



SECOND ITEM ON THE AGENDA

**Date, place and agenda of the 91st
Session (2003) of the Conference****Contents**

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Appendix: GB.279/5/2

Date

1. *In accordance with the provisions adopted by the Governing Body at its 254th Session (November 1992),¹ it is proposed that the 91st Session (2003) of the International Labour Conference should open on Tuesday, 3 June 2003.*

Place

2. *It is proposed that the session be held in Geneva.*

Agenda

3. At its 91st Session (2003) the Conference will have before it the following standing items:
 - Reports of the Chairperson of the Governing Body and the Director-General.
 - Programme and Budget proposals for 2004-05 and other financial questions.
 - Information and reports on the application of Conventions and Recommendations.
4. The agenda of the 90th Session (2002) of the Conference, as determined by the Governing Body at its 279th Session (November 2000), includes the following four items:
 1. Promotion of cooperatives (*standard setting, second discussion*).
 2. Recording and notification of occupational accidents and diseases, including the possible revision of the ILO list of occupational diseases (*standard setting, single discussion*).
 3. Informal sector (*general discussion*).
 4. Withdrawal of 20 Recommendations (*withdrawal*).
5. This paper is submitted to the Governing Body as a basis for its re-examination and selection of items for the agenda of the 91st Session (2003) of the Conference. The agenda of the 90th Session (2002) does not include any standard-setting item calling for a second discussion in 2003. According to practice the Conference can deal with three technical items at the same session. The proposals submitted for consideration below include one item proposed for standard setting. In the case of the four remaining items the Governing Body is offered to choose between one item proposed either for standard setting or for a general discussion that could result in future standard setting, one item proposed for general discussion that could result in future standard setting, one item proposed for an integrated analysis in one subject area which would result in a plan of action, including a plan for future ILO standard-setting activities, and finally one item for general discussion.
6. At its 279th Session in November 2000, the Governing Body held an initial discussion on proposals for the Conference agenda for the year 2003 on the basis of two documents

¹ GB.254/16/19, para. 5.

prepared by the Office on this question.² It selected a shortlist of items for a more in-depth discussion at the present session, and decided to request law and practice reports, or more detailed proposals, on five subjects:

1. Human resources training and development – Revision of the Human Resources Development Recommendation, 1975 (No. 150) (*standard setting*).
2. The employment relationship (scope) (*standard setting or general discussion*).
3. Migrant workers (*general discussion*).
4. ILO standards-related activities in the area of occupational safety and health: An in-depth study for discussion with a view to the adoption of a plan of action for such activities (*general discussion*).
5. Investment and employment (*general discussion*).

Further developed items

7. Items 1 (Human resources development) and 2 (The employment relationship) have been further developed. Item 1 is a follow-up to the general discussion on human resources development held in June 2000. This proposal was shortlisted for the first time in November 2000 and is submitted for standard setting with a view to the possible adoption of a revised Recommendation. Item 2 was considered by the Governing Body both in March and November 2000 and has been further developed in the light of the discussions in the Governing Body in November 2000.

The integrated approach

8. Item 4 (Integrated approach in the area of occupational safety and health) is a proposal submitted against the background of the discussions in the Governing Body in November 2000 on “Possible improvements in ILO standards-related activities”,³ and on the proposals for the agenda of the 91st Session of the Conference.⁴ The Governing Body decided to adopt a new integrated approach to ILO standards-related activities and to apply this approach for the first time in the area of occupational safety and health. This approach will be applied, as appropriate, to other subject areas which are being developed and will be submitted to the Governing Body for consideration during its 282nd Session (November 2001).
9. As a result of these discussions the Governing Body shortlisted in November 2000 a proposal for an in-depth examination of ILO standards-related activities in the area of occupational safety and health in the context of a general discussion. According to its regular procedure, proposals shortlisted at its November session are examined in more detail at the March session of the Governing Body. The proposal submitted to the

² GB.279/5/1 and GB.279/5/2.

³ GB.279/4.

⁴ GB.279/5/1 and GB.279/5/2.

Governing Body in November 2000⁵ already contained a detailed outline of the proposed content of the new in-depth examination to be undertaken. The details of the proposal presented below therefore focus on the proposed procedure for preparing the Conference discussion rather than the substantive content of the proposal.

