term “all branches of economic activity”, so that it incorporated “all sectors of activity, including the public service.” (ILC, *Record of Proceedings*, 1980, Report of the Committee on Collective Bargaining, p. 41/4). Subsequently, in Article 1, paragraph 3, Convention No. 154 explicitly provided that “as regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice” and in Article 1, paragraph 2, that “the extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.”

between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants employed in government ministries and other comparable bodies, as well as ancillary staff) who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention. In this connection, the Committee emphasizes that the mere fact that public servants are white-collar employees is not *in itself* conclusive of their qualification as employees “engaged in the administration of the State”; if this were the case, Convention No. 98 could be deprived of much of its scope.²

Similarly, the Committee on Freedom of Association has stated that:

*All public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights and the right to conclude collective agreements.*³

A distinction must be drawn between, on the one hand, *public servants who by their functions are directly engaged in the administration of the State* (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98.⁴

In a case in which an attempt was being made to give the workers in the National Bank private sector status, the Committee considered that it was not within its purview to express an opinion as to whether the workers should be given public law or private law status. Considering that Conventions Nos. 87 and 98 apply to all workers in the banking sector, however, the Committee expressed the hope that the right of bank employees would be recognized to conclude collective agreements and join the federations of their choosing.⁵

With reference to specific categories of workers, the Committee on Freedom of Association has emphasized, for example, that the following categories of workers in the private sector cannot be excluded from collective bargaining: staff of the bus and water administration, persons working in public or nationalized undertakings, employees of the postal and telecommunications services, of state-owned commercial or industrial enterprises, of the national bank, of national radio and television institutes, seafarers not

² *General Survey, 1994*, op. cit., para. 200.

³ *CFA Digest, 1996*, op. cit., paras. 793 and 795.

⁴ *ibid.*, para. 794.

⁵ *ibid.*, para. 798.

resident in the country, civil aviation technicians, workers in export processing zones and contract employees.⁶ In the preparatory work for Convention No. 154, a proposed amendment to exclude from collective bargaining “persons employed in publicly or semi-publicly financed non-profit-making activities” was not retained.⁷

Nevertheless, in the preparatory work for Convention No. 151, the Committee on the Public Service confirmed the interpretation that “members of parliament, the judiciary and other elected or appointed members of public authorities themselves do not come within the meaning of the term persons *employed by public authorities*”,⁸ and are therefore excluded from the application of the Convention. It may be understood that this criterion probably also applies to Convention No. 154, which also applies to the public service.

⁶ *ibid.*, paras. 792 to 805, and 313th Report of the Committee on Freedom of Association, Case No. 1981 (Turkey), para. 263.

⁷ ILC, *Record of Proceedings*, 1981, p. 22/4.

⁸ ILC, *Record of Proceedings*, 1978, p. 25/4.

5. SUBJECTS COVERED BY COLLECTIVE BARGAINING

As noted above, ILO instruments (Conventions Nos. 98, 151 and 154 and Recommendation No. 91) focus the content of collective bargaining on “terms and conditions of work and employment” and on the regulation of the “relations between employers and workers and between organizations of employers and of workers”. However, it is not easy to determine the subjects to be covered by collective bargaining, since this depends on what is meant by the *conditions* and *relations* referred to above. In the preparatory work for Convention No. 154, in the Committee on Collective Bargaining, the Worker members subsequently amended an amendment which they had originally proposed concerning the subjects of collective bargaining, by seeking to delete the references to “conditions of life” and “social measures of any kind” and replace them by the terms “determining working conditions and terms of employment”. They asked, however, that the Committee confirm the interpretation of the term “working conditions and terms of employment” which had already been given in 1951 and according to which “the parties are entirely free to determine, within the limits of law and public order, the content of their agreements and consequently also to agree to clauses dealing with all conditions of work and of life, including social measures of any kind” (ILO, *Industrial Relations*, Report V(2), International Labour Conference, 34th Session, 1951, p. 51). The amendment, as sub-amended, was adopted and the Committee agreed to confirm the above interpretation.¹

The concept of working conditions used by the supervisory bodies has followed this orientation and is not limited to traditional working conditions (working time,² overtime, rest periods, wages, etc.), but also covers “certain matters which are normally included

¹ ILC, *Record of Proceedings*, 1981, pp. 22/5 and 22/6.

² For example, according to the Committee of Experts, it should be possible to agree through collective agreements to a shorter working day than that envisaged by law (see Report of the Committee of Experts, 1998, Report III (Part 1A), p. 256).

in conditions of employment”, such as promotions, transfers, dismissal without notice, etc.³ This trend is in line with the modern tendency in industrialized countries to recognize “managerial” collective bargaining concerning procedures to resolve problems, such as staff reductions, changes in working hours and other matters which go beyond terms of employment in their strict sense. According to the Committee of Experts, “it would be contrary to the principles of Convention No. 98 to exclude from collective bargaining certain issues such as those relating to conditions of employment”⁴ and “measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with the Convention”.⁵ Nevertheless, although the range of subjects which can be negotiated and their content is very broad, they are not absolute and need to be clearly related to conditions of work and employment or, in other words, “matters which are primarily or essentially questions relating to conditions of employment.”⁶ Moreover, the supervisory bodies allow the exclusion from the subjects covered by negotiations of matters which are for the employer to decide upon as part of the freedom to manage the enterprise, such as the assignment of duties and appointments.⁷ They also allow the prohibition of certain clauses, as established by the law for purposes of public order, such as discriminatory clauses, clauses of trade union security, or clauses which are contrary to the minimum standards of protection set out in the law. The Committee on Freedom of Association has indicated that certain matters can also reasonably be regarded as outside the scope of negotiation, such as “matters which clearly appertain primarily or essentially to the management and operation of government business”.⁸ In a recent case concerning the subjects which could be negotiated in the public education sector, the Committee on Freedom of Association noted, for example, that “determining the broad lines of educational policy has been given as an example of a matter which can be excluded from collective bargaining”. However, it

³ *General Survey, 1994*, op. cit., para. 250 .

⁴ *ibid.*, para. 265.

⁵ *ibid.*, para. 250.

⁶ *CFA Digest, 1996*, op. cit., para. 812.

⁷ ILC, 86th Meeting, Report of the Committee of Experts, 1998, p.259.

⁸ *CFA Digest, 1996*, op. cit., para. 812.

also indicated that “these policy decisions may have important consequences on conditions of employment, which should be the subject of free collective bargaining.”⁹

Finally, with regard to the negotiable issues relating to the relations between the parties which are mentioned in Convention No. 154 as subjects of collective bargaining, it should be recalled that the Workers’ Representatives Convention, 1971 (No. 135), and its corresponding Recommendation, envisage a series of guarantees and facilities for these representatives, which may be obtained through collective agreements, or in other ways. Evidently, the issues concerning relations between the parties covered by collective bargaining not only include trade union guarantees and facilities, but also other forms of consultation, communication and cooperation and the procedures established for the resolution of disputes.

⁹ Report of the Committee on Freedom of Association, 311th Report, Case No. 1951, para. 220.

6. THE PRINCIPLE OF FREE AND VOLUNTARY NEGOTIATION AND THE LEVEL OF NEGOTIATION

The voluntary nature of collective bargaining is explicitly laid down in Article 4 of Convention No. 98 and, according to the Committee on Freedom of Association, is a fundamental aspect of the principles of freedom of association.¹ This Article is of a promotional nature. It explicitly advocates encouraging and promoting machinery for voluntary negotiation and also provides that “measures appropriate to national conditions shall be taken, *where necessary*” for that purpose. During the preparatory work for Convention No. 154, the Committee on Collective Bargaining agreed upon an interpretation of the term “promotion” (of collective bargaining) in the sense that it “should not be capable of being interpreted in a manner suggesting an obligation for the State to intervene to impose collective bargaining”, thereby allaying the fear expressed by the Employer members that the text of the Convention could imply the obligation for the State to take compulsory measures.”²

The Committee on Freedom of Association has considered that, if it is to be effective, collective bargaining must assume a voluntary character and not entail recourse to measures of compulsion, which would alter the voluntary nature of such bargaining. It has also stated that nothing in Article 4 of Convention No. 98 places a duty on a government to enforce collective bargaining with a given organization by compulsory means, and that such an intervention by a government would clearly alter the nature of bargaining.³ By way of illustration, in one case the Committee on Freedom of Association considered that the use of collective bargaining to settle problems of rationalization in enterprises and improve their efficiency might yield valuable results for both the workers and the

¹ *CFA Digest, 1996*, op. cit., para. 844.

² ILC, *Record of Proceedings*, 1981, p. 22/6.

³ *CFA Digest, 1996*, op. cit., paras. 845 and 846.

enterprises. Nevertheless, if this type of collective bargaining has to follow a special pattern which imposes bargaining on the trade union organizations on those issues determined by the labour authority, and if it is stipulated that the period of negotiation shall not exceed a specified time and that, failing agreement between the parties, the points at issue shall be submitted to arbitration by the above authority, such a statutory system would not conform to the principle of voluntary negotiation, which is the guiding principle of Article 4 of Convention No. 98.⁴

It cannot therefore be deduced from the ILO's Conventions on collective bargaining that there is a formal obligation to negotiate⁵ or to achieve a result (an agreement), particularly if sanctions are used by the authorities in order to ensure that negotiations take place. Nevertheless, the supervisory bodies have considered that the criteria established by law should enable the most representative organizations to take part in collective bargaining, which implies the recognition or the duty to recognize such organizations.⁶ The Committee on Freedom of Association has considered that employers, including governmental authorities acting in the capacity of employers, should recognize for collective bargaining purposes the organizations which are representative of the workers employed by them and the organizations that are representative of workers in a particular industry. Where the union concerned is found to represent the majority of the workers, the authorities should take appropriate conciliatory measures to obtain the employer's recognition of that union for collective bargaining purposes.⁷ Moreover, the Committee of Experts, when examining the application of Convention No. 98, has not criticized the prohibition of certain unfair labour practices in the process of negotiation.⁸ Similarly, the principles of the supervisory bodies emphasize that the machinery which supports bargaining (the provision of information, consultation, mediation, arbitration) should be of a voluntary nature.

⁴ *ibid.*, para. 847.

⁵ The obligation to negotiate is imposed in certain countries. See, in this respect: ILO, Joint Committee on the Public Service, Fourth Session, Geneva, 1988, Report II, p. 25. See also: ILO, Joint Committee on the Public Service, Report II, Geneva, 1970.

⁶ *General Survey, 1994*, op. cit., para. 245.

⁷ *CFA Digest, 1996*, op. cit., paras. 821, 823 and 824; and 316th Report of the Committee on Freedom of Association, Case No. 1996 (Uganda), para. 667.

⁸ *General Survey, 1994*, op. cit., para. 246.

This is not adapted to the detailed regulation of negotiation existing in many pieces of national legislation, which obliges the parties to follow fixed procedures setting out all the stages and phases of the negotiation process, and under which there are frequently compulsory interventions by the administrative authorities through conciliation, mediation or arbitration based on predetermined time limits. According to the Committee of Experts, such machinery “should be designed to facilitate bargaining between the two sides of industry, leaving them free to reach their own settlement.”⁹

In practice, the supervisory bodies have nevertheless accepted the imposition of certain sanctions in the event of conduct which is contrary to good faith or which constitutes unfair practice in the course of collective bargaining, provided that they are not disproportionate,¹⁰ and have admitted conciliation and mediation imposed by law within reasonable time limits.¹¹ These criteria have undoubtedly taken into account the objective of promoting collective bargaining in situations in which the trade union movement is not sufficiently developed. They have also taken account of the underlying concern in many pieces of legislation to avoid unnecessary strikes and precarious and tense situations resulting from the failure to renew collective agreements, particularly where they cover extensive categories of workers.

The Committee of Experts has noted that the difficulties which arise most frequently are: unilateral decisions (by law or by the authorities) as to the level of bargaining; the exclusion of certain matters from the scope of bargaining; the requirement that collective agreements are subject to prior approval by the administrative or budgetary authorities; observance of criteria pre-established by the law, in particular as regards wages; and the unilateral imposition of working conditions.¹²

⁹ *ibid.*, para. 248.

¹⁰ For example, when examining the Panamanian legislation and noting that the employer was obliged to pay the workers for days when they had been on strike, in cases where the strike had occurred because the employer had not replied to the demands which had been made and because conciliation had been abandoned, the Committee on Freedom of Association considered that the sanctions were disproportionate (see 318th Report, Case No. 1931, para. 371).

¹¹ See, for example, *Official Bulletin*, Series B, Vol. LXXX, No. 2, 1997, 307th Report, Case No. 1898 (Guatemala), para. 324; and *Official Bulletin*, Series B, Vol. LXXIX, No. 2, 1996, 304th Report, Case No. 1822 (Venezuela), paras. 508 and 509; see also Report of the Committee of Experts, 1998, p. 253.

¹² *General Survey, 1994*, op. cit., para. 248.

With regard to the level of collective bargaining, the Collective Bargaining Recommendation, 1981 (No. 163), provides in Paragraph 4(1) that “measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.”

Similarly, the Committee of Experts, after recalling that the right to bargain collectively should also be granted to federations and confederations, and rejecting any prohibition of the exercise of this right, has stated that “legislation which makes it compulsory for collective bargaining to take place at a higher level (sector, branch of activity, etc.) also raises problems of compatibility with the Convention” and that “the choice should normally be made by the partners themselves, since they are in the best position to decide the most appropriate bargaining level, including, if they so wish, by adopting a mixed system of framework agreements supplemented by local or enterprise-level agreements.”¹³

The Committee on Freedom of Association has stated that “according to the principle of free and voluntary collective bargaining embodied in Article 4 of Convention No. 98, the determination of the bargaining level is essentially a matter to be left to the discretion of the parties and, consequently, the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority.”¹⁴ The Committee on Freedom of Association did not therefore “consider the refusal by employers to bargain at a particular level as an infringement of freedom of association.”¹⁵ Similarly, “legislation should not constitute an obstacle to collective bargaining at the industry level.”¹⁶ In this respect, “the requirement of the majority of not only the number of workers, but also of enterprises, in order to be able to conclude a collective agreement on the branch or occupational level could raise problems with

¹³ *ibid.*, para. 249.

¹⁴ *CFA Digest, 1996*, op. cit., para. 851. See also 310th Report of the Committee on Freedom of Association, Case No. 1887 (Argentina), para. 103.

¹⁵ *CFA Digest, 1996*, *ibid.*, para. 852.

¹⁶ *ibid.*, para. 853.

regard to the application of Convention No. 98”¹⁷ and it should be sufficient for the trade union at the branch level to establish that it is sufficiently representative at the enterprise level.¹⁸

According to the Committee on Freedom of Association, “the best procedure for safeguarding the independence of the parties involved in collective bargaining is to allow them to decide by mutual agreement the level at which bargaining should take place. In this respect, it would appear that, in many countries, this question is determined by a body that is independent of the parties themselves. The Committee considers that in such cases the body concerned should be truly independent.”¹⁹ Where a government has sought to alter bargaining structures in which it acts actually or indirectly as the employer, the Committee on Freedom of Association has emphasized that “it is particularly important to follow an adequate consultation process, whereby all objectives perceived as being in the overall national interest can be discussed by all parties concerned, in keeping with the principles established in the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).”²⁰ Such consultation is to be undertaken in good faith and both parties are to have all the information necessary to make an informed decision.²¹ The need to hold consultations also applies “prior to the introduction of legislation through which the government seeks to alter bargaining structures in which it acts actually or indirectly as employer.”²²

The supervisory bodies have not established criteria concerning the relationship between collective agreements at the different levels (which may address the economy in general, a sector or industry, or an enterprise or group of enterprises, an establishment or factory; and which may, according to the individual case, have a different geographical scope). In principle, this should

¹⁷ *ibid.*, para. 854, and *Official Bulletin*, Series B, Vol. LXXX, No. 1, 1997, 306th Report, Case No. 1906 (Peru), para. 533; the Committee of Experts shared this point of view: see ILC, Report III (Part 4A), 83rd Session, 1996, p. 215.

¹⁸ *Official Bulletin*, Series B, Vol. LXXIX, No. 1, 1996, 302nd Report of the Committee on Freedom of Association, Case No. 1845 (Peru), para. 516.

¹⁹ *CFA Digest, 1996*, op. cit., para. 855.

²⁰ *ibid.*, para. 856.

²¹ 311th Report of the Committee on Freedom of Association, Case No. 1951 (Canada), para. 228.

²² *CFA Digest, 1996*, op. cit., para. 857.

depend on the wishes of the parties. In practice, the supervisory bodies accept systems in which it is left to collective agreements to determine how they are to be coordinated (for example, by establishing that a problem resolved in one agreement cannot be decided upon at other levels), as well as systems in which legal provisions distribute subjects between collective agreements, give primacy to a specific level, adopt the criteria of the standards which are the most favourable to the workers, or which do not establish criteria and leave these questions to practical application. The Collective Bargaining Recommendation, 1981 (No. 163), indicates in Paragraph 4(2) that “in countries where collective bargaining takes place at several levels, *the parties to negotiations* should seek to ensure that there is co-ordination among these levels.”

Finally, it should be recalled that the free and voluntary nature of negotiations implies that workers’ organizations must themselves be able to choose which delegates will represent them in collective bargaining, without the interference of the public authorities.²³

²³ *Official Bulletin*, Series B, Vol. LXXX, No. 2, 1997, 307th Report of the Committee on Freedom of Association, Case No. 1910 (Democratic Republic of the Congo), para. 174; and *Official Bulletin*, Series B, Vol. LXXX, No. 1, 1997, 306th Report of the Committee on Freedom of Association, Case No. 1865 (Republic of Korea), para. 331.

7. THE PRINCIPLE OF GOOD FAITH

In the preparatory work for Convention No. 154, the Committee on Collective Bargaining recognized that “collective bargaining could only function effectively if it was conducted in good faith by both parties” and “emphasised the fact that good faith could not be imposed by law, but could only be achieved as a result of the voluntary and persistent efforts of both parties.”¹ The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body in 1977, in its section on collective bargaining, refers explicitly to bona fide negotiations (paragraph 52), recognizes the right of representative organizations to be recognized for the purpose of collective bargaining (paragraph 48) and states that collective agreements should include provisions for the settlement of disputes arising over their interpretation and application and for ensuring mutually respected rights and responsibilities (paragraph 53).

The Committee on Freedom of Association, in addition to drawing attention to the importance that it attaches to the obligation to negotiate in good faith, has established the following principles: (1) “it is important that both employers and trade unions bargain in good faith and *make every effort to reach an agreement; moreover genuine and constructive negotiations* are a necessary component to establish and maintain a relationship of confidence between the parties”; (2) “the principle that both employers and trade unions should negotiate in good faith and make efforts to reach an agreement means *that any unjustified delay in the holding of negotiations should be avoided*”; (3) “while the question as to whether or not one party adopts an amenable or uncompromising attitude towards the other party is a matter for negotiation between the parties, both employers and trade unions should bargain in good faith *making every effort* to reach an agreement”; and (4) “*agreements* should be *binding* on the parties.”²

¹ ILC, *Record of Proceedings*, 1981, p.22/11.

² *CFA Digest*, 1996, op. cit., paras. 814 to 818.

The principle of the mutual respect for commitments entered into in collective agreements is explicitly recognized in Recommendation No. 91 (Paragraph 3), which provides that “collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded.” The Committee on Freedom of Association has examined many cases of allegations that collective agreements have not been complied with and has indicated that “agreements should be binding on the parties”³ and that “mutual respect for the commitment undertaken in the collective agreements is an important element of the right to bargain collectively and should be upheld in order to establish labour relations on stable and firm ground.”⁴ In this way, the principle of good faith implies making an effort to reach an agreement, conducting genuine and constructive negotiations, avoiding unjustified delays, complying with the agreements which are concluded and applying them in good faith. To this may be added the recognition of representative trade union organizations. After indicating that “in several countries legislation makes the employer liable to sanctions if he refuses to recognize the representative trade union, an attitude which is sometimes considered as an unfair labour practice”, the Committee of Experts has recalled in this connection “the importance which it attaches to the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement, the more so in the public sector or essential services where trade unions are not allowed strike action.”⁵

Finally, the outcome of negotiations must be taken into account in good faith. With regard, in particular, to the public service, a memorandum prepared by the International Labour Office⁶ in reply to a request for clarification from a government concerning Convention No. 154 indicated that:

... there is no element at all either in the Convention or in the preparatory work before its adoption from which it can be inferred that where collective bargaining culminates in a settlement between the parties such settlement must take the form and have the status of a collective agreement. While in most (if not all) countries this is the usual outcome of collective bargaining in different branches of the public service, in some

³ *ibid.*, para. 818.

⁴ 308th Report of the Committee on Freedom of Association, Case No. 1919, para. 325.

⁵ *General Survey, 1994*, op. cit., para. 243.

⁶ See GB.224/21/1, November 1983; and *Official Bulletin*, Series A, Vol. LXVII, No. 1, 1984.

countries collective bargaining in the public service results in settlements which do not have the status of a collective agreement. The conclusion may be drawn that a State ratifying the Convention may have recourse to special modalities of application in the case of the public service as provided by Article 1, paragraph 3, of the Convention. Hence, if a settlement is reached through collective bargaining within the context of the public service, this settlement may in form and nature be different from a collective agreement. In countries where, for example, the conditions of employment of public servants are governed by special laws or provisions, negotiations with a view to the amendment of these special laws or provisions need not necessarily lead to legally binding agreements, so long as account is taken in good faith of the results of the negotiations in question.

8. THE ROLE OF PROCEDURES TO FACILITATE NEGOTIATION

Collective bargaining can be prepared or facilitated in various ways. In certain countries, the parties may have recourse to “preventive mediation”, which makes use of the good offices of a third party which is independent of both sides. A sufficient time before the process of collective bargaining, this mediator endeavours to assist in identifying the real problems which may arise, ensures contact and communication between the parties, places at their disposal relevant experience, information, studies and statistics, depending on the needs which arise, and assists the parties in the analysis of all this information.

The traditional forms of intervention of third parties are well known. These consist of: conciliation (to bring both sides and their positions closer together), mediation (issuing recommendations or proposals which are not binding upon the parties) and arbitration (submission of both sides to the decision of the arbitrator). In so far as conciliation and mediation are of a voluntary nature and are accepted by both sides, they do not raise problems in relation to the principles of collective bargaining, since their function is to support negotiation. Where the law imposes them systematically after a certain period has elapsed, they may in certain cases infringe, and even restrict the collective autonomy of both sides to a greater or lesser degree, depending on the characteristics and legal regulations governing these institutions. These mechanisms, in the same way as arbitration, may be designed to resolve a dispute between the sides, but may also occur during the initial process of preparing the positions of the parties and may, in many cases, contribute to reducing tension and identifying intermediary or general solutions.

Arbitration may be sought by both parties (voluntary arbitration), or – and this may raise problems in relation to the principles of collective bargaining, as indicated by the ILO’s supervisory bodies – may be imposed by law, by one of the parties or by the authorities (compulsory arbitration). Both types of

arbitration, despite their different names, are binding. Another approach which lies between mediation and arbitration involves the parties reserving the right to endorse the decision of a third party, which up to that point is not binding. Another approach is intermediary arbitration under which, during the course of the negotiations, the arbitrator decides on some of the basic offers made by the parties, thereby facilitating the process of negotiation on related or other matters.

According to the Committee of Experts, the existing machinery and procedures should be designed to facilitate bargaining between the two sides, leaving them free to reach their own settlement.¹ The Committee on Freedom of Association has emphasized that “the bodies appointed for the settlement of disputes between the parties to collective bargaining should be independent and recourse to these bodies should be on a voluntary basis”² and that “certain rules and practices can facilitate negotiations and help to promote collective bargaining and various arrangements may facilitate the parties’ access to certain information concerning, for example, the economic position of their bargaining unit, wages and working conditions in closely related units, or the general economic situation; however, all legislation establishing machinery and procedures for arbitration and conciliation designed to facilitate bargaining between both sides of industry must guarantee the autonomy of parties to collective bargaining.”³

In short, the supervisory bodies admit conciliation and mediation which is voluntary or imposed by law, if it is within reasonable time limits,⁴ in accordance with the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), Paragraph 3 of which indicates that voluntary conciliation may be set in motion either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority. The supervisory bodies also accept voluntary arbitration, but only admit compulsory arbitration in certain cases.

¹ *General Survey, 1994*, op. cit., para. 248.

² *CFA Digest, 1996*, op. cit., para. 858.

³ *ibid.*, para. 859.

⁴ *ibid.*, paras. 502 to 504.

9. VOLUNTARY BARGAINING AND COMPULSORY ARBITRATION

One of the most radical forms of intervention by the authorities in collective bargaining, directly under the terms of the law or as a result of an administrative decision, is the imposition of compulsory arbitration when the parties do not reach agreement, or when a certain number of days of strike action have elapsed. Compulsory arbitration may also be sought by one of the parties, but always conflicts with the voluntary nature of negotiation, since the solution which is imposed is not derived from the will of both parties, but from a third party to whom they have not had recourse jointly.

The preparatory work for Convention No. 151 shows that compulsory arbitration appears to be one of the procedures for the settlement of disputes in the public service envisaged by Article 8 of the Convention. During the preparatory work, it was emphasized that these have to be procedures which are genuinely independent and impartial and have the confidence of the parties.¹ It will be seen below that only in this and other limited cases have the supervisory bodies admitted compulsory arbitration.

The Committee of Experts has found that some confusion arises at times as to the exact meaning of the term “compulsory arbitration”. If that term refers to the compulsory effects of an arbitration procedure resorted to voluntarily by both of the parties, the Committee considers that this does not raise difficulties since the parties should normally be deemed to accept to be bound by the decision of the arbitrator or arbitration board they have freely chosen. The real issue arises in practice in the case of compulsory arbitration, which the authorities may impose in an interest dispute at the request of one party, or at their own initiative.² According to the Committee of Experts:

As regards arbitration imposed by the authorities at the request of one party, the Committee considers that it is generally contrary to the principle

¹ ILC, *Record of Proceedings*, 1978, p. 25/4, para. 26, and p. 25/10, para. 66.

² *General Survey*, 1994, op. cit., para. 256.

of the voluntary negotiation of collective agreements established in Convention No. 98, and thus the autonomy of bargaining partners. An exception might however be made in the case of provisions which, for instance, allow workers' organizations to initiate such a procedure on their own, for the conclusion of a *first* collective agreement. As experience shows that first collective agreements are often one of the most difficult steps in establishing a sound bargaining relationship, these types of provisions may be said to be in the spirit of machinery and procedures which facilitate collective bargaining.

As regards arbitration imposed by the authorities at their own initiative, the Committee considers that it is difficult to reconcile such interventions with the principle of the voluntary nature of negotiation established in Article 4 of Convention No. 98. However, it has to recognize that there comes a time in bargaining where, after protracted and fruitless negotiations, the authorities might be justified to step in when it is obvious that the deadlock in bargaining will not be broken without some initiative on their part. In view of the wide variety of legal frameworks (completed through national case-law and practice) established in the various member States to address what constitutes one of the most difficult problems of industrial relations, the Committee would only give some general guidance in this respect and suggest a few principles that could be implemented through "measures appropriate to national conditions", as contemplated in Article 4 of the Convention.

In the Committee's opinion, it would be highly advisable that the parties be given every opportunity to bargain collectively, during a *sufficient period*, with the help of *independent* facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations.³

The Committee on Freedom of Association has indicated that: (1) "the imposition of a compulsory arbitration procedure if the parties do not reach agreement on a draft collective agreement raises problems in relation to the application of Convention No. 98"; (2) "provisions which establish that, failing agreement between the parties, the points at issue in collective bargaining must be settled by the arbitration of the authority are not in conformity with the principle of voluntary negotiation contained in Article 4 of Convention No. 98"; and (3) "a provision which permits either party

³ *ibid.*, paras. 257, 258 and 259.

unilaterally to request the intervention of the labour authority for the settlement of the dispute (...) does not promote voluntary collective bargaining.”⁴ The Committee on Freedom of Association admits recourse to compulsory arbitration at the initiative of the authorities, or of one of the parties, or ex officio by law in the event of an acute national crisis, in the case of disputes in the public service involving public servants exercising authority in the name of the State (who can be excluded from the right to collective bargaining under Convention No. 98) or in essential services in the strict sense of the term, namely those services whose interruption would endanger the life, personal safety or health of the whole or part of the population.⁵ Evidently, compulsory arbitration is also acceptable where it is provided for in the collective agreement as a mechanism for the settlement of disputes. It is also acceptable, as the Committee on Freedom of Association, following the Committee of Experts, has recently indicated in cases where, after protracted and fruitless negotiations, it is obvious that the deadlock in bargaining will not be broken without some initiative on the part of the authorities.⁶

With regard to the criteria which must be taken into account by arbitrators, when examining Case No. 1768 concerning Iceland, in which the law provides that arbitration in a collective dispute in the merchant marine sector should take into account current agreements on conditions of remuneration and work and the general wage trends in the country, the Committee on Freedom of Association reminded the Government that “in order to gain and retain the parties’ confidence, any arbitration system should be truly independent and the outcomes of arbitration should not be predetermined by legislative criteria.”⁷

Finally, with regard to voluntary arbitration, when examining the requirement to submit a collective dispute to a court of arbitration, at the request of both parties, the Committee on Freedom of Association indicated that the decision should be taken

⁴ *CFA Digest, 1996*, op. cit., paras. 861, 862 and 863.

⁵ *ibid.*, paras. 515 and 860.

⁶ In a case relating to Iceland, the Committee on Freedom of Association expressed this point of view, which had previously been endorsed by the Committee of Experts (see *Official Bulletin*, Series B, Vol. LXXVII, No. 2, 1995, 299th Report, Case No. 1768 (Iceland), para. 109).

⁷ *ibid.*, para. 110.

by the absolute majority of the members of the trade union organization and it emphasized that “it is for the trade unions themselves to establish criteria to have recourse to arbitration.”⁸

⁸ *Official Bulletin*, Series B, Vol. LXXVIII, No. 2, 1995, 304th Report, Case No. 1836 (Colombia), para. 194; on other issues relating to arbitration, see 310th Report, Case No. 1928 (Canada/Manitoba), paras. 171 to 184.

10. INTERVENTION BY THE AUTHORITIES IN COLLECTIVE BARGAINING

In the ILO's Conventions on collective bargaining, there are no provisions covering possible conflicts between the specific interests of the parties and the general interest of the population. This omission was deliberate, rather than a result of negligence.¹ In practice, in situations of extremely serious economic crisis (such as situations of war or in the subsequent periods of economic reconstruction) or in order to combat inflation, achieve a balance of payments or combat unemployment or other economic objectives, governments have resorted to wages and incomes policies with a view to achieving a correlation between general rates of wages and incomes and general productivity levels by avoiding the impact of wage increases on prices. These have been implemented through measures to freeze wages or confine wage rises to certain limits,

¹ During the preparatory work for Convention No. 154, a Government member submitted an amendment designed to reconcile the specific interests of the parties with the general interest. The discussion and its outcome were as follows:

He noted that this issue had been discussed by the Committee last year and that there was widespread recognition of the need to bring about a reconciliation between the general interest and the specific interests of the parties, since, for example, there could be instances where the results of collective bargaining might conflict with national economic objectives. Even though the concept of the general interest did give rise to problems of definition, it was still essential to recognise it. Moreover, he felt that the required reconciliation could be achieved without prejudice to collective bargaining and the basic interests of the parties since there were adequate safeguards for their autonomy and for the principle of freedom of association in this and other instruments and the text itself provided for prior consultations. The proposed amendment was supported by certain Government members who thought that it was in line with the development plans of many developing countries. However, it was opposed by other Government members, who pointed out that having to judge what was in the general interest would transform Labour Ministries into Supreme Courts. The two parties should have as much freedom as possible to conclude collective agreements directly between them. The Worker members expressed strong opposition to the amendment since, in their view, the concept of the general interest was too nebulous to be introduced into an international instrument, and in fact, was incapable of precise definition in democratic societies. Moreover, they saw serious dangers in the wording of the amendment, since the public authorities were being called upon not just to take account of the general interest but also to reconcile the specific interest of the parties with it. They felt that such a provision would do nothing to promote collective bargaining, the basic objective of the instrument. For similar reasons, the Employer members also opposed the amendment. The amendment was withdrawn. (ILC, Record of Proceedings, 1981, Committee on Collective Bargaining, p.22/8.

and have included mechanisms requiring the approval, modification or annulment of collective agreements that are in force, under the pretext of the substantial proportion of State expenditure accounted for by the wages of employees in the public service and the public sector in general and the enormous volume of wages in the private sector in relation to the total income of the country.

Depending on the country, the measures taken to pursue these policies may or may not have been adopted with the agreement of employers' and workers' organizations, who are sometimes consulted or included in commissions responsible for developing the policies. The measures adopted may or may not include price freezes and guaranteed minimum wage levels for the least well-paid workers. These are unpopular policies, even though in certain cases they have enjoyed the initial support of workers' organizations in general, and they cannot be maintained over many years, particularly when prices are rising, and especially in countries where decentralized collective bargaining is prevalent and where, at a certain point, it becomes extremely difficult to control the attitudes of thousands of units of production.² As will be seen below, the limitations implied by such adjustment policies are not acceptable in the view of the supervisory bodies in cases where they change the content of collective agreements which have already been concluded. However, they are admissible when they are imposed on future negotiations, provided that the situation is urgent and a series of guarantees are secured, which are enumerated below.

The various types of intervention by the authorities in collective bargaining are covered below. Depending on the case, these may be adopted for technical, legal or economic reasons.

Intervention by the authorities in the drafting of collective agreements

In the opinion of the Committee on Freedom of Association, this type of intervention is not compatible with the spirit of Article 4 of Convention No. 98, unless it consists exclusively of technical aid.³

² The ideas expressed are developed in *Collective bargaining in industrialised market economies*, ILO, Geneva, 1974.

³ *CFA Digest, 1996*, op. cit., para. 867.

Refusal to approve a collective agreement

According to the supervisory bodies, such a refusal is permitted on grounds of errors of pure form or procedural flaws,⁴ or where the collective agreement does not conform to the minimum standards laid down by the general labour legislation.⁵ However, legislative provisions are not compatible with Convention No. 98 where they permit the refusal to register or approve a collective agreement on grounds such as incompatibility with the general or economic policy of the government or official directives on wages or conditions of work. A situation which requires prior approval of collective agreements by the authorities amounts to a violation of the principle of the autonomy of the parties to negotiation.⁶ In the opinion of the Committee on Freedom of Association:

Legal provisions which make collective agreements subject to the approval of the ministry of labour for reasons of economic policy, so that employers' and workers' organizations are not able to fix wages freely, are not in conformity with Article 4 of Convention No. 98 respecting the promotion and full development of machinery for voluntary collective negotiations.⁷

A provision which establishes as a ground for refusing approval the existence in a collective agreement of a clause which interferes with "the right reserved to the State to coordinate and have the overall control of the economic life of the nation" involves the risk of seriously restricting the voluntary negotiation of collective agreements.⁸

Nevertheless, for reasons of general interest, governments establish mechanisms so that the parties take into account considerations relating to their economic and social policy and the protection of the general interest. Both the Committee of Experts and the Committee on Freedom of Association accept these mechanisms, provided that they are not of a compulsory nature. The two Committees have indicated that:

The discretionary power of the authorities to approve collective agreements is by its very spirit contrary to the principle of voluntary bargaining, but this does not mean that the public authorities may not establish machinery to encourage the parties to collective bargaining to take voluntary account of government social and economic policy considerations and

⁴ *ibid.*, para. 868.

⁵ *General Survey, 1994*, op. cit., para. 251.

⁶ *ibid.*, para. 251; and *CFA Digest, 1996*, op. cit., para. 868.

⁷ *CFA Digest, 1996*, para. 869.

⁸ *ibid.*, para. 874.

the protection of the public interest. However, such machinery is not likely to be supported by the parties concerned if the objectives which the authorities would like to see recognized as being in the public interest are not first submitted for consultation to the parties at the appropriate level within an advisory body, for example in line with the provisions of the Consultation (Industrial and National Levels) Recommendation, 1960 (No. 113).

The public authorities could also envisage a procedure to draw the attention of the parties in certain cases to considerations of general interest that might call for further examination by them of proposed agreements, provided, however, that preference is always given to persuasion rather than coercion. Thus, rather than making the validity of collective agreements subject to administrative or judicial approval, it might be prescribed that any collective agreement submitted to the Ministry of Labour would normally enter into force within a reasonable period after being filed; if the public authority considers that the terms of the imposed agreement are clearly contrary to the economic policy objectives recognized as being in the public interest, the case could be submitted for advice and recommendation to an appropriate joint body, provided, however, that the final decision would rest with the parties.⁹

However, these considerations must not be confused with stabilization policies which result in significant and generalized restrictions on future wage negotiations, which will be specifically examined in a separate section below.

Interference by the authorities in the application of collective agreements

When the outcome of collective bargaining is restricted or annulled by law or by decision of the administrative authorities, industrial relations are destabilized and workers lose their confidence in their trade union organizations, particularly when this type of intervention, which normally implies wage restrictions, occurs on successive occasions. These interventions violate the principle of free and voluntary negotiation of agreements and take various forms, which have been strongly refuted by the Committee on Freedom of Association.¹⁰ These are enumerated below:

- the suspension or derogation by decree, without the agreement of the parties, of collective agreements;

⁹ *General Survey, 1994*, op. cit., paras. 252 and 253; and *CFA Digest, 1996*, para. 872.

¹⁰ *CFA Digest, 1996*, op. cit., paras. 871 to 880.

- the interruption of already negotiated agreements ;
- the requirement to renegotiate collective agreements which have been freely concluded ;
- the annulment of collective agreements and their forced renegotiation.

Other types of intervention, such as the compulsory extension of the validity of collective agreements by law, particularly where this occurs following previous government interventions, are only admissible in cases of emergency and for brief periods of time, since such measures amount to interference with free collective bargaining.¹¹

Restrictions imposed by the authorities on future negotiations

According to the Committee of Experts, in recent years an increasing number of governments, believing that the national economic situation requires stabilization measures, have taken steps to restrict or prevent the free fixing of wages by means of collective bargaining. In this respect, the Committee of Experts has established the following basic principle :

If, under an economic stabilization or structural adjustment policy, that is for imperative reasons of national economic interest, wage rates cannot be fixed freely by means of collective bargaining, these restrictions should be applied as an exceptional measure and only to the extent necessary, should not exceed a reasonable period and should be accompanied by adequate safeguards to protect effectively the standard of living of the workers concerned, in particular those who are likely to be the most affected.¹²

The Committee on Freedom of Association has expressed itself in very similar terms :

If, as part of its stabilization policy, a government considers that wage rates cannot be settled freely through collective bargaining, such a restriction should be imposed as an exceptional measure and only to the extent that is necessary, without exceeding a reasonable period, and it should be accompanied by adequate safeguards to protect workers' living standards.¹³

In a case in which, in the context of a stabilization policy, the provisions of collective agreements relating to remuneration were suspended (in the public and private sectors), the Committee emphasized that collective

¹¹ *ibid.*, para. 881.

¹² *General Survey, 1994*, op. cit., para. 260.

¹³ *CFA Digest, 1996*, op. cit., para. 882.

agreements which were in force should be applied fully (unless otherwise agreed by the parties). As for *future negotiations*, the only government interference acceptable must comply with the [principle formulated in the paragraph above].¹⁴

The Committee on Freedom of Association has indicated that, in any case, *any limitation* on collective bargaining by the authorities should be *preceded by consultations* with the workers' and employers' organizations in an effort to obtain their agreement¹⁵ and that repeated recourse to statutory restrictions on collective bargaining could, in the long term, only prove harmful and destabilize labour relations, as it deprives workers of a fundamental right and means of defending and promoting their economic and social interests.¹⁶

With regard to the duration of restrictions on collective bargaining, the Committee on Freedom of Association has considered that a three-year period of limited collective bargaining on remuneration within the context of a policy of economic stabilization constitutes a substantial restriction, and the legislation in question should cease producing effects at the latest at the dates mentioned in the legislation, or indeed earlier if the fiscal and economic situation improves.¹⁷ Similarly, where wage restraint measures are taken by a government to impose financial controls, care should be taken to ensure that collective bargaining on non-monetary matters can be pursued.¹⁸

The Committee on Freedom of Association has also indicated that the basic principle with regard to wage restrictions in the context of stabilization policies and the required guarantees are also applicable in cases in which the law obliges future collective agreements to respect productivity criteria,¹⁹ or prohibits the indexation of wages or the negotiation of wage increases beyond the level of the increase in the cost of living.²⁰

¹⁴ *ibid.*, para. 883.

¹⁵ *ibid.*, para. 884.

¹⁶ *ibid.*, para. 885.

¹⁷ *ibid.*, para. 886.

¹⁸ *ibid.*, para. 888.

¹⁹ *ibid.*, para. 890.

²⁰ *ibid.*, paras. 891 and 892.

11. COLLECTIVE BARGAINING IN THE PUBLIC SERVICE

The exercise of the right of freedom of association by organizations of public officials and employees, which has been recognized at the international level since the adoption by the ILO of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), has allowed these organizations to seek more appropriate means of furthering the interests of their members and, in many cases, of achieving recognition of the right to collective bargaining and to strike. The exercise of these rights is now a reality in the public service in industrialized countries and in many developing countries. Once again this confirms the aspirations of the different social groups to equality, in terms of sharing the levels of well-being resulting from national prosperity, and to enjoy the means of improving their respective situations.

From the point of view of the public service, G. von Potobsky resumes the itinerary of ILO standards on collective bargaining as follows:¹

The standards of the International Labour Organization constitute, for international labour law, a faithful reflection of the development of case-law and jurisprudence. In 1949, when the Right to Organize and Collective Bargaining Convention, (No. 98), was adopted, “public servants engaged in the administration of the State”² were explicitly excluded from its scope and are not therefore covered by the provision relating to the full development of “voluntary negotiation” with a view to the regulation of terms and conditions of employment (Article 4). During the discussion of the Convention, various Government delegates noted that, while the right of public servants to freedom of association should be recognized (they are covered by Convention No. 87), the same did not apply to the right to collective bargaining.

¹ Potobsky, G. von, “La negociación colectiva en la administración pública central y descentralizada”, *Derecho del Trabajo*, XLVIII-B, Buenos Aires, 1988.

² According to the Committee of Experts, these are “public servants who by their functions are directly employed in the administration of the State (... civil servants employed in government ministries and other comparable bodies, as well as ancillary staff)”. On the other hand, “all other persons employed by the government, by public enterprises or by autonomous public institutions” are covered by the Convention (*General Survey, 1994*, para. 200).

Thirty years later, in 1978, the Labour Relations (Public Service) Convention, 1978 (No. 151), took an important step forward in requiring States to promote “machinery for negotiation” or “such other methods as will allow representatives of public employees to participate in the determination of” terms and conditions of employment in the public service.³ The right of participation of public servants was therefore officially recognized at the international level, and specific reference was made to negotiation. The only categories which can be excluded (apart from the armed forces and the police, as in previous Conventions) are “high-level employees whose functions are normally considered as policy-making or managerial” and “employees whose duties are of a highly confidential nature”.

The final stage was reached in 1981 with the adoption of the Collective Bargaining Convention, 1981 (No. 154), which includes the whole public service (with the exception of the armed forces and the police) alongside the private sector and only allows, for the public service, the fixing of special modalities of application of the Convention by national laws or regulations or national practice. A State which ratifies the Convention cannot confine itself to consultations, but has to “promote collective bargaining” with the aim, inter alia, of “determining working conditions and terms of employment”. This recognition in two international instruments of the right of public servants to collective bargaining swept aside previous objections, although it was accepted that the characteristics of this sector modify the application of this right.

It should be pointed out, as a matter of interest which facilitated the inclusion of the public service that, in contrast with Convention No. 98, Convention No. 154 no longer refers to the determination of terms and conditions of employment by means of “collective agreements”. Such a provision would have made it impossible for this right to be included, in view of the objections of the States which were prepared to recognize collective bargaining in the public service, but without renouncing at the same time a statutory system.⁴

Collective bargaining in the public service raises specific problems which are mainly derived: on the one hand, from the existence of one or more national conditions of service designed to achieve uniformity, which are in general approved by Parliament and are applicable to all public servants, and which often contain exhaustive regulations covering their rights, duties and conditions of service, thereby prohibiting or leaving little room for negotiation; and, on the other hand, the fact that the remuneration and other

³ With regard to the term “public authorities”, it should be recalled that, in the preparatory work for Convention No. 151, the Committee on the Public Service agreed that it “should be understood to refer to all bodies or institutions invested with public authority or public functions” (see: ILC, *Record of Proceedings*, 1978, Report of the Committee on the Public Service, p. 25/3, para. 23).

⁴ As of 1 August 1999, Convention No. 151 had been ratified by 35 countries and Convention No. 154 by 30 countries.

conditions of employment of public servants which have financial implications have to be reflected in public budgets, which are approved by such bodies as Parliaments and municipalities, which are not always the employers of public servants and whose decisions have to take into account the economic situation of the country and the general interest. Associations which participate in negotiations in the public service are therefore very frequently subject to directives or the control of external bodies, such as the ministry of finance or an inter-ministerial committee.

These problems are compounded by other difficulties, such as the determination of the subjects which can be negotiated and their distribution between the various levels within the complex territorial and operational structure of the State, as well as the determination of the negotiating parties at these levels.

Nevertheless, where collective bargaining is recognized, the public authorities and trade union organizations need to endeavour to identify appropriate and effective solutions. These frequently require a high level of creativity, in order to ensure negotiation through institutional mechanisms or consolidated practices which align collective bargaining with budgetary policies and procedures and the possibilities offered by the economic situation, which in many cases presupposes political contacts, in particular with committees and the leaders of parliamentary groups.

It should be emphasized that collective bargaining and procedures for the settlement of disputes (which include collective bargaining) are treated separately in both the Labour Relations (Public Service) Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154). In this way, although the exercise of the right to strike forms part of negotiating practice, the recognition of this right for public servants is not sufficient in itself to meet the requirements of these Conventions, since collective bargaining must be possible outside the context of strike action and must be able to be used voluntarily by the parties before a dispute arises. In this respect, it should be recalled that Convention No. 154 calls for measures to be taken with the aim that “collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules” (Article 5, paragraph 2(d)).

As noted above, it is admissible for special modalities of application to be fixed for collective bargaining in the public

service. The Committee of Experts has not yet carried out a general survey on this subject and the principles set out by the ILO's supervisory bodies have focused mainly on budgetary matters and interventions by the authorities in freely concluded agreements. In any event, collective bargaining may take place "within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate" (Article 6 of Convention No. 154). The question arises as to whether these specific modalities include: the harmonization of an agreed system with a statutory system;⁵ the exclusion from bargaining of certain subjects; the centralization of negotiation on subjects with budgetary implications or which would imply changes in the laws governing the conditions of service of public servants; or the possibility that the legislative authority should determine certain directives, preceded by discussions with the trade union organizations, within which each exercise of collective bargaining on issues relating to remuneration or other matters with financial implications must remain. We believe that the answer to these questions is probably affirmative, taking into account the principles of the supervisory bodies referred to below.

In the opinion of the Committee of Experts, the following are compatible with the Conventions on collective bargaining:

(...) legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall "budgetary package" within which the parties may negotiate monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a *significant* role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts.

This is not the case of legislative provisions which, on the grounds of the economic situation of a country, impose unilaterally, for example, a specific percentage increase and rule out any possibility of bargaining, in particular by prohibiting the exercise of means of pressure subject to the

⁵ See: Potobsky, G. von, op. cit., p. 1895.

application of severe sanctions. The Committee is aware that collective bargaining in the public sector "... calls for verification of the available resources in the various public bodies or undertakings, that such resources are dependent upon state budgets and that the period of duration of collective agreements in the public sector does not always coincide with the duration of budgetary laws – a situation which can give rise to difficulties."⁶ The Committee therefore takes full account of the serious financial and budgetary difficulties facing governments, particularly during periods of prolonged and widespread economic stagnation. However, it considers that the authorities should give preference as far as possible to collective bargaining in determining the conditions of employment of public servants; where the circumstances rule this out, measures of this kind should be limited in time and protect the standard of living of the workers who are the most affected. In other words, a fair and reasonable compromise should be sought between the need to preserve as far as possible the autonomy of the parties to bargaining, on the one hand, and measures which must be taken by governments to overcome their budgetary difficulties, on the other.⁷

This point of view has been shared by the Committee on Freedom of Association.⁸

The Committee on Freedom of Association has emphasized that "the *reservation of budgetary powers to the legislative authority* should not have the effect of preventing compliance with collective agreements entered into by, or on behalf of, that authority" and that "the exercise of *financial powers by the public authorities* in a manner that prevents or limits compliance with collective agreements already entered into by public bodies is not consistent with the principle of free collective bargaining."⁹ In the same way as the Committee of Experts, the Committee on Freedom of Association has considered that, in so far as the income of public enterprises and bodies depends on state budgets, it would not be objectionable – after wide discussion and consultation between the concerned employers' and employees' organizations in a system having the confidence of the parties – for *wage ceilings to be fixed in state budgetary laws*, and neither would it be a matter for criticism that the Ministry of Finance prepares a report prior to the commencement of collective bargaining with a view to ensuring respect of such ceilings.¹⁰ This

⁶ See 287th Report of the Committee on Freedom of Association, Case No. 1617 (Ecuador), para. 63.

⁷ *General Survey, 1994*, op. cit., paras. 263 and 264.

⁸ *CFA Digest, 1996*, op. cit., para. 899.

⁹ *ibid.*, paras. 894 and 895.

¹⁰ *ibid.*, para. 896.

should not be confused with the requirement of a preliminary opinion issued by the financial authorities (and not by the public employer) on draft collective agreements in the public sector and their financial implications, that is *during* their negotiation. In such cases, provision should be made for a mechanism which ensures that, in the collective bargaining process in the public sector, both the trade union organizations and the employers and their associations are consulted and can express their points of view to the authority responsible for assessing the financial consequences of draft collective agreements. Nevertheless, notwithstanding any opinion submitted by the financial authorities, the parties to collective bargaining should be able to conclude an agreement freely.¹¹ If this is not possible, any exercise by the public authorities of their prerogatives in financial matters which hampers the free negotiation of collective agreements is incompatible with the principle of freedom of collective bargaining.¹²

With regard to collective bargaining in the public service, Convention No. 154 admits special modalities which permit a certain flexibility in the application of its provisions and, in so doing, allows the various national systems and budgetary procedures to be taken into account. On the subject of the provisions of collective agreements relating to remuneration and conditions of employment which have financial implications, one of the fundamental principles mentioned above is that, once they have been adopted, collective agreements must be respected by the legislative and administrative authorities. This principle is compatible with the various budgetary systems, provided that they meet certain conditions and, in particular, can accommodate, on the one hand, systems in which collective agreements resulting from negotiation are concluded before the budgetary debate (provided that the budgets in practice respect the content of the agreements) and, on the other hand, systems in which the agreements are concluded after the budget and where the budget: (a) is conceived in flexible terms which permit an internal adjustment of the budgetary items to give effect to collective agreements; (b) allows the transfer to future budgets of the debt resulting from unforeseen expenditure derived from collective agreements in the public

¹¹ *ibid.*, para. 897.

¹² *ibid.*, para. 898.

service; (c) can be changed in subsequent additional laws which allow compliance with the collective agreements; or (d) by leaving significant latitude for negotiation, determines maximum levels of remuneration in terms of percentage increases or the overall wage mass, after taking into account in good faith the outcome of significant prior consultations with trade union organizations.

As noted above, it is also acceptable for the employers' side in the negotiation process, where it represents the public service, to comply with the directives of the ministry of finance or an economic or financial body which assesses "the financial consequences of draft collective agreements",¹³ provided that the employers and trade union organizations can express their points of view through consultations. In this respect, the Committee on Freedom of Association has emphasized that sufficient advance notice needs to be given "to public sector trade union organizations when they are convened for collective bargaining, so as to allow them a reasonable period of time to negotiate their conditions of employment, especially in view of the fact that there are strict time limits for submitting bills to Parliament."¹⁴

Finally, the flexibility permitted by Convention No. 154 means that, when negotiation covers terms and conditions of employment which involve changes in the legislation respecting administrative careers or the conditions of service of public employees, its results can take the form of a commitment by the government authorities to submit draft legislation to parliament to amend the above texts along the lines of the negotiations. In this respect, in a case concerning Spain in which it was considered that the subjects of negotiation included "all matters that relate (...) to the working conditions of public servants whose terms of office have to be regulated by standards having force of law", the Committee on Freedom of Association considered that the provision complies with the Conventions on collective bargaining.¹⁵

¹³ *Official Bulletin*, Series B, Vol. LXXX, No. 1, 1997, 306th Report of the Committee on Freedom of Association, Case No. 1878 (Peru), para. 538.

¹⁴ See: 310th Report of the Committee on Freedom of Association, Case No. 1946 (Chile), para. 270.

¹⁵ *Official Bulletin*, Series B, Vol. LXXVII, No. 2, 1995, 299th Report of the Committee on Freedom of Association, Case No. 1561 (Spain), para. 40.

12. OTHER INTERVENTIONS BY THE AUTHORITIES

In a case in which it was alleged that the Government had violated Article 4 of Convention No. 98 because, when lengthy negotiations had reached deadlock, the claims of the union had been given effect by means of legislation (a general increase in wages and the award of a special bonus), the Committee on Freedom of Association indicated that “such an argument would, if carried to its logical conclusion, mean that, in nearly every country where the workers were not sufficiently strongly organized to obtain a minimum wage, and that this standard was prescribed by law, Article 4 of Convention No. 98 would be infringed. Such an argument would clearly be untenable. If a government, however, adopted a systematic policy of granting by law what the unions could not obtain by negotiation, the situation might call for reappraisal.”¹

In another case in which general wage increases in the private sector were established by law, and in which they were added to the increases agreed upon in collective agreements, the Committee on Freedom of Association drew the Government’s attention to the fact that “the harmonious development of industrial relations would be promoted if the public authorities, in tackling problems relating to the loss of the workers’ purchasing power, were to adopt solutions which did not entail modifications of what had been agreed upon between workers’ and employers’ organizations without the consent of both parties.”²

¹ *CFA Digest, 1996*, op. cit., para. 902.

² *ibid.*, para. 903.

13. STRIKES, COLLECTIVE BARGAINING AND “SOCIAL PEACE”¹

In practice, strikes may or may not be linked to a bargaining process intended to lead to a collective agreement. In connection with strikes for which collective bargaining is the point of reference, the Committee on Freedom of Association has stated that “strikes decided systematically long before negotiations take place do not fall within the scope of the principles of freedom of association.”² Similarly, according to the Committee, “a ban on strikes related to recognition disputes (for collective bargaining) is not in conformity with the principles of freedom of association.”³ Moreover, as regards strikes concerning the level at which negotiations are conducted, the Committee on Freedom of Association has stated that:

Provisions which prohibit strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer are contrary to the principles of freedom of association on the right to strike; workers and their organizations should be able to call for industrial action in support of multi-employer contracts.

Workers and their organizations should be able to call for industrial action (strikes) in support of multi-employer contracts (collective agreements).⁴

On the other hand, the Committee has also considered acceptable a temporary restriction on strikes under “provisions prohibiting strike action in breach of collective agreements.”⁵ It has also considered that, since the solution to a legal conflict as a result of a difference in interpretation of a legal text should be left to the competent courts, the prohibition of strikes in such a situation does not constitute a breach of freedom of association.⁶

Nonetheless, the Committee on Freedom of Association considers that the right to strike should not be limited solely to

¹ This part has been taken from: Gernigon, Bernard; Otero, Alberto; and Guido, Horacio, “ILO principles concerning the right to strike”, *International Labour Review*, Vol. 137, No. 4, 1998, pp. 460-461.

² *CFA Digest, 1996*, op. cit., para. 481.

³ *ibid.*, para. 488.

⁴ *ibid.*, paras. 490 and 491.

⁵ See: 147th Report of the Committee on Freedom of Association, para. 167.

⁶ *CFA Digest, 1996*, op. cit., para. 485.

industrial disputes that are likely to be resolved through the signing of a collective agreement: “workers and their organizations should be able to express in a broader context, if necessary, their dissatisfaction as regards economic and social matters affecting their members’ interests.”⁷ Similarly, the Committee on Freedom of Association has stated that “a ban on *strike action not linked to a collective dispute* to which the employee or union is a party is contrary to the principles of freedom of association.”⁸ The Committee of Experts has adopted a similar approach.

The Committee of Experts has dealt in greater detail than the Committee on Freedom of Association with the matters raised by collective bargaining systems which provide for social peace while the collective agreement is in force, either by virtue of the law, a collective agreement or guidelines established by judicial decisions or arbitration awards:

The legislation in many countries does not establish any restrictions on the time when a strike may be initiated, stipulating only that the advance notice established by the law must be observed. Other industrial relations systems are based on a radically different philosophy in which collective agreements are seen as a social peace treaty of fixed duration during which strikes and lockouts are prohibited under the law itself, with workers and employers being afforded arbitration machinery in exchange. Recourse to strike action is generally possible under these systems only as a means of pressure for the adoption of an initial agreement or its renewal. The Committee considers that both these options are compatible with the Convention [No. 87] and that the choice should be left to the law and practice of each State. In both types of systems, however, workers’ organizations should not be prevented from striking against the social and economic policy of the Government, in particular where the protest is not only against that policy but also against its effects on some provisions ... (for instance the impact of a wage control policy imposed by the Government on monetary clauses in the agreement).

If the legislation prohibits strikes during the term of collective agreements, this major restriction on a basic right of workers’ organizations must be compensated by the right to have recourse to impartial and rapid arbitration machinery for individual or collective grievances concerning the interpretation or application of collective agreements. Such a procedure not only allows the inevitable difficulties of application and interpretation to be settled during the term of an agreement, but has the advantage of clearing the ground for subsequent bargaining rounds by identifying the problems which have arisen during the term of the agreement.⁹

⁷ *ibid.*, para. 484.

⁸ *ibid.*, para. 489.

⁹ *General Survey, 1994*, op. cit., paras. 166 and 167.

14. OTHER ISSUES

Right of information

The Collective Bargaining Recommendation, 1981 (No. 163), indicates in Paragraph 7(1) that “measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations. (2) For this purpose (a) public and private employers should, at the request of workers’ organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining; (b) the public authorities should make available such information as is necessary on the over-all economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.”

The Workers’ Representatives Recommendation, 1971 (No. 143), establishes in Paragraph 16 that the management should make available to workers’ representatives such material facilities and information as may be necessary for the exercise of their functions. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 also indicates that “multinational enterprises should provide workers’ representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity or, where appropriate, of the enterprise as a whole” (paragraph 54) and that “governments should supply to the representatives of workers’ organisations on request, where law and practice so permit, information on the industries in which the enterprise operates, which would help in

laying down objective criteria in the collective bargaining process. In this context, multinational as well as national enterprises should respond constructively to requests by governments for relevant information on their operations” (paragraph 55). Finally, the Communications within the Undertaking Recommendation, 1967 (No. 129), contains provisions of a general nature which refer not only to collective bargaining, but also to the information which should be provided by representatives of management to workers’ representatives.

Extension of collective agreements

The Collective Agreements Recommendation, 1951 (No. 91), states in Paragraph 5(1) that, “where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement. (2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions; (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative; (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement; (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.”

In a case in which the public authorities had decreed the extension of collective agreements, when current collective agreements had been concluded by minority organizations in the face of opposition by an organization which represented the large majority of workers in a sector, the Committee on Freedom of Association considered that “the Government could have carried out an objective appraisal of representativity of the occupational associations in question since, in the absence of such appraisal, the

extension of an agreement could be imposed on an entire sector of activity contrary to the views of the majority organization representing the workers in the category covered by the extended agreement, and thereby limiting the right of free collective bargaining of that majority organization.” In the opinion of the Committee on Freedom of Association, “any extension of collective agreements should take place subject to tripartite analysis of the consequences it would have on the sector to which it is applied. (...) When the extension of the agreement applies to non-member workers of enterprises covered by the collective agreement, this situation in principle does not contradict the principles of freedom of association, in so far as under the law it is the most representative organization that negotiates on behalf of all workers, and the enterprises are not composed of several establishments (a situation in which the decision respecting extension should be left to the parties). The extension of an agreement to an entire sector of activity contrary to the views of the organization representing most of the workers in a category covered by the extended agreement is liable to limit the right of free collective bargaining of that majority organization. This system makes it possible to extend agreements containing provisions which might result in a worsening of the conditions of employment of the category of workers concerned.”¹ This latter principle has been endorsed by the Committee of Experts.²

Relationship between individual contracts of employment and collective agreements

The Collective Agreements Recommendation, 1951 (No. 91), indicates in Paragraph 3(2) that stipulations in contracts of employment which are “contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.” The Committee on Freedom of Association has indicated that “the relationship between individual employment contracts and collective agreements, and in particular the possibility that the former may

¹ *CFA Digest, 1996*, op. cit., paras. 906 to 909.

² See Committee of Experts, Report III (Part 1A), 1998, p. 233.

override certain clauses in the latter under specific conditions, is dealt with differently in the various countries and under the various types of collective bargaining systems concerned. (...) In a case in which the relationship between individual contracts and the collective agreement seems to have been agreed between the employer and the trade union organizations, the Committee considered that the case did not call for further examination.” In another case, the Committee on Freedom of Association indicated that it is “difficult to reconcile the equal status given in the law to individual and collective contracts with the ILO principles on collective bargaining, according to which the full development and utilization of machinery for voluntary negotiation between employers or employers’ organizations and workers’ organizations should be encouraged and promoted, with a view to the regulation of terms and conditions of employment by means of collective agreements. In effect, [in this particular case] it seemed that the Act *allowed* collective bargaining by means of collective agreements, along with other alternatives, rather than *promoting and encouraging it*.”³

When examining a case concerning Peru, the Committee on Freedom of Association considered that “when in the course of collective bargaining with the trade union, the enterprise offers better working conditions to non-unionized workers under individual agreements, there is a serious risk that this might undermine the negotiating capacity of the trade union and give rise to discriminatory situations in favour of the non-unionized staff; furthermore, it might encourage unionized workers to withdraw from the union”. It therefore urged the Government “to ensure that the individual agreements offered by the (...) enterprise to non-unionized workers do not give rise to any discrimination vis-à-vis the workers belonging to (...) or undermine the negotiating capacity of the trade union.”⁴ In another case, the Committee on Freedom of Association indicated that, avoiding a representative organization and entering into direct individual negotiation with employees is contrary to the promotion of collective bargaining.⁵ With regard to

³ *CFA Digest, 1996*, op. cit., paras. 910 and 911.

⁴ *Official Bulletin*, Series B, Vol. LXXX, No. 1, 1997, 306th Report of the Committee on Freedom of Association, Case No. 1845 (Peru), paras. 517 and 518.

⁵ See: 310th Report of the Committee on Freedom of Association, Case No. 1852 (United Kingdom), para. 337.

temporary job offers in the public sector to combat unemployment, in which the wages were not determined under the terms of the collective agreements governing the remuneration of regular employees, the Committee on Freedom of Association “expressed the hope that the Government would ensure that, in practice, the job offers remained of a limited duration and did not become an opportunity to fill permanent posts with unemployed persons, restricted in their right to bargain collectively as regards their remuneration.”⁶ The Committee of Experts also considers that giving primacy to individual contracts over collective agreements does not promote collective bargaining, as required by Convention No. 98.⁷

Compliance with collective agreements in cases of competition with creditors and bankruptcy

The Committee on Freedom of Association has always considered that “collective agreements entered into freely by the parties must be respected”. However, in a case which related to “insolvency and bankruptcy proceedings”, it commented that “insisting on full compliance with the provisions of the collective agreements might threaten the continued operation of the enterprise and the maintenance of the workers’ jobs”. It therefore indicated that, where the trade unions concerned can renegotiate the collective agreements which were left without effect in a crisis situation, this does not violate Convention No. 98.⁸

Duration of collective agreements

With regard to the duration of collective agreements, the Committee on Freedom of Association has considered that “amendments removing the upper limit on the term of collective agreements, and their effect on the time periods for assessing representativity, collective bargaining, change of union allegiance

⁶ *CFA Digest, 1996*, op. cit., para. 912.

⁷ See: Committee of Experts, Report III (Part 1A) 1998, p. 223.

⁸ *Official Bulletin*, Series B, Vol. LXXX, No. 2, 1997, 307th Report of the Committee on Freedom of Association, Case No. 1887 (Argentina), para. 67.

and affiliation, do not constitute a violation of the principles of freedom of association. However, the Committee is aware that, at least potentially, the possibility of concluding collective agreements for a very long term entails a risk that a union with borderline representativity may be tempted to consolidate its position by accepting an agreement for a longer term to the detriment of the workers' genuine interests."⁹

⁹ *CFA Digest, 1996*, op. cit., para. 905.

15. RESTRICTIONS ON THE EXERCISE OF THE RIGHT TO COLLECTIVE BARGAINING IN NATIONAL LAW

The observations made by the Committee of Experts concerning the application of Convention No. 98 in its reports over recent years (1998 and 1999)¹ give a fairly full overview of problems related to collective bargaining which arise in the countries which have ratified the Convention. They also show the intentions expressed by a considerable number of Governments to amend the law with a view to taking these principles into account.

Out of a total of 47 governments to which the Committee of Experts has addressed critical observations concerning the right to collective bargaining within the framework of Convention No. 98 (which has been ratified by 141 member States), the problems which arise may be summarized as follows:

Albania. Denial of the right of public servants who are not engaged in the administration of the State to negotiate their salaries, which are fixed by decree.

Argentina. The obligation to obtain approval for collective agreements going beyond the enterprise level and the need to take into account for such approval not only whether the collective agreement contains clauses violating public order standards, but also whether it complies with criteria relating to productivity, investments and the introduction of technology and vocational training systems (the Government has indicated that these issues are addressed in a draft reform of the law); and the power of decision of the authorities concerning the level of bargaining in cases where the parties do not reach agreement in this respect.

Australia. Certain provisions of the legislation: (1) give primacy to individual labour relations over collective labour relations, which does not promote the utilization of collective bargaining; (2) give

¹ See: ILC, 86th and 87th Sessions, Reports of the Committee of Experts, Report III (Part IA), 1998 and 1999.

preference to bargaining at the enterprise level and at the workplace; (3) prohibit the issue of strike pay being raised as a matter for negotiation; and (4) require majority approval of certified agreements.

Bangladesh. Obstacles to voluntary bargaining in the private sector (only registered unions may become collective bargaining agents, and the percentage of members required for the registration of a workers' organization is too high); restrictions on voluntary bargaining in the public sector (the determination of wage rates and other conditions of employment through Government-appointed wages commissions); and the denial of the right to collective bargaining in export processing zones.

Bolivia. Denial of the right to collective bargaining for agricultural workers and public servants who are not engaged in the administration of the State; the need to promote and develop collective bargaining so that it is not confined to determining wage levels, but also in practice covers other conditions of employment.

Brazil. Denial of the right to collective bargaining of public servants who are not engaged in the administration of the State; the submission of collective bargaining respecting wages to the Government's economic policy.

Cape Verde. The absence of appropriate measures to encourage and promote the full development and utilization of machinery for voluntary negotiation with a view to the regulation of terms and conditions of employment by means of collective agreements.

Colombia. Denial of the right to collective bargaining of public employees who are not engaged in the administration of the State and to federations and confederations; the requirement that industrial or branch unions comprise over 50 per cent of the workers in an enterprise in order to be able to bargain collectively.

Costa Rica. Non-recognition of the right to collective bargaining of public servants who are not engaged in the administration of the State (the Government has provided information on a Bill which envisages this right).

Democratic Republic of the Congo. Absence of measures to encourage and promote machinery for the negotiation of terms and conditions of employment between the public authorities and workers' organizations.

Denmark. Exclusion from collective bargaining of persons who are not resident in Denmark and who are employed on vessels flying the Danish flag; the extension of a collective agreement to the entire sector of activity, contrary to the views of the organization representing most of the workers in the category covered by the extended agreement (the Government has indicated that it envisages submitting draft legislation to Parliament on this latter issue).

Dominican Republic. The legal requirement that, in order to be able to bargain collectively, a trade union must represent an absolute majority of the workers in an enterprise or the workers employed in the sector concerned.

Ecuador. Denial of the right to collective bargaining of workers in official departments and other public sector institutions and private sector institutions in the social and public spheres; non-recognition of the right to collective bargaining of personnel in educational institutions and those who carry out technical and professional functions in the education sector; the requirement to set up a committee approved by over 50 per cent of the workers in public sector institutions and enterprises, or those in the private sector in the social or public sphere; and non-recognition of the right to collective bargaining of public employees who are not engaged in the administration of the State due to the fact that they do not enjoy the right to associate.

Egypt. The provision that any clause of a collective agreement which is liable to impair the economic interests of the country shall be null and void (the Government has indicated that a draft has been prepared of a new Labour Code which does not contain the above provision).

Ethiopia. The need to adopt legislation ensuring the recognition, in both law and practice, of the right to voluntary negotiation of the terms and conditions of employment of public servants who are not engaged in the administration of the State (the principle was recognized in the Constitution in 1994).

Fiji. The impossibility for a representative trade union which does not cover 50 per cent of the employees in a unit to bargain collectively (the Government has indicated that an amendment to the legislation has permitted the existence of a multiplicity of trade unions in an enterprise which are granted bargaining rights and the Committee of Experts has asked to be provided with a copy of the

legislation); and the obligation for agreements or arrangements to respect the wage restrictions established by the authorities, under the penalty of being declared illegal and deemed to be an offence.

Germany. Exclusion from the right to collective bargaining of teachers with civil service status.

Guatemala. The requirement of too high a number of votes by the members of the general assembly of a trade union (two-thirds) to authorize the conclusion, approval or endorsement of a draft collective agreement; and the absence of a mechanism through which, within the collective bargaining process in the public sector, trade union organizations and employers are adequately consulted so as to be able to express their points of view as soon as possible to the financial authorities, so that they can be duly taken into account.

Haiti. The power of the administrative authorities to intervene in the preparation of collective agreements.

Indonesia. Excessive legal requirements for the registration of trade unions or federations, and therefore on collective bargaining.

Iraq. The absence of measures to encourage and promote the full development and utilization of machinery for the voluntary negotiation of collective agreements in the private, mixed and cooperative sectors.

Iceland. Intervention by the Government in agreements that have been freely concluded by the social partners.

Jamaica. Denial of the right to negotiate collectively in a bargaining unit when there is no trade union whose members comprise 40 per cent of the workers in the unit; and the need for the trade union claiming the right to negotiate to obtain 50 per cent of the votes of the workers in the recognition procedure for the purposes of collective bargaining.

Japan. Certain limitations on the participation in the process of wage determination of public servants who are not engaged in the administration of the State.

Jordan. Exclusion from the scope of collective bargaining of domestic workers, gardeners, cooks and the like, as well as agricultural workers.

Kenya. Denial of the right to collective bargaining of public employees who are not engaged in the administration of the State.

Lebanon. The requirement that workers' representatives must obtain the approval of at least 60 per cent of the Lebanese workers concerned to be able to negotiate; the need for a collective agreement to be approved by two-thirds of the general assembly of trade unions party to the agreement; the denial of the right to collective bargaining in the public sector, including for workers who are not engaged in the administration of the State; and the imposition of compulsory arbitration in public services.

Liberia. The impossibility for employees of State enterprises and other authorities to bargain collectively.

Libyan Arab Jamahiriya. The requirement for the clauses of collective agreements to be in conformity with the national economic interest; and the denial of the right to collective bargaining of public servants who are not engaged in the administration of the State, as well as agricultural workers and seafarers.

Malaysia. Limitations on the scope of collective agreements for "pioneer companies" (the Government has announced measures to abolish this restriction); and restrictions on collective bargaining on such matters as transfers, dismissals and reinstatement; restrictions on the right to bargain collectively of public employees who are not engaged in the administration of the State.

Morocco. Denial of the right to bargain collectively of public employees who are not engaged in the administration of the State.

Pakistan. Denial of the right to bargain collectively of employees in the public banking and financial sectors and in export processing zones.

Panama. An excessively long conciliation procedure in the event of disputes or negotiations.

Papua New Guinea. The discretionary power of the authorities to cancel arbitration awards or declare wage agreements void when they are contrary to Government policy or national interest (the Government has indicated that measures are being taken to abolish the respective legislative provisions).

Peru. Obstacles to voluntary negotiation resulting from the requirement of an absolute majority, not only of the number of workers, but also of enterprises, in order to conclude a collective agreement for a branch of activity or occupation; the possibility for the employer, without the agreement of the workers, to modify conditions of work previously agreed upon.

Portugal. The possibility for one of the parties or the administrative authority to submit disputes arising from the negotiation of a collective agreement to compulsory arbitration.

Rwanda. The need to adopt measures to promote collective bargaining (collective agreements have not been concluded in the country).

Singapore. The prohibition of collective bargaining on subjects such as transfers and dismissals; and the discretionary power of the industrial arbitration court to refuse to register collective agreements concluded in newly established enterprises.

Sudan. The possibility for the authorities to submit a collective dispute to compulsory arbitration in non-essential services (the Government has indicated that a tripartite commission has been set up to review the legislation).

Swaziland. Denial of the right of federations to engage in collective bargaining; the power of the administrative authorities to deny the right to collective bargaining in an industrial sector; and the possibility for the employer not to recognize for the purposes of collective bargaining a trade union which does not represent over 50 per cent of the workers.

Syrian Arab Republic. The possibility provided in the law to refuse to approve a collective agreement or to cancel any clause likely to harm the economic interests of the country (the Government has indicated that a draft law has been prepared to repeal the respective provisions of the Labour Code).

United Republic of Tanzania. The power of the courts to refuse to register a collective agreement if it is not in conformity with the Government's economic policy.

Trinidad and Tobago. Denial of the right to collective bargaining in cases where the trade union does not represent 50 per cent of the workers in a bargaining unit; and the submission of collective disputes in the Central Bank to a special tribunal.

Turkey. Prohibition of collective bargaining by confederations and at the industry-wide level; the authorization of only one collective agreement at a given level; the imposition of ceilings on various indemnities; the dual criteria for the determination of trade unions which are representative for the purposes of collective bargaining; the denial of the collective bargaining rights of public

servants who are not engaged in the administration of the State; and the imposition of compulsory arbitration in export processing zones if negotiations fail.

United Kingdom. The existence of certain provisions of the legislation which do not encourage or promote voluntary bargaining (the Government has indicated that consultations are being held with the social partners on this issue).

Venezuela. The need for a trade union to represent an absolute majority of the workers in an enterprise in order to negotiate a collective agreement.

Yemen. The compulsory registration of collective agreements, with registration being subject to their conformity with the economic interests of the country.

16. SUMMARY OF ILO PRINCIPLES ON THE RIGHT TO COLLECTIVE BARGAINING

To resume the previous chapters, the standards and principles emerging from the ILO's Conventions, Recommendations and other instruments on the right to collective bargaining, and the principles set forth by the Committee of Experts and the Committee on Freedom of Association on the basis of these instruments, may be summarized as follows.

A. The right to collective bargaining is a fundamental right endorsed by the members of the ILO in joining the Organization, which they have an obligation to respect, to promote and to realize, in good faith (ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up).

B. Collective bargaining is a right of employers and their organizations, on the one hand, and organizations of workers, on the other hand (first-level trade unions, federations and confederations); only in the absence of these latter organizations may representatives of the workers concerned conclude collective agreements.

C. The right to collective bargaining should be recognized throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the State who may be excluded from the exercise thereof (Convention No. 98).¹

D. The purpose of collective bargaining is the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.

¹ Nevertheless, when a State ratifies the Collective Bargaining Convention, 1981 (No. 154), the right to collective bargaining is also applicable in the context of the public administration, for which special modalities of application may be fixed (in contrast with the provisions of Convention No. 154, the Labour Relations (Public Service) Convention, 1978 (No. 151), provides a lower level of international protection for collective bargaining, since it permits, in the context of the public administration, the possibility of opting between collective bargaining and other methods for the determination of terms and conditions of employment).

E. Collective agreements should be binding. It must be possible to determine terms and conditions of employment which are more favourable than those established by law and preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.

F. To be effective, the exercise of the right to collective bargaining requires that workers' organizations are independent and not "under the control of employers or employers' organisations" and that the process of collective bargaining can proceed without undue interference by the authorities.

G. A trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union fulfils these conditions or such exclusive rights are not recognized, workers' organizations should nevertheless be able to conclude a collective agreement on behalf of their own members.

H. The principle of good faith in collective bargaining implies recognizing representative organizations, endeavouring to reach an agreement, engaging in genuine and constructive negotiations, avoiding unjustified delays in negotiation and mutually respecting the commitments entered into, taking into account the results of negotiations in good faith.

I. In view of the fact that the voluntary nature of collective bargaining is a fundamental aspect of the principles of freedom of association, collective bargaining may not be imposed upon the parties and procedures to support bargaining must, in principle, take into account its voluntary nature; moreover, the level of bargaining must not be imposed unilaterally by law or by the authorities, and it must be possible for bargaining to take place at any level.

J. It is acceptable for conciliation and mediation to be imposed by law in the framework of the process of collective bargaining, provided that reasonable time limits are established. However, the imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is only admissible: (1) in essential services in the strict sense of the term (those whose interruption would endanger the life, personal safety or health of

the whole or part of the population); (2) with regard to public servants engaged in the administration of the State; (3) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities; and (4) in the event of an acute national crisis. Arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.

K. Interventions by the legislative or administrative authorities which have the effect of annulling or modifying the content of freely concluded collective agreements, including wage clauses, are contrary to the principle of voluntary collective bargaining. These interventions include: the suspension or derogation of collective agreements by decree without the agreement of the parties; the interruption of agreements which have already been negotiated; the requirement that freely concluded collective agreements be renegotiated; the annulment of collective agreements; and the forced renegotiation of agreements which are currently in force. Other types of intervention, such as the compulsory extension of the validity of collective agreements by law is only admissible in cases of emergency and for short periods.

L. Restrictions on the content of future collective agreements, particularly in relation to wages, which are imposed by the authorities as part of economic stabilization or structural adjustment policies for imperative reasons of economic interest, are admissible only in so far as such restrictions are preceded by consultations with the organizations of workers and employers and fulfil the following conditions: they are applied as an exceptional measure, and only to the extent necessary, do not exceed a reasonable period and are accompanied by adequate guarantees designed to protect effectively the standards of living of the workers concerned, and particularly those who are likely to be the most affected.

17. CONCLUSIONS ON THE DEGREE TO WHICH THE RIGHT TO COLLECTIVE BARGAINING IS APPLIED

The above analysis of the observations made by the Committee of Experts in 1998 and 1999 on the application of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), shows that 67 per cent of the 141 States which have ratified the Convention apply it in a satisfactory manner. Only in 47 countries has the Committee of Experts found that there are provisions which limit one or other of the aspects of collective bargaining (and not always very serious aspects), although without seriously undermining collective bargaining as such. This demonstrates that it is a right which enjoys almost universal recognition.

The problems noted most frequently in the comments of the Committee of Experts relate in particular to the scope of the right to collective bargaining, and especially its denial to public servants who are not engaged in the administration of the State, as well as the requirement for trade union organizations to represent too high a proportion of workers to be recognized or to engage in collective bargaining. Immediately afterwards comes the significant number of countries in which collective bargaining is subjected to the government's economic policy. Finally, although implicating fewer countries, certain exclude some subjects from collective bargaining, submit it to compulsory arbitration in certain cases, restrict the right of the parties to determine the level of bargaining, or prohibit collective bargaining of specific categories of workers in the private sector or of federations and confederations.

* * *

We wish to conclude this paper by paying tribute to Nicolas Valticos, a supreme world authority in international labour law, a teacher, colleague and friend who, through his high responsibilities in the International Labour Office dedicated an important part of his life to promoting the standards and principles of freedom of

association and collective bargaining. Through his great wisdom, he has made a very valuable contribution to the development of these standards and principles, which we have endeavoured to describe in this publication, particularly by means of his assistance to the various bodies of the Organization and out of his concern (and here we cite his own words, written exactly 20 years ago) that “States individually and the international community as a whole attain greater awareness of their common interest not only in world peace but also in justice, well-being and freedom for mankind.”¹

¹ Valticos, Nicolas, “Future prospects for international labour standards”, *International Labour Review*, Vol. 118, No. 6, Nov.-Dec. 1979, p. 463.

ANNEXES

DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION (DECLARATION OF PHILADELPHIA)

The General Conference of the International Labour Organisation, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organisation and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organisation is based and, in particular, that:

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:

- (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
- (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

- (d) it is a responsibility of the International Labour Organisation to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;
- (e) in discharging the tasks entrusted to it the International Labour Organisation, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognises the solemn obligation of the International Labour Organisation to further among the nations of the world programmes which will achieve:

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;
- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
- (e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- (g) adequate protection for the life and health of workers in all occupations;
- (h) provision for child welfare and maternity protection;
- (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
- (j) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations, to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international

trade, the Conference pledges the full cooperation of the International Labour Organisation with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilised world.

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

(Geneva, 18 June 1998)

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace;

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference;

1. Recalls:

- (a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;
- (b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
 - (a) freedom of association and the effective recognition of the right to collective bargaining;
 - (b) the elimination of all forms of forced or compulsory labour;
 - (c) the effective abolition of child labour; and
 - (d) the elimination of discrimination in respect of employment and occupation.
3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:
 - (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
 - (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and
 - (c) by helping the Members in their efforts to create a climate for economic and social development.
4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.
5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

CONVENTION NO. 98

Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively¹

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Thirty-second
Session on 8 June 1949, and
Having decided upon the adoption of certain proposals concerning the
application of the principles of the right to organise and to bargain
collectively, which is the fourth item on the agenda of the session, and
Having determined that these proposals shall take the form of an
international Convention,
adopts this first day of July of the year one thousand nine hundred and forty-
nine the following Convention, which may be cited as the Right to Organise and
Collective Bargaining Convention, 1949:

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to –
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;
 - (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 2

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.

¹ Ed.: this Convention came into force on 18 July 1951

Article 3

Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Article 5

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 6

This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.

Article 7

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 8

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 9

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of article 35 of the Constitution of the International Labour Organisation shall indicate –

(a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;

- (b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
- (c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
- (d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

Article 10

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 11, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

LABOUR RELATIONS (PUBLIC SERVICE) CONVENTION, 1978
(NO. 151)

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Sixty-fourth Session
on 7 June 1978, and

Noting the terms of the Freedom of Association and Protection of the Right
to Organise Convention, 1948, the Right to Organise and Collective
Bargaining Convention, 1949, and the Workers' Representatives
Convention and Recommendation, 1971, and

Recalling that the Right to Organise and Collective Bargaining Convention,
1949, does not cover certain categories of public employees and that
the Workers' Representatives Convention and Recommendation, 1971,
apply to workers' representatives in the undertaking, and

Noting the considerable expansion of public-service activities in many
countries and the need for sound labour relations between public
authorities and public employees' organisations, and

Having regard to the great diversity of political, social and economic systems
among member States and the differences in practice among them (e.g.
as to the respective functions of central and local government, of
federal, state and provincial authorities, and of state-owned under-
takings and various types of autonomous or semi-autonomous public
bodies, as well as to the nature of employment relationships), and

Taking into account the particular problems arising as to the scope of, and
definitions for the purpose of, any international instrument, owing to
the differences in many countries between private and public
employment, as well as the difficulties of interpretation which have
arisen in respect of the application of relevant provisions of the Right
to Organise and Collective Bargaining Convention, 1949, to public
servants, and the observations of the supervisory bodies of the ILO on
a number of occasions that some governments have applied these
provisions in a manner which excludes large groups of public
employees from coverage by that Convention, and

Having decided upon the adoption of certain proposals with regard to
freedom of association and procedures for determining conditions of
employment in the public service, which is the fifth item on the agenda
of the session, and

Having determined that these proposals shall take the form of an inter-
national Convention,
adopts this twenty-seventh day of June of the year one thousand nine hundred
and seventy-eight the following Convention, which may be cited as the Labour
Relations (Public Service) Convention, 1978:

PART I. SCOPE AND DEFINITIONS

Article 1

1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.

2. The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.

3. 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.

Article 2

For the purpose of this Convention, the term “public employee” means any person covered by the Convention in accordance with Article 1 thereof.

Article 3

For the purpose of this Convention, the term “public employees’” organisation means any organisation, however composed, the purpose of which is to further and defend the interests of public employees.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 4

1. Public employees shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to:

- (a) make the employment of public employees subject to the condition that they shall not join or shall relinquish membership of a public employees’ organisation;
- (b) cause the dismissal of or otherwise prejudice a public employee by reason of membership of a public employees’ organisation or because of participation in the normal activities of such an organisation.

Article 5

1. Public employees’ organisations shall enjoy complete independence from public authorities.

2. Public employees’ organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.

3. In particular, acts which are designed to promote the establishment of public employees’ organisations under the domination of a public authority, or

to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of interference within the meaning of this Article.

PART III. FACILITIES TO BE AFFORDED TO PUBLIC EMPLOYEES' ORGANISATIONS

Article 6

1. Such facilities shall be afforded to the representatives of recognised public employees' organisations as may be appropriate in order to enable them to carry out their functions promptly and efficiently, both during and outside their hours of work.

2. The granting of such facilities shall not impair the efficient operation of the administration or service concerned.

3. The nature and scope of these facilities shall be determined in accordance with the methods referred to in Article 7 of this Convention, or by other appropriate means.

PART IV. PROCEDURES FOR DETERMINING TERMS AND CONDITIONS OF EMPLOYMENT

Article 7

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

PART V. SETTLEMENT OF DISPUTES

Article 8

The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

PART VI. CIVIL AND POLITICAL RIGHTS

Article 9

Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions.

RECOMMENDATION NO. 159

Recommendation concerning Procedures for Determining Conditions of Employment in the Public Service

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Sixty-fourth Session
on 7 June 1978, and

Having decided upon the adoption of certain proposals with regard to
freedom of association and procedures for determining conditions of
employment in the public service, which is the fifth item on the agenda
of the session, and

Having determined that these proposals shall take the form of a
Recommendation supplementing the Labour Relations (Public Service)
Convention, 1978,

adopts this twenty-seventh day of June of the year one thousand nine hundred
and seventy-eight the following Recommendation, which may be cited as the
Labour Relations (Public Service) Recommendation, 1978:

1. (1) In countries in which procedures for recognition of public
employees' organisations apply with a view to determining the organisations to
be granted, on a preferential or exclusive basis, the rights provided for under
Parts III, IV or V of the Labour Relations (Public Service) Convention, 1978,
such determination should be based on objective and pre-established criteria with
regard to the organisations' representative character.

(2) The procedures referred to in subparagraph (1) of this Paragraph
should be such as not to encourage the proliferation of organisations covering
the same categories of employees.

2. (1) In the case of negotiation of terms and conditions of employment
in accordance with Part IV of the Labour Relations (Public Service) Convention,
1978, the persons or bodies competent to negotiate on behalf of the public
authority concerned and the procedure for giving effect to the agreed terms and
conditions of employment should be determined by national laws or regulations
or other appropriate means.

(2) Where methods other than negotiation are followed to allow
representatives of public employees to participate in the determination of terms
and conditions of employment, the procedure for such participation and for final
determination of these matters should be determined by national laws or
regulations or other appropriate means.

3. Where an agreement is concluded between a public authority and a
public employees' organisation in pursuance of Paragraph 2, subparagraph (1),
of this Recommendation, the period during which it is to operate and/or the
procedure whereby it may be terminated, renewed or revised should normally
be specified.

4. In determining the nature and scope of the facilities which should be
afforded to representatives of public employees' organisations in accordance with
Article 6, paragraph 3, of the Labour Relations (Public Service) Convention, 1978,
regard should be had to the Workers' Representatives Recommendation, 1971.

COLLECTIVE BARGAINING CONVENTION, 1981 (NO. 154)

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Sixty-seventh
Session on 3 June 1981, and
Reaffirming the provision of the Declaration of Philadelphia recognising
“the solemn obligation of the International Labour Organisation to
further among the nations of the world programmes which will achieve
... the effective recognition of the right of collective bargaining”, and
noting that this principle is “fully applicable to all people everywhere”,
and
Having regard to the key importance of existing international standards
contained in the Freedom of Association and Protection of the Right
to Organise Convention, 1948, the Right to Organise and Collective
Bargaining Convention, 1949, the Collective Agreements
Recommendation, 1951, the Voluntary Conciliation and Arbitration
Recommendation, 1951, the Labour Relations (Public Service)
Convention and Recommendation, 1978, and the Labour
Administration Convention and Recommendation, 1978, and
Considering that it is desirable to make greater efforts to achieve the
objectives of these standards and, particularly, the general principles
set out in Article 4 of the Right to Organise and Collective Bargaining
Convention, 1949, and in Paragraph 1 of the Collective Agreements
Recommendation, 1951, and
Considering accordingly that these standards should be complemented by
appropriate measures based on them and aimed at promoting free and
voluntary collective bargaining, and
Having decided upon the adoption of certain proposals with regard to the
promotion of collective bargaining, which is the fourth item on the
agenda of the session, and
Having determined that these proposals shall take the form of an
international Convention,
adopts this nineteenth day of June of the year one thousand nine hundred and
eighty-one, the following Convention, which may be cited as the Collective
Bargaining Convention, 1981 :

PART I. SCOPE AND DEFINITIONS

Article 1

1. This Convention applies to all branches of economic activity.
2. The extent to which the guarantees provided for in this Convention apply to the armed forces and the police may be determined by national laws or regulations or national practice.
3. As regards the public service, special modalities of application of this Convention may be fixed by national laws or regulations or national practice.

Article 2

For the purpose of this Convention the term “collective bargaining” extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations, on the other, for:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.

Article 3

1. Where national law or practice recognises the existence of workers’ representatives as defined in Article 3, subparagraph (b), of the Workers’ Representatives Convention, 1971, national law or practice may determine the extent to which the term “collective bargaining” shall also extend, for the purpose of this Convention, to negotiations with these representatives.

2. Where, in pursuance of paragraph 1 of this Article, the term “collective bargaining” also includes negotiations with the workers’ representatives referred to in that paragraph, appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers’ organisations concerned.

PART II. METHODS OF APPLICATION

Article 4

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations.

PART III. PROMOTION OF COLLECTIVE BARGAINING

Article 5

1. Measures adapted to national conditions shall be taken to promote collective bargaining.

2. The aims of the measures referred to in paragraph 1 of this Article shall be the following:

- (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
- (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
- (c) the establishment of rules of procedure agreed between employers’ and workers’ organisations should be encouraged;

(d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;

(f) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

Article 6

The provisions of this Convention do not preclude the operation of industrial relations systems in which collective bargaining takes place within the framework of conciliation and/or arbitration machinery or institutions, in which machinery or institutions the parties to the collective bargaining process voluntarily participate.

Article 7

Measures taken by public authorities to encourage and promote the development of collective bargaining shall be the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organisations.

Article 8

The measures taken with a view to promoting collective bargaining shall not be so conceived or applied as to hamper the freedom of collective bargaining.

RECOMMENDATION NO. 163

Recommendation concerning the Promotion of Collective Bargaining

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Sixty-seventh
Session on 3 June 1981, and
Having decided upon the adoption of certain proposals with regard to the
promotion of collective bargaining, which is the fourth item on the
agenda of the session, and
Having determined that these proposals shall take the form of a
Recommendation supplementing the Collective Bargaining
Convention, 1981,
adopts this nineteenth day of June of the year one thousand nine hundred and
eighty-one the following Recommendation, which may be cited as the Collective
Bargaining Recommendation, 1981 :

I. METHODS OF APPLICATION

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, arbitration awards or in any other manner consistent with national practice.

II. MEANS OF PROMOTING COLLECTIVE BARGAINING

2. In so far as necessary, measures adapted to national conditions should be taken to facilitate the establishment and growth, on a voluntary basis, of free, independent and representative employers' and workers' organisations.

3. As appropriate and necessary, measures adapted to national conditions should be taken so that -

- (a) representative employers' and workers' organisations are recognised for the purposes of collective bargaining;
- (b) in countries in which the competent authorities apply procedures for recognition with a view to determining the organisations to be granted the right to bargain collectively, such determination is based on pre-established and objective criteria with regard to the organisations' representative character, established in consultation with representative employers' and workers' organisations.

4. (1) Measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.

(2) In countries where collective bargaining takes place at several levels, the parties to negotiations should seek to ensure that there is co-ordination among these levels.

5. (1) Measures should be taken by the parties to collective bargaining so that their negotiators, at all levels, have the opportunity to obtain appropriate training.

(2) Public authorities may provide assistance to workers' and employers' organisations, at their request, for such training.

(3) The content and supervision of the programmes of such training should be determined by the appropriate workers' or employers' organisation concerned.

(4) Such training should be without prejudice to the right of workers' and employers' organisations to choose their own representatives for the purpose of collective bargaining.

6. Parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations within their respective organisations.

7. (1) Measures adapted to national conditions should be taken, if necessary, so that the parties have access to the information required for meaningful negotiations.

(2) For this purpose –

(a) public and private employers should, at the request of workers' organisations, make available such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations; where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to be made available may be agreed upon between the parties to collective bargaining;

(b) the public authorities should make available such information as is necessary on the overall economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest.

8. Measures adapted to national conditions should be taken, if necessary, so that the procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves, whether the dispute is one which arose during the negotiation of agreements, one which arose in connection with the interpretation and application of agreements or one covered by the Examination of Grievances Recommendation, 1967.

RECOMMENDATION NO. 91

Recommendation concerning Collective Agreements

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Thirty-fourth Session
on 6 June 1951, and

Having decided upon the adoption of certain proposals with regard to
collective agreements, which is included in the fifth item on the agenda
of the session, and

Having determined that these proposals shall take the form of a
Recommendation designed to be implemented by the parties
concerned or by the public authorities as may be appropriate under
national conditions,

adopts this twenty-ninth day of June of the year one thousand nine hundred and
fifty-one the following Recommendation, which may be cited as the Collective
Agreements Recommendation, 1951 :

I. COLLECTIVE BARGAINING MACHINERY

1. (1) Machinery appropriate to the conditions existing in each country
should be established, by means of agreement or laws or regulations as may be
appropriate under national conditions, to negotiate, conclude, revise and renew
collective agreements, or to be available to assist the parties in the negotiation,
conclusion, revision and renewal of collective agreements.

(2) The organisation, methods of operation and functions of such machinery
should be determined by agreements between the parties or by national laws or
regulations, as may be appropriate under national conditions.

II. DEFINITION OF COLLECTIVE AGREEMENTS

2. (1) For the purpose of this Recommendation, the term “collective
agreements means all agreements in writing regarding working conditions and
terms of employment concluded between an employer, a group of employers or
one or more employers’ organisations, on the one hand, and one or more
representative workers’ organisations, or, in the absence of such organisations,
the representatives of the workers duly elected and authorised by them in
accordance with national laws and regulations, on the other.

(2) Nothing in the present definition should be interpreted as implying the
recognition of any association of workers established, dominated or financed by
employers or their representatives.

III. EFFECTS OF COLLECTIVE AGREEMENTS

3. (1) Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded. Employers and workers bound by a collective agreement should not be able to include in contracts of employment stipulations contrary to those contained in the collective agreement.

(2) Stipulations in such contracts of employment which are contrary to a collective agreement should be regarded as null and void and automatically replaced by the corresponding stipulations of the collective agreement.

(3) Stipulations in contracts of employment which are more favourable to the workers than those prescribed by a collective agreement should not be regarded as contrary to the collective agreement.

(4) If effective observance of the provisions of collective agreements is secured by the parties thereto, the provisions of the preceding subparagraphs should not be regarded as calling for legislative measures.

4. The stipulations of a collective agreement should apply to all workers of the classes concerned employed in the undertakings covered by the agreement unless the agreement specifically provides to the contrary.

IV. EXTENSION OF COLLECTIVE AGREEMENTS

5. (1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:

- (a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;
- (b) that, as a general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement;
- (c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

V. INTERPRETATION OF COLLECTIVE AGREEMENTS

6. Disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations as may be appropriate under national conditions.

VI. SUPERVISION OF APPLICATION OF COLLECTIVE AGREEMENTS

7. The supervision of the application of collective agreements should be ensured by the employers' and workers' organisations parties to such agreements or by the bodies existing in each country for this purpose or by bodies established ad hoc.

VII. MISCELLANEOUS

8. National laws or regulations may, among other things, make provision for:
- (a) requiring employers bound by collective agreements to take appropriate steps to bring to the notice of the workers concerned the texts of the collective agreements applicable to their undertakings;
 - (b) the registration or deposit of collective agreements and any subsequent changes made therein;
 - (c) a minimum period during which, in the absence of any provision to the contrary in the agreement, collective agreements shall be deemed to be binding unless revised or rescinded at an earlier date by the parties.

RECOMMENDATION NO. 92

Recommendation concerning Voluntary Conciliation and Arbitration

The General Conference of the International Labour Organisation,
Having been convened at Geneva by the Governing Body of the
International Labour Office, and having met in its Thirty-fourth Session
on 6 June 1951, and
Having decided upon the adoption of certain proposals with regard to
voluntary conciliation and arbitration, which is included in the fifth
item on the agenda of the session, and
Having determined that these proposals shall take the form of a
Recommendation designed to be implemented by the parties
concerned or by the public authorities as may be appropriate under
national conditions,
adopts this twenty-ninth day of June of the year one thousand nine hundred and
fifty-one the following Recommendation, which may be cited as the Voluntary
Conciliation and Arbitration Recommendation, 1951:

I. VOLUNTARY CONCILIATION

1. Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.

2. Where voluntary conciliation machinery is constituted on a joint basis, it should include equal representation of employers and workers.

3. (1) The procedure should be free of charge and expeditious; such time limits for the proceedings as may be prescribed by national laws or regulations should be fixed in advance and kept to a minimum.

(2) Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority.

4. If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress.

5. All agreements which the parties may reach during conciliation procedure or as a result thereof should be drawn up in writing and be regarded as equivalent to agreements concluded in the usual manner.

II. VOLUNTARY ARBITRATION

6. If a dispute has been submitted to arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the arbitration is in progress and to accept the arbitration award.

III. GENERAL

7. No provision of this Recommendation may be interpreted as limiting, in any way whatsoever, the right to strike.