

INTERNATIONAL LABOUR ORGANIZATION

**Information note for the group of independent
experts on standards-related activities and
decent work: Prospects in the field of
social security (rev.)**

**International Labour Standards Department and
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Note on methodology

This information note is designed to describe the current situation in the ILO as regards its standards-related activities. It covers work carried out over the last 20 years, although emphasis is laid on the work of the last decade. In this context, documents of the International Labour Conference and the Governing Body of the ILO have been examined, along with those of their various committees. The records of discussions of the ILO's constituents on those documents have also been consulted in order to get a clearer picture of their respective views and to understand better the measures favoured by the Organization.

For each issue examined we have tried to describe, where necessary, how the Organization operates and the constitutional and institutional constraints which, in some cases, limit the options available. Also, the particular concerns of the ILO's constituents about problems raised in discussions on standards-related activities were emphasized. Lastly, the issues that have not yet been examined in detail or resolved and those relating specifically to social security have been identified as far as possible.

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I. Reflections on the underlying features of ILS

There is a consensus in the ILO among the Organization's constituents on the fact that standards-related activities form part of the values, along with tripartism and social justice, that constitute the foundations of the ILO. And they are still as relevant today as when the ILO was first established in 1919. The Governing Body considered in 2000 that the fundamental role of the ILO's standards-related activities in translating into reality its constitutional objectives is undoubtedly confirmed: "The question is not *whether* standard setting should continue, but *how* it can be most efficient in contributing to the realization of these objectives and attaining measurable results."¹ This is the framework for the work of this group of experts.

Of the various guarantees afforded by international labour standards, two are essential: progress towards democracy, characterized by effective tripartism (A) and universality (B). Tripartite discussions, both within the Organization and at the national level, on the formulation and application of a whole series of standards contribute to democratic development. Universality would also appear to be a prerequisite for the ILO to fulfil its role.

A. Tripartism

The ILO Constitution does not provide any explicit definition of tripartism. This is a surprising omission, because the doctrinal position is that this principle is the ILO's main pillar and its primary characteristic. Instead of looking for an explicit definition in the text of the Constitution, the ILO's tripartism must be understood through the Organization's bodies and mechanisms.

1. Composition of ILO bodies

The International Labour Conference (ILC) is the supreme body of the ILO. Its functions include formulating and adopting international labour standards (ILS). Within it, tripartism is evident in the obligation for the delegations of member States to be of tripartite composition: two Government delegates, one Worker delegate and one Employer delegate.² Each member State is therefore obliged to send a 2/1/1 tripartite delegation to the plenary sessions of the ILC. The ILO Constitution also requires member States to agree on the designation of non-governmental delegates with the country's most representative organizations of employers and workers, where such exist.³

It may be tempting to see this power of appointment delegated to the State as a flaw that has blocked the establishment of true tripartism. Such an observation is, however, mitigated by the principle of the autonomy of delegates. The Constitution provides that each delegate shall be entitled to vote individually on all matters submitted to the ILC.⁴ In

¹ Doc. GB.277/LILS/2 (Mar. 2000), para. 5.

² Constitution of the ILO, art. 3(1).

³ *ibid.*, art. 3(5).

⁴ *ibid.*, art. 4(1).

practice, like political parties in a legislative assembly, Worker delegates usually vote together and Employer delegates vote together, following the logic of their group interests, rather than any presumed national allegiance. Each group is represented by a spokesperson.⁵

Criticism of unequal tripartism, in view of the 2/1/1 ratio of the delegations of member States, is also tempered in practice by the considerable importance of the ILC's technical committees, on which each group is equally represented (1/1/1). With regard to the standard-setting activities of the ILO, it should be pointed out that these tripartite committees examine the provisions of standards before they are submitted to the ILC. Moreover, the latter generally adopts them without major modification.

If the ILC seems to be like the ILO's own parliament, the Governing Body is something of its executive arm. Among other functions, it determines the agenda of the sessions of the ILC and therefore controls the choice of subjects to be considered. It also decides on the Organization's budget, which gives it great importance as it has a final say on both thematic and financial issues.

In the same way as the ILC, the Governing Body is tripartite, with 56 members, of whom 28 represent governments (ten of which are appointed from Members of chief industrial importance), 14 employers and 14 worker.⁶ Unlike the ILC, for which the member State appoints the employer and worker representatives who make up the delegation, the Constitution provides that the representatives of employers and workers on the Governing Body shall be elected respectively by the Employer and Worker groups of the ILC. This consolidates the autonomy of the non-governmental groups in relation to States and therefore inevitably serves to strengthen tripartism.

All the mechanisms for the development and adoption of ILS, and even in certain cases their supervision, are intended to breathe life in practice into tripartism. They are discussed below.

2. Tripartism and representativeness

Although they are significant indications of its existence, the various tripartite aspects noted in the ILO's bodies are not a guarantee in themselves of real tripartism. It is also necessary to ensure the representative nature of workers' and employers' organizations, which is a complex task raising numerous difficulties. The issue of representativeness is closely linked with that of the independence of workers' and employers' organizations. A reading of the ILO's constituent texts shows that tripartism presupposes the capacity of workers' and employers' representatives to make choices without instructions or interference from the public authorities. In effect, the issue is to guarantee, in so far as possible, the independence of the non-governmental representatives within each State delegation. In the final analysis, these delegates must be able to associate without problems with the groups representing their interests within the ILC. Independence is in practice a *sine qua non* of the effective achievement of tripartism. The end of the Cold War briefly raised hopes that this would be achieved more easily. However, it has to be acknowledged that many obstacles remain on the path of tripartism. The Organization is conscious that efforts have to be made in the short and medium term to achieve progress in terms of

⁵ The seemingly inequitable distribution of delegations to the ILC is therefore attenuated by this group approach which is evident among the Workers and Employers, but not among Government delegates, who do not constitute a homogenous group.

⁶ Constitution of the ILO, art. 7.

tripartism in certain specific situations, such as the informal sector and in cases where there are no workers' organizations.

3. **NGOs and tripartism**

By virtue of its tripartite nature, the ILO closely integrates non-governmental organizations of employers and workers into its structure and activities. It opened up to civil society before any other international organization. But the ever-increasing involvement of NGOs at the international level is making it necessary to examine the role that could be assigned to them within the ILO.

In his report on *Decent work* in 1999, the Director-General, Juan Somavia, emphasized the advantages of an alliance between certain NGOs and the traditional social partners recognized by the ILO.⁷ These alliances could strengthen the position of workers' and employers' organizations at the national and international levels.⁸ The Director-General also emphasized that the terms of the Constitution of the ILO require no amendment to allow such collaboration. There is therefore no need to change the ILO's structure before it can envisage alliances with NGOs.

In the first place, in line with the practice of other international organizations, the ILO allows the participation of NGOs in the meetings of its various bodies. This participation has the merit of having a constitutional basis. Article 12 of the Constitution allows the ILO to cooperate with public international organizations, a term that refers to NGOs other than workers' and employers' organizations, which are referred to explicitly by the Constitution. The Declaration on Fundamental Principles and Rights at Work, adopted by the Conference in 1998, as seen below, as an ILO response to the liberalization of trade, also explicitly encourages the establishment of relations with public international organizations.⁹ In addition, the Constitution empowers the Conference to add technical experts to any committees that it appoints.¹⁰ Clearly, these experts may be drawn from the representatives of NGOs with experience in the field under examination. Although they do not have the right to vote, they can nevertheless have a strong influence on the discussions.¹¹

It should be noted that the positions of the ILO Employer and Worker groups are common on the question of the participation of NGOs in the work of the Organization. They both insist that tripartism must in no way be weakened and that the balance of forces

⁷ *Decent work*, Report of the Director-General, ILC, 87th Session, 1999, pp. 39 and 40.

⁸ The collaboration between the Commission of Inquiry on forced labour in Burma and the NGOs concerned with the matter showed certain of the advantages of such an alliance. In this case, the NGOs provided several types of proof which served as a basis for the work of the Commission of Inquiry. This collaboration occurred again during the work of the High-level Team in October 2001 (doc. GB.282/4, Nov. 2001).

⁹ ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the ILC at its 86th Session, 1998, para. 3. See *infra*.

¹⁰ Constitution of the ILO, art. 18.

¹¹ A special list, prepared by the Governing Body, includes around 150 non-governmental organizations, different from workers' and employers' organizations. Reference may be made, merely by way of illustration, to Amnesty International, Anti-Slavery International, the International Commission of Jurists, the World Organization against Torture, the International Organization for Standardization, ...

must not be modified. Up to now, they have been totally opposed to any modification of the ILO's structure to include NGOs and also very reticent with regard to any systematic participation of NGOs in the work of the Organization. They have emphasized that they should be able to decide upon the admissibility or not of an NGO, by examining in detail its legitimacy and representativeness and the effective contribution and added value that it brings to the tripartite discussions of the Organization.

B. Universality

Two issues reoccur in relation to the universality of the Organization's standards-related activities. The first refers to the very components of a universal standard (1), while the second addresses a much more concrete aspect, namely the establishment and implementation of machinery for the development of international labour standards (ILS) that are truly universal (2).

1. Universal ILS: Elements of a definition

There appears to be agreement around the fact that the degree to which a standard is ratifiable is a good indication of its universality. In other terms, to be universal a standard must be ratifiable by the greatest possible number of States. In this respect, one danger must however be avoided: placing the threshold of the standard so low that it does not constitute any real progress in relation to the average level of actual practice. As discussed below, the standard must therefore reflect a balance between a concern for realism and its essential dynamic role in serving as a guide for the direction that should be taken by social progress.

The ILO's constituents are evidently aware of the increasing difficulty of developing common rules adapted to an ever-larger number of member States, in which the national situations are extremely different, while at the same time responding to the concerns and needs of employers and workers. They recall that when it was first established the ILO had 42 member States and that it is now composed of 176 member States. They consider that this has resulted in a considerable challenge and that, in this situation, they are under the obligation to think carefully about the significance of the universality of standards and to assess the consequences on the content of the instruments that they adopt. But this process of reflection has not seriously questioned the machinery for the development of standards.

Finally, it should also be recalled that, within the ILO, the issue of universality does not only refer to ILS themselves, but also touches on their interpretation. In this respect, the Committee of Experts on the Application of Conventions and Recommendations, the principal body for the supervision of compliance with ratified Conventions¹² reaffirmed in 1977 that its principal function is:

... to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country. Subject only to any derogations which are expressly permitted by the Convention itself, these requirements remain constant and uniform for all countries. In carrying out this work the Committee is guided by the standards laid down in the Convention alone, mindful, however, of the fact that the modes of their implementation may be different in different States. These are international standards,

¹² See *infra*.

and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular social or economic system.¹³

2. ILO machinery for the formulation of universal ILS

The strength of ILS, compared with the standards emanating from other international organizations, lies in the successful tripartite dialogue on which they are generally based. The work carried out by the Organization with a view to improving its standards-related activities is therefore intended, with more or less success as the case may be, to ensure, within the limits set by the constituent texts of the ILO, that its standards have as broad a basis as possible in the three groups and the various geographical regions. In other words, while the various stages of the development of ILS are not being questioned, the work currently being undertaken is intended to integrate consensus between constituents into the overall process of the preparation, formulation and adoption of the standard.

(a) Choice of subject

The development of an ILS requires, first of all, the choice of a subject which, in view of its importance, calls for standard-setting activity. This choice is generally the responsibility of the Governing Body of the ILO, which decides upon its inclusion on the agenda of the ILC¹⁴ which, as already seen, is the plenary body competent for the adoption of international labour Conventions and Recommendations.¹⁵

In making its choice, the Governing Body has at its disposal the studies carried out by the Office on the respective subject.¹⁶ These studies are generally prepared on the basis of the information available to the technical branches at headquarters. The Governing Body also has to ensure “thorough technical preparation and adequate consultation of the Members ... prior to the adoption of a Convention or Recommendation by the Conference.”¹⁷

These provisions are intended to ensure that the ILS that are adopted are relevant, offer real “added value” and therefore respond to needs that are felt, so that they have a real impact. In practice, several problems have arisen with regard to the choice of subjects for standard-setting activities and obliged the Director-General of the ILO in 1997 to recognize that “now that the ILO membership has grown so much and the Organization is involved in so many areas, this task ... has become increasingly difficult to fulfil.”¹⁸ Furthermore, he had to note that recent experience has shown that “the difficulties and

¹³ See in particular the Committee of Experts on the Application of Conventions and Recommendations, Report, 1977, pp. 10 and 11, para. 31, and *ibid.*, Report, 1978, para. 10.

¹⁴ Constitution of the ILO, art. 14(1). Before making its choice, the Governing Body has to consider any suggestion made by a Member, a workers’ or employers’ organization or a “public international organization”.

¹⁵ The ILC can also decide itself, by a two-thirds majority, to include an item on the agenda of its following session: Constitution of the ILO, art. 16(3).

¹⁶ Constitution of the ILO, art. 10.

¹⁷ *ibid.*, art. 14(2).

¹⁸ *The ILO, standard setting and globalization*, Report of the Director-General, ILC, 85th Session, 1997, p. 37.

vicissitudes inherent in the subject have not always been gauged before embarking irreversibly upon the drafting of standards.” In other words, experience of discussions in the ILC on complex issues giving rise to controversy (reference may be made, for example, to home work or subcontracting) has shown the importance of selecting a subject for standard-setting only when the necessary research and preparatory work has been completed and it can reasonably be considered that the subject is “ripe” for standard-setting activities. In response to these observations, the Organization’s constituents unanimously recognized the need to target the choice of ILS more effectively to ensure that they have a better impact.¹⁹

In response to these concerns, in 1997 the Governing Body adopted the concept of a “regularly updated ‘portfolio’ of proposals for standard-setting items”. This portfolio had the following aims:

... [to] give the Governing Body a wider overall view of possible standard-setting actions when setting the Conference agenda and allow it to make strategic choices rather than choosing a subject which is neither ready nor acceptable to anyone – a situation bound to lead to disagreement and frustration during discussions at the Conference and disappointment at the ratification or implementation stages.²⁰

The portfolio was also intended to assist in improving the situation by allowing the Governing Body, over the course of its successive examinations, to specify the profile of the instrument on the selected subject. It was however indicated that, to prevent the portfolio from becoming a mere extended catalogue of subjects for standard-setting, all the constituents should be more closely involved in the process through the technical departments and decentralized structures of the Office. Finally, the question also arose of whether the subjects in the portfolio should respond to certain criteria in addition to those retained in 1987 (number of workers affected, value for workers in the lower economic stratum, severity of the problem)²¹ and include a precise evaluation for each subject envisaged of the added value that the new instrument would bring to the ILO instruments already in existence and to the internal legal systems of ILO member States. No. precise response has been given to these issues.

A first portfolio of proposals was submitted to the Governing Body in November 1997. This portfolio continued to be enriched over the next three years and, in 2000, contained around thirty subjects. In November 2000, it had to be recognized that this approach offered advantages, but also evident shortcomings:

... the Office has had neither the resources nor the time to evaluate all these proposals in such a way as to determine their potential for standard setting. Divergent and occasionally strongly opposing views have been expressed with regard to some of the proposed items, and it has been extremely difficult to reconcile those views in the absence of an appropriate analysis, in particular with regard to the expected impact of proposed standards. To summarize, the greater number of topics from which to choose complicated the business of making the choice, since there was no way of ensuring that the items finally chosen by the Governing Body were the most relevant to the Organization’s objectives. It would therefore appear that, despite the good intentions that lay behind it, the portfolio has not lived up to its expectations.²²

¹⁹ Doc. GB.270/3/2 (Nov. 1997), para. 12.

²⁰ *ibid.*, para. 14.

²¹ See *infra*, point I. B.3.

²² Doc. GB.279/4 (Nov. 2000), para. 8, and Doc. GB.283/4 (Mar. 2002), para. 19.

In general, the Organization's constituents drew the following conclusions from the experience of the portfolio:

While it is not too difficult to agree in general terms on the need to continue standards-related activities, including traditional activities of this type, it is far more difficult to establish, in abstract terms, viable criteria with regard to the desired outcome of those standards in terms of their objects, level, content and form. This suggests that the best guarantee of the viability and relevance of standards-related activities lies in *more in-depth preparatory work*. This would enable the Governing Body to include an item on the agenda once its object, the need to which it responds and the added value which the proposed instrument would bring to existing standards, have been as clearly defined and generally agreed as possible.²³ (italics added)

It is in this context that the integrated approach, which will be discussed below, was formulated. This approach is intended to ensure the relevance of standards, the best guarantee of which is the appreciation, shared as broadly as possible, that the ILO's constituents must have of the value of the proposed action. In other words, it consists of seeking a broad consensus for the formulation of new or revised standards.

(b) Formulation and adoption

Once the subject of the standard has been selected, a cycle of discussions begins which in general is spread over 40 months.²⁴ This cycle is divided into two distinct phases. Firstly, it includes a period of consultations based on the sending of questionnaires to governments, which have to consult the most representative national organizations of employers and workers in this respect. The second phase consists of an examination of the texts, following which the ILC proceeds to the adoption on a tripartite basis of one of more instruments.²⁵

(i) *First phase: Consultation*

During this phase, the Office has the responsibility of holding consultations with the Organization's constituents in the field in which it is proposed to formulate an instrument.²⁶ For this purpose, the Office prepares a preliminary report on the situation in law and practice with regard to the subject in the various countries, accompanied by a questionnaire intended to identify the position of governments on the international standards that they consider it possible and desirable to adopt. Governments are requested to reply and to gather the opinions of the most representative employers' and workers' organizations. Based on the replies received, the Office prepares a report which includes draft conclusions that are submitted to the ILC for examination.²⁷

It should be recalled that the Organization's constituents generally support the consultation procedure by means of questionnaires and that this procedure remains the

²³ *ibid.*, para. 9.

²⁴ Standing Orders of the ILC, arts. 39-40. The ILC generally follows the double discussion procedure. However, in case of special urgency or where specific circumstances so warrant, the Governing Body may decide to submit an issue to the ILC for a single discussion, which clearly results in a substantial reduction in the time required for adoption.

²⁵ *ibid.*, art. 40. See Annex 1 which presents in diagrammatic form the various stages of the formulation and adoption of ILS.

²⁶ *ibid.*, arts. 38 and 39.

²⁷ In the case of a single discussion, the Office already prepares a draft instrument at this stage.

least costly means of carrying out a global consultation, at least formally, on future instruments. However, the use of questionnaires has raised certain problems that have been the subject of discussion within the ILC and the Governing Body, most recently last March. In 1994, during the discussion of the Report of the Director-General in the ILC, certain constituents emphasized the need to improve questionnaires, basically considering them to be too long and over-detailed. Furthermore, proposals were made to confine questionnaires to general principles and fundamental considerations, leaving the respondents to offer additional elements. In 1997, the Director-General noted in this respect that:

... the Office ... is often left to its own devices to prepare a report and questionnaire which already give a fairly detailed outline of the structure and the content of the instrument. This responsibility is of course entirely within the constitutional functions of the Office. But it is regrettable that it does not have the chance to benefit from some sort of preliminary guidance on issues deemed essential.²⁸

In practice, the Office has noted that half of member States reply to questionnaires within the time-limits. The Office has provided additional indications of the replies received over the past five years and on the percentage of comments by employers' and workers' organizations communicated with the government replies, which are set out below.

	1998 (%)	1999 (%)	2000 (%)	2001 (%)	2002 (%)
Response rate	62	61	48	51	42
Employers/workers comments	37	33	33	34	22

The Office also noted that it is generally the same member States which reply to all the questionnaires. Where there are variations, the Office considered that:

... the reply rate may be attributed to the degree of Members' interest in the subject proposed for standing setting: this was obviously the case in 1998 (worst forms of child labour) and 1999 (maternity protection), but also in 1972 (minimum age) and 1982 (disabled persons). Furthermore, it is more than likely that the mobilization of ILO resources both at headquarters and in external offices makes it easier to obtain replies, particularly in the case of countries whose administrative infrastructure or human resources do not always make it possible to carry out the necessary studies to provide relevant replies to the questionnaire. Lastly, it should be borne in mind that the subjects dealt with in Conventions do not always hold the same degree of interest for the ministries with which the Office has established lines of communication and may even concern ministerial departments with a limited knowledge of the ILO's activity. Whether a reply on such instruments will be received depends to a certain extent on that degree of interest or knowledge.²⁹

The Office therefore proposed that improvements to the questionnaire could result in its fuller integration into the standard-setting process, the modification of its form and content and the optimization of its efficiency. With regard to the first point, the Office suggested that the questionnaire should be prepared following a preliminary discussion which could take the form of a general discussion (see the integrated approach) or a

²⁸ *The ILO, standard setting and globalization*, Report of the Director-General, ILC, 85th Session, 1997, Appendix, p. 73.

²⁹ Doc. GB.286/LILS/1/1 (Mar. 2003), para. 14.

preparatory technical conference or meeting.³⁰ With regard to the form and content of the questionnaire, the Office considered that better preparation upstream should make it possible to reduce the size of the questionnaire and focus on the points that had not been resolved or discussed during the preparatory phase. The Office also indicated that it was ready to envisage the elimination of the questionnaire, or that it could be accompanied by a model instrument, which would make it possible to visualize the proposed instrument(s) more easily. Finally, the Office recalled the importance of its resources being used with a view to optimizing the use made of the questionnaire. It even proposed a better utilization of information technology and that the questionnaire should be placed on line (accessible through the Internet), which would make it possible for workers' and employers' organizations to send in their comments directly.

All of the proposals to optimize the questionnaire received a positive response from the constituents. They all reiterated their attachment to the practice of sending out questionnaires and emphasized that they did not want to see it disappear. Certain Government members expressed opposition to the holding of preparatory conferences (including the market economy countries – IMEC) and the Workers' group emphasized that any preliminary discussion should not delay the standard-setting process.³¹

(ii) *Second phase: Examination and formulation*

As indicated above, the report and proposed conclusions prepared by the Office in the light of the replies to the questionnaire are subsequently submitted for examination to the ILC. The examination of these documents and the discussion of any amendments is undertaken by a special tripartite technical committee appointed the ILC for each item on its agenda. Following these discussions, the technical committee, and then the ILC in plenary session, decide whether a Convention or a Recommendation is appropriate for the subject and adopt the corresponding conclusions. The item is then included on the agenda of the following session of the ILC.³² Based on this first discussion, the Office prepares a draft instrument(s) to be sent to governments for their comments and those of workers' and employers' organizations. In the light of the comments received, the Office prepares an amended draft instrument which will serve as a basis for the second discussion in a tripartite technical committee of the ILC. The texts that are finally adopted by the technical committee are submitted to the ILC in plenary session, which decides on their approval. If the texts are approved, they are forwarded to the ILC's drafting committee for the preparation of a definitive text. These texts are then submitted to the ILC for final adoption.

In practice, the time devoted to discussions in technical committees is short and a maximum of 19 sittings (57 hours) are available during each Conference session for their work, to which may be added around 12 hours for the drafting committees of the ILC's technical committees.³³ The work of drafting committees is particularly delicate, as they

³⁰ Preparatory conferences are envisaged in article 14(2) of the Constitution of the ILO. Technical meetings are less formal. Their composition and mandate could be determined by the Governing Body on an *ad hoc* basis.

³¹ See doc. GB.286/13/1 (Mar. 2003), paras. 32-38. The discussions are due to continue in November 2003.

³² The ILC can also decide to include it on the agenda of a later session.

³³ Doc. GB.286/LILS/1/1 (Mar. 2003), para. 6. The Office explains that the "committee drafting committee has the task of preparing the English and French texts, both versions being equally authoritative, solving drafting problems specifically referred to it by the committee and ensuring

have to ensure the clarity and appropriate form of texts, without affecting the compromise solutions achieved during the discussions in the technical committees. In March 2003, the Office suggested, in response to the legitimate concerns of the constituents in this respect, the preparation of a code of good drafting practices to preserve the coherence of the instruments as a whole.³⁴ This proposal was received favourably by the constituents.

Up to now, the ILC has adopted 185 Conventions and 194 Recommendations.³⁵

3. Overview of the production of standards by the ILO

The question of the revision of ILS has arisen since the beginnings of the Organization.

(a) Revision of existing ILS

At its First Session in 1919, the ILC decided to include in the final articles of each Convention a provision envisaging an examination every ten years of whether it was appropriate to undertake a total or partial revision of the Convention.³⁶ In 1944-46, the constitutional reform was intended, among other objectives, to introduce the obligation of reporting on difficulties preventing or delaying the ratification of Conventions³⁷ with such reports also being intended to facilitate the revision of Conventions. In 1961, the Final Articles Revision Convention (No. 116) was adopted. In 1963, the Report of the Director-General to the ILC analysed the shortcomings of the current revision procedure, which led the Governing Body to propose to the Conference in 1965 the establishment of a simplified revision procedure and a permanent technical revision committee of the ILC; in 1974, an in-depth study of ILS was submitted to the Governing Body with a view to re-examining existing standards, creating an updated, concise and coherent International Labour Code and possibly eliminating outdated instruments; in 1979, and then in 1987, two successive working groups on ILS, chaired by Mr Ventejol, submitted reports in which the question of the revision of standards was prominent.³⁸

that both texts are legally and linguistically consistent, where necessary informing the committee of the legal and drafting problems encountered and the solutions proposed to overcome them". The ILC drafting committee "... prepares the definitive texts to be proposed to the Conference for adoption": *ibid.*, para. 6.

³⁴ The Office proposed that the code of good drafting practices should cover the following subjects: practices concerning the drafting of preambles; the way to refer to international instruments; the way to avoid needless repetitions between a Convention and its supplementary Recommendation; terms to be used (or avoided), in particular in relation to the gender dimension; basic terminology and definitions of frequently used terms; translations in the two official languages of a number of common expressions; and flexibility clauses: doc. GB.286/LILS/1/1 (Mar. 2003), para. 41.

³⁵ See the list in Annex 2.

³⁶ In 1932, for the first time, a Convention was revised, with the adoption of the Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32).

³⁷ Constitution of the ILO, art. 19.

³⁸ See, in particular, ILO, *Official Bulletin*, Vol. LXX, 1987, Series A, Special Issue. The second Ventejol Working Group in 1987 drew up a list of 25 Conventions and Recommendations to be revised.

In 1994, in his report to the ILC on standards-related activities, the Director-General considered that in this respect the efforts of the ILO should focus on updating standards which are no longer relevant and that it would even be necessary to envisage revising certain recent Conventions which have not been ratified, despite their relevance, because their provisions were considered to be too rigid, or their requirements were deemed to be set too high. During the discussions of this issue, a large number of representatives of the three groups came out in favour of revising and updating existing standards. The discussions also revealed a broad consensus on the nature of the standards that should be revised. The Director-General summarized the discussion as follows:

[The standards that should be reviewed] fall into two categories. Firstly, those standards described by speakers as out of date, obsolete or unsuited to present needs should be reviewed and updated. It was stated that while some of them might recognize principles that had remained valid and should be retained, they also contained transitional provisions which often had the effect of hindering rather than facilitating the application of these principles. Secondly, those Conventions which have received few ratifications, whether old or new, should be reviewed if they contain complex, detailed, rigid or ambiguous provisions that gave rise to the difficulties encountered. The purpose of revision should then be to adapt the provisions concerned so as to enable the Convention to be widely ratified and to ease its application.³⁹

It was following this discussion that the Governing Body decided in March-April 1995 to set up a working party to examine the question of the revision of standards and to make Recommendations in this respect. The Working Party was also called upon to examine the issue of the criteria to be used for the revision of standards.⁴⁰ The broadly accepted reason for the revision was expressed in the following terms in 1995:

... the revision of existing standards has two complementary but distinct objectives: to update standards on the one hand and to facilitate the ratification of Conventions and their application on the other hand. To these two must be added a third objective, which has been expressed within the framework of the consolidation of standards and which concerns the consistency of the ILO's standard-setting system..⁴¹

Since 1995, the Working Party has held 13 meetings, the last of which was in March 2002. It made a considerable number of proposals, which have been unanimously approved by the Governing Body.

(b) Results of the work of the Working Party on Policy regarding the Revision of Standards

In March 2002, at the conclusion of its work, the Working Party on Policy regarding the Revision of Standards drew up an information note on the situation of its work and the decisions taken with regard to the revision of standards. This valuable document is attached in Annex.⁴² In short, the Working Party enabled the Governing Body to take

³⁹ Doc. GB.261/LILS/3/1 (Nov. 1994), para. 16.

⁴⁰ Doc. GB.262/9/2 (Mar.-Apr. 1995), paras. 51 and 52. The Working Party was composed of 16 Government members, (four per region), eight Employer members and eight Worker members. It was chaired by a Government representative. The Working Party is a body of the Committee on Legal Issues and International Labour Standards (LILS) of the Governing Body.

⁴¹ Doc. GB.262/LILS/3 (Mar. 1995), para. 9.

⁴² Doc. GB.283/LILS/WP/PRS/1/2 (Mar. 2002). See Annex 3.

decisions with regard to nearly all the ILO's instruments.⁴³ A reading of the document shows that the Governing Body decided that, of the 185 Conventions and 194 Recommendations adopted to date by the ILO:

- 71 Conventions are up to date;
- 24 Conventions have to be revised;
- 54 Conventions are outdated;⁴⁴
- five Conventions have been withdrawn (never entered into force);
- 73 Recommendations are up to date (two further Recommendations have been adopted since March 2002);
- 17 Recommendations have been explicitly replaced by later instruments;
- 15 Recommendations are to be revised; and
- 67 Recommendations are outdated.

It should also be noted that nearly 80 per cent of the Conventions considered to be up to date by the Governing Body have been adopted since 1960, that no Convention adopted since 1966 has been considered to be outdated and that over 80 per cent of the outdated Conventions were adopted before 1947. Finally, the Governing Body noted that a large number of older Conventions have already been revised and decided to invite the States parties to the original Conventions to examine the possibility of ratifying the corresponding revised Convention and denouncing on that occasion the earlier Convention so as to preserve the level of ratifications.⁴⁵

(c) Situation with regard to social security
(in terms of up-to-date standards)

In the field of social security, eight Conventions are considered to be up to date:

⁴³ The Working Party reached conclusions on 181 Conventions and 191 Recommendations. However, it did not reach conclusions with regard to two instruments: the Termination of Employment Convention (No. 158), and Recommendation (No. 166), 1982.

⁴⁴ With regard to the outdated Conventions, it should be noted that the ILC has adopted a proposal to amend the Constitution of the ILO and the Standing Orders of the ILC so as to enable the ILC to abrogate or withdraw Conventions and Recommendations. The amendment to the Constitution is intended to empower the ILC to abrogate, with a two-thirds majority of the votes of the delegates present, any Convention if it appears to have lost its object or no longer makes a useful contribution to the achievement of the objectives of the Organization. As of September 2003, some 76 member States had ratified or accepted the amendment, including six States of chief industrial importance (China, France, India, Italy, Japan and United Kingdom). The amendment will enter into force when 117 States have ratified it (including five of chief industrial importance). As a result of the amendment of its Standing Orders, the ILC will be able to withdraw a Convention which has not entered into force or which is no longer in force by reason of denunciation, or a Recommendation.

⁴⁵ The principal concern of the Working Party was to prevent a Member from deciding immediately to denounce a Convention and putting off to a later and unspecified date the ratification of the corresponding recent Convention. These two measures (ratification/denunciation) provide a balance and have to be taken in a concomitant manner.

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- (1) the Social Security (Minimum Standards) Convention, 1952 (No. 102);
 - (2) the Equality of Treatment (Social Security) Convention, 1962 (No. 118);
 - (3) the Maintenance of Social Security Rights Convention, 1982 (No. 157);
 - (4) the Medical Care and Sickness Benefits Convention, 1969 (No. 130);
 - (5) the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128);
 - (6) the Employment Injury Benefits Convention, 1964 (No. 121);
 - (7) the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); and
 - (8) the Maternity Protection Convention, 2000 (No. 183).

Seven Recommendations, which accompany one or other of these Conventions, are considered to be up to date:

- (1) the Maintenance of Social Security Rights Recommendation, 1983 (No. 167);
- (2) the Income Security Recommendation, 1944 (No. 67);
- (3) the Medical Care and Sickness Benefits Recommendation, 1969 (No. 134);
- (4) the Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131);
- (5) the Employment Injury Benefits Recommendation, 1964 (No. 121);
- (6) the Employment Promotion and Protection against Unemployment Recommendation, 1988 (No. 176); and
- (7) the Maternity Protection Recommendation, 2000 (No. 191).⁴⁶

Furthermore, in view of the complexity of their provisions, the Governing Body also considered that the Office should not confine itself to promoting the ratification of these Conventions, but should also offer technical assistance to member States in this field, including through the dissemination of information⁴⁷

In 2002, in the context of the 50th anniversary of the Social Security (Minimum Standards) Convention (No. 102), the Committee of Experts on the Application of Conventions and Recommendations recalled that the standard-setting activities of the ILO

⁴⁶ In total, 13 Conventions and seven Recommendations were considered outdated (see Annex 3). In the case of the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), the Governing Body invited the States parties to the Convention to examine the possibility of ratifying the Equality of Treatment (Social Security) Convention, 1962 (No. 118), by accepting its obligations, particularly for branch (g) (employment injury benefit): doc. GB.283/LILS/WP/PRS/1/2 (Mar. 2002), para. 14.

⁴⁷ Moreover, for Conventions Nos. 102, 118, 157, 130, 128 and 121, the Governing Body invited member States to inform the ILO, where appropriate, of the obstacles and difficulties encountered which might prevent or delay their ratification. Their situation should therefore be re-examined by the Governing Body in due course.

in the field of social security went back to the origins of the Organization.⁴⁸ It also reviewed the history of the many instruments adopted in this field:

The adoption of the ILO's series of social security standards (31 Conventions and 15 Recommendations) corresponds to three generations based on different approaches. In the first generation, the standards are inspired principally by the concept of social insurance, applicable to certain categories of workers and covering a specific contingency and sector of activity (industry, agriculture, etc.). After the Second World War, the international community recognized the need to extend social protection to the population as a whole; the second generation standards therefore reflect a more general concept of social security. The Declaration of Philadelphia, adopted in 1944, re-defined ILO objectives by including the extension of social security measures to provide basic income to all in need of such protection, and comprehensive medical care. This conception also inspired the Conference when it adopted the Social Security (Minimum Standards) Convention, 1952 (No. 102). As indicated by its title, this Convention provides for a minimum level of benefits in each of the nine branches of social security that it covers. The instruments adopted subsequently, in the third generation, while drawing upon the model of Convention No. 102, offer a higher level of protection in terms of the population covered and the level of benefits.⁴⁹

It should also be added that this Convention is the reference point in Europe, being the minimum reference level for States which wish to accede to the European Union.

- (d) Coherence of the body of standards (between all existing standards and future standards): Favoured contemporary approaches

Two approaches are being explored by the Organization with a view to ensuring greater coherence in the body of standards. These are the integrated approach (i) and consolidation (ii).

- (i) *Integrated approach*

In his report to the ILC in 1997, the Director-General emphasized that the adoption of standards over the years had given rise to an overlapping of instruments covering similar or analogous subjects. This overlapping, according to the Director-General, in addition to the risk of differences and even contradictions, results in a dilution of the impact of the instruments as a whole. In accordance with the observation of the Director-General, a large number of constituents emphasized the fact that the body of standards needed to be coherent, significant and up to date.

In this spirit, it has been seen above that existing standards have undergone a procedure of revision with a view to ascertaining whether they are up to date and relevant. The Governing Body has also addressed the issue of future standards and it was in this context that the *portfolio* was developed. However, this method of proposing subjects for standard-setting did not give the expected results in terms of overall vision. Indeed, one of the main failings of the portfolio is that it does not ensure the coherence of the body of standards, particularly in view of the fact that it does not make a synthesis of instruments which already exist in the selected field and does not therefore identify the added value that could be brought by a new instrument.

⁴⁸ Committee of Experts on the Application of Conventions and Recommendations (CEACR), Report, 2003, para. 46.

⁴⁹ *ibid.*, para. 47.

In November 2000, following a request by the Governing Body, the Office proposed a new approach to standards-related activities. As explained by the Office, this approach, known as the *integrated approach*, is:

... aimed at a better integration of standards among themselves and with the other means of action of the Organization... The purpose of this approach is on the one hand to improve the coherence of standards and their relevance in the light of the Organization's objectives and on the other hand to strengthen their impact through an integrated use of all the means of action available to the Organization.⁵⁰

In practice, this approach involves two aspects: firstly, upstream, strengthening the coherence and relevance of the production of standards through a prior in-depth review of existing standards; and secondly, downstream, reinforcing their impact through integrated and systematic action for their promotion and evaluation. At this stage, the first aspect will be examined, with the second being addressed in the context of the implementation of ILS and their effectiveness.⁵¹

With regard to coherence and relevance, the Office explains that:

While the notion of coherence refers to the relation between existing and future standards, the concept of relevance refers to the degree to which standards reflect the Organization's constitutional objectives, on the one hand, and actual conditions, on the other. Improving the relevance of standards means quite simply enhancing their ability to promote, in concrete terms, the ILO's constitutional objectives, while taking into account the wide variety of circumstances in different countries.⁵²

In order to ensure coherence and relevance, the Office proposes to carry out a preliminary in-depth review of the existing standards in the field in question. This examination should also contribute to the emergence of a common assessment and a consensus.⁵³ The in-depth review consists of three stages which concern in turn the Office, the ILC and the Governing Body.

The first stage consists of making a complete inventory of the situation in the area under consideration and reviewing "existing standards in the light of the needs identified in the area under examination, including needs for revision, with a view to determining the objectives."⁵⁴ The inventory should also take into account "all the other means and instruments available to the Organization for achieving its goals and responding to needs, as well as the way in which those means have been applied to implement the relevant standards." The Office considers that the inventory should make it possible to assess more fully, in particular:

- (i) whether and to what extent existing ILO or other international standards in the area examined leave gaps in coverage that need to be filled; (ii) the object of the

⁵⁰ Doc. GB.279/LILS/WP/PRS/3 (Nov. 2000), para. 2.

⁵¹ See Part III *infra*.

⁵² Doc. GB.279/4 (Nov. 2000), para. 11.

⁵³ The Office explains that: "This seems to be no more than common sense: an in-depth analysis of the Organization's existing instruments in a given area should be carried out before including any new standard-setting item on the agenda to be sure of the relevance of new or revised standards in that area, and to ensure the overall coherence of the outcome.", *ibid.*, para. 13.

⁵⁴ *ibid.*, para. 14.

revisions decided, in principle, by the Governing Body on the basis of the work of the Working Party on Policy regarding the Revision of Standards; and (iii) where applicable, whether and to what extent in the area examined standards would overlap (for example, general standards and sectoral standards) which might call for “consolidation”.⁵⁵

The second stage consists of a universal tripartite discussion by the ILC of the inventory that has been established with a view to formulating, if the constituents so wish, an integrated plan of action identifying, in the specific field, potential new subjects for standards and endeavouring to specify the general objective and the form of the standards envisaged. The tripartite discussion should therefore make it possible, before placing a subject on the agenda of the ILC, to gain a very clear idea of the form of the most appropriate standards-related action to achieve the desired objective. Finally, in the third stage, the Governing Body will have to decide the standards-related or other action to be taken and, in particular, whether the subject should be placed on the agenda of the ILC with a view to the adoption of instruments.⁵⁶

By proposing the integrated approach, the Office recognizes that it is merely a “common-sense method” which should enable the Governing Body “to include on the Conference agenda items whose relevance is clearly established in order to attain an objective that has been identified in the course of tripartite discussions.”⁵⁷

The integrated approach was welcomed by the Governing Body and it was decided in November 2000 to apply it in the field of occupational safety and health. An inventory was therefore prepared by the Office⁵⁸ with a view to its discussion by the ILC in 2003.

In June 2003, a general discussion based on the integrated approach was held in a technical committee, which was called upon to assess the situation with regard to occupational safety and health, and the instruments and means of action currently available to the ILO, and to propose conclusions which could serve as a basis for a plan of action for the Organization and its constituents.⁵⁹ The Committee’s conclusions concerning the ILO’s standards activities in the field of occupational health and safety revolve around five points: promotion, awareness-raising and advocacy; ILO instruments; technical assistance and cooperation; knowledge development, management and dissemination; and international collaboration.

With regard specifically to the adoption of new instruments, the constituents agreed on the fact that a new instrument establishing a promotional framework in the field of occupational safety and health should be developed as a priority. However, no agreement was reached on the form that the instrument should take. In its report, the Committee explains that:

The main purpose of this instrument should be to ensure that a priority is given to OSH in national agendas and to foster political commitments to develop, in a tripartite context,

⁵⁵ *ibid.*

⁵⁶ The Office specifies that this system is not intended to deny the Governing Body’s discretion to place an item on the agenda of the ILC at its own initiative to address a specific need.

⁵⁷ Doc. GB.279/4 (Nov. 2000), para. 17.

⁵⁸ Doc. GB.279/5/2 (Nov. 2000).

⁵⁹ See “Conclusions of the Committee” in the report of the Committee on Occupational Safety and Health, *Provisional Record* No. 22, ILC, 91st Session, June 2003 (Annex 4).

national strategies for the improvement of OSH based on a preventative safety and health culture and the management systems approach. In its function as an overarching instrument with a promotional rather than prescriptive content, it would also contribute to increasing the impact of existing up-to-date ILO instruments and to a continuous improvement of national OSH systems including legislation, supporting measures and enforcement. Such a practical and constructive instrument should promote, inter alia, the right of workers to a safe and healthy working environment; the respective responsibilities of governments, employers and workers; the establishment of tripartite consultation mechanisms on OSH; the formulation and implementation of national OSH programmes based on the principles of assessment and management of hazards and risks at the workplace level; initiatives fostering a preventative safety and health culture; and worker participation and representation at all relevant levels. It should strive to avoid duplication of provisions which are in existing instruments. In order to enable an exchange of experience and good practice on OSH in this respect, the instrument should include a mechanism for reporting on achievements and progress.

In this context, the ILO's other instruments on occupational safety and health remain in force, as the Committee proposes to revise as a priority two Conventions previously identified by the Working Party on Policy regarding the Revision of Standards. Finally, with a view to increasing the relevance of ILO instruments, the Committee considers that greater priority should be given to the development of new instruments in the fields of ergonomics and biological hazards.⁶⁰ The Committee also emphasizes that as occupational safety and health is an area that is in constant technical evolution, the high-level instruments to be developed should therefore focus on key principles. Requirements that are more subject to obsolescence should be addressed through detailed guidance in the form of codes of practice and guidelines. The ILO should develop a methodology for the systematic updating of these codes and guidelines.

The Governing Body will have to decide at its November 2003 Session whether it wishes to include occupational safety and health on the agenda of the Session of the ILC in 2005 as a standard-setting theme.

(ii) *Consolidation*

It is in the maritime sector that the approach of consolidation has been developed. Far from being an alternative to the integrated approach, it should instead be seen as included within the latter, and as constituting one means, and by no means the only one, of applying it.

In January 2001, the ILO's Joint Maritime Commission, bringing together shipowners and seafarers, noted that "the emergence of the global labour market for seafarers has effectively transformed the shipping industry into the world's first genuinely global industry, which requires a global response with a body of global standards." The members of the Shipowners' group and the Seafarers' group agreed that the ILO's maritime instruments currently in force should be regrouped and updated by means of a new Framework Convention on labour standards applicable to the maritime sector.⁶¹ A High-Level Tripartite Working Group was set up by the Governing Body to formulate a new instrument, which would incorporate in so far as possible the basic provisions of the

⁶⁰ It adds that priority should also be given to the formulation of a new instrument on the guarding of machinery in the form of a code of good practice. Consideration should also be given to work-related psychosocial risks in future ILO activities: see Committee on Occupational Safety and Health, Report, plan of action, paras. 8 and 9 (Annex 4).

⁶¹ See Joint Maritime Commission, Final Report, 29th Session, 22-26 Jan. 2001, para. 36.

various ILS deemed to be sufficiently up to date in the maritime sector. As of September 2003, two meetings of the Tripartite Working Group had been held.⁶²

A consensus emerged around the proposal that the consolidated Convention should:

- (a) incorporate, in so far as possible, the substance of all relevant maritime labour standards with any necessary updating;
- (b) be easily updatable to keep pace with developments in the maritime sector;
- (c) be drafted in such a way as to secure the widest possible acceptability;
- (d) place emphasis on the means of enforcing its provisions in order to establish a “level playing field”; and
- (e) be structured in such a way as to facilitate the achievement of the above objectives.⁶³

The consolidated Convention is intended to make use of the solutions developed in the framework of the International Maritime Organization (IMO) and will be subdivided into various binding and non-binding parts. To achieve the objective of flexibility in updating the instrument, one of the principal innovations of the proposed consolidated Convention is the possibility of using a simplified procedure for the amendment of provisions relating to the detailed implementation of the Convention.⁶⁴ Up to now, ILO Conventions have not provided for an amendment procedure, with the result that changes which may relate to a single provision give rise to the formulation of a new instrument (most frequently, a revised Convention). This amendment procedure based on tacit acceptance envisages the entry into effect of the amendment, unless a specified number of member States express opposition, which should make it possible to update the Convention more easily.⁶⁵

Another innovative aspect of the Convention should be the very complete system for following up its enforcement and supervision. In the first place, it is envisaged that the various aspects of enforcement at the national level will be identified and grouped in a

⁶² December 2001 and October 2002.

⁶³ See doc. GB.286/LILS/8 (Mar. 2003), para. 3.

⁶⁴ The Office considers that the legal basis for this amendment procedure lies in the fact that “the legislators concerned (the International Labour Conference, acting under article 19 of the ILO Constitution, and national parliaments) are not required to set out all the details of the norms they are establishing, but can leave such provisions to be developed through a simpler procedure or subsidiary legislation”, doc. GB.286/LILS/8 (Mar. 2003), para. 8.

⁶⁵ The Office explains that: “The procedure for amendment by tacit acceptance that would be provided for in the consolidated Convention is inspired by procedures contained in other international instruments, especially those of the International Maritime Organization (IMO). It is, however, adapted to the particular circumstances of the ILO: amendments of detailed provisions could be adopted by a special committee established by the Governing Body and consisting of Members that had ratified the new Convention together with representatives of the Shipowners and Seafarers. Representatives of other ILO Members would be able to participate without vote. Once adopted, the amendments would have to be approved at an ordinary session of the International Labour Conference. When approved, they would be submitted to ratifying Members for consideration. They would enter into effect unless more than one-third of the ratifying Members, or ratifying Members representing at least 50 per cent of gross tonnage of the world’s merchant fleet, expressed their disagreement within a prescribed period. If some ratifying Members expressed their disagreement (but not enough to block the amendment), the amendments would not take effect with respect to them.”, doc. GB.286/LILS/8 (Mar. 2003), para. 7.

separate section. This section should define the role of the various actors in relation to its enforcement.⁶⁶ It is also planned to establish a system of national certification, based on national inspections, of compliance with the provisions of the new Convention. The measures envisaged would be based on the ILO's supervisory machinery, including the complaints procedures.⁶⁷

During the discussions in the Governing Body in March 2003, the reactions of the constituents were generally positive, although certain of them emphasized that the traditional ILO supervisory machinery should not be weakened as a result.

⁶⁶ The Office indicates that: "A proper interaction of this part with the rest of the consolidated Convention is a major aim. Not only should the provisions on enforcement offer inspectors, at the flag-state and port-state levels, effective solutions in practice to ensuring implementation of the provisions setting out the standards; but each of those provisions should be drafted in a way which enhances their enforceability. Account would also need to be taken of the interaction between the provisions of the consolidated Convention and related activities under other international instruments, such as those of the IMO, especially in the field of safety and security and professional competencies. The coordination of similar inspections to be carried out under the consolidated Convention and IMO Conventions is given particular importance in this connection.", doc. GB.286/LILS/8 (Mar. 2003), para. 12.

⁶⁷ See *infra*.

II. Diversity of standards-setting instruments

The ILO Constitution provides that the ILC may adopt international labour Conventions and Recommendations.¹

A. International labour Conventions

Synonymous with international treaties, international labour Conventions go through a pre-established tripartite discussion procedure and, as explained earlier, are also adopted within a tripartite framework.² Once a Convention has been adopted by the ILC, the member States are required under the Constitution to bring it before the competent authorities “for the enactment of legislation or other action”.³ This innovative requirement is intended to generate democratic debate at national level on whether it is appropriate to ratify the international labour Convention concerned. If the member State decides to ratify the Convention, it is only at that point that it acquires binding force for that State and that the State has to take such action as may be necessary to make its provisions effective.⁴

Generally speaking, it is recognized that Conventions have to be universal – in other words ratifiable by the largest possible number of States – adapted to national conditions,⁵ flexible and viable. Some Conventions are more technical, setting out specific standards which the member States undertake to comply with or to achieve through ratification, while others are more of a promotional nature, setting aims that have to be pursued by means of ongoing national action plans.⁶ From the point of view of the ILO Constitution, international labour Conventions do not affect more favourable national provisions.⁷ Furthermore, if a State withdraws from the ILO, it remains bound by Conventions which it has previously ratified.⁸

Since the Organization was founded the ILC has pursued an intense programme of legislative activity with 185 Conventions adopted to date, which involved 7,160 ratifications. They cover all labour-related issues. As stated, 71 of the 185 Conventions adopted have been deemed to be up to date by the Governing Body following a tripartite examination over a period of more than seven years. Eight of these

¹ ILO Constitution, art. 19(1).

² As mentioned, international labour Conventions are adopted by a two-thirds majority of delegates to the ILC: ILO Constitution, art. 19(2).

³ *ibid.*, art. 19(5)(b).

⁴ *ibid.*, art. 19(5)(d).

⁵ *ibid.*, art. 19(3).

⁶ See Committee of Experts on the Application of Conventions and Recommendations (CEACR), report, 1981, pp. 13-14.

⁷ ILO Constitution, art. 19(8).

⁸ *ibid.*, art. 1(5).

are regarded as fundamental, while four others are priority Conventions.⁹ With the exception of the Weekly Rest (Industry) Convention, 1921 (No. 14), and the Forced Labour Convention, 1931 (No. 29), none of the Conventions adopted before 1945 is regarded as up to date.

Lastly, mention should also be made of the ILC's use of Protocols, which are also international treaties, but which, in the ILO context, do not exist independently since they are always linked to a Convention. Like Conventions, they are subject to ratification (however, the Convention to which they are linked also remains open for ratification). They are used for the purpose of partially revising Conventions, in other words where the subject of the revision is limited. They thus allow adaptation to changing conditions and they enable practical difficulties to be dealt with which have arisen since the Convention was adopted, thus making the Conventions more relevant and up to date. Protocols are particularly appropriate where the aim is to keep intact a Convention which has already been ratified and which may receive further ratifications, while amending or adding to certain provisions on specific points. The ILC has adopted four Protocols to date.¹⁰

B. International labour Recommendations

International labour Recommendations go through the same tripartite drafting and adoption process as Conventions. They too have to be brought before the competent authorities,¹¹ but they are not subject to ratification and do not therefore have binding force. The ILO Constitution provides that Recommendations shall be adopted where the subject, or aspect of it, dealt with by the ILC is not suitable for a Convention.¹² However, practice has moved away from the primary role provided for in the Constitution, and most up-to-date Recommendations supplement and clarify the content of the Conventions they accompany. Only a small number of independent Recommendations have been adopted by the ILC.¹³ Recommendations serve above all to define the standards that are to guide government action.

⁹ The fundamental Conventions are: the Forced Labour Convention, 1930 (No. 29); the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Abolition of Forced Labour Convention, 1957 (No. 105); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182). The priority Conventions are: the Labour Inspection Convention, 1947 (No. 81); the Employment Policy Convention, 1964 (No. 122); the Labour Inspection (Agriculture) Convention, 1969 (No. 129); and the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). The classification affects mainly the regularity of the reports to be produced, since these Conventions are subject to a two-year rather than a five-year reporting cycle.

¹⁰ These are the Protocol of 1982 to the Plantations Convention, 1958 (No. 110); the Protocol of 1990 to the Night Work (Women) Convention, 1948 (No. 89) (Revised); the Protocol of 1995 to the Labour Inspection Convention, 1947 (No. 81); and the Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147).

¹¹ ILO Constitution, art. 19.

¹² *ibid.*, art. 19(1).

¹³ This was the practice between 1951 and 1970. In 2002, two independent Recommendations were adopted: the Promotion of Cooperatives Recommendation (No. 193), and the List of Occupational Diseases Recommendation (No. 194).

The ILC has adopted 194 Recommendations to date, 73 of which are classified as up to date.

C. Other ILO instruments developed in practice

Although Conventions and Recommendations are the instruments most commonly used by the ILC to formulate standards, it has also, in its long practice, used other types of texts.

1. ILC and Governing Body declarations

Declarations are generally used by the ILO ILC or Governing Body in order to make a formal statement and reaffirm the importance which the constituents attach to certain principles and values. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States. In some cases declarations could be regarded as an expression of customary law. Four declarations have been adopted by the ILO: the Declaration of Philadelphia in 1944, which has since formed an integral part of the ILO Constitution; the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977; the Declaration on apartheid in 1964;¹⁴ and lastly, in 1998, the Declaration on Fundamental Principles and Rights at Work.

2. ILC resolutions

The ILC generally uses resolutions on two occasions. First, it may use resolutions as a way of formally expressing its will or its opinion on a given subject. These resolutions are intended as a response to practical situations and specific needs. Some are used as guidelines in terms of social policy standards and as reference points by the ILO's supervisory bodies for evaluating national situations.¹⁵ Secondly, the ILC may adopt resolutions accompanied by conclusions following general tripartite discussions within one of its technical committees. Although such discussions may not lead directly to a standard-setting action, in many cases they enable problems to be explored in detail and from every angle (this was the case with social security in 2001, the informal economy in 2002, and the employment relationship in 2003).¹⁶ This year a general discussion on occupational health and safety was held as part of an integrated approach towards establishing an action plan identifying, inter alia, new possible normative subjects.¹⁷

3. Other ILO texts

Technical committees of experts, special or regional conferences and bodies set up to deal with particular issues (social security, labour statistics, health and safety) or sectors

¹⁴ Amended in 1988 and 1991.

¹⁵ The resolution of 1952 concerning the independence of the trade union movement and the resolution of 1970 concerning trade union rights and their relation to civil liberties may be mentioned here.

¹⁶ Some people warn against the risk that the general discussion process may gradually take the place of standard-setting measures.

¹⁷ See *infra*.

(industrial committees, joint maritime commission, etc.) are also required to adopt texts which may take various forms (resolutions, guidelines, standard regulations). These standards vary both in their content, which may relate to fundamental principles or technical matters, and in the authority conferred on them. However, they are certainly useful in that they are designed to respond to practical situations and have been adopted by bodies representing the interests involved.

Lastly, mention must be made of the guidelines and codes of practice prepared by the International Labour Office's technical departments and branches. Although not binding, they are still useful in that they are sometimes provided for in the Conventions themselves, and they develop and flesh ILS. Their amendment procedure is also much more flexible than for the international labour Conventions and Recommendations. These guidelines and codes of practice are subject to the tripartite discussion process and to the Governing Body.¹⁸

4. Possibility of importing instruments from the experiences of other institutions: Example of the European Union's open method of coordination

We have decided to give a brief description of the open method of coordination adopted by the European Union in order to take action in the social field and other politically sensitive areas. This method is a non-binding way of taking action and is accompanied by monitoring devices and incentives.

The open method of coordination was designed by the European Union as a means of achieving the strategic objective set for the next decade at the Lisbon European Council in March 2000, which was "to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion"¹⁹. The open method of coordination, based on soft law, was presented as the ideal instrument for pursuing an integrated approach which took account of social and economic aspects²⁰.

This method basically involves three phases which may be summarized as follows:

- (1) The definition of common objectives at a supranational level: the EU draws up guidelines, in consultation with the social partners, which are intended to help the member States to define their own national policies. The role of these guidelines is to identify objectives which are common to different member States in certain fields, and to make it possible to coordinate the measures taken by various actors at various levels;
- (2) The implementation of these objectives at national and regional level: the aim is to adapt the objectives to the specific needs and circumstances of each member State,

¹⁸ Reference may be made here to the Guidelines on Occupational Safety and Health Management Systems, adopted in 2001, the series of practical guidelines on HIV/AIDS and the world of work, adopted in 2001, and the practical Guidelines on Safety in the Use of Chemicals at Work, adopted in 1993.

¹⁹ European Council, Lisbon conclusions, Mar. 2000, para. 5.

²⁰ This method was initially applied in the employment field, but was subsequently extended to other politically sensitive areas, particularly combating poverty and social exclusion.

which has to define the most appropriate forms of action and to actively involve the regional and local authorities, the social partners and civil society in various forms of partnership;

- (3) The evaluation of these national and regional policies at a supranational level in order to identify best practice and engage a learning process: common parameters have been developed in the form of indicators, which can be used to measure the progress made by the member States towards achieving their political commitments.²¹

The open method of coordination gives a completely new picture of soft law. Rather than merely establishing guidelines, it actually involves a multi-stage process. The monitoring phase is designed to check how far the member States have met their political commitments, to compare the different performances and to identify best practice. This exercise is now carried out using indicators developed in common. Thus, although they are not binding, the guidelines are supplemented by a form of supervision which makes the commitments more than just voluntary. The main aim of the open method of coordination is to be a learning process and a way of disseminating knowledge. The idea is to make the good practices used by member States accessible, to compare the different policies adopted to achieve the same goal, and to encourage the member States to take the lead from the best performers.

Opinion is divided on the impact of this method.

D. Maximization and strengthening of international labour Conventions

There is a consensus within the ILO about the importance of the Convention, which has proved to be the most complete form of standards-related activity. In other words, people recognize the importance of international labour Conventions as a unique and irreplaceable source of binding obligations whose application is subject to a number of different types of supervisory procedures. However, a certain degree of dissatisfaction has been expressed about how they are developed and their form.

More specifically, in his report to the ILC in 1994, the Director-General pointed out that in recent years Conventions had been developed using a sort of “maximalist” strategy, which aimed to include provisions with high added value that were already in force at national or regional level. In his view this strategy presented major risks, and it was more appropriate for Conventions to establish a general framework, subject to more detailed provisions set out in Recommendations or flexibility clauses. When they came to discuss this report the delegates to the ILC generally entirely agreed with the Director-General. They commented in particular on the limits of universality and the scope of recently adopted Conventions; their complexity; the need to reconcile realism and dynamism in the aims pursued; and the need for flexibility. These observations are examined below. A basic (and far from exhaustive) comparison is given of the main characteristics of the Conventions adopted by the ILC and their effect on the way in which they were subsequently received by the member States (translated usually in a more or less high rate of ratifications).

²¹ In its assessment of the application of the European Employment Strategy, the European Commission found that these indicators have promoted “stress of convergence” towards the best performers in the European Union: COM(2002) 416 final, p. 15.

1. **Scope of the Conventions**

It may be generally observed that most general Conventions have a longer shelf-life than sectoral Conventions. The most ratified up-to-date Conventions usually have universal or at least very wide scope. Those relating to specific fields, including social security, are the ones which have evolved most differently, have been most widely questioned when it comes to revision, have spawned the largest number of instruments and have encountered the most severe ratification problems. From this angle, the issue of their complexity becomes very important.

2. **Complexity of the Conventions**

As mentioned earlier, it is accepted that recent Conventions have often been too complex and too detailed, and that this presents a major obstacle to ratification. In order to remedy the situation, the Director-General appealed in 1994 for standards-related activities to be refocused on fundamental principles or on establishing a general framework in the field in question. In his view, technical provisions should form part of flexibility clauses or Recommendations. Such an approach should have the direct effect of making the Conventions adopted more universal.

In practice, Conventions which are limited to a few fundamental provisions have generally been much better accepted by the member States than long, detailed Conventions. However, this observation needs to be qualified by looking at the subject of the Convention, in other words the choice of field is just as important as the level of detail of the Convention.²²

In the case of the most ratified and not too detailed Conventions, the techniques used by the ILC have varied. Some Conventions are Organized around recognition of a fundamental principle, accompanied by a minimum number of supplementary provisions.²³ Others define a series of unlawful measures, leaving the national legislatures full scope to decide on implementing rules and methods.²⁴ There are also Conventions which establish a general prohibition with a few exceptions,²⁵ or which establish clearly defined requirements or rights.²⁶ Lastly, some are based on reciprocal relations between member States.²⁷

Generally speaking, these Conventions do not seek to impose detailed rules on national legislatures or governments. They establish principles or limits while respecting each Member's ability to decide what legislation, regulations or other provisions giving effect to the international standards would be appropriate for the national situation.

²² Some Conventions have been ratified very little, even though they contain only a general principle. See, for example, the Conventions on hours of work.

²³ The freedom of association and collective bargaining Conventions Nos. 87 and 98 are examples of this type of principle-based Convention.

²⁴ See the Abolition of Forced Labour Convention, 1957 (No. 105).

²⁵ See the Underground Work (Women) Convention, 1935 (No. 45).

²⁶ See the Protection of Wages Convention, 1949 (No. 95), or the Weekly Rest (Industry) Convention, 1921 (No. 14).

²⁷ See the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

In addition to these types of Conventions, the Office has proposed that Conventions should be developed for the purposes of national coordination, feeling that this technique could be useful particularly with Conventions relating to specific fields. In such cases, the Office explains that it should be up to the national legislatures to regulate the conditions and methods of applying the ILS, while the latter merely set out guidelines or required outcomes (“*obligation de résultat*”), or define what is not compatible. Lastly, where national legislation and practices appear to vary too widely, the Office proposes that Recommendations should again be used, rather than Conventions.²⁸

3. Dynamism and realism

The balance between realism and dynamism in the aims pursued by the Conventions must be considered and defined in each individual case. In other words, the desire for realism must not overwhelm the vital dynamic role that they play, so that the Conventions can help to steer social progress in the direction it should take. In this respect, particularly in fields where there are frequent developments, it is important to provide for quick, easy and flexible ways of changing the Conventions or the texts to which they refer (codes of practice, guidelines, etc.).²⁹

4. Flexibility

The need for greater flexibility is a response to a requirement set out in the ILO Constitution.³⁰ However, it must be stressed that some delegates to the ILC have used the debate on flexibility as an opportunity to try to introduce a general movement toward deregulation within the Organization itself. This interpretation of flexibility has encountered considerable opposition, with some regarding it as a clear violation of the very aims of the ILO.

The concept of flexibility is used when clauses need to be included in Conventions to enable them *inter alia* to be ratified in part or applied gradually.³¹ It should be pointed out that, in practice, such provisions have not proved as successful as expected and no empirical study has really been carried out that might explain why. However, it seems to be agreed that they are relevant, but in some cases they are regrettably complex. For example, in the field of social security and the Social Security (Minimum Standards) Convention, 1952 (No. 102), the Committee of Experts on the Application of Conventions and Recommendations noted in 2003 that:

Convention No. 102, in the same way as the later instruments, militates against the idea of rigidity that is often held of Conventions. Convention No. 102 offers a range of options and flexibility clauses making it possible to attain gradually the objective of universal coverage in harmony with the rate of national economic development. Each country may apply the Conventions through a combination of contributory and non-contributory benefits, different methods for the administration of benefits, general and occupational schemes, compulsory and

²⁸ This is what has happened in the field of industrial relations.

²⁹ See *infra*.

³⁰ See ILO Constitution, art. 19(3).

³¹ Various forms of flexibility clauses have been used by the ILC. They may refer to the scope of the Convention, its content or the methods to be used to implement it. See, on this subject, a document prepared by the Office in 1989: doc. GB.244/SC/3/3 in Annex 5.

voluntary insurance, and public and private participation, all intended to secure an overall level of protection which best responds to its needs.

It added that:

The flexibility contained in its provisions has permitted Convention No. 102 to pass the test of time, and to encompass the new model of social security that is emerging, in which that part of responsibility that is renounced by the State is taken up by private insurance schemes, enterprises and insured persons themselves.³²

5. Use of Recommendations and soft law

For at least ten years now the question of the use of “independent” Recommendations and other soft law instruments has come up repeatedly in discussions among the Organization’s constituents. In 1994, for example, the Director-General emphasized the value of Recommendations and the role they could play as independent instruments without being associated with Conventions, particularly where the field in question was not suitable for standard-setting measures. He pointed out that more than half of the instruments adopted between 1951 and 1970 were independent Recommendations, although they became the exception after 1971. The Director-General’s comments produced various reactions, with mainly the employer members stressing the benefit of making greater use of independent Recommendations. Some government delegates and the whole of the workers’ group expressed a certain scepticism, not because the Recommendations lacked intrinsic value, but because of the attitude shown towards them at national level by governments and employers’ organizations, which did not attach any importance to them because they contained no legal obligations and were not subject to any regular supervisory mechanism.

The idea of making greater use of Recommendations resurfaced in a following report presented in 1997. This time the Director-General proposed that Recommendations should have a monitoring mechanism, although he did not say which.³³ The proposal was generally well received by the governments, although the workers were more hesitant, stressing once again that the value of Recommendations depended on how they were implemented by the member States and monitored by the ILO’s supervisory bodies.

Alongside the discussion about the use of Recommendations, since 1994 the Director-General has also tried to generate debate about the use of other soft law instruments such as guidelines and codes of practice. Most of these proposals were fairly well received, since they were not intended to take the place of standard-setting measures. It was emphasised that these sorts of instruments can be drawn up and amended more quickly in areas where the situation is rapidly changing, and they are also more flexible and non-binding.

This idea was fleshed out over the next few years, and there was talk of updating Conventions by referring to non-binding instruments. In practice, the ILC already uses this technique. Thus it is a special feature of some Conventions that they make it compulsory for each member State to ensure on a regular basis that they comply with the most recent data in certain specified fields. The ILO’s supervisory bodies then use the International Labour Office’s codes of practice, together with standards drawn up jointly by a number of

³² CEACR, report, 2003, paras. 51 and 52.

³³ The Office proposes incorporating a monitoring clause in the text of the Recommendation, to be adjusted to the subject in question.

international institutions including the ILO, to assess whether national legislation and practice comply with the ILS.³⁴ The Office explains that “this technique of referral to non-binding instruments which are themselves regularly updated offers the advantage of limiting the revision needs of such Conventions on the points in question”.³⁵ It might also allow a better balance to be achieved between dynamism and the desire for realism, as discussed earlier. The Office adds that this technique “is particularly useful for Conventions relating to scientific or technical standards, as such standards are in constant evolution and in principle do not give rise to controversy when they are established by institutions having internationally recognized authority on the subject”.³⁶

³⁴ For example, the Radiation Protection Convention, 1960 (No. 115), provides that “[such] maximum permissible doses and amounts [of radiation] shall be kept under constant review in the light of current knowledge” (Art. 6(2)). Also the Occupational Cancer Convention 1974, (No. 139), provides that “in making the determination required by paragraph 1 of this Article, consideration shall be given to the latest information contained in the codes of practice or guides which may be established by the International Labour Office, as well as to information from other competent bodies” (Art. 1(3)). Lastly, the Labour Statistics Convention, 1985 (No. 160), provides that “in designing or revising the concepts, definitions and methodology used ... Members shall take into consideration the latest standards and guidelines established under the auspices of the International Labour Organization” (Art. 2).

³⁵ Doc. GB.276/LILS/WP/PRS/2 (Nov. 1999), para. 34.

³⁶ *ibid.*

III. Complementarity of the constitutional machinery for the application of Conventions

The implementation of international labour Conventions and verification of the conformity of national law and practice depend on their ratification (A), which is indispensable for the ILO's supervisory bodies to enter into operation (B). In their awareness of the close relationship between ratification and supervision of compliance with Conventions, the ILO's constituents have developed a follow-up procedure through which it is possible to provide help to States that have not ratified the fundamental Conventions in their efforts to promote compliance with them. This is the 1998 Declaration on Fundamental Principles and Rights at Work (C).

A. Ratification

Ratification is the act by which a State gives its consent at the international level to be bound by a treaty. The ILO does not deviate from the traditional approach of international law in this respect. As international labour Conventions are not binding in themselves, it is through their ratification that the State assumes the obligation to give effect to them. Various observations are prompted in this respect. Firstly, ratification is the prerogative of the State; it gives rise to obligations that the State alone has to assume and which, if they are not respected, call into question its international responsibility. In other words, States are the main channels in the implementation of international standards. The Constitution of the ILO provides that, once the State has communicated to the Director-General its formal ratification of the Convention, it "...will take such action as may be necessary to make effective the provisions of such Convention."¹ However, the ILO makes an exception from the general rule of international law by prohibiting ratification from being accompanied by reservations.² Furthermore, within the ILO, ratification results in the acceptance by the State that it is subject to the supervisory machinery envisaged in the Constitution and which is described in greater detail below. Finally, in view of the multilateral nature of the ILO, ratification constitutes, and this is perhaps the most important point in seeking the universal application of labour rights, an undertaking by a State in relation to other States to adopt a "standard of fairness on which all countries can build an institutional framework for national labour markets."³

Three questions are regularly raised by ILO constituents relating, respectively, to the ratification rate of ILO Conventions and the assessment of obstacles to ratification (1); the use of universal ratification to obtain a global system of supervision for fundamental labour rights (2); and the minimum threshold of ratifications set for an ILO Convention to enter into force for the Organization (3). A fourth question could be added relating to the responsibility of the State in respect of violations of international labour Conventions that it has ratified by private entities on its territory (4).

For all these issues, there appears to be agreement on the fact that special attention has to be paid to the observations of governments, upon which the final responsibility rests

¹ Constitution of the ILO, art. 19(5)(d)

² The reason most commonly given for this exception is the tripartite nature of the Organization adopting the standards.

³ *Working out of poverty*, Report of the Director General, 91st Session, ILC, 2003, p. 70.

for the ratification and application of standards. They also bear the greatest part of the legislative and administrative burden resulting from the ratification of Conventions.

1. Ratification rate of ILO Conventions and assessment of obstacles

In his report in 1994,⁴ the Director-General noted a stagnation in the rate of ratification of Conventions, even if the total number of ratifications continued to rise. This observation is still valid today, even though certain comments should be made. In practice, when considering the total number of ratifications, the figures show that the progression of new ratifications has continued over the past five decades. Since 1955, the number of new ratifications has been approaching or higher than 100 a year, or 1,000 a decade. Over the past decade (1995-2003), the number of new ratifications was nearly equivalent to that of the previous decade (1985-94).⁵ The average ratification rate is around 40. However, this figure is not very indicative and information should be provided for the 71 Conventions which are up to date, including those considered to be priority or fundamental Conventions. The up-to-date Conventions register an average rate of 47.5 ratifications. The average rate of ratification falls for Conventions adopted over the past two decades, namely an average of 22 for the Conventions adopted between 1981 and 1990, and 20 for those adopted between 1991 and 2000. Leaving aside the Worst Forms of Child Labour Convention (No. 182), this latter average falls drastically to nine.⁶ Bearing in mind that Conventions do not concern all member States equally, 59 of the 71 Conventions that are up to date have been ratified by under 50 per cent of the member States of the ILO, while those adopted since 1987, with the exception of Convention No. 182, have been ratified by fewer than 11 per cent of member States. In the case of the fundamental and priority Conventions, they have been ratified by an average of 151.4 and 93.5 States, respectively. Indeed, disregarding these latter Conventions, only the Protection of Wages Convention, 1949 (No. 95), has been ratified by over 80 States (95) and the Weekly Rest (Industry) Convention, 1921 (No. 14), by over 100 (117).⁷

If these data are analysed in detail, they provide interesting information on the regions. Although ratification rates have continued to rise at the global level, there are clear variations between regions.⁸ While Africa and Asia remained well below the average for member States during the 1985-94 decade, these regions have caught up over the past decade, with new ratifications rising from 92 to 251 for Africa and from 71 to 169 for Asia and the Pacific. It should, however, be noted that around 68 per cent of these new ratifications concern fundamental or priority Conventions and that 17 per cent of ratifications for the two regions are solely for Convention No. 182. The Americas have also seen an increase in the number of new ratifications, rising from 130 for the decade 1985-94 to 189 for the past decade. In this region, 45.5 per cent of ratifications are for fundamental or priority Conventions. Finally, Europe has shown an important decline in the number of ratifications, registering 700 ratifications during the decade 1985-94, compared with only 316 for the past decade. These figures show that international labour

⁴ *Defending values, promoting change: Social justice in a global economy: An ILO agenda*, Report of the Director General, ILC, 82nd Session, 1994.

⁵ See Annex 6.

⁶ See Annex 7.

⁷ See Annex 8.

⁸ For details, see Annex 6.

Conventions are of interest both to industrialized and developing countries, even though the average ratification rate in the latter is clearly higher.

Finally, the trends of ratifications have remained very uneven in relation to the fields covered by Conventions and, within each field, according to the Conventions themselves.⁹ With regard to the fundamental Conventions, the eight Conventions concerned have received a remarkable rate of ratification, at over 86 per cent of member States. However, it should also be noted that certain Conventions relating to fundamental rights, such as the Collective Bargaining Convention, 1981 (No. 154), with a ratification rate of 34, has not had the same success. In general, it would appear that sectoral Conventions and those covering specific fields have been less well ratified than other Conventions. For example, in the case of social security, the Conventions considered to be up to date have been ratified on average by 13 per cent of member States.

Analysis of ratifications involves a number of factors and is not interpreted in the same way by the ILO's constituents. In certain cases (employers and many governments), these trends, particularly relating to the Conventions adopted over the past ten years, are perceived as being an aggravation of previous trends, which were already a matter for concern. For others (particularly workers), they are relatively stable trends showing a constant progress which, in the general context of international deregulation, is not unsatisfactory. Emphasis is also placed on the fact that the number of ratifications does not express the full value of Conventions, in view of their role in guiding social progress (as a reference point for collective bargaining, and in influencing national priorities and private initiatives).¹⁰ However, it is generally acknowledged that the primary purpose of Conventions is to be ratified, since ratification generally means that law and practice can be brought into conformity with the Convention and that measures are taken to ensure that no conflict arises with the accompanying Recommendation.

During the discussion of the Report of the Director-General in 1994, the reasons most frequently given to explain the stagnation of ratifications was analysed in greater detail: the content of Conventions was deemed too complex and over-detailed; the difficulty of their incorporation into international law;¹¹ the dissuasive legal and economic costs of adapting the national system; the administrative burden related to the procedure of the submission of

⁹ See Annex 9.

¹⁰ For example, in the field of social security, the CEACR has observed that Convention No. 102 has had a substantial influence on the development of social security in the various regions of the world, and is in practice deemed to embody an internationally accepted definition of the very principle of social security. Furthermore, the Committee added that 40 countries have ratified Convention No. 102 and have therefore incorporated its provisions into their internal legal systems and, in many cases, their national practice; nearly all the industrialized countries have established social security systems covering the nine branches to which Convention No. 102 applies; many developing countries, inspired by Convention No. 102, have embarked upon the road to a general social security system, even though nearly all of their systems are more modest in scope and, in general, do not yet encompass unemployment or family benefit; most of the social security schemes in Latin America, which have their origins in the era of social insurance, were greatly influenced by ILS and, in particular, by Convention No. 102; Convention No. 102 served as a model for the adoption of the European Code of Social Security, adopted under the aegis of the Council of Europe with the collaboration of the ILO; and the European Social Charter provides that the Contracting parties undertake to maintain a level of protection at least equal to that required by the ratification of Convention No. 102. See CEACR, Report, 2003, para. 53.

¹¹ It would appear that divergencies of a technical nature relating to the procedures for the application of a principle, and not the fundamental provisions, are at the origins of the decision not to ratify.

new instruments (consultation with other ministries, translation); the desire to avoid the supervisory machinery;¹² the increase in the number of Conventions; competition from other national and regional instruments. For others, these reasons are compounded by the procedure for the negotiation and formulation of the ILC's instruments, which involves the submission of many amendments during the discussions in the technical committees, and the tendency for the discussions to be polarized between the Workers' and Employers' groups, thereby reducing the role of governments and giving them the impression that they are not participating fully in the negotiation.

Certain of these obstacles have been examined in depth over the years that followed. With regard to the content of Conventions, as explained above, the ILO Governing Body undertook the revision of existing Conventions with a view to evaluating their relevance. In relation to future Conventions, discussions are still under way and cover both the procedure for the choice of subjects for standard-setting¹³ and good drafting techniques, including better use of flexibility clauses. The constituents often insist on the importance of having recourse to technical cooperation to assist governments in the measures involved in ratification and the proper implementation of Conventions. However, no systematic action has been taken in this respect, even though it would appear to be evident that measures should be taken to ensure more sustained progress in the ratification of Conventions that are considered to be up to date. The question could certainly be raised of the use of means similar to those deployed for the fundamental Conventions, and which have contributed to the remarkable rates of ratifications registered.

For some years, emphasis has been placed on the importance of understanding more fully the obstacles to ratification. In this connection, it is proposed to make better use of the constitutional procedures of the ILO, and particularly article 19 which, in paragraph 5(e), provides that a Member shall explain the difficulties preventing or delaying the ratification of a Convention by means of a report. This provision, amended in 1946, is specifically intended to allow the ILC to evaluate the nature of the reasons given by a State for not ratifying a Convention, in the hope of exercising influence to ensure that ratification becomes as universal as possible, and also to envisage revision so as to encourage a larger number of ratifications. However, it has not been possible up to now to formulate a regular, flexible and effective procedure through which the constituents can explain the difficulties encountered or propose the revision of standards. Such a procedure should make it possible to assess the progress achieved towards the objective of the instruments and to note any indirect or perverse effects in relation to the Organization's other objectives. In all cases, workers' and employers' organizations should be in a position to bring to the knowledge of the ILO the difficulties that they encounter due to the fact that their governments have not ratified Conventions.¹⁴

¹² It is contended in certain quarters that ratification can be penalizing and that States which undertake this process risk being punished for their virtue.

¹³ See *supra*.

¹⁴ Proposals have been made to make use of the general surveys carried out by the CEACR, which will be described in greater detail below. Others, emphasizing that these analyses imply an evaluation of the current situation and require assessment of aspects other than legal ones, consider that it would be preferable to entrust them, not to the CEACR, but to the Governing Body or the ILC. In 2000, in its presentation of the integrated approach, the Office emphasized the importance of not confining the examination to the efforts made by States, but also to describe those of the Organization to come to their assistance with a view to analysing successes and shortcomings.

2. Universal ratification and an overall supervisory system for fundamental rights at work

It should be possible to confront the globalization of markets with a globalization of rights. In the ILO's logic, this globalization of rights involves the ratification of international labour Conventions, with the State thereby undertaking to comply with and submitting to the supervisory machinery, which should assist it to follow this path. But the universal ratification of all ILO Conventions has never really been discussed, since it would appear to be clearly unachievable and, in any case, not necessarily useful or relevant for the achievement of the Organization's objectives. However, in the discussions which have been held since 1994, the constituents rapidly agreed on the importance of promoting compliance with fundamental rights and principles at work. The question was then to determine the rights in question and the manner in which their protection should be ensured. The discussions identified with a certain facility a group of so-called fundamental rights at work. These rights relate to freedom of association and collective bargaining, non-discrimination and protection against forced labour and child labour. Furthermore, the universality of these rights was acknowledged as they have the same value in member States and compliance with them is required everywhere, irrespective of the situation or economic fluctuations. With regard to the means to be used to promote the fundamental Conventions, various measures were proposed. Firstly, attempts were made to link compliance with these rights to international trade agreements. As explained below, these were abortive. Secondly, as from 1995, the Director-General emphasized the importance of achieving universal ratification of these Conventions and for this purpose launched a ratification campaign which achieved a certain level of success. As of July 2003, the average number of ratifications of the fundamental Conventions, as noted above, reached 151.¹⁵

This ratification campaign certainly benefited from the adoption of the ILO Declaration on Fundamental Principles and Rights at Work¹⁶ which, by relating technical cooperation to the promotion of these rights and principles provided an institutional platform for the constituents and the Office to work towards compliance with them, even in countries which have not ratified the Conventions and which show a high level of sensitivity in this respect. As will be seen, it is clear that the campaign for universal ratification also had a direct positive impact on the ratification of the fundamental Conventions.¹⁷

Finally, it is agreed that a ratification campaign is not sufficient in itself and that it must necessarily be accompanied by a strengthening of the supervisory system¹⁸ and the possibility of having recourse, both before and after ratification, to technical cooperation.

¹⁵ See Annex 10.

¹⁶ See *infra*.

¹⁷ This phenomenon is sometimes explained as being a result of the fact that the States do not wish to be subject to an additional reporting obligation under the promotional follow-up to the Declaration, although it is also considered that technical cooperation has enabled States to demystify the fundamental Conventions and gain a better understanding of the extent of their obligations.

¹⁸ See *infra*.

3. *Minimum threshold set for the entry into force of Conventions for the Organization*

Current practice in the ILO is for a Convention to enter into force for the Organization one year after the registration of two ratifications.¹⁹ According to some Governments and Employer members, this practice sets a threshold that is too low and should be raised. It has been proposed on various occasions to adopt a figure of between five and ten ratifications, or to set a minimum percentage of member States.²⁰ It should be noted in this respect that the ILO's supervisory system, which covers both ratified and unratified Conventions, depends on the entry into force of Conventions for the Organization and that any increase in the minimum threshold of ratifications could delay technical cooperation in this respect. Furthermore, as the Office indicated in March 2001 in a document on possible improvements to standards-related activities, "if there is a broad consensus on a Convention, and if it is effectively promoted, its ratification rate would tend to increase (which at the same time, would render such a minimum requirement less relevant)".²¹ The Office also observes that the threshold of ratifications required could also be adapted to the topic of Conventions, particularly where they cover specific sectors or situations which may not concern all countries.

4. *Responsibility of the State for violations of Conventions by private entities*

It has been noted above that the State is the principal link in the chain for the implementation of ILS. However, in practice, in many cases the violations of the international labour Conventions ratified by a State are committed by private entities and not directly by the authorities of the State. In general, the State is never responsible for the acts of individuals which, as they are not carried out by any of its organs, cannot be attributed to it. However, an exception may be made to this rule, namely that the State may be held responsible for the acts of individuals under its jurisdiction when it has not taken adequate precautions to prevent an incident or protect the victims. In such cases, the State is not really responsible for the act of the individual, but more for the attitude of its own authorities, whether they are executive, legislative or judicial, which have not respected the obligation of vigilance which rests upon them. In the context of the ILO, the Committee on Freedom of Association, the supervisory body competent in this field, would not hesitate to request States to take the necessary measures to bring an end to violations of freedom of association committed by private entities. For example, the Committee on Freedom of Association regularly requests States to take measures so that workers who have been dismissed by private enterprises for anti union reasons are reinstated in their jobs. It has not yet been possible to go further and extend systematically this practice to other ILO mechanisms and bodies.

B. *Supervision*

Of all the contemporary universal international organizations, the ILO is perhaps the one with the most sophisticated supervisory machinery. In practice, this is composed of a

¹⁹ There have been exceptions to this rule, particularly in the maritime field.

²⁰ Comments of the same nature have been made with regard to denunciation. By only allowing denunciation at ten-year intervals and for a limited period, Conventions are said to make ratification irreversible and therefore dissuasive.

²¹ Doc. GB. 280/LILS/3 (Mar. 2001), para. 41.

unique series of procedures applicable to all Conventions, which does not even exist, for example, in the United Nations, where different and ad hoc supervisory procedures accompany, in some cases, the instruments adopted. Certain specific features merit particular attention. In the first place, the wealth and diversity of the procedures encompassed by the system, all called upon to play a precise and specific role in helping States to achieve better compliance with ILS. It also combines, on the one hand, a procedure based on dialogue, which associates an independent technical body (the Committee of Experts) with a political body (the Conference Committee on the Application of Standards) and, on the other hand, more adversarial procedures. Furthermore, contrary to the traditional international approach in which no *locus standi* is granted to individuals, reference should be made to the role assigned to non-governmental actors, which may act on an individual or collective basis, and whose representatives also sit on the deliberative bodies examining the case.

1. **Brief description of the supervisory machinery**

The supervisory mechanisms can be divided into two categories. On the one hand, there are the mechanisms based on reports supplied by governments and observations made by workers' and employers' organizations. The reporting obligation exists even before ratification, as governments have to report on their obligation of "submission to the competent authorities" and may be required to report on unratified Conventions and Recommendations. Following ratification, governments have to report on each ratified Convention according to a reporting cycle determined by the Governing Body. On the other hand, there are the so-called special procedures which, to enter into action, have to be set in motion by a competent entity (often a workers' or employers' organization).

(a) Submission to the competent authorities

By virtue of article 19 of the Constitution, all member States are under the obligation within a certain time-limit from the adoption of a Convention or a Recommendation by the ILC to submit the instrument to "the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action" (paragraphs 5(b) and 6(b)) and to report thereon to the Office. Workers' and employers' organizations can also provide their observations in this respect. This obligation of submission to the competent authorities, that is to the legislative authority, often a parliament, is intended to bring the instrument to the knowledge of the public, as discussion in a deliberative assembly "can constitute an important factor in the complete examination of a question and the improvement of the measures taken at the national level with regard to the instruments adopted by the Conference".²² The information provided by governments and the social partners is examined by the Committee of Experts, the specific features and characteristics of which are described below, which each year notes the measures adopted by the authorities, reminds them of the importance of complying with this constitutional obligation and proposes, where necessary, the technical assistance of the Office.²³

(b) Reports on unratified Conventions and Recommendations

Also under article 19 of the Constitution, the Governing Body may request each member State to report on "the position of its law and practice in regard to the matters dealt with in the Convention [or Recommendation], showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention [or

²² CEACR, Report, 2003, Submission to the competent authorities, case of Malawi, p. 719.

²³ See *infra*.

Recommendation]” (paragraphs 5(e) and 6(d)). In the case of a Convention, a State also has to indicate “the difficulties which prevent or delay the ratification of such Convention.” These reports are examined by the Committee of Experts and analysed in a general survey, as discussed below. The promotional follow-up procedure of the 1998 Declaration on Fundamental Principles and Rights at Work is also based on this article.

(c) Reports on ratified Conventions

This mechanism is considered to be the cornerstone of the whole supervisory system and is called regular in that it is automatically set in motion by the ratification of a Convention. Ratification places the member State under the obligation to provide a periodical report on the application of the obligations that it has freely accepted (Article 22).²⁴ It is, evidently, still the State that draws up the report on the situation in national law and practice, although it nevertheless has to follow the questions raised in a report form adopted by the Governing Body. Moreover, this report necessarily has to be transmitted to workers’ and employers’ organizations, which are free in turn to make the observations that they consider necessary and to forward them directly to the Committee of Experts if they so wish.²⁵ In 2002-03, a total of 1,701 reports due (or 71 per cent of the total) were supplied, sometimes late, by governments. Some 400 observations from occupational organizations, of which 73 were made by employers’ organizations and 327 by workers’ organizations, were also received. Several of them covered a number of Conventions.²⁶

All of this information is then examined by the Committee of Experts on the Application of Conventions and Recommendations and by the tripartite Conference Committee on the Application of Standards.

(d) Committee of Experts on the Application of Conventions and Recommendations (CEACR)

This Committee was created in 1926 by the ILC and is not of tripartite composition. In practice, it was grafted onto the reporting procedure and over the years became an essential element in the current system. It is composed of independent jurists, specialists in labour law or international law, selected on the basis of their personal qualities and out of a concern to represent the diversity of major legal systems. The experts are appointed by the Governing Body upon the proposal of the Director-General for renewable three-year periods. The CEACR currently has 19 members, of which 14 are men and five are women.²⁷ Once a year (November-December), these experts examine the various reports sent by governments and the comments of workers’ and employers’ organizations. The

²⁴ The reporting cycles have been modified on several occasions and reports are now due at two- or five-year intervals, even though reports can be requested more frequently if necessary. This reporting obligation also exists for non-metropolitan territories (Constitution of the ILO, art. 35).

²⁵ Constitution of the ILO, art. 23(2). There is also an obligation under Article 5(d) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), to hold regular consultations with these organizations on “questions arising out of reports to be made to the International Labour Office under article 22 of the Constitution of the International Labour Organisation”.

²⁶ See table in Annex 11.

²⁷ See the names and brief *curricula* attached in Annex 12.

CEACR's work is confidential and is based on documentary information.²⁸ Where the CEACR receives comments from a professional organization on the application of a Convention in a particular country, even in the absence of a government report, it will generally publish its observations. All the observations are then gathered together in an annual report, which also includes in a first part an examination of general matters relating to ILS and to related instruments and their implementation.²⁹ As noted above, the CEACR also publishes each year a general survey which reviews the law and practice in a specific field based on the information obtained in the reports on ratified and unratified Conventions.³⁰

The most serious cases examined by the CEACR in its report are subsequently discussed, in June every year, in a tripartite committee of the ILC, namely the Committee on the Application of Standards.³¹

(e) Conference Committee on the Application of Standards

This is a permanent tripartite committee of the ILC which meets, like the Conference, each year in June. This Committee, which works in public, discusses, among other matters, the report of the CEACR. It is from this more political angle that the cases previously examined by the CEACR, a technical and independent body, are discussed. As described by the Representative of the Secretary-General of the Conference in 2003, the Committee "establishes the essential link between law and politics, international standards and national legislation, political responsibilities and social dialogue, universalism and particularities".³²

The Committee on the Application of Standards usually starts with a general discussion of the report of the CEACR, followed by a discussion of the general survey. It then examines the individual cases that have been selected. For this purpose, it convokes the representatives of the governments concerned, who once again have the opportunity to submit written replies and to participate orally in the discussions, in a procedure that is intended to allow for a more in-depth examination of their situation. Following the statements by the government representatives, the members of the Committee can raise questions or make comments, and the Committee then adopts conclusions on the case. Cases of continued failure or deficiencies can be mentioned in a special paragraph of the report. The Committee's report is submitted to the ILC and discussed in plenary, which gives the delegates another opportunity to draw attention to specific aspects of its work.

²⁸ The documentation available to the CEACR includes: the information provided by governments in their reports to the Conference Committee on the Application of Standards; the texts of legislation, collective agreements and relevant judicial decisions; the information provided by States on the results of inspections; the comments of employers' and workers' organizations; the reports of other ILO bodies (such as Commissions of Inquiry or the Committee on Freedom of Association); reports on technical cooperation activities. In practice, the CEACR focuses on the reports of governments and the observations of workers' and employers' organizations.

²⁹ The CEACR has also since 1957 adopted direct requests which, following old practices of diplomatic courtesy, are transmitted directly to the governments concerned and are not submitted to the ILC. In the event of continued failings, the CEACR publishes them.

³⁰ See in Annex 13 the list of general surveys carried out up to now.

³¹ Standing Orders of the ILC, art. 7.

³² *Provisional Record No. 24*, First Part, ILC, 91st Session, 2003, para. 41, *in fine*.

Since 1994, the Committee has examined an average of 27 cases each session (with a maximum of 37 in 1995 and a minimum of 24 in 2001). With regard to the nature of the Conventions selected, over 70 per cent of the cases relate to the so-called fundamental or priority Conventions.³³ With regard to the geographical origin of the countries selected, over the past 20 years the countries whose cases are examined most frequently are from Latin America (and particularly Brazil, Chile, Colombia, Dominican Republic, Guatemala, Panama and Peru) and the Indian subcontinent (India and Pakistan). Certain countries from other regions have also been selected particularly frequently: Central African Republic, Turkey and the United Kingdom. More precisely, in 2003, a total of 26 individual cases were discussed by the Committee on the Application of Standards, of which 19 (73 per cent) related to fundamental or priority Conventions.³⁴ The geographical distribution was as follows: Arab States (11 per cent), Asia (15.3 per cent), Africa (27 per cent), Europe (15.3 per cent) and Latin America (including the Caribbean) (31 per cent). In six cases, the Committee considered that there were grounds for drawing the attention of the Conference to the discussion that it had held,³⁵ and in two cases it decided to mention them in a special paragraph noting, with great concern in these cases the continued failure over several years to eliminate serious discrepancies in the application of certain Conventions.³⁶

As noted above, procedures of a more adversarial nature exist alongside the regular mechanisms.

(f) Representations made under article 24 of the Constitution

The representation procedure envisaged by the Constitution has to be set in motion automatically by a competent entity.³⁷ In contrast with the regular supervisory mechanisms, it is not set in motion by the ratification of a Convention. In this respect, it follows the adversarial model. A workers' or employers' organization may make a representation to the ILO. In other words, it consists of a direct channel of recourse at the international level available to non-governmental organizations in civil society.

The conditions for the receivability of a representation are simple: the workers' or employers' organization must consider that a member State has violated the provisions of a

³³ Of these Conventions, certain are targeted in particular, namely Convention No. 87 (with the highest number of cases), followed by Convention No. 29, Convention No. 111, Convention No. 98 and Convention No. 105. The other so-called priority Conventions come well behind.

³⁴ Convention No. 29: India, Mauritania, Myanmar, United Arab Emirates. Convention No. 81: Uganda. Convention No. 87: Belarus, Cameroon, Colombia, Cuba, Ethiopia, Myanmar, Panama, Serbia and Montenegro, Venezuela. Convention No. 95: Ukraine. Convention No. 98: Guatemala, Pakistan, Zimbabwe. Convention No. 111: Islamic Republic of Iran. Convention No. 118: Libyan Arab Jamahiriya. Convention No. 122: Portugal. Convention No. 131: Uruguay. Convention No. 138: Kenya. Convention No. 153: Ecuador. Convention No. 162: Croatia. Convention No. 169: Paraguay.

³⁵ These were: Belarus, Cameroon and Myanmar for Convention No. 87; Libyan Arab Jamahiriya for Convention No. 118; Mauritania for Convention No. 29; and Zimbabwe for Convention No. 98.

³⁶ These were Belarus and Myanmar for the Freedom of Association and Protection of the Right to Organise Convention (No. 87).

³⁷ Constitution of the ILO, arts. 24 and 25, and Standing Orders concerning the procedure for the examination of representations under arts. 24 and 25 of the Constitution of the ILO, in *ILO law on freedom of association: Standards and procedures*, ILO, Geneva, 1995, pp. 141-144.

Convention that has been duly ratified by the State.³⁸ When a representation has been deemed receivable by the Governing Body, the latter sets up a tripartite committee composed of a Government, Employer and Worker representative chosen from among the members of the Governing Body. This ad hoc committee is specifically called upon to examine the substance of the representation and to make recommendations, where appropriate, on how to bring the situation into conformity with the provisions of the Convention. The government concerned is invited to be represented at the Governing Body during the examination of its case. Over 70 representations have been found receivable since the establishment of the ILO.³⁹ At present, four representations are pending and refer to the Tripartite Consultations Convention, 1976 (No. 144), and the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

(g) Complaints under article 26 of the Constitution

The Constitution also provides for a complaint procedure reserved for the most serious cases and which may result, if the Governing Body so decides, in the establishment of a Commission of Inquiry.⁴⁰ As it is a costly procedure which has to be preceded by a discussion in a political body, it has in the final analysis been used infrequently in the ILO's history. Although it was initially intended for Commissions of Inquiry⁴¹ to be of tripartite composition, the model finally accepted for their composition was the formula of experts appointed in a personal capacity and swearing an oath similar to that of the judges of the International Court of Justice.

At first sight, the recourse procedure in question appears to be similar to the traditional dispute settlement procedures between States, that is a procedure between two sovereign States bound by the principle of reciprocity under the terms of a treaty. Indeed, the Constitution provides that any member State shall have the right to file a complaint against another member State if it is not satisfied that it is securing the effective observance of any Convention which both have ratified.⁴²

The principle of tripartism is not, however, fully followed in the case of the complaint procedure concerning the application of ratified Conventions, since this procedure can also be set in motion by the Governing Body, either of its own motion or on receipt of a complaint from a delegate to the Conference.⁴³ The Governing Body was able to use this procedure in the 1970s in the case of Chile and, more recently, in the 1990s in the case of Nigeria in relation to allegations of violations of the principles of freedom of association. The Employers also made use of this procedure in 1987 with regard to violations of the

³⁸ Standing Orders, *ibid.*, art. 2(2). Receivability is subject to the following conditions: the representation must be communicated to the ILO in writing; it must emanate from an industrial association of employers or workers; it must make specific reference to article 24 of the Constitution of the ILO; it must concern a Member of the ILO; it must refer to a Convention to which the Member against which it is made is a party; and it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.

³⁹ See Annex 14.

⁴⁰ Constitution of the ILO, arts. 26-34.

⁴¹ See Annex 15 for a full list of the Commissions of Inquiry established.

⁴² Constitution of the ILO, art. 26(1).

⁴³ *ibid.*, art. 26(4).

same principles in Nicaragua. More recently, the procedure was also set in motion by 25 Workers' delegates to the Conference in June 1996 through the lodging of complaints against Myanmar (Burma) for the violation of the Forced Labour Convention, 1930 (No. 29). In this latter case, the failure of Myanmar to comply with the recommendations made by the Commission of Inquiry led to the application in June 2000, for the first time in the history of the ILO, of article 33 of the Constitution, which allows the Conference to take such action as it may deem expedient to secure compliance with the recommendations of a Commission of Inquiry.⁴⁴

Commissions of Inquiry determine their own rules of procedure. They generally hold hearings and carry out investigations on the spot with a view to formulating their conclusions and recommendations. The CEACR monitors the effect given to the conclusions of Commissions of Inquiry.

(h) Special procedure for freedom of association

The faculty for workers' and employers' organizations to make complaints can also be seen in the case of the Committee on Freedom of Association. This tripartite body, composed of nine members and chaired by an independent person, emanates from the Governing Body and was established in 1951 following an agreement between the United Nations Economic and Social Council and the ILO.⁴⁵ It is responsible for examining allegations of violations of the principles of freedom of association which may be referred to it by a State or by a workers' or employers' organization.⁴⁶ In this context, the Committee on Freedom of Association has always emphasized that it is not a judicial body and has insisted on the fact its function is to guarantee and promote the right of association of workers and employers and that this function does not therefore consist of bringing charges against governments or indeed condemning them.

In view of the importance of compliance with freedom of association for an Organization built on tripartism, the Committee on Freedom of Association can hear allegations of violations of the principles of freedom of association against a State which has not ratified the relevant Conventions. This characteristic supplements the procedural differences that have their origin in the tripartite nature of the Organization. It distinguishes it even more from the procedure generally accepted under the traditional

⁴⁴ *ibid.*, art. 33, which reads as follows: "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." This is considered by some to be a provision authorizing legal sanctions. In contrast, others consider that the term "sanctions" is not fully appropriate to describe the measures envisaged in view of the Organization's lack of coercive power.

⁴⁵ It should be recalled that originally the Committee on Freedom of Association was responsible for undertaking a preliminary examination of complaints with a view to determining whether the allegations were sufficiently well-grounded to be referred to the Fact-Finding and Conciliation Commission on Freedom of Association. This latter Commission was established in agreement with the United Nations Economic and Social Council by Resolutions Nos. 239(IX) of 2 August 1949 and 277(X) of 17 February 1950 of the Economic and Social Council; 110th Session of the Governing Body, *Official Minutes*, pp. 71-90. Gradually, the Committee on Freedom of Association came to examine the substance of complaints itself.

⁴⁶ Procedures of the Fact-Finding and Conciliation Commission and the Committee on Freedom of Association for the examination of complaints alleging breaches of freedom of association, reproduced in *ILO law on freedom of association: Standards and procedures*, ILO, Geneva, 1995, pp. 125-140.

theory of international law, which generally requires the explicit consent of the State to any mechanism supervising compliance with its international obligations.

The Committee on Freedom of Association meets three times a year and examines the cases which are submitted to it, essentially on the basis of documentary evidence,⁴⁷ with the complaints being communicated to the government concerned and examined together with the latter's reply. The decisions of the Committee on Freedom of Association have always been adopted by consensus, as this "methodology adds to the weight of its decisions, while at the same time ensuring a judicious balance between the interests defended by the Government, Employer and Worker members, which subsequently helps to gain broad support within the Governing Body of the ILO".⁴⁸ Up to now, the Committee on Freedom of Association has examined over 2,300 cases.

Being free to determine its procedure, the Committee on Freedom of Association decided in 1972 to take practical measures to reinforce and evaluate more effectively cases of progress. For over 30 years, in all cases in which it recommends that measures be taken, the Committee on Freedom of Association invites the government to indicate, after a reasonable period of time, taking into account the circumstances of each case, the effect that it has given to the recommendations addressed to it. In cases in which the issues raised are of a legislative nature and the State concerned has ratified the Conventions on freedom of association, the Committee on Freedom of Association refers these issues to the CEACR. This procedure ensures reciprocal knowledge of the work of the Committee on Freedom of Association and the CEACR and reinforces their complementarity. In cases in which the Conventions have not been ratified, the Committee on Freedom of Association ensures the follow-up itself. Finally, the Committee on Freedom of Association has frequently made use of the direct contacts procedure discussed below.

These special procedures are supplemented by mechanisms which are not strictly speaking of a supervisory nature, but which complement them with a view to achieving a higher level of compliance with ILS.

(i) Direct contacts and technical assistance⁴⁹

In the context of a procedure adopted in 1964, a country may request direct contacts to discuss matters raised by the supervisory bodies. In these cases, the Director-General appoints a representative, who may be an official of the Office or an independent personality, to examine the situation with the government and the tripartite partners in the country with a view to identifying solutions that are acceptable for all parties.⁵⁰

In general, the ILO provides considerable assistance to its constituents for the application of ILS. This assistance is provided either in response to requests by governments or employers' and workers' organizations, or in the context of the Office's normal work of advising member States. In general, and as will be seen below, all technical cooperation and assistance activities provided by the Office should be in

⁴⁷ It should be noted that the Committee on Freedom of Association has heard witnesses on six occasions.

⁴⁸ *The Committee on Freedom of Association: Its impact over 50 years*, ILO, 2001, p. 12.

⁴⁹ These procedures are supplemented by *ad hoc* follow-up or supervisory procedures to which the ILO can always have recourse, such as reports and special studies.

⁵⁰ In 1994, the Director-General proposed the development, based on the direct contacts procedure, of a procedure of voluntary mediation and arbitration. This proposal was not given effect.

harmony with ILS, one of the important objectives of such assistance being to facilitate their ratification and application.

2. Reinforcement of the supervisory system

The ILO's supervisory system has developed in a very pragmatic manner over time. It is in some ways the result of a phenomenon of accretion, with certain mechanisms being grafted onto others as a function of historical circumstances and needs. The question of reinforcing the ILO's supervisory system has been the subject of many rich discussions in the ILC and the Governing Body, as well as in the supervisory bodies themselves, which are responsible for determining their own working methods.

Certain leading ideas have emerged from the debates and have to be taken into consideration in any reflection on the reinforcement of the supervisory system. In the first place, when the Director-General raised the question in 1994 of whether the philosophy of the supervisory system should be maintained or modified, the discussions revealed profound attachment and support for the system as it currently exists and its underlying philosophy. In other words, the Organization has to continue to give priority to dialogue and persuasion and avoid recourse to sanctions. In this spirit, it is understood that reinforcing effectiveness and impact does not necessarily mean strengthening the binding nature of the supervisory system. Indeed, greater effectiveness can easily signify making better use of dialogue and promotion, and particularly technical cooperation. Secondly, the constituents agree on the fact that reinforcement presupposes the maintenance of systematic equilibrium between, on the one hand, all the components of the supervisory system and, on the other, the various means of action available (regular reporting, tripartite dialogue, technical cooperation and adversarial procedures). Thirdly, the constituents do not appear to desire any major upheaval in the supervisory system. For example, the idea of the extension of the procedure of the Committee on Freedom of Association to other fundamental rights, or of opening up the supervisory procedures to individuals (other than those acting on behalf of workers' or employers' organizations) have been rejected following discussion.⁵¹ Finally, the constituents consider reporting to be the cornerstone of the system. In this respect, efforts have regularly been made to lighten as much as possible the administrative burden relating to the management of reports by constituents and the Office, while at the same time increasing their effectiveness and impact. They resulted in 2002 (to be applied for the first time in 2003), in a rearrangement of the reporting cycles, with the two- and five-year cycles being retained, but the Conventions being regrouped by subject.⁵²

The main subjects of discussion which have retained the attention of the constituents may be grouped under the following headings:

(a) **Overlapping and lack of knowledge of the supervisory machinery**

During the discussions, several constituents expressed concern at the overlapping of the various supervisory mechanisms and emphasized that they sometimes had the impression of being placed under examination on several occasions for the same facts, which in their view was in contradiction with the principle of *double jeopardy*. In this

⁵¹ The idea that the CEACR should deal with compensation which could be granted to persons or institutions injured by the failure to apply Conventions or the constitutional principles of the ILO has been raised but not gone into in detail.

⁵² See Annex 16.

respect, practical measures have been taken over the years to avoid the risks of competition and contradiction. For example, in the case of the CEACR and the ad hoc committees established under article 24 of the Constitution, it has been agreed that the CEACR does not examine aspects of the application of the Convention which are addressed in a representation before the procedure for the examination of the representation is completed. Similarly, if the Committee on Freedom of Association is examining a similar issue to one covered by the CEACR, the Committee on Freedom of Association, if it issues its conclusions first, will submit the legislative aspects to the Committee of Experts; otherwise, it will take into consideration the legislative analysis of the Committee of Experts in its own examination of the case. Clearly, the issue does not arise in the case of the CEACR and the Conference Committee on the Application of Standards. These bodies are of a quite different but complementary nature and form a continuum, in the sense that the report of the CEACR serves as a basis for the discussions of the Conference Committee on the Application of Standards.

It would appear to be clear that these concerns are also closely related to the lack of knowledge of the supervisory mechanisms, for which the constituents cannot be held to be to blame, in view of their complexity. In-depth reflection on this issue, with a view to identifying ways of demystifying them and making them more flexible and easy to assimilate, has not yet been undertaken.⁵³ It would also be opportune to address the distinctive characteristics of these supervisory bodies and their specific objectives, with a view not only to streamlining them, but also mutually reinforcing them. For example, it could be interesting to explore how the distinctive nature of article 22 (reporting obligations) could be reinforced, based on a dialogue between the CEACR, governments and the social partners, to make a clearer distinction between procedures of an adversarial nature and to serve as a basis for determining the action to be taken in the context of technical cooperation.

(b) Transparency

The issue of transparency in the working methods of the supervisory bodies is raised frequently in discussions concerning these procedures. More specifically, this issue refers in particular to the choice of cases submitted to the Conference Committee on the Application of Standards and the methods of selecting the experts sitting on the CEACR. With regard to the cases submitted to the Conference Committee on the Application of Standards, it should be noted that the list of cases (from those included in the report of the CEACR) is formulated on the basis of proposals made by the Employers' group and the Workers' group of the tripartite Committee and discussed by them, before being submitted for approval to the Committee in plenary session.⁵⁴ There are no formal criteria in this

⁵³ In 2002-03, the CEACR paid particular attention to the drafting of its report so as to make its contents more accessible and improve the awareness of a broader readership of the importance of Conventions and their application in practice: CEACR, Report, 2003, para. 8.

⁵⁴ Originally, the Committee on the Application of Standards covered the whole of the report of the CEACR. In 1955, the Committee on the Application of Standards made the Office responsible for making a choice and only retaining cases for which the experts had indicated clear divergences between the terms of certain ratified Conventions and the situation in national law and practice (*Record of proceedings*, ILC, 38th Session, p. 582, para. 7). In practice, it was the secretariat of the Conference Committee which undertook this task until the middle of the 1990s. Now, the Employers' and Workers' groups agree on a list for submission to the Committee. In fact, the issue of the selection criteria was not raised in discussions between constituents until the mid-1990s, with Governments only really making their voices heard in this respect as from 2000.

respect.⁵⁵ Any proposal for the participation of governments in the selection of cases, particularly through the prior approval of the list by the Governing Body, has been rejected. The criteria the most frequently retained or mentioned (whether cumulative or not) are: the nature of the comments made by the CEACR, and particularly the existence of a footnote referring the case to the Conference; the gravity and persistence of failures in the application of the Convention; the urgency of the situation; previous discussions of the case;⁵⁶ the particular nature of the situation (if it raises an issue that has not hitherto been discussed, or if a case could help in resolving problems of application); and the probability that the discussions will have a tangible impact on the case. However, the constituents are agreed on the fact that it should be possible to achieve a better distribution between cases concerning fundamental Conventions and those raising more technical issues, but which are also of interest to certain members.⁵⁷ Furthermore, the Employers have insisted on the fact that the Committee on the Application of Standards should not only examine cases which raise problems, but should also refer to cases of progress so that a series of good practices can be developed as a point of reference. Finally, in general terms, the question may be raised as to how the discussion of around 20 cases can be best used for the benefit of others which would have merited discussion and which, for various reasons, were not examined.

With regard to the selection of experts for the CEACR, it should be recalled that the experts are appointed by the Governing Body for a period of three years based on proposals submitted by the Director-General. Originally, the appointment by the Governing Body and not by the countries of which they are nationals was intended to mark their independence.⁵⁸ During the recent discussions in the Governing Body, the Government members of South-East Asia emphasized the importance of the selection criteria being clearly defined and of the members of the supervisory bodies representing as diverse knowledge and experience as possible. This group expressed the desire, in other words, of extending the competence of the CEACR. In their view, the Committee of Experts should be “balanced with respect to the diversity of skills reflecting the particular legal and socio-economic situations in the member countries, the geographical distribution and gender”.⁵⁹

(c) Impact, effectiveness and assistance

A large number of constituents have emphasized that the supervisory mechanisms should give rise to more reaction by States and that the effectiveness and efficiency of follow-up mechanisms have to be improved. In this respect, the principal means of measuring impact which can be enumerated are as follows:

⁵⁵ Even though the Employers’ and Workers’ groups regularly recall their own criteria for the submission of proposals.

⁵⁶ This criterion gives rise to arguments both for and against the inclusion of a case on the list during the current session.

⁵⁷ In practice, the very great majority of the cases examined by the Committee on the Application of Standards concern violations of freedom of association and forced labour.

⁵⁸ As the mandates of the experts are renewable, certain experts have sat for decades, which has given rise to criticisms within the Committee of Experts itself.

⁵⁹ Doc. GB.280/12/1 (Mar. 2001), para. 51.

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- the list of cases of progress and of interest drawn up by the Committee of Experts;⁶⁰ and
 - the follow-up procedure of the Committee on Freedom of Association which, in 2002, made it possible to assess the impact of this procedure.⁶¹

However, the absence of means of measuring the impact or of systematic follow-up of the procedures established under articles 24 and 26 of the Constitution has to be acknowledged, as well as more generally the absence of any in-depth study of the impact of the supervisory activities. Such a study would admittedly require reflection on the measurement criteria, which would have to be developed and selected for such an exercise.

In recent years, the Organization's constituents have principally focused on the question of how to ensure more effective and rapid follow-up to the comments of the supervisory bodies through assistance by the Office and more targeted interventions. In this respect, for example, the CEACR has proposed that its members should participate in field missions so as to be in a better position to understand problems of application and to be able to propose appropriate solutions.⁶²

Such follow-up or "integrated action" by the Office would also require verification of the extent to which the technical departments of the Office, which are responsible for the substantive areas covered by the Conventions, base their action on the comments of the supervisory bodies in the context of the assistance and advice that they provide to member States. In parallel, such action would oblige the CEACR to investigate methods of increasing the value, interest and credibility of its observations. In this spirit, in November 2001, it was decided to offer assistance on a country-by-country basis in an attempt to "resolve as many of the standards-related problems raised by the supervisory bodies as possible".⁶³ This specific type of assistance has not yet been put into effect. This approach to action would perhaps make it possible to combine the question of the application of ILS with other issues of an economic, social and political nature, an essential exercise if it is really intended to combat the decent work deficit, which is in itself an obstacle to the achievement of fundamental principles and rights at work.

⁶⁰ See paras. 107-109 of the Report of the CEACR, 2003.

⁶¹ See *supra*.

⁶² This proposal would necessarily involve additional costs and should be examined in the light of the limited resources allocated to the CEACR in the ILO's regular budget (US\$ 881,000 for the biennium 2002-03, of which \$387,000 are intended to cover direct costs and \$494,000 indirect costs, such as translation).

⁶³ The Office explains that: "In doing so, the comments of the Committee of Experts, the Conference Committee and the Committee on Freedom of Association, as well as the results of articles 24 and 26 procedures, would be a guide to the work required. The governments and the social partners concerned would have to commit themselves to working with the Office to analyse and correct all the problems raised. This would often involve other actors in the country beyond ministries of labour, including other ministries and national legislatures to implement the Conventions, and apply the measures needed to eliminate the concerns of the ILO supervisory bodies. The Office for its part would have to devote the resources necessary to doing so, both from the multidisciplinary teams (MDT) and the various technical departments concerned, including the Standards Department." Doc. GB.282/LILS/5 (Nov. 2001), para. 50.

3. *Interpretation*

The issue of the interpretation of Conventions and the role to be played by the CEACR in this respect is regularly raised in discussions on the supervisory machinery and still appears to be far from being resolved.

Article 37, paragraph 1, of the Constitution of the ILO provides that:

Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.⁶⁴

In view of the tripartite nature of the ILO, the founders of the Organization did not wish to follow the traditional rules of international law in respect of interpretation, namely leaving it to States, but instead intended that a universal international judicial body, the ICJ, should be the only body competent in this respect. However, this referral mechanism has never yet been used. This can be explained in part by the machinery developed by the ILO, within which the CEACR occupies a pre-eminent position,⁶⁵ and which have made it possible to resolve current difficulties of application without the necessarily heavy procedure involved in referral to the ICJ.

The CEACR itself considers that, in practice, supervision of application always involves some degree of interpretation. This is particularly true in the case of Conventions of a promotional nature, which require regular and continued efforts to achieve their objectives, or Conventions which contain very broad provisions, for which only examination of practice can really specify their extent and scope. Moreover, where States are not in agreement, as noted above, the Constitution already contains a mechanism for resolving the issue. Therefore, in so far as the views that the CEACR has expressed on the significance of the provisions of a Convention and its legal scope are not contradicted by the ICJ, they are considered to be “valid and generally recognized”.⁶⁶ The opinions that it issues also benefit from its impartiality and objectivity, as well from the thousands of examinations that it has undertaken of application since its creation. However, as the CEACR itself indicated in 1991, it is not a tribunal and the views that it expresses are not judgements. In other words, this means more specifically that it does not adopt an adversarial procedure and that its conclusions do not have legally binding force.

The question therefore arises as to the extent to which recourse to the ICJ, or the establishment of a special labour tribunal, as advocated in article 37, paragraph 2, could offer benefits in relation to interpretation within the ILO. It should also be pointed out that article 37 raises many issues with regard to its implementation which have not yet been

⁶⁴ Paragraph 2 provides that: “Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.”

⁶⁵ Reference could also be made in this respect to the various departments of the Office and the ILC through its Committee on the Application of Standards.

⁶⁶ See CEACR, Report, 1990, paras. 7 and 8.

completely clarified.⁶⁷ It could be imagined that one clear benefit of such referral would to improve legal certainty in relation to the ILO's supervisory machinery, which are intended more for the promotion of dialogue than the imposition of a definitive solution. For example, cases could be referred to the ICJ (or to the special labour tribunal) in which governments are not in agreement with the opinion of the supervisory bodies in their comparison of law and practice with ILO Conventions;⁶⁸ to clarify uncertainties in relation to the exact meaning to be given to certain Conventions where these prove to be an obstacle to ratification; and finally, the ICJ could possibly participate in the improvement of situations where serious violations of ratified Conventions have been observed and no measures have been taken despite the repeated requests in this respect by the ILO, including its supervisory bodies. However, in all cases, the procedure should be very carefully examined so as to preserve the tripartite nature of the Organization and, in so doing, ensure the full participation of the social partners.

C. Promotional follow-up: A tested solution for alleviating the limitations of supervision in the event of non-ratification

Promotional follow-up was developed in the context of the 1998 Declaration on Fundamental Principles and Rights at Work. Before going further into the impact of the follow-up (3), it is necessary firstly to briefly present the Declaration (1) and the phases of its follow-up in the strict sense of the term (2).

1. Presentation of the 1998 Declaration and its promotional follow-up

In 1998, the ILO adopted a Declaration on Fundamental Principles and Rights at Work. In so doing, the Organization intended to provide a social response to the challenges of economic globalization. The Director-General explains that the "aim of the Declaration is to reconcile the desire to stimulate national efforts to ensure that social progress goes hand in hand with economic progress and the need to respect the diversity of circumstances, possibilities and preferences of individual countries".⁶⁹ The Declaration envisages reciprocal commitments between member States and the Organization. On the one hand, the former undertake, even if they have not ratified the Conventions in question, 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:

⁶⁷ For example, it is not clear whether it is a question of the adversarial or advisory competence of the ICJ. In the former case, this provision could be viewed as a compromissory clause under which any of its members could seek the submission of any ILO Convention to jurisdictional examination. The other solution is to emphasize the advisory recourse available to the Organization itself.

⁶⁸ For example, it had already been emphasized in this respect that the legal issue of whether the economic and social conditions or systems of a country should be taken into account as a factor in evaluating compliance with a ratified Convention could be referred to the ICJ (doc. GB.228/4//2 (Nov. 1984), para. 30).

⁶⁹ "Presentation", in ILO Declaration on Fundamental Principles and Rights at Work, ILO, Geneva, 2001, p.1.

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- (a) freedom of association and the effective recognition of the right to collective bargaining;⁷⁰
 - (b) the elimination of all forms of forced or compulsory labour;⁷¹
 - (c) the effective abolition of child labour;⁷² and
 - (d) the elimination of discrimination in respect of employment and occupation.⁷³

On the other hand, the Organization undertakes to support the efforts made by member States by offering them assistance and cooperation with a view to promoting the ratification and implementation of the fundamental Conventions and helping them in this respect.⁷⁴

Conscious that these undertakings had to be accompanied by a procedure to evaluate the progress achieved in the implementation of the fundamental principles and rights, the constituents agreed that the Declaration should be accompanied by a promotional follow-up mechanism.

2. Promotional follow-up of the Declaration

There are two aspects to the promotional follow-up. Firstly, it is based on the reports provided each year by governments which have not ratified one or more of the fundamental Conventions and on the observations made by workers' and employers' organizations.⁷⁵ This information is analysed by a group composed of independent expert-advisers who draft a synthesis document (Annual Report). Secondly, global reports are submitted each year to the ILC on one of the four categories of fundamental principles and rights. The objective of these reports is to provide a global and dynamic picture of each category of fundamental principles and rights, as observed over the past four-year period, and serving as a basis for evaluating the effectiveness of the assistance provided by the Organization. Up to now, one global report has been submitted on each of the categories of fundamental principles and rights: freedom of association and the effective recognition of the right to collective bargaining in 2000;⁷⁶ the elimination of all forms of

⁷⁰ Two fundamental Conventions correspond to each group of fundamental principles and rights. In the case of freedom of association, they are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

⁷¹ The Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105).

⁷² The Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182).

⁷³ The Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁷⁴ Declaration of 1998, para. 3.

⁷⁵ This follow-up is of a promotional nature, which is not to be confused with the supervisory machinery. See the annex to the Declaration, para. I.2.

⁷⁶ *Your voice at work*, Global Report, ILC, 88th Session, June 2000.

forced or compulsory labour in 2001;⁷⁷ the effective abolition of child labour in 2002;⁷⁸ and the elimination of discrimination in respect of employment and occupation.⁷⁹

These annual and global reports make it possible to establish action plans for technical cooperation, which are adopted in November each year by the Governing Body for each group of fundamental principles and rights. These action plans are intended to define priorities for the following period, and in particular to make it possible to mobilize the internal and external resources necessary for technical cooperation activities. Up to now, action plans have been established for freedom of association,⁸⁰ forced labour⁸¹ and child labour.⁸²

3. Results achieved and overview

The Declaration has made it possible to achieve positive results in various areas which are presented briefly below.

- (1) The Declaration has made it possible to achieve international consensus with regard to the identification and content of fundamental rights and principles at work.
- (2) The Declaration has resulted in recognition by the international community of the ILO as the agency responsible for the social dimension of globalization. As a consequence, the content of universally accepted social rules are to be determined by ILO standards, and only ILO standards.⁸³
- (3) The Declaration has demonstrated that the application of standards is entirely compatible with technical cooperation which takes fully into consideration concerns related to development, poverty and the informal economy. Indeed, the Declaration shows that standards and technical cooperation can be mutually reinforcing. The Declaration has also made it possible to see that technical cooperation can serve as a catalyst for national action.
- (4) No one can deny that the Declaration has had a considerable impact on the ratification rate of fundamental Conventions, which is over 86 per cent.⁸⁴ However, this success

⁷⁷ *Stopping forced labour*, Global Report, ILC, 89th Session, June 2001.

⁷⁸ *A future without child labour*, Global Report, ILC, 90th Session, June 2002.

⁷⁹ *Time for equality at work*, Global Report, ILC, 91st Session, June 2003.

⁸⁰ Doc. GB.279/TC/3 (Nov. 2000).

⁸¹ Doc. GB.282/TC/5 (Nov. 2001).

⁸² Doc. GB.286/TC/2 (Nov. 2002).

⁸³ For example, at the World Summit on Sustainable Development, held in September 2002 in Johannesburg, the State agreed to take measures to multiply income-generating activities, in accordance with the Declaration of 1998 (see doc. Off. UN/A/CONF. 199/20, para. 28).

⁸⁴ Details of the ratification rates are as follows: Convention No. 87: 81 per cent (142 States); Convention No. 98: 87 per cent (153 States); Convention No. 29: 93 per cent (162 States); Convention No. 105: 92 per cent (161 States); Convention No. 138: 74 per cent (130 States); Convention No. 182: 81 per cent (143 States); Convention No. 100: 92 per cent (161 States); Convention No. 111: 91 per cent (159 States). See also the figures in Annex 10.

also has to be seen in relation to the campaign for the universal ratification of the fundamental Conventions launched in 1995⁸⁵ and the work of the Working Party on Policy regarding the Revision of Standards, which among other measures called upon States to ratify these Conventions as a priority. It should also be noted that the principal efforts of the ILO have been focused on the promotion of the Declaration.⁸⁶ The Declaration also appears to have contributed to the ratification of the priority Conventions. However, no significant impact of the Declaration can be seen on the ratification rate of all the other Conventions considered to be up to date.⁸⁷

- (5) Another positive aspect of the 1998 Declaration is that it has offered countries that have not ratified the fundamental Conventions and which are facing serious problems the possibility to engage in a process of dialogue without negative repercussions. In the same spirit, the Declaration has made it possible to improve the coordination of technical cooperation and to mobilize resources.
- (6) The Declaration has made it possible to develop instruments to measure progress in each country at the individual level, thereby avoiding any form of comparison and allowing the Office to adjust cooperation as a function of the needs of countries.

With regard to the impact of the Declaration on the implementation of the fundamental Conventions in the strict sense of the term, it is more difficult to reach conclusions. The second cycle of global reports, which will be initiated in 2004, will undoubtedly give a clearer picture. At present, it may be affirmed that the Declaration has made a major contribution to overcoming obstacles to the ratification of the fundamental Conventions, which now means that the focus can be shifted from questions of ratification to application.⁸⁸

Finally, it would be appropriate, over six years after the adoption of the Declaration, to examine ways of improving the follow-up to the Declaration as a non-conditional and promotional instrument based on assistance through technical cooperation. Any reflection undertaken on this subject has to take into consideration the concerns expressed by the constituents, namely: on the one hand, that sanctions are not introduced and, on the other, the need for the system to be transparent, to make it possible to evaluate progress and to intervene where the efforts made are not genuine. It would also be appropriate to raise the issue of the use of the Declaration for the purpose of increasing the attention paid to other up-to-date Conventions.

⁸⁵ See *supra*.

⁸⁶ However, it has to be regretted that such assistance has been provided to the detriment of other tasks, such as assistance for the preparation of the reports envisaged in articles 19 and 22 of the Constitution: doc. GB.276/LILS/7 (Nov. 1999), para. 23.

⁸⁷ See Annex 17.

⁸⁸ Doc. GB.285/LILS/5 (Nov. 2002).

IV. Decent Work Agenda: Strengthening the effectiveness of ILS?

In 1999, the Director-General reformulated the ILO's mission in terms which made it possible to base the defence of the ILO's traditional values in the new context of the globalized economy. Social justice "is about a set of regulations, institutions and policies that ensures a fair treatment to all members of society, and a relatively equal distribution of opportunities and of income".¹ To achieve this objective, the Director-General proposed that the Organization should set as its primary goal "to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".²

A. Concept of decent work

The concept of decent work is based on four Strategic Objectives, which are to:³

- promote and realize standards and fundamental principles and rights at work (Objective No. 1);
- create greater opportunities for women and men to secure decent employment and income (Objective No. 2);
- enhance the coverage and effectiveness of social protection for all (Objective No. 3); and
- strengthen tripartism and social dialogue (Objective No. 4).

These four Objectives taken together define the manner in which the ILO can promote decent work. The Strategic Objectives are then subdivided into operational objectives, which are accompanied by indicators and targets, with a view to evaluating the progress achieved. The details are provided in Annex 18.

This new conceptualization of the ILO's mandate, based on clear and precise objectives, was welcomed with enthusiasm by the constituents. The Office was subsequently reorganized according to these objectives and the Organization reviewed its strategic budget. Since 1999, three budgets aimed at implementing these objectives have been submitted by the Director-General. The most recent covers the biennium 2004-05 and is examined in greater detail below.

B. ILO resources and decent work

It should be noted that the ILO operates on the basis of the regular budget as well as extra-budgetary resources, the latter being allocated in their great majority to technical

¹ *Decent work: Issues and policies*, ILO Decent work Pilot Programme, ILO, Geneva, 2002, point 3.

² *Decent work*, Report of the Director-General, ILC, 87th Session, 1999, p. 3.

³ *ibid.*, p. 13.

cooperation activities. The ILO's regular budget for the biennium 2004-05 is US\$434,040,000.⁴

Of this amount, a total of US\$331,256,996 (76 per cent) is allocated for the achievement of the Strategic Objectives and is subdivided as follows:

Objective No. 1	US\$58,167,538 (17.5 per cent);
Objective No. 2	US\$105,234,284 (31.8 per cent);
Objective No. 3	US\$59,917,872 (18.1 per cent);
Objective No. 4	US\$107,937,302 (32.6 per cent).

This is supplemented by US\$226,000,000 in the form of extra-budgetary resources.

The allocations envisaged for the achievement of each of the Strategic Objectives are then subdivided between the various operational objectives. For ILS, for example, there are three operational objectives, namely: standards and fundamental principles and rights at work; child labour and normative action. For each of these operational objectives, the following regular budget (RB) resources have been allocated:

Standards and fundamental principles and rights at work	US\$4,564,773
Child labour	US\$10,131,266
Normative action	US\$43,471,499

These amounts are supplemented by extra-budgetary (EB) resources estimated for each of the operational objectives of Objective No. 1 as:

	US\$	Total (RB and EB)
Standards and fundamental principles and rights at work	12,484,00	17,048,773
Child labour	88,883,000	99,014,266
Normative action	3,294,000	46,765,499
Total (extra-budgetary funds)	104,661,000	

The figure in Annex 19 shows the situation with regard to regular budget resources, extra-budgetary resources and funds from the 2000-01 surplus by Strategic Objective for 2004-05 (in US dollars). It may be noted that, in contrast with the other Strategic Objectives, the majority of the total budget allocated for Objective No. 1 is based on extra-budgetary resources. Furthermore, it should be added that the regular budget resources allocated to each of the Strategic Objectives are divided between the technical programmes, regions and support services. In practice, the technical department for Objective No. 1 (which includes the InFocus Programme on Promoting the Declaration, the InFocus Programme on Child Labour, the International Labour Standards Department

⁴ This is a zero growth budget. An allocation of US\$ 13,980,730 has been established to cover cost increases, which gives a revalued budget of an amount of US\$ 448,980,730.

and the Office of the Executive Director) has a total operational budget of US\$23,454,822, of which over 84 per cent is to cover staff costs.⁵

C. Brief assessment

It is timely, four years after the launching of the decent work concept, to endeavour to assess its impact, and particularly to ascertain the extent to which ILS have benefited.

The concept of decent work forms part of a tendency to place labour and social issues at the centre of national and international concerns and interests and has even made it possible to accelerate trends in this respect. This dynamic concept has received a very warm welcome from the ILO's constituents, to the extent that some have taken it up as a political vehicle at the national level (for example, the Brazilian election campaign with the slogan "*Brasil decente*"). Nor has the international community remained indifferent to the concept.⁶

Decent work has also served as a management concept and has made it possible to organize and rationalize the Organization's resources around four Strategic Objectives, rather than based on specific units. This budgeting is therefore based on results with a view to improving the relevance, effectiveness and efficiency of the ILO's work.

With regard to ILS, from a theoretical point of view, it may be affirmed that they occupy a pre-eminent role in the achievement of the concept of decent work. Firstly, one Strategic Objective, namely the first one, is devoted to them. ILS should also "help to clarify the meaning of decent work" and to put it into practice as they constitute an indicator and a guide for the progress achieved and to be achieved.⁷ From this angle, there are grounds for believing that ILO standards provide the foundation for the whole concept of decent work, and that the achievement of the other Strategic Objectives should necessarily be measured partly in the light of standards-related indicators.

Practice offers some interesting indications in this respect. Firstly, an examination of the regular budget resources of the Organization shows that 17.5 per cent of the Organization's budget is devoted to the achievement of Strategic Objective No. 1, while the Objective relating to employment (No. 2) receives nearly 32 per cent.⁸ This concentration of the Organization's financial and human resources in the field of employment has the consequences of assimilating the concept of decent work ever more closely to employment, and indeed to the measures to be taken for the creation of employment.

With regard to the operational objectives and indicators established for the achievement of Objective No. 1, it should be noted that there is no specific indicator to

⁵ In general, in the Organization, over 70 per cent of the regular budget resources cover staff costs.

⁶ See, in particular, the support expressed by the Development Assistance Committee (DAC) of the OECD in its guidelines on poverty reduction, in which it refers to the action plan on decent working conditions adopted by the ILO and where the reinforcement of the right to decent work is identified as one of the actions required to remedy poverty. *DAC guidelines on poverty reduction*, OECD, 2001.

⁷ *Reducing the Decent work deficit: A global challenge*, Report of the Director-General, ILC, 98th Session, 2001, pp. 59-61.

⁸ See table in Annex 18.

measure the promotion and application of Conventions other than fundamental Conventions and that no resources appear to be allocated for the formulation of new standards, which was regretted by the Workers' group during the discussion of the budget.⁹ The principal technical support activities in the field of ILS have to be carried out with the assistance of extra-budgetary resources, 85 per cent of which are mobilized for the InFocus Programme on Child Labour (see technical cooperation *infra*).

Examination of the operational objectives, performance indicators and targets identified for the other Strategic Objectives also gives an indication of the extent to which ILS are taken into account in the progress achieved or to be achieved. It may be noted that the operational objectives, performance indicators and targets envisaged for the achievement of Strategic Objectives Nos. 3 and 4, namely social protection and social dialogue, only take into consideration in an incidental manner standards-related aspects, which are also almost absent from those established for Objective No. 2 on employment.

Finally, from the point of view of technical cooperation, it may be noted that the Office does not yet have a method of ensuring that the relevant standards-related aspects are systematically taken into consideration in the design and implementation of technical cooperation projects and programmes.

In 1999, the Director-General emphasized the need to “reinvigorate” ILS. He indicated that the formulation of standards is only a beginning and that promotional action has to be intensified for their ratification and application. In 2001, he recalled that normative action is an indispensable tool to make decent work a reality.¹⁰ However, he pointed out that the methods of normative action do not seem well adapted to decent work, of which the components are interdependent, while normative action tends to be fragmented. However, these apparent limitations can be overcome, particularly through the combination of the 1998 Declaration and the integrated approach to standards. He therefore called for continued exploration of other new mechanisms and institutions in the field of standards.¹¹ Finally, in 2003, in his report on the challenge of reducing poverty, the Director-General once again addressed ILS from the angle of job creation, indicating that the universally accepted rights and principles set forth in the 1998 Declaration are among the essential tools for the elimination of poverty and the achievement of full employment and social cohesion.¹²

It is in this global context, in which the need for a certain international regulation of labour is increasingly being felt, that it would appear to be timely to revisit the concept of decent work so as to place ILS at the centre of ILO action once again. Attention should mainly be paid to their transversal integration as an indicator of the achievement of the other Strategic Objectives, as well as to the reinforcement of the links with technical cooperation with a view to their conversion into concrete national policies and action. In so doing, the role and responsibilities of the social partners, at both the national and international levels, will have to be further developed.

⁹ Doc. GB.286/12/3 (Mar. 2003), paras. 41 and 50.

¹⁰ *Reducing the decent work deficit: A global challenge*, Report of the Director-General, ILC, 89th Session, 2001, pp. 59-60.

¹¹ *ibid.*

¹² *Working out of poverty*, Report of the Director-General, ILC, 91st Session, 2003, pp. 67-72. The Director-General added that the 1998 Declaration, by giving people title over their own labour, these principles “serve as a foundation enabling governments, employers and workers to build fairer and more efficient governance mechanisms for the labour market”.

V. Technical cooperation and ILS

The principle that technical cooperation activities should be closely linked to ILS has been generally accepted since the 1950s.¹ There is agreement that technical cooperation supplements the Conventions and recommendations and enables the ILO to “promote awareness of its social philosophy, as embodied in its Constitution and ILS”.² The complementarity between ILS and technical cooperation should operate on two levels. First, the standards should be used as guidelines for devising and implementing technical cooperation activities. Second, the experience gained in the field should provide detailed knowledge of the practical difficulties faced in applying the standards and should enable areas to be identified where new standards are needed or standards need to be revised. This is a way of making sure that the standards and their supervisory system are more relevant.³ In practice, however, it has been difficult to identify the measures that need to be taken in order to ensure synergy between technical cooperation and ILS.⁴ Since 1984, special attention has been given to the need for greater complementarity between these two types of measures, in particular by helping the developing countries to create more favourable conditions for ratifying and applying the standards.⁵ Over the years the ILO has developed various strategies in this regard.

A. ILO strategies

In 1993 the ILO adopted a new strategy on technical cooperation, known as “active partnership policy”, which was designed to create a new dynamic between ILS and technical cooperation. This policy largely met with the approval of the social partners,⁶ and was subsequently strengthened and consolidated by the adoption of the 1998 Declaration and the Decent Work Agenda.

1. *Active partnership policy*

The main aim of the policy of active partnership is to devise measures which meet the constituents’ requests and needs, help them to solve the problems they face and lead them

¹ In 1949 the ILC authorized the ILO to take part in the broad technical assistance programme launched under the auspices of the United Nations, which became the United Nations Development Programme (UNDP) in 1966. Since then, cooperation has grown in scale and no longer just consists of technical advice, but takes the form of technical assistance provided as part of projects. For a brief history of the ILO’s technical cooperation, see doc. GB.252/15/1 (Feb.-Mar. 1992).

² *The role of the ILO in technical cooperation*, Report VI, ILC, 80th Session, 1993, p. 3.

³ *ibid.*, p. 65.

⁴ One of the ways considered, but quickly rejected, for strengthening links between ILS and technical cooperation is conditionality, which would involve making the provision of technical cooperation subject to the ratification or application of the conventions. See doc. GB.252/15/1 (Feb.-Mar. 1992).

⁵ Report of the Director-General, ILC, 70th Session, 1984, pp. 50-63; resolution on the role of the ILO in technical cooperation, ILC, 73rd Session, 1987

⁶ Doc. GB.271/TC/1 (Mar. 1998); doc. GB.273/TC/2 (Nov. 1998).

to be self-sufficient.⁷ Of the main measures introduced to achieve this, it should be noted in particular that: (1) objectives are formulated for each country, in order to target efforts, identify priorities and promote the founding principles of the ILO;⁸ (2) the impact of the technical cooperation programmes is assessed, mainly by the constituents;⁹ and (3) a multidisciplinary approach is used, since it is felt to be more appropriate for responding to the complex problems facing the member States.¹⁰

In practice, multidisciplinary teams (MDTs) have been set up in all regions.¹¹ Their task is to work closely with governments, employers' and workers' organizations and donors to provide technical support and guidance in running ILO activities at regional and subregional level, and to help to define objectives for each country.¹² Each team normally includes a specialist in ILS and labour legislation, whose central role has been highlighted on a number of occasions by the Office¹³ and the Governing Body.¹⁴

2. **Decent work**

In 1999 the Decent Work Agenda and the Conference conclusions on technical cooperation provided a new framework for technical cooperation.¹⁵ A number of measures were planned in order to:¹⁶ (1) make technical cooperation more relevant and effective; (2) improve the quality, visibility, effectiveness and impact of technical cooperation; and (3) strengthen partnerships. More particularly, on the subject of ILS, the Director-General stressed in his report on decent work – as mentioned – that decent work involves meeting four strategic targets, including compliance with ILS and fundamental rights at work. As far as ILS are concerned, he called for a number of measures to improve the image of the ILO's standards-related work and to give it greater scope. These included in particular stepping up efforts to help countries to implement the ILO's standards. The Director-General considered that:

... setting standards is of course only the start. The ILO needs to reinvigorate its promotional efforts to see that standards are ratified and applied. The ILO needs to be more proactive when it comes to implementation, assisting governments in giving effect to the Conventions they have chosen to ratify. At the formal level this could mean helping governments revise their

⁷ *ibid.*, para. 2.

⁸ *ibid.*, para. 49.

⁹ *ibid.*, para. 52.

¹⁰ *ibid.*, para. 48.

¹¹ *ibid.*, para. 50. They are now incorporated in the field structure of regional and subregional offices.

¹² *The role of the ILO in technical cooperation*, Report VI, ILC, 81st Session, 1993, p. 69

¹³ Doc. GB.271/TC/1 (Mar. 1998); doc. GB.273/TC/2 (Nov. 1998).

¹⁴ Doc. GB.271/15 (Mar. 1998); doc. GB.273/11 (Nov. 1998).

¹⁵ "Conclusions concerning the role of the ILO in technical cooperation", report of the Committee on Technical Cooperation, *Provisional Record* No. 22, ILC, 87th Session, 1999. See Annex 20.

¹⁶ *ibid.*, paras. 50-52.

labour legislation and improve their inspectorates. A key way to promote implementation is to ensure that everyone appreciates the value and use of standards.¹⁷

The report particularly stressed the need to include monitoring standards in the ILO's technical cooperation and research activities.

B. Figures

Funding for technical cooperation has changed enormously since the 1990s. After constant increases between 1987 and 1991,¹⁸ spending on technical cooperation had almost halved by 1996,¹⁹ falling from a total of nearly 754.1 million dollars over the period 1988-92 to around 581.2 million dollars over the period 1993-97. This reduction came against a background of declining ODA (official development assistance), which made it difficult to mobilize resources. It also coincided with a transition period when the ILO was undergoing internal reforms and was having to adapt to reforms brought to the United Nations system.²⁰ Under these circumstances, from 1993 onwards technical cooperation was financed by a combination of funds from the Organization's regular budget and extra-budgetary resources, although it is the latter, in the form of trust funds (multi/bilateral donors, development banks, beneficiaries),²¹ which are the main source of funding for the technical cooperation programme. With the adoption of the 1998 Declaration, funding was specifically earmarked for promoting standards, based on the idea that there is close complementarity between standards and technical cooperation and that they reinforce each other.²² In general terms, 53.4 per cent of the technical cooperation projects approved in 2001 related to Strategic Objective No. 1 on ILS and fundamental rights.²³ However, it should be pointed out that most of the extra-budgetary resources for this Objective – which are the ones earmarked for technical cooperation – are monopolized by the IPEC Programme for the elimination of child labour.

C. Fields

Attempts were made to strengthen complementarity between technical cooperation and ILS at different levels, with varying results. We will focus on the technical cooperation efforts made concerning the ratification (1) and implementation (2) of ILS. Finally, we will discuss the targeting of technical cooperation activities on the strategic objectives of decent work (3).

¹⁷ *Decent work*, Report of the Director-General, ILC, 87th Session, 1999, p.19.

¹⁸ Bringing spending on technical cooperation to \$169 dollars a year.

¹⁹ Spending on technical cooperation was \$98.2 million per year in 1996.

²⁰ In particular the reforms which led to new methods for implementing programmes and thus affected the volume and nature of technical cooperation. The new methods place emphasis on improving countries' capabilities and encouraging them to use their own human and institutional resources to implement projects, thus reducing the involvement of specialized institutions.

²¹ *The role of the ILO in technical cooperation*, Report VI, ILC, 87th Session, 1999, p. 4.

²² See *infra*.

²³ See Annex 21.

1. *Technical cooperation on ratification*

There has been a considerable drive since 1995 to get the fundamental Conventions ratified, with technical cooperation here largely forming part of the campaign to promote universal ratification and the InFocus Programmes on Child Labour and on Promoting the 1998 Declaration.²⁴ Assistance has been provided in two main forms: legal assistance or technical consultation,²⁵ and the promotion of the ILO's fundamental Conventions. The results have been remarkable, since, as we said earlier, more than 86 per cent of the member States have ratified the fundamental Conventions.²⁶ In November 2002 the Office pointed out that the high level of ratification achieved had shifted priorities in technical cooperation "over and above ratification and advocacy to improved implementation of standards. This is a logical shift [...]".²⁷ However, it has to be said that the concentration of resources on the fundamental Conventions has resulted (as the members of the workers' group has deplored on many occasions) in the abandonment of efforts to promote ratification of the ILO's other up-to-date Conventions.

The first lesson to be learnt from these results, as the Office has stressed, is that technical cooperation and standards-related action reinforce one another in principle. This is clear from the results obtained under the InFocus Programmes on Child Labour and on Promoting the Declaration:

[...] technical cooperation activities resulted in enhanced understanding of the problems involved in eliminating child labour, which, in turn, influenced the normative agenda of the Organization. The work undertaken by the IPEC from 1992 onwards definitely played an

²⁴ See *infra*.

²⁵ This is by far the most frequently requested form of assistance. It can be either formal or informal, or even confidential, be provided in writing or orally. For the countries concerned, it is a matter of clarifying certain provisions in fundamental Conventions, of asking the Office for advice on the conformity of prevailing national legislation with one or more of the Conventions they are considering ratifying, of asking the ILO to formulate comments and provide advice on draft laws and legislative amendments or to prepare draft laws or labour codes, of inviting it to participate in tripartite discussions on the revision of labour legislation, etc.: doc. GB.270/LILS/5 (Nov. 1997), paras. 14-15.

²⁶ The aim of this form of assistance is to increase the awareness of governments, employers' and workers' organizations, as well as the general public, about fundamental rights at work. It seeks to encourage countries to review their initial position and to consider, at the national level, the appropriateness of ratifying all the fundamental Conventions and, in consequence, how to overcome the presumed and real obstacles to ratification. In concrete terms, this technical assistance consists of: organizing and participating in meetings of a tripartite nature at the national, subregional and regional levels on ILS; examining the obstacles to the ratification of specific Conventions; establishing contacts during the ILC with the delegations participating in the work of the Committee on the Application of Standards; training officials and representatives of employers' and workers' organizations (in respect of the obligations associated with membership of the Organization and with the ratification of ILO Conventions, the ratification procedure for Conventions, the role assigned to occupational organizations in the Constitution) either on the spot or by organizing study visits to headquarters or the Turin Centre; providing and disseminating information to officials in the ministries of labour and to national legislators, the social partners, governmental and non-governmental organizations and to the general public particularly MPs, judges and lawyers; participating in conferences organized by employers' and workers' organizations, universities, governmental and non-governmental organizations; and sending copies of fundamental ILO Conventions and examples of comparative legislation; financing translations of fundamental Conventions into national languages: doc. GB.270/LILS/5 (Nov. 1997), para. 6.

²⁷ Doc. GB.285/LILS/5 (Nov. 2002), para. 6.

important role in the growing awareness of the need for a supplementary instrument for more focused action against the worst forms of child labour. Subsequently, there were increased ratifications not only of the new Convention No. 182, adopted in 1999, but also of Convention No. 138 on minimum age for employment and work. This Convention, adopted in 1973, has experienced a significant increase in ratifications since it was included in the ratification campaign launched in 1995 following the Copenhagen Social Summit".²⁸

However, technical cooperation and standards do not systematically reinforce each other, as the Strategies and Tools against Social Exclusion and Poverty Programme (STEP), launched in January 1998, appears to show. This programme aims to promote social development in order to help combat poverty and social exclusion, and to preserve and strengthen social cohesion and protection in the context of globalization, macroeconomic stabilization policies, structural adjustment programmes and transition strategies.²⁹ Thus STEP aims to promote fundamental labour standards and standards relating to social security, rural workers' organizations and cooperatives, child labour and female employment, plantation workers and indigenous and tribal peoples. However, unlike the IPEC Programme, it has not resulted in an increase in the number of ratifications of the social security Conventions.

2. Technical cooperation on the implementation of ILS

Technical cooperation on the implementation of ILS takes similar forms to those on ratification. It aims, inter alia, to enable member States to meet their obligations under the ILO Constitution³⁰ and to bring their national legislation and practice into line with the provisions of the ratified Convention. The question here is not what form the technical cooperation should take, but how it can be targeted so that it can be more effective in supporting ILS and so that it can always take account of a normative component.

On the first of these two points, it was suggested by the Office in November 2002, following a request from the constituents, that the ILO's supervisory system should be given a greater role and should be included in any evaluation of requirements in terms of technical cooperation.³¹ On a more practical level, the Governing Body decided to

²⁸ *ibid.*, para. 20.

²⁹ This programme is currently a major component of the global campaign to promote social security for all, launched in June 2003. Based on the concept of a social economy, and given that the traditional social security mechanisms hardly seem up to the challenge of extending cover to everyone in the near future, the STEP Programme aims to put in place alternative, complementary and effective arrangements, to guarantee social protection and to promote development in favour of the most deprived groups in society.

³⁰ ILO Constitution, arts. 19 and 22.

³¹ The Office considers that: "the supervisory system assembles information about specific national circumstances in which the standards are applied. Analysing this information should lead to better understanding of the real situation. As a result, it should help the ILO to determine, together with the member States concerned, technical assistance and cooperation needed to tackle the problems of application in their actual context" (doc. GB.285/LILS/5 (Nov. 2002), para. 36). The Office thus proposes that the comments of the supervisory bodies should be taken into account when planning technical assistance designed to facilitate the implementation of the conventions. Conversely, the CEACR could be more systematic in including in its reports observations on how the ILO's assistance could help to solve application problems. This would also enable the Standards Committee of the ILC to discuss these observations in a tripartite forum. See *The role of the ILO in*

promote cooperation through agreements on assistance programmes with each individual country, in order to solve problems in applying the Conventions and any related issues identified by the supervisory bodies.³²

On the second point, about taking account of the normative aspect in all technical cooperation activities, the Office suggested various options, in particular joint programming requiring closer coordination between the various units of the Office, and the use of an integrated approach,³³ one of whose key aims “is to integrate standards with other activities of the Organization as well as looking in an integrated way at the interrelationship of standards”.³⁴

3. Target technical cooperation activities on the strategic objectives of decent work

The Director-General’s Report on *Decent work* describes technical cooperation as vital for achieving the four strategic objectives in practice. Its role is to help to create an environment at both national and international levels which is conducive to realising the Organization’s values and principles in the areas of development, institutional capacity, legislation and socio-economic policy.³⁵ With decent work, technical cooperation is viewed in the broader context of ILS. On the one hand, technical cooperation activities could be more firmly anchored in the standards, with Objective 1 of the Decent Work Agenda dedicated to them. On the other, the remaining strategic objectives (on employment, social protection and social dialogue) could also offer scope for including normative aspects.³⁶ In practice, this means that, as we said earlier, there could be indicators and targets designed to measure the normative component in all technical cooperation activities for each of the other three strategic objectives. This has not yet been done up to now.

The Governing Body is still discussing how to strengthen links between the supervisory system and technical cooperation.

technical cooperation, Report VI, ILC, 87th Session, 1999, pp. 51-54; doc. GB.285/LILS/5 (Nov. 2002), paras. 36-50.

³² Doc. GB.282/8/2 (Nov. 2001), para. 47(g).

³³ See *supra*.

³⁴ Doc. GB.285/LILS/5 (Nov. 2002), para. 31.

³⁵ *The role of the ILO in technical cooperation*, supplement to Report VI, ILC, 87th Session, June 1999, para. 1.

³⁶ Doc. GB.279/TC/1 (Nov. 2000), paras. 49-51.

VI. ILS and globalization

It was in the mid-1990s that the debate on standard-setting was finally placed in a wider context that took account of the characteristics of a changing world, in particular the process of economic globalization and the transformation of the world of work itself. It was then a matter of defining the role of the ILO in general, and that of its standards-related activities in particular, as the regulator of what was now a globalized production system. Discussions were held – and are still ongoing – within the ILO and other international bodies on this subject, and it was swiftly recognized that the ILO was the international agency in charge of ensuring that globalization has a social dimension. It was assigned a predominant role here, given that the social aspect had largely been neglected by the international bodies responsible for international trade issues. However, the ILO's methods and tools have still largely to be defined, and the vast majority of ILO constituents stress that they must always reinforce standard-setting activities rather than replacing them.

Discussions within the ILO on standards-related activities in times of globalization are continuing. This issue is being looked at from various points of view, which have been explored in varying degrees of detail. First of all, the ILO constituents continually question the position which the ILO and international labour standards occupy in the international system (A). Secondly, they want to identify what effect the role of non-governmental actors in the economic globalization process has on the ILO's standards-related activities, and how greater use might be made here of the 1977 Declaration on multinationals and voluntary initiatives (B). Lastly, they are discussing strengthening the ILO's links with the international financial institutions (C) and the WTO (D).

A. International system

If standard-setting measures are to be taken in response to globalization, questions need to be asked about the position of international labour standards in the international system. This applies on two levels. First, we need a clearer definition of the links between the ILO and other sources of international labour law and how they can be coordinated. In view of the large number of different international organizations and their overlapping fields of competence, “normative competition” is inevitable. Today it happens both with international organizations that actually deal with social issues, whether universal (the United Nations) or regional (the European Union), and with those that only incidentally encounter these issues when carrying out their institutional mandate (the Bretton Woods institutions). Obviously, everything must be done to avoid conflict between the different texts produced by these institutions. If the ILO is to be genuinely recognized as the agency responsible for the social dimension of globalization, it must be remembered that the ILO's texts and the work of its supervisory bodies take the leading role here. More specifically, there must at the very least be coordination and reciprocal consultation between the organizations concerned. Measures of this type undertaken with the international financial institutions and the WTO will be described later.

As far as the United Nations and the specialised institutions are concerned, those with which the ILO has special arrangements receive a copy of the reports sent by the governments under article 22 of the Constitution.¹ Representatives of those organizations

¹ See CEACR, Report, 2003, paras. 34-35. In 2002-2003, this involved reports on the Radiation Protection Convention, 1960 (No. 115), sent to the International Atomic Energy Agency (IAEA); on the Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117), sent to the United

are also invited to attend meetings of the CEACR to discuss the application of the Conventions. Finally, the ILO sends regular reports and oral information to the various bodies responsible for examining the application of the UN Conventions relating to the ILO's mandate.²

At the European level, in 2003 the CEACR examined 17 reports on the application of the European Code of Social Security and, where appropriate, the Protocol to it.³ It noted that the States which are parties to the Code and the Protocol are largely continuing to apply them. Moreover, in September 2002 representatives of the ILO attended, as technical advisers, the meeting of the Committee of Experts in the social security field,⁴ where the application of the European instruments was examined on the basis of the CEACR's conclusions. Finally, as part of its cooperation with the Council of Europe, an ILO representative, acting in an advisory capacity, attended sessions of the European Committee of Social Rights held during 2002.

In order to ensure that international labour standards are more effective – and this is the second level of debate – it is essential that the States, which still constitute the main channels through which they are implemented, regard them as ineluctable. The ILO's work shows that it is the national legislative and judicial bodies that are the most directly involved. What this means is that we need to ensure that there are as few conflicts as possible between international and national sources. Various considerations and options have been explored here. Awareness-raising seminars have been organized to discuss the problem directly with legal specialists at national level, which enabled a large number of national court rulings to be collected in which reference was made to international labour law. We can see, encouragingly, that judicial bodies, regardless of their legal tradition, try to interpret national legislation in a way which is not incompatible with international law and with international labour Conventions and recommendations in particular. Thus the courts use international labour instruments to fill legal loopholes, to clarify the protection

Nations Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Organization (UN), with a copy also sent to the Office of the UN High Commissioner for Human Rights; on the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134), and the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), sent to the International Maritime Organization (IMO); the Rural Workers' Organizations Convention, 1975 (No. 141), sent to the FAO and the UN, with a copy also sent to the Office of the UN High Commissioner for Human Rights; the Human Resources Development Convention, 1975 (No. 142), sent to UNESCO; the Nursing Personnel Convention, 1977 (No. 149), sent to the World Health Organization (WHO); and the Indigenous and Tribal Peoples Convention, 1989 (No. 169), sent to the UN, the FAO, UNESCO and the WHO, with a copy also sent to the Inter-American Indian Institute of the Organization of American States, and the Office of the UN High Commissioner for Human Rights.

² These bodies constitute the supervisory machinery which the UN set up to examine the reports which countries are required to submit at regular intervals on each of the United Nations instruments that they have ratified. In 2002-03 activities were organized with the bodies responsible for supervising the application of the following instruments: International Covenant on Economic, Social and Cultural Rights (two sessions); International Covenant on Civil and Political Rights (two sessions); Convention on the Elimination of All Forms of Discrimination against Women (three sessions); International Convention on the Elimination of All Forms of Racial Discrimination (two sessions); Convention on the Rights of the Child (three sessions).

³ In accordance with the monitoring procedure set up under Article 74(4) of the Code and the arrangements made between the ILO and the Council of Europe.

⁴ The Committee of Experts emphasized at the meeting that Convention No. 102 was still very relevant, noting that the ILO's normative work on social security had laid the foundations for the European Code of Social Security.

offered by the law, to strengthen the interpretation of the law, or to guarantee an interpretation of the law which offers no less protection than international labour standards. The courts also use international labour law to ensure consistency in regional interpretation.⁵

Secondly, we can also see that recent national constitutions increasingly refer to international law, both to ratified Conventions and treaties (the most frequent cases), and to general international law or customary law. They often provide that, in the event of conflict, international standards shall prevail. However, a great deal remains to be done to make these provisions genuinely effective, since the courts are often reluctant to use them, particularly where this involves setting aside or even annulling legislation.

B. Multinational enterprises

Globalization demonstrates the importance of mobilizing new actors in order to promote the ILO's values. The Organization has explored various options in this regard: strengthening the Tripartite Declaration, in particular through the issuing of social labels and closer links with other multilateral normative initiatives (1); promoting voluntary initiatives (2); and developing framework agreements (3).

1. *Strengthening the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted by the ILO in 1977. It was developed, inter alia, in response to initiatives by other organizations (the UN's former Commission on Transnational Corporations and the OECD) in this field.

(a) Brief description

The Tripartite Declaration has two interdependent objectives: (1) to encourage multinational enterprises to make a positive contribution to economic and social progress, and (2) to minimize and overcome the difficulties which their various operations can produce. It is addressed to the three traditional ILO parties (governments, workers' organizations and employers' organizations) and to multinational enterprises themselves.

The Tripartite Declaration is a non-binding instrument which works on the basis of a system of regular surveys carried out using questionnaires which the ILO sends to governments and to the most representative employers' and workers' organizations. The information forwarded by the ILO's constituents records how multinationals in their countries have followed up the Tripartite Declaration. Surveys are carried out every three or four years. Eight have been carried out to date, the latest of which covered the years 1999-2003. The Governing Body (through its Subcommittee on Multinational Enterprises) formulates conclusions and recommendations on the measures to be taken at national and international levels. The recommendations concern the best way to exploit the information obtained, whether it is appropriate to carry out another survey, and how to make the Declaration work more effectively.

⁵ A document analysing more than 200 national court rulings referring to ILS is available, together with the full text of the decisions.

Furthermore, where there is a dispute between any of the parties about the interpretation of the principles contained in the Declaration, it may be referred to the Governing Body, which has the authority to settle it (through its Subcommittee on Multinational Enterprises). The interpretation is sent to the parties concerned and is usually made public. To date three requests for interpretations have specified on the merit some principles set out in the Tripartite Declaration. Annex 22 gives details of the parties involved, the questions raised and the principles defined.

(b) Measures to strengthen the Tripartite Declaration of Principles

The Tripartite Declaration has been strengthened in various ways: through the encouragement of social labels, the identification of strategic objectives to be pursued and closer links with other multilateral initiatives in this field. The constituents feel that efforts need to continue to promote the Tripartite Declaration so that it becomes an essential reference instrument in the current discussions on the concept of corporate social responsibility,⁶ including how to cover the entire production chain.⁷ However, there is no consensus on the form which cooperation with the other institutions should take.⁸

In order to promote greater knowledge of the Tripartite Declaration, in March 2001 the Governing Body adopted four strategic objectives:⁹ (1) improving knowledge of the principles of the Tripartite Declaration and their application; (2) including the application of the Tripartite Declaration in programmes carried out at the ILO headquarters and in the regions; (3) promoting the effective application of the Tripartite Declaration at national and regional levels; and (4) facilitating the effective application of the Tripartite Declaration at those levels.

A number of initiatives have been undertaken since then to promote the Tripartite Declaration. For example, a users' guide has been developed, which is designed to make the Declaration's principles easier to understand. A Tripartite Forum has also been organized to encourage dialogue between the addressees of the Declaration and to enable them to exchange experiences on the best ways of applying and promoting its principles.¹⁰

(c) Closer links with other multilateral initiatives in this field

The ILO regularly informs the Governing Body about the main initiatives taken in fields affecting corporate social responsibility. The ILO has focused particular attention on the following initiatives:

⁶ Doc. GB.286/14 (Mar. 2003).

⁷ See on this point paragraph 20 of the Tripartite Declaration, which states that: "To promote employment in developing countries, in the context of an expanding world economy, multinational enterprises, wherever practicable, should give consideration to the conclusion of contracts with national enterprises for the manufacture of parts and equipment, to the use of local raw materials and to the progressive promotion of the local processing of raw materials. Such arrangements should not be used by multinational enterprises to avoid the responsibilities embodied in the principles of this Declaration."

⁸ Doc. GB.285/12 (Nov. 2002); doc. GB.286/14 (Mar. 2003).

⁹ Doc. GB.280/13 (Mar. 2001).

¹⁰ The guide and the document summarizing the debates of the Tripartite Forum will be available at the meeting in December.

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- The OECD Guidelines for Multinational Enterprises, adopted in 1976 and amended in 2000. Since they were revised, the guidelines have formed an integral part of the OECD Declaration on International Investment. They constitute non-binding recommendations by governments to multinational enterprises operating on or from the territory of OECD countries or any of the following four countries: Argentina, Brazil, Chile and Slovakia. The recommendations cover areas such as employment and industrial relations, human rights, the environment, competition, the dissemination of information disclosure and taxation. The 2000 revision, in which the ILO was involved, related mainly to implementing procedures.¹¹ More specifically, in each country which has signed up to the guidelines, there is a National Contact Point (NCP) responsible for promoting the guidelines and for dealing with any problems on the subject which may arise. The NCPs are responsible for dealing with questions which arise on the territory of countries which have adhered to the guidelines or in relation to activities which multinationals from those countries carry out on the territory of countries that have not signed up to them. The Committee on International Investment and Multinational Enterprises (CIME) is responsible for clarifying the guidelines. Along with other duties, the CIME is also responsible for holding exchanges of news on the activities of NCPs in order to enhance the effectiveness of the guidelines. Both the NCPs and the CIME receive advice about the methods they should use in order to fulfil their obligations. For example, the CIME can ask for technical advice about any issue relating to the guidelines. It seems that this may include consulting the ILO.¹²
 - The United Nations Global Compact, launched at the World Economic Forum in Davos (Switzerland) on 31 July 1999. The Compact aims to raise awareness in the business world on nine principles relating to human rights, work and the environment. As far as work is concerned, the Compact reproduces the rights and principles set out in the 1998 Declaration.¹³ It brings together the secretariat heads from a number of organizations in the United Nations system. According to the latest Global Compact annual report, presented in July 2003, over 1000 enterprises have signed the Compact and are now involved in the initiative, working together with international workers' organizations, civil society and other parties promoting its principles.¹⁴ The operational activities carried out under the Compact have been led by an inter-institutional committee involving the Global Compact office, the ILO, the Office of the UN High Commissioner for Human Rights, the United Nations Development Programme (UNDP), and the United Nations Environment Programme (UNEP).¹⁵
 - The European Commission Green Paper entitled "Promoting a European framework for corporate social responsibility" (July 2001), and the European Commission Communication published in July 2002, entitled "Corporate social responsibility: A business contribution to sustainable development".¹⁶
 - The standards of the International Organization for Standardization (ISO).

¹¹ Doc. GB.279/WP/SDG/1 (Nov. 2000).

¹² Doc. GB.279/WP/SDG/1 (Nov. 2000), para. 26.

¹³ See *supra*.

¹⁴ United Nations press release, ECO/33 (2 July 2003).

¹⁵ Doc. GB.286/MNE/3 (Mar. 2003), paras. 2-3.

¹⁶ *ibid.*, paras. 15-17.

2. Voluntary initiatives

The ILO has carried out a number of studies on private sector voluntary initiatives affecting the social dimension of business activities.¹⁷ The main study in this field¹⁸ spells out some of the terms used. Thus, for the ILO, “private sector initiatives” refers to actions which may seek to enhance or supplement behaviour required by law.¹⁹ Such initiatives are generally rooted in the idea of corporate social responsibility. The desire to add value to an enterprise by promoting a good public image is a key factor behind these initiatives.²⁰ “Labour practices” are defined in principle as all conditions of labour and rights at work within the scope of the ILO mandate.²¹

The ILO identifies three main types of voluntary initiatives: (a) codes of conduct; (b) social labels; and (c) investor initiatives. The constituents agree that the ILO should provide assistance in the form of information and advice for those undertaking voluntary initiatives, and they also want research to continue in the various fields connected with voluntary initiatives. There is no consensus, on the other hand, on the longer-term question of a so-called “proactive position of engagement” which the ILO might adopt towards such initiatives.²² The constituents’ showed enormous reluctance towards the Director-General’s proposal for an international inspection system for social labels, forming part of an international Convention. The debate has now shifted to the idea of corporate social responsibility, and the Governing Body is to continue its discussion on this issue in November 2003.²³

(a) Codes of conduct

A code of conduct is a written document setting out the policy or principles which enterprises undertake to follow. It contains commitments which they give, particularly in response to market expectations, without being forced to do so by legislation or regulations. However, since they are public statements, it is usually felt that the codes could have legal implications, given that there are laws governing statements by businesses, advertising and competition (in the case of joint action by a number of enterprises).²⁴

(b) Social labelling

Social labelling is a way of communicating information on the social conditions surrounding the manufacture of a product or the rendering of a service. Independent labels are developed and administered by NGOs, workers' organizations (union labels), industry

¹⁷ Doc. GB.270/WP/SL/1/3 (Nov. 1997); doc. GB.271/WP/SDL/1/1 (Mar. 1998); doc. GB.274/WP/SDL/1 (Mar. 1999).

¹⁸ Doc. GB.273/WP/SDL/1 (Nov. 1998).

¹⁹ *ibid.*, para. 6.

²⁰ *ibid.*, para. 11.

²¹ *ibid.*, para. 6.

²² Doc. GB.274/15 (Mar. 1999).

²³ Doc. GB.286/WP/SDG/4 (Mar. 2003).

²⁴ Doc. GB.273/WP/SDL/1 (Nov. 1998), para. 26.

and trade unions or other enterprise associations, or hybrid partnerships of one or more of those sectors. Social labels may appear on the product or packaging, or may be displayed in the retailer's shop or shop-window. Some labels are assigned to enterprises, usually producers or manufacturers, and they are aimed at consumers and potential business partners. Social labelling programmes are considered to be voluntary responses to market incentives (including the demands of business partners) rather than to public law or regulation.²⁵

In 1994, recognizing the potential of the Tripartite Declaration, the Director-General suggested that its benefits should be optimized by extending its scope to social labels.²⁶ He referred to this issue once again in his 1997 report. He considered that the ILO should adopt a proactive attitude towards these voluntary initiatives, by providing for an international inspection system

... under an international labour Convention which, because of its voluntary nature, would allow each State to decide freely whether to give an overall social label to all goods produced on its territory – provided that it accepts the obligations inherent in the Convention and agrees to have monitoring on the spot.²⁷

This proposal was received very reluctantly by the ILO constituents, some of whom saw this as a way of reintroducing social clauses through the back door.²⁸ They were unable to reach a consensus on this issue.

(c) Investor initiatives concerning labour practices of enterprise

Investor initiatives concerning labour practices in enterprise form part of the “socially responsible investment” movement that has recently grown in importance in certain developed countries. Although there is no single accepted definition of this term, it generally indicates investment-related decisions that seek social change while maintaining economic returns. It seems that the idea of social change, however, varies considerably and appears to be based on highly subjective judgements.²⁹

(d) Evaluation of voluntary initiatives

These initiatives have both advantages and disadvantages. The most frequently mentioned advantages include:

- stimulation of social concern among enterprise and consumers;³⁰
- market-based financial (rather than regulatory) incentives to improve labour conditions;³¹

²⁵ *ibid.*, paras. 68-70.

²⁶ *Defending values, promoting change: Social justice in a global economy: an ILO agenda*, Report of the Director-General, ILC, 81st Session, 1994, pp. 64-66.

²⁷ *The ILO standard setting and globalization*, Report of the Director-General, ILC, 85th Session, 1997, p. 31.

²⁸ Doc. GB.270/3/1 (Nov. 1997).

²⁹ Doc. GB.273/WP/SDL/1 (Nov. 1998), para. 82.

³⁰ *ibid.*, para. 80.

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- potential advantages in terms of social progress in countries that have not ratified the corresponding ILO Conventions.³²

The disadvantages regularly mentioned include:³³

- lack of transparency and of participation by the supposed beneficiaries, attributable to the unilateral origin of the initiatives;
- the lack of references to ILS. Only one third of the codes studied by the ILO (out of a total of 215) refer to ILS in general or to the principles enshrined in specific ILO Conventions or recommendations. Only one code referred to the Tripartite Declaration of Principles and one other to the 1998 Declaration;
- the selective nature of the issues dealt with. In the codes reviewed, references to various fundamental labour issues can be estimated as follows: freedom of association and collective bargaining (15 per cent of codes referred to this); forced labour (25 per cent); wage levels (40 per cent); child labour (45 per cent); freedom from discrimination (two-thirds of codes); health and safety (three-quarters of codes). Selectivity of focus and diversity of implementation are particularly notable in the operation of social labels, which are rooted largely in the concerns of consumers, the media and civil society;
- self-definition is frequently used to define the reference criteria for determining good practice. The disparity, in terms of the content of the definitions given, is particularly marked in the case of freedom of association;
- the wide variety of methods of implementation, including internal management systems and external monitoring or inspection, makes it virtually impossible to verify the credibility of the claims made. The lack of standardisation of criteria and procedures for implementation impede the ability to assess the concrete effects of such initiatives, or to compare the outcomes in different enterprises, systems of certification and labelling programmes;
- the possible discriminatory effect of social labels on producers in developing countries, who face heavy constraints, particularly financial ones, in having to obtain certificates of compliance.

(3) Framework agreements

Unlike codes of conduct, framework agreements are negotiated between multinational enterprises and international workers' organizations and include a joint mechanism for monitoring their application. They often stipulate that they must not take the place of collective bargaining at local or national level – which must continue to take priority – but that they are designed instead to encourage greater respect for freedom of association and collective bargaining at those levels by ensuring compliance with fundamental rights and

³¹ *ibid.*.

³² *ibid.*, para. 129.

³³ Doc. GB.273/WP/SDL/1(Add.1) (Nov. 1998), paras. 3-5.

principles on all the sites of the enterprise in question. They sometimes cover the entire production chain, including the enterprise's subsidiaries, suppliers and sub-contractors.³⁴

Framework agreements were used for the first time in 1985, when Danone and the International Union of Food, Agriculture, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) started negotiations which led to the adoption of five agreements between 1989 and 1997.³⁵ Since then, 25 multinationals have concluded framework agreements with the international workers' organizations concerned, with a notable increase in 2002 and 2003, when almost 50 per cent of the agreements were signed.³⁶

The obvious advantage of these framework agreements is their broad scope, which means that establishments that remain reluctant to apply fundamental rights at work can be forced to recognize them and apply them. Since they are a relatively new phenomenon, framework agreements are naturally viewed rather cautiously by some employers. For example, the International Organization of Employers recommends that businesses should bear in mind all the consequences that the conclusion of these agreements might bring, including legal consequences. The Secretary-General of this Organization notes with concern that agreements requiring companies to comply with fundamental rights and principles at work are likely to shift responsibility for application and compliance from governments to individual businesses.³⁷

C. Bretton Woods institutions

It was at the World Summit in Copenhagen in 1995 that the ILO was recognized by the whole of the international community as the agency responsible for defining universal social rules. This recognition, which has been reaffirmed on many occasions since then, gave the ILO a solid basis for strengthening its ties with the Bretton Woods institutions.³⁸

³⁴ In some cases suppliers may have their contracts cancelled if they breach the provisions of the agreement.

³⁵ These agreements related to respect for trade union rights and the right to collective bargaining; managing the impact of changes in the enterprise employment strategy; gender equality in enterprise; professional training; and access to economic and social information with a view to collective bargaining. The 1997 agreement setting out the principles which enterprises undertake to respect "in the event of work changes affecting jobs or working conditions" has enabled a biscuit production plant to continue its operation in Hungary despite the ongoing restructuring of the sector.

³⁶ These are: Accor (hotels), Danone (foodstuffs), Ikea (furniture), Statoil (oil), Faber Castell (furniture), Freudenberg (chemicals), Hochtief (construction), Carrefour (distribution), Chiquita (agriculture), Ote Telecom (telecommunications), Skanska (construction), Telefonica (telecommunications), Merloni (metallurgy), Endesa (electricity), Ballast Nedam (construction), Fonterra (dairy products), Volkswagen (automobiles), Norkse Skog (paper), AngloGold (mining), Daimler Chrysler (automobiles), Eni (energy), Iss (property), Leoni (automobiles), Del Monte (foodstuffs) and Interbrew (foodstuffs).

³⁷ "Update on global agreements", in *European Industrial Relations Review*, No. 353, June 2003, pp. 26-30.

³⁸ For example, States which took part in the International Conference on Financing for Development in Monterrey in March 2002 said that they supported the ILO and urged it to continue its work on the social dimension of globalisation in order to strengthen the useful role which the global economic system plays in promoting development (UN off. doc. A/CONF.198/3 (1 Mar. 2002), para. 64).

The question of the social repercussions of “structural adjustments”³⁹ and the role that the ILO should play initially formed the focus of the ILO’s relations with the Bretton Woods institutions. Following the World Summit, the ILO’s collaboration with them was extended to broader economic issues to do with globalization and economic growth, and to a whole series of social issues and labour market problems,⁴⁰ the importance of enhanced institutional dialogue being felt particularly keenly after the crisis in Asia and Russia. Furthermore, from the ILO’s point of view, this cooperation is particularly important since the World Bank and the IMF have for several years been investing in fields which had previously come under the mandate of the ILO alone. The message which the ILO is trying to get across to these institutions is mainly about employment, respect for fundamental workers’ rights and the promotion of social dialogue.

Before looking at the forms of cooperation and specific measures undertaken in this context (3), it would first be appropriate to describe the policy of the financial institutions in some of the fields under the ILO’s mandate (1). This policy directly impacts on the positions adopted by the Worker and Employer members of the ILO, particularly as regards links with those institutions (2).

1. Positions of the Bretton Woods institutions on some of the ILO’s strategic objectives

The following is an analysis of the positions of the Bretton Woods institutions on the issues of fundamental workers’ rights, employment and social protection.

(a) Fundamental workers’ rights

An ILO document from 1996 notes the important gaps and divergences that remain between the World Bank and the ILO, particularly regarding “the importance of freedom of association and the right to collective bargaining as fundamental workers’ rights, the level of collective bargaining and its role as an ‘alternative’ to legal regulation”.⁴¹ The ILO also points out that approach of the Bretton Woods institutions on labour standards has been far from consistent or uniform. On the one hand, the IMF has supported fundamental labour standards and has promoted them in countries hit by the financial crisis in Asia, such as the Republic of Korea and Indonesia. The World Bank, on the other hand, favours applying only those standards which it feels are economically justified, such as those relating to child labour, forced labour and gender discrimination. It takes a more conservative view on freedom of association and the right to collective bargaining, which it feels have broader economic and political implications.⁴²

(b) Employment

The policy pursued by the Bretton Woods institutions seems to devote scant attention to employment issues. This is clear from the lack of measures to compensate for the

³⁹ The term “structural adjustment” or “structural adaptation” refers to the draconian economic reform and stabilization programmes carried out under the aegis of the World Bank and the IMF, which highly indebted developing countries are forced to adopt in order to solve their problems: doc. GB.261/ESP/1/1 (Nov. 1994), para. 2.

⁴⁰ Doc. GB.267/ESP/2 (Nov. 1996), paras. 1-2.

⁴¹ *ibid.*, para. 15.

⁴² Doc. GB.276/ESP/5 (Nov. 1999), annex.

repercussions, in terms of jobs, of the structural adjustment programmes⁴³ or strategies to combat poverty, most of which make no mention of employment issues.⁴⁴ Conversely, the creation of jobs which respect fundamental workers' rights is one of the ILO's central concerns and forms one of the pillars of decent work.⁴⁵

(c) Social protection

An ILO document from 1994 notes that the World Bank in particular and the IMF have taken a closer interest in social protection issues in the context of structural adjustment. The ILO's line is that "fundamental economic restructuring should be accompanied by a review of the social protection system as a whole, and not merely by the establishment of a short-term safety net to alleviate the immediate possible adverse effects of vulnerable groups".⁴⁶ Measures taken in this field will be examined below.

2. *Positions of the social partners on relations between the ILO and the financial institutions*

Both the worker and the employer members are in favour of stepping up dialogue and cooperation between the ILO and the financial institutions. However, their report on the situation highlights different and even divergent aspects. On the one hand, the workers note that:

- dialogue with the financial institutions is not an end in itself and should result in social aspects being taken into account in the structural adjustments, which does not always appear to be the case;⁴⁷
- the Asian crisis has seriously called into question the methods adopted by the two Bretton Woods institutions, and it is a unique opportunity for the ILO to devise appropriate reforms and to reaffirm its authority on issues of employment and labour;⁴⁸
- the World Bank's position on labour standards is worrying;⁴⁹
- the interest shown by the financial institutions in the ILO's concerns is very encouraging, but must not lead to a reduced role for the ILO;⁵⁰
- there is a dangerous gap between the theory formulated by the institutions and practice on the ground;⁵¹ and

⁴³ Doc. GB.261/ESP/1/1 (Nov. 1994).

⁴⁴ Doc. GB.285/ESP/2 (Nov. 2002), para. 21.

⁴⁵ See in particular doc. GB.286/ESP/1 (Mar. 2003).

⁴⁶ Doc. GB.261/ESP/1/1 (Nov. 1994), para. 39.

⁴⁷ Doc. GB.267/10 (Nov. 1996), para. 28.

⁴⁸ Doc. GB.273/9 (Nov. 1998), para. 12.

⁴⁹ Doc. GB.276/11 (Nov. 1999), para. 82.

⁵⁰ Doc. GB.279/13 (Nov. 2000), para. 8; doc. GB.282/9 (Nov. 2001), para. 72.

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- the World Bank and the IMF are still failing to fulfil their commitments, and it is essential for the ILO to be given greater financial and technical resources.⁵²

For their part, the employer members instead want:

- the ILO to put greater emphasis on the changes promoted by the Bretton Woods institutions;⁵³
- questions to be asked, following the Asian crisis, about how effective the ILO's measures are and the possibility of considering other measures to strengthen the impact of its actions on the ground.⁵⁴

Furthermore, they think that:

- the activities of the financial institutions should not be made subject to compliance with ILS, which are a matter for the ILO and the governments;⁵⁵
- a close link between standards and the Bretton Woods institutions' programmes to combat poverty⁵⁶ would be equivalent to a form of conditionality which is felt to be unacceptable;⁵⁷ and
- it would be desirable to increase the ILO's financial and technical resources in order to enable the programmes combating poverty to be implemented effectively.⁵⁸

3. Forms of cooperation designed to encourage the Bretton Woods institutions to take greater account of the ILO's values

There are forms of cooperation at both institutional and operational levels. At institutional level, the ILO is consulted about the preparation of World Bank and IMF reports, giving it the opportunity to influence the messages sent out by these reports about the ILO's main spheres of competence: ILS, including fundamental workers' rights, the economic role of peaceful industrial relations and the usefulness of public intervention where the free play of market mechanisms does not produce fair results.⁵⁹ The ILO also attends the annual meetings of the World Bank (since 1994) and the IMF (since 1995) as

⁵¹ Doc. GB.279/13 (Nov. 2000), para. 8.

⁵² Doc. GB.285/13 (Nov. 2002), para. 76.

⁵³ Doc. GB.267/10 (Nov. 1996), para. 31.

⁵⁴ Doc. GB.273/9 (Nov. 1998), para. 9.

⁵⁵ Doc. GB.276/11 (Nov. 1999), para. 83.

⁵⁶ See *infra*.

⁵⁷ Doc. GB.279/13 (Nov. 2000), para. 6; doc. GB.282/9 (Nov. 2001), para. 70.

⁵⁸ Doc. GB.285/13 (Nov. 2002), para. 77.

⁵⁹ Since 1995 the ILO has published an annual report on labour in the world (world labour report), which forms the basis for useful dialogue on the main basic questions arising from these two reports.

an official observer.⁶⁰ This should enable it to have closer ties with these organizations when measures are taken, particularly in the follow-up to the World Summit,⁶¹ and it should make it easier to align the organizations' policies by identifying common problems more clearly.⁶² The World Bank and the IMF are invited to the ILC every year. Lastly, technical information meetings on ILS are organized periodically, to which officials of the World Bank and the IMF are invited. These meetings are designed to ensure that their activities achieve a desired level of compatibility with ILS.

Operational cooperation has mainly taken the form of partnership in the fight against poverty. Following the 1999 financial crisis, the World Bank and the IMF refocused their policy on combating poverty, and a new global method for achieving this was defined. The method is based on the development of frameworks to combat poverty, in which "economic, financial, structural and social issues must be addressed equally in an integrated framework", putting countries themselves "firmly in the driver's seat with respect to policies and programmes affecting them, and where the ultimate objective will be the eradication of poverty. National ownership of this process will be supported with assistance for improved governance and strengthened participatory approaches".⁶³ Most OECD member States have agreed to base their aid programmes for low-income countries on this process.⁶⁴ The ILO's strategy is to work with the tripartite representatives so that: (a) the issues of job creation and decent work are included as specifically stated aims in all poverty reduction strategies, and (b) social dialogue is promoted through the involvement of the social partners as a contribution towards closer national monitoring of programmes and a stronger participatory process.⁶⁵ For the ILO, the idea is to ensure that decent work is more systematically included as a poverty reduction strategy when PRSPs are developed.⁶⁶

4. Examples of measures taken by the ILO in cooperation with the Bretton Woods institutions

Five groups of measures have been carried out by the ILO in cooperation with the international financial institutions. First of all, the ILO and the World Bank have worked together on "employment-intensive forms of work", which has enabled the ILO

⁶⁰ Since 1999 the ILO has attended related joint meetings of the IMF's Development Committee and International Monetary and Financial Committee.

⁶¹ See *infra*.

⁶² Doc. GB.279/ESP/1 (Nov. 2000), para. 3.

⁶³ Doc. GB.276/ESP/5 (Nov. 1999), para. 12. This approach is applied in practice through Poverty Reduction Strategy Papers which describe countries' economic, social and political policies and programmes over a period of three years or more.

⁶⁴ Doc. GB.285/ESP/2 (Nov. 2002), para. 8.

⁶⁵ Doc. GB.279/ESP1 (Nov. 2000), paras. 10-12; doc. GB.282/9 (Nov. 2001), para. 69.

⁶⁶ In order to ensure that Decent Work is included more systematically as a poverty reduction strategy, since 2001 the ILO has developed a Global Employment Agenda, which aims to place employment at the heart of economic and social policy in States and to promote the creation of productive and decent jobs. This is a response to the request to the ILO at the World Summit to assume a key role in the employment field: doc. GB.286/ESP/1 (Mar. 2003).

... to influence investment policies so as to maximize their impact on employment generation and poverty alleviation; to promote the capacity of the private sector to implement labour-based works programme while respecting relevant labour legislation and standards; and to demonstrate the cost-effectiveness of labour-intensive methods.⁶⁷

Second, there has been practical cooperation on certain forms of “conditional investment”. The World Bank has adopted a joint policy for the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC), under which they are not allowed to support projects based on forced labour or child labour⁶⁸ and projects must be compatible with the national legislation of the host country, including texts which protect fundamental labour standards and treaties relating to them which the host countries have ratified.⁶⁹

Third, the Bank has drawn up, in consultation with the ILO, a computer “toolkit” on fundamental labour standards for its staff to use.⁷⁰

Fourth, the two organizations have worked together to draw up analyses for individual countries as part of the follow-up to the World Summit. The aim of these analyses is to help States to define and implement suitable policies and programmes to promote the aim of full employment while fully respecting workers’ rights. For the ILO, this involves looking in detail at the measures taken by the countries studied and the reforms adopted recently to promote employment and sustainable subsistence methods. Seven countries (Chile, Hungary, Nepal, Indonesia, Mozambique, Zambia and Morocco) were chosen.⁷¹

Finally, the World Bank and the ILO work together in the context of the strategic frameworks on poverty reduction, which have been seen as a unique opportunity to strengthen the partnership between the Bretton Woods institutions and the ILO, particularly by taking account of the priorities of the Decent Work Agenda in the development of the frameworks, and through the ILO’s involvement in implementing pilot projects in individual countries.⁷² The ILO has monitored five pilot countries (Cambodia, Honduras, Mali, Nepal and Tanzania). Assessing experience with the PRSPs, an ILO document found that: (a) not enough attention was given to equity as compared with growth; (b) the social partners and the Labour Ministries often face difficulties in taking part in PRSPs; (c) that few PRSPs contain a detailed analysis of the labour market, employment and all the rights which define decent work. The World Bank tends to make little reference to the ILO documentation on standards.⁷³ Aspects relating to decent work are taken into greater account in the five pilot projects with which the ILO is more directly

⁶⁷ Doc. GB.267/ESP/2 (Nov. 1996), para. 24.

⁶⁸ The other fundamental rights, including freedom of association and combating discrimination in employment, are ignored.

⁶⁹ Doc. GB.273/ESP/6 (Nov. 1998), para. 14; doc. GB.282/ESP/3 (Nov. 2001), para. 21.

⁷⁰ Doc. GB.282/ESP/3 (Nov. 2001), para. 21.

⁷¹ These countries are regarded as a representative sample since they are in different regions and have different sizes and development levels. Doc. GB.267/ESP/1 (Nov. 1996), para. 4.

⁷² Doc. GB.285/ESP/2 (Nov. 2002), para. 21.

⁷³ *ibid.* For a detailed analysis of the ILO’s involvement in the PRSPs, see *Working out of poverty*, Report of the Director-General, ILC, 91st Session, 2003, pp. 99-100.

associated.⁷⁴ In 2002, the ILO's constituents stressed the importance of including in PRSPs the specific problems presented by the informal economy.⁷⁵

Other measures, including those relating to the reform of the social security systems, have also been undertaken. The ILO has established dialogue with the World Bank,⁷⁶ which has been accompanied by close cooperation on technical assistance projects for individual countries, and by the development of a quantitative global method for evaluating the financial, budgetary and economic impact of systems of social protection.⁷⁷ These measures seem to take less account of the normative dimension, however.

D. World Trade Organization (WTO)

Relations between the ILO and the WTO largely revolve around the question of links between trade liberalisation and social progress. This issue was examined at the ILO during the debate on the social clause in the 1990s,⁷⁸ when discussions within GATT were still ongoing. A special working party was set up within the ILO's Governing Body to discuss the social dimension of international trade.⁷⁹ Its mandate was essentially to look at two issues: first, the scope for and ways of linking ILO standards and GATT procedures;⁸⁰ and second, the impact of trade liberalization on the attainment of the ILO's objectives, and the measures to be taken.⁸¹ From 2000 onwards the working party has focused above all on issues to do with the social dimension of globalization, such as the links between fundamental rights, particularly freedom of association, and development, poverty reduction and decent work. At its November 2001 session the Governing Body decided to

⁷⁴ *ibid.*, (Nov. 2002), paras. 22-33.

⁷⁵ The ILO constituents also stressed that it is essential to work with the Bretton Woods institutions in order to avoid duplication of effort, to identify responsibilities and to divide them up, with the ILO taking the lead here: conclusions on Decent Work and the informal economy, Committee on the Informal Economy, *Provisional Record No. 25*, ILC, 90th Session, 2002, para. 37(j) and (r).

⁷⁶ As part of the STEP project (Strategies and tools against social exclusion and poverty), an official from the ILO is responsible in Washington for promoting cooperation with the Bretton Woods institutions and the Inter-American Development Bank.

⁷⁷ Doc. GB.267/ESP/2 (Nov. 1996), paras. 30-31.

⁷⁸ The dictionary of public international law defines the social clause as follows: "*Disposition introduite dans les accords régionaux de commerce ou l'accord instituant l'Organisation mondiale du commerce (OMC) prévoyant le recours à des mesures de réaction, telles que restrictions commerciales ou retrait de préférences commerciales, dans le cas de non-respect de droits fondamentaux du travail.*" ["Provision included in regional trade agreements or the agreement establishing the World Trade Organisation (WTO) providing for the use of reactive measures such as trade restrictions or the withdrawal of trade preferences, where fundamental rights at work are not respected."] (*Dictionnaire de droit international public*, Brussels, Bruylant, 2001, p. 186).

⁷⁹ This working party was set up following the discussion on the future of the ILO's standards-related activities in the face of the globalisation of international trade, an issue raised in the Director-General's report at the ILC's 81st Session: *Defending values, promoting change*, Report of the Director-General, ILC, 81st Session, 1994, pp. 41-68.

⁸⁰ In other words, whether it was appropriate to introduce a social clause.

⁸¹ Doc. GB.261/WP/SDL/1 (Nov. 1994).

set up a World Commission on the Social Dimension of Globalization,⁸² made up of independent experts and given the task of presenting a report on the social dimension of globalization, which should be available in January 2004.

1. The social clause

The social clause was the subject of extremely heated debate in the ILO and was fairly quickly abandoned when it was realised that there were insurmountable differences of interest between the constituents. The ILO's three groups agree that respect for fundamental rights must be universally guaranteed – and cannot therefore depend on a country's level of development –, and they agree on the substance of those fundamental rights. Conversely, there were clear differences between the three groups on the need to establish a binding link, in other words one that incurred sanctions, between respect for internationally recognized workers' rights and trade liberalisation. On the one hand, the workers and the governments of certain developed countries supported the introduction of such a clause, for different reasons. Some claimed that the social clause was a way of ensuring that all countries involved in trade would respect fundamental rights, while others claimed that it would combat the unfair comparative advantage that countries with low labour costs enjoy. The employers and the governments of developing countries, on the other hand, were radically opposed to the social clause, again for very different reasons. The employers regarded it as an unacceptable restriction on trade and felt that it went beyond the ILO's mandate, while the developing countries unanimously argued that sanctions were being introduced solely for protectionist reasons, albeit disguised.⁸³

2. Impact of trade liberalization on the ILO's objectives

The working party focused its investigations on the impact of trade liberalization on the attainment of the ILO's objectives, particularly in the context of a globalized economy. Its work identified the main problems which the opening up of the markets presented for the Organization, and the solutions that should be considered. The ILO's efforts to ensure that globalization had a social dimension were targeted on promoting an optimum alignment between the economic growth associated with trade liberalization, and social progress. The response of the ILO's constituents to this attempted alignment was given in the 1998 Declaration, which establishes a core group of fundamental rights and principles at work which are recognized by the international community as a prerequisite for all economic progress. Another option explored for translating the economic progress generated by trade liberalization into social progress was to mobilize non-governmental actors, particularly through social labelling.⁸⁴ As mentioned, this has been only partly successful. Lastly, studies on individual countries have also been carried out in order to examine the social impact of globalization.⁸⁵

⁸² Doc. GB.283/WP/SDG/3(Corr.) (Mar. 2002).

⁸³ Doc. GB.261/WP/SDL/RP (Nov. 1994); doc. GB.262/WP/SDL/RP (Mar.-Apr. 1995).

⁸⁴ Note paragraph 5 of the Declaration, which specifically states 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".

⁸⁵ Doc. GB.276/WP/SDL/1 (Nov. 1999).

3. *ILO cooperation with the WTO*

At the WTO Ministerial Conference in December 1996 in Singapore, the ILO's authority in the field of fundamental labour standards was specifically recognized.⁸⁶ Under the Singapore Declaration the members of the WTO, most of which are also members of the ILO, undertook to respect fundamental labour standards and to support the ILO, and they affirmed that trade made it easier to promote better labour standards. However, they were against using ILS for protectionist purposes, and they agreed that the comparative advantage of countries must in no way be called into question.⁸⁷ Following this Ministerial Declaration, the WTO was given observer status in the ILC and the ILO's Governing Body, and it was arranged for the two institutions to exchange documents and for there to be informal cooperation between their secretariats.⁸⁸ The ILO does not have official observer status at the WTO, but nevertheless has a standing invitation to attend the Ministerial Conferences, as it did at Doha (2001) and Cancun (2003).

⁸⁶ The full text of the corresponding paragraph is as follows: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration." Singapore Ministerial Declaration, 1996 (para. 4). See document GB.268/WP/SDL/1/3, Corr. and Add. 1 (Mar. 1997). This declaration was renewed at the Doha Ministerial Conference in 2001 (see in particular para. 8 of the Declaration).

⁸⁷ See doc. GB.268/WP/SDL/1/3 (Mar. 1997) and Declaration of the WTO representative: doc. GB.277/16 (Mar. 2000).

⁸⁸ Doc. GB.270/WP/SDL/1/1 (Nov. 1997), para. 26.

VII. Informal economy

The expression “informal sector” appeared for the first time in the early 1970s in an ILO report on employment in Kenya.¹ In 1991, it was the subject of a report by the Director-General entitled “The dilemma of the informal sector”.² Then, the problem of the informal sector was seen as a dilemma for politicians and workers’ and employers’ organizations: should the informal sector be promoted as a practical and economic way of absorbing labour that was not employable elsewhere, or should efforts be made instead to bring it within the scope of regulation and protection, at the risk of compromising its ability to absorb labour? Could the two aims of absorbing labour and providing protection be reconciled?³ The report focused solely on the urban informal sector.⁴ The ILC looked at this issue again during the 2002 General Discussion on decent work and the informal economy,⁵ when the expression “informal sector”, seen as inadequate because it did not reflect the wide range of activities, the dynamism and the complexity of the phenomenon, was abandoned in favour of the term “informal economy”. The problem was therefore no longer approached as a dilemma, but was viewed in terms of the decent work “deficits” encountered by all those working in the “informal economy”.⁶ The concept of decent work implies that “the ILO is concerned with all workers”, regardless of where they work.⁷ The commitment to decent work is anchored in the Declaration of Philadelphia, which enshrines everyone’s right to live in “conditions of freedom and dignity, of economic security and equal opportunity”. This objective applies to both the formal and informal economies.

A. Scale of the informal economy

The report presented at the 2002 General Discussion on decent work and the informal economy states that:

... the bulk of new employment in recent years, particularly in developing and transition countries, has been in the informal economy. Most people have been going into the informal economy because they cannot find jobs or are unable to start businesses in the formal economy.⁸

An ILO study from 2002 shows that, in the developing countries, informal employment accounts for 50-75 per cent of non-agricultural employment (48 per cent in North Africa, 51 per cent in Central America, 65 per cent in Asia and 72 per cent in sub-

¹ *Employment, incomes and equality; a strategy for increasing productive employment in Kenya*, ILO, Geneva, 1975 (original published in English in 1972).

² *The dilemma of the informal sector*, Report of the Director-General, ILC, 78th Session, 1991.

³ *ibid.*, p. 63.

⁴ *ibid.*, p. 4.

⁵ *Decent work and the informal economy*, Report VI, ILC, 90th Session, 2002.

⁶ *ibid.*, p. 4.

⁷ *Decent work*, Report of the Director-General, ILC, 87th Session, 1999, p. 3.

⁸ *Decent work and the informal economy*, Report VI, ILC, 90th Session, 2002, p. 1.

Saharan Africa). When the agricultural sector is included in the statistics, the informal employment rate can be up to 90 per cent. Most informal workers are self-employed. As a percentage of all informal workers, they number 60 per cent in Latin America and Asia, 62 per cent in North Africa and 70 per cent in Africa. Employed informal work is also widespread, accounting for 30-40 per cent of informal employment in the developing countries. In the developed countries atypical employment (self-employment, fixed-duration, part-time) represents 30 per cent of employment in the countries of the European Union and 25 per cent in the USA. Even though not all atypical work is necessarily informal, the majority do not receive the benefits and protection derived from a traditional employment relationship. In the USA, for example, less than 20 per cent of regular part-time workers have sickness insurance or a pension under their employment contract.⁹ These statistics provide convincing evidence that the ILO needs to devote special attention to workers in the informal economy.

B. Characteristics of informal jobs and workers

It was clear from the discussion in the ILC in 2002 that all speakers agreed that the informal economy has far more disadvantages than advantages. However, the social partners do not share exactly the same views. For the Workers' group, the informal economy has no advantages at all, whereas for the Employers' group it has a number of considerable positives. The tripartite conclusions adopted by the Committee on the Informal Economy in June 2002 set out the characteristics of the informal economy. These are attached in Annex 24. In brief, the informal economy refers to

... all economic activities – in law or in practice – not covered or insufficiently covered by formal arrangements. These activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that, although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.¹⁰

Workers in the informal economy cover wage workers and those working for their own account. The Committee points out that:

... most own-account workers are as insecure and vulnerable as wage workers and move from one situation to the other. Because they lack protection, rights and representation, these workers often remain trapped in poverty.¹¹

The informal economy absorbs workers who would:

⁹ The issue of new forms of employment relationships has been the subject of major studies by the ILO in recent years. The complexity of the issue was evident from the difficult discussions held in the ILC in 1997. See *Contract labour*, report by the Committee on Contract Labour, Provisional Record No. 18, ILC, 85th Session, 1997. See also the work of the group of experts who met in 1999: Meeting of Experts on Workers in Situations Needing Protection, doc. MEWNP/2000/4(Rev.) (Nov. 2000). In 2003, a general discussion was held in the ILC on the question of the scope of the employment relationship. It resulted in the adoption of a resolution and conclusions: "Conclusions concerning the employment relationship", Committee on the Employment Relationship, *Provisional Record* No. 21, ILC, 91st Session, 2003, pp. 51-57 (Annex 23).

¹⁰ "Conclusions concerning decent work and the informal economy", Committee on the Informal Economy, *Provisional Record* No. 25, ILC, 90th Session, 2002, para. 3 (Annex 24).

¹¹ *ibid.*, para. 4.

... otherwise be without work or income, especially in developing countries that have a large and rapidly growing labour force, for example in countries where workers are made redundant following structural adjustment programmes. Most people enter the informal economy not by choice but out of a need to survive.¹²

In terms of decent work, the members of the Committee on the Informal Economy agree that

... workers in the informal economy are not recognized, registered, regulated or protected under labour legislation and social protection, for example when their employment status is ambiguous, and are therefore not able to enjoy, exercise or defend their fundamental rights. Since they are normally not organized, they have little or no collective representation vis-à-vis employers or public authorities. Work in the informal economy is often characterised by small or undefined workplaces, unsafe and unhealthy working conditions, low levels of skills and productivity, low or irregular incomes, long working hours and lack of access to information, markets, finance, training and technology. Workers in the informal economy may be characterised by varying degrees of dependency and vulnerability.¹³

More precisely, in terms of social protection, although they are particularly exposed to risk, workers in the informal economy are almost completely unprotected:

Beyond traditional social security coverage, workers in the informal economy are without social protection in such areas as education, skill-building, training, health care and childcare, which are particularly important for women workers. The lack of social protection is a critical aspect of the social exclusion of workers in the informal economy.¹⁴

To sum up, the informal economy is characterised by poverty, exclusion and vulnerability. Women, young people, immigrants and older workers are the main victims of the decent work deficit.

C. Measures planned to reach the informal economy

In the conclusions adopted by the Committee on the Informal Economy, the ILO constituents recognize that promoting decent work for all workers in the informal economy, both male and female, requires a broad strategy aimed at:

... realizing fundamental principles and rights at work; creating greater and better employment and income opportunities; extending social protection; and promoting social dialogue. These dimensions of decent work reinforce each other and comprise an integrated poverty reduction strategy.¹⁵

From the outset the members of the Committee agree that:

... to promote decent work, it is necessary to eliminate the negative aspects of informality while at the same time ensuring that opportunities for livelihood and entrepreneurship are not

¹² *ibid.*, para. 6. We must not overlook the fact that in situations of high unemployment, the informal economy is a potential source of job-creation. The problem is that these jobs only rarely meet the requirements of decent work. In addition, the informal economy is a way of meeting the needs of poor consumers by offering cut-price goods and services.

¹³ *ibid.*, para. 9.

¹⁴ *ibid.*, para. 10.

¹⁵ *ibid.*, para. 2.

destroyed, and promoting the protection and incorporation of workers and economic units in the informal economy into the mainstream economy. Continued progress towards recognized, protected decent work will only be possible by identifying and addressing the underlying causes of informality and the barriers to entry into the economic and social mainstream.¹⁶

The measures considered by the Committee concern governments, workers' and employers' organizations and the ILO.

According to the Committee, informality is largely a question of governance and inappropriate macro-economic and social policies. It is therefore first and foremost a matter for the governments.¹⁷ Furthermore, it is essential that governments should establish legal and institutional frameworks to cover workers and enterprises in the informal economy.¹⁸ In this context the Committee stresses that the 1998 Declaration and fundamental labour standards must apply as much to the informal economy as to the formal economy. The Committee points out that:

... legislation is an important instrument to address the all-important issue of recognition and protection for workers and employers in the informal economy. All workers, irrespective of employment status and place of work, should be able to enjoy, exercise and defend their rights as provided for in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up and the core labour standards.¹⁹

The Committee points out that the implementation and enforcement of these rights should be supported by "improved systems of labour inspection and easy and rapid access to legal aid and the judicial system".²⁰ These legal frameworks should also protect freedom of association, thus allowing workers to organize freely, and it is therefore up to the governments to establish a framework which enables workers to exercise their rights to representation.²¹ Government policies and programmes must focus on integrating workers in the informal economy into the formal economic and social system, so that they are brought within the scope of the legal and institutional framework.

For their part, the workers' and employers' organizations should work to improve representation in the informal economy.²² Lastly, the Committee sets out a series of measures that should be taken by the ILO, stressing that they must seek to integrate

¹⁶ *ibid.*, para. 13.

¹⁷ Macroeconomic policies, including policies on structural adjustment, economic restructuring and privatization, which were not sufficiently focused on employment, have destroyed jobs or have not created enough new jobs in the formal economy. *ibid.*, para. 14.

¹⁸ Wrongly defining a wage earner or worker may mean that he is classified as equivalent to a self-employed worker and is thus excluded from the protection of labour legislation. *ibid.*, para. 16.

¹⁹ *ibid.*, para. 22.

²⁰ *ibid.*, para. 30.

²¹ In his 2003 report, the Director-General stresses the importance of dialogue with various types of representative organizations in order to remedy the failings of governance. *Working out of poverty*, Report of the Director-General, ILC, 91st Session, 2003, pp. 72-75.

²² "Conclusions concerning decent work and the informal economy", Committee on the Informal Economy, *Provisional Record* No. 25, ILC, 90th Session, 2002, paras. 33-34.

workers and economic units in the informal economy into the formal economy.²³ The ILO should give priority to helping governments to formulate laws and establish the necessary institutions.

D. Informal economy and social security

Although the Declaration of Philadelphia mentions extending social security as one of the priorities to be achieved by the ILO member States, only one in five people in the world has adequate cover and more than half of the world's population has no social protection at all. As mentioned, it is often workers in the informal economy who do not have access to the formal machinery of social protection. ILS on social security are based on the idea that “an increasing proportion of the labour force in developing countries would end up in formal sector employment or self-employment covered by social security”.²⁴ Their personal and material scope and the level of protection they provide are largely shaped by this initial assumption, but it has not turned out to be the case. In June 2001 the ILO constituents reached a new consensus on social security.²⁵ They agreed that absolute priority had to be given to devising policies and initiatives that would be likely to extend the benefits of social security to those not covered by the current system. They also agreed on the following basic principles that should guide the implementation of this priority:

1. social security is very important for the well-being of workers, their families and the community as a whole;²⁶
2. social security, if well managed, promotes productivity by providing health care, a secure income and social services;²⁷
3. there is no ideal model of social security;²⁸
4. for those of working age, the best way to obtain a secure income is to have decent work;²⁹

²³ *ibid.*, para. 37.

²⁴ *Decent work and the informal economy*, Report VI, ILC, 90th Session, 2002, p. 56.

²⁵ “Conclusions concerning social security”, report of the Committee on Social Security, CRP 16, ILC, 89th Session, 2001, Annex 25.

²⁶ *ibid.*, para. 2.

²⁷ *ibid.*, para. 3.

²⁸ However, the Committee points out that: “The State has a priority role in the facilitation, promotion and extension of coverage of social security. All systems should conform to certain basic principles. In particular, benefits should be secure and non-discriminatory; schemes should be managed in a sound and transparent manner, with administrative costs as low as practicable and a strong role for the social partners. Public confidence in social security systems is a key factor for their success.”: *ibid.*, para. 4.

²⁹ According to the Committee, “the provision of cash benefits to the unemployed should therefore be closely coordinated with training and retraining and other assistance they may require in order to find employment”: *ibid.*, para. 7.

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5. the policies applied by the States should encourage a movement towards the formal economy. It is for society as a whole to finance support for vulnerable groups in the informal economy.³⁰
 6. social security should be based on the principle of equality between men and women, and should promote that principle;³¹
 7. in the context of the basic principles described earlier, every country should define a national strategy for achieving the objective of social security for all. This should be closely linked to the strategy it has adopted on employment and its other social policies³²

Furthermore, many developing countries face a crucial challenge in having to strengthen their social protection systems in order to cope with the HIV/AIDS pandemic. Finally, the Committee recommends that the ILO should continue to develop inter-institutional cooperation on social security.³³

In June 2003, the ILO launched a global campaign whose overall objective is to extend social security to those who are not covered, and to give everyone access to health care and a secure income.

³⁰ *ibid.*, para. 6. The conclusions of the Committee on the Informal Economy also state that: “Governments have a lead responsibility to extend the coverage of social security, in particular to groups in the informal economy which are currently excluded. Micro-insurance and other community based schemes are important but should be developed in ways that are consistent with the extension of national social security schemes. Policies and initiatives on the extension of coverage should be taken within the context of an integrated national social security strategy”: “Conclusions concerning decent work in the informal economy”, Committee on the Informal Economy, *Provisional Record* No. 25, ILC, 90th Session, 2002, para. 29.

³¹ “Conclusions concerning social security”, report of the Committee on Social Security, *Provisional Record* No. 16, ILC, 89th Session, 2001, paras. 8-10. The Committee particularly points out that: “As a result of the vastly increased participation of women in the labour force and the changing roles of men and women, social security systems originally based on the male breadwinner model correspond less and less to the needs of many societies. Social security and social services should be designed on the basis of equality of men and women.”

³² *ibid.*, para. 16.

³³ *ibid.*, para. 21.