Items submitted for renewed consideration

10. The Governing Body selected items 3 (Migrant workers) and 5 (Investment and employment) for closer scrutiny already at its 276th Session (November 1999) in the context of the agenda of the Conference for 2002. These items have thus already been proposed to the Governing Body at its 277th and 279th Sessions (March and November 2000) in this context.⁶ They have remained virtually unchanged since March 2000. Both these proposals are resubmitted with a view to a general discussion. As regards the proposed general discussion on migrant workers one of the points for discussion is the possibility of future standard-setting action.
11. *The Governing Body is accordingly invited to complete the agenda of the 91st Session (2003) of the International Labour Conference in the light of the following proposals:*
 1. *Human resources training and development – Revision of the Human Resources Development Recommendation, 1975 (No. 150) (standard setting).*
 2. *The employment relationship (scope) (standard setting or general discussion).*
 3. *Migrant workers (general discussion).*
 4. *ILO standards-related activities in the area of occupational safety and health: An in-depth study for discussion with a view to the adoption of a plan of action for such activities (general discussion).*
 5. *Investment and employment (general discussion).*

Geneva, 27 February 2001.

Point for decision: Paragraph 11.

⁵ Included in the appendix to this document.

⁶ This question was before the Governing Body on two occasions as it decided in March 2000 to defer the decision until its November 2000 session.

1. Human resources development and training – Revision of the Human Resources Development Recommendation, 1975 (No. 150)

Summary

This paper proposes the development of a new Recommendation on human resources development. Whereas the Human Resources Development Convention, 1975 (No. 142), is still valid, the Human Resources Development Recommendation, 1975 (No. 150), which was adopted together with Convention No. 142, has been overtaken by economic and social developments since 1975, and has in many parts lost its relevance. The proposed Recommendation would be a dynamic and flexible instrument that would be supplemented by a practical, renewable guide to assist member States in implementing its provisions. It would reflect the new approach to training, characterized by efforts to make training respond better to economic demand and social needs, and with a new distribution of roles and responsibilities in human resources development between the State, the social partners and other stakeholders in training. The proposal presents some examples of national law and practice that embody the new approach to training; outlines elements of the proposed new Recommendation; and describes briefly the preparatory work under way. It also proposes a timetable for preparing the new instrument.

Background

12. The conclusions concerning human resources training and development, adopted by the International Labour Conference at its 88th Session (2000)⁷ – hereafter called the Conclusions – confirmed that

human resources development, education and training contribute significantly to promoting the interests of individuals, enterprises, economy and society. By making individuals employable and informed citizens, human resources development and training contribute to economic development and to achieving full employment and promoting social inclusion. They also help individuals gain access to decent work and good jobs, and escape poverty and marginalization. Education and skills formation could lead to less unemployment and to more equity in employment. The economy and society at large, like individuals and enterprises, benefit from human resources development and training. The economy becomes more productive, innovative and competitive through the existence of more skilled human potential. Human resources development also underpins the fundamental values of society – equity, justice, gender equality, non-discrimination, social responsibility and participation.⁸

13. The Conclusions also recognized that human resources development and training were elements of both the economic and social response to globalization, i.e. the various processes that in recent years have accelerated economic integration worldwide. Education and training have a *proactive* function: to assist countries, enterprises and individuals to seize new opportunities offered by globalization, and enhance the competitiveness of enterprises and individuals' productivity and income-earning capacity. But equally important, education and training have a *social* function to address the unwelcome effects of globalization. Although addressing different needs, these two functions nevertheless converge in pointing towards the emergence of knowledge- and skills-based societies, where education and skills largely determine the employment and career prospects of

⁷ International Labour Conference, 88th Session, Geneva, 2000, *Provisional Record* No. 21.

⁸ *ibid.*, para. 1.

individuals, enterprises' competitiveness and, ultimately, the wealth and well-being of nations.

14. While the objectives of human resources development and training have remained largely the same over the years, the context has recently changed fundamentally as witnessed by: the shift to liberal, market-based economies; the upward skill bias of technological change; the increasing insecurity of employment, poverty and social exclusion; and the changing roles and responsibilities in human resources development and training of the State, the social partners and other actors. The potential economic and social benefits of education and training to individuals, enterprises and society are great. However, society, enterprises and individuals have not fully reaped these benefits due to a lack of adequate investment in education and training. To enable everybody to participate fully in the knowledge and skills-based society, rethinking human resources development and training becomes fundamental.

ILO standards and practice

15. The ILO Constitution and the Declaration of Philadelphia recognize the importance of vocational and technical education for the improvement of the conditions of workers. The ILO has developed extensive standard-setting, research, advisory services and technical cooperation activities in the human resources development and training area. The major ILO instruments on human resources development and training are the Human Resources Development Convention, 1975 (No. 142), and Recommendation (No. 150), both adopted in 1975, and the Paid Educational Leave Convention, 1974 (No. 140), and Recommendation (No. 148) of 1974.⁹ Convention No. 142 and Recommendation No. 150 cover most aspects of vocational training and guidance and have replaced various older ILO Recommendations.¹⁰ Convention No. 142, which is rather general, is still considered valid. On the other hand, as pointed out in the Conclusions, "although some aspects of the [Human Resources Development] Recommendation are still valid, others have lost their relevance".¹¹
16. Recommendation No. 150 reflects the planning context of the 1970s. It gives little room for demand and labour market considerations and provides little guidance on contemporary issues that are central to training policy and system reforms introduced in many member States. These issues include: the policy, governance and regulatory framework of training; the need to make training and human resources development better respond to economic demand and social needs, and to develop skills that enhance people's employability, productivity and social inclusion; the need to provide for lifelong learning and training opportunities as individuals' circumstances and learning needs change; the changing role of the stakeholders in human resources development – the State, enterprises, the social partners and also other actors, e.g. civil society, NGOs and the individual – and, in particular, the increased importance of training in the workplace; the means and

⁹ At the present session of the Governing Body both Convention No. 140 and Recommendation No. 148 are being examined in the context of the Working Party on Policy regarding the Revision of Standards. See GB.280/LILS/WP/PRS/2/1 and GB.280/LILS/WP/PRS/3.

¹⁰ Including the Vocational Training Recommendation, 1962 (No. 117), which itself replaced a series of specific standards developed since 1939, particularly the Vocational Training Recommendation, 1939 (No. 57), the Apprenticeship Recommendation, 1939 (No. 60), and the Vocational Training (Adults) Recommendation, 1950 (No. 88).

¹¹ Conclusions, para. 21.

mechanisms for increasing investment in human resources development by the various stakeholders; the shift towards a competence approach to human resources development, often in a context of the development of comprehensive national (and also regional) qualification frameworks; and efforts by many countries to train people for self-employment and ultimately for transforming, for example through human resources development, informal sector work into decent, productive work that is fully integrated into the mainstream economy.

Law and practice

- 17.** Few countries have explicit national human resources development and training policies. Human resources development efforts are often guided by a country's national economic and social development plan or employment policy, often supplemented by sectoral policies, e.g. on education, industry or agriculture. Legal instruments can include the national Constitution that stipulates fundamental rights, including the right and equal access to education and training. Many countries have adopted general laws or regulations relating to training and education in general, or in specific areas such as vocational training, vocational guidance and continuous training and lifelong learning. In recent years these laws have become more promotional than mandatory. They also allow for more flexibility in training provision, which has become necessary in the context of globalization and enterprises' endeavour to raise competitiveness.
- 18.** A major objective of training reforms has been to make training institutions and programmes responsive to economic demand and social needs, rather than to supply considerations. New technologies, particularly the introduction of information and communication technologies, have made it possible to devolve training decision-making and link local training supply better to economic and social needs. In the Emilia-Romagna region in Italy, for example, local stakeholders (e.g. local government, enterprises, the social partners and training institutions) participate in financing and implementing training programmes. Rapid technological and labour market change make skills rapidly obsolete. Individuals need to renew their skills as economic circumstances and needs change. In response, several countries, mostly OECD members, have enacted constitutional guarantees of the right to lifelong learning and many of them, but also other countries such as Benin, Morocco, South Africa and Argentina, have enacted laws to promote and develop lifelong learning actively. Australia has developed a comprehensive national strategy for vocational education and training "A bridge to the future" after extensive consultation with all interested parties. Another important objective of national legislation has been to promote equality of access to training and to target particular groups facing the risk of economic and social exclusion and discrimination. In many developing countries, training institutions and providers increasingly reach out to informal sector entrepreneurs and workers in order to raise their productivity and income-earning capacity.
- 19.** Increasing economic integration has resulted in legislation at the regional level, for example in the European Union, in support of the latter's employment policy. The Union and its Member States have also put into effect a large number of promotional education, training and exchange programmes. These have stimulated new training initiatives at the national, regional and local levels.
- 20.** The transition from a primarily state-controlled, centralized and supply-driven training system to a devolved, more market-driven system has led to a redefinition of the role of the State and other parties involved in training. This transition has been accompanied by the growing need for meaningful and effective dialogue and partnership among the social partners, the State, local government and representatives of civil society. The social partners are assuming a major role in designing, financing and providing training

programmes, often in the context of tripartite or bipartite collective agreements. Many enterprises recognize the strategic role of their human resources for maintaining competitiveness in an increasingly integrated world economy. They consequently invest large sums in staff development and training, which often far exceed any legal obligation. Individuals are also encouraged to invest, in the context of lifelong learning, in their own competence development and self-improvement. In the United Kingdom, for example, a project has encouraged individuals to open a savings account (“skill account”) with a bank and use that money to pay for learning that would help them remain economically active in a rapidly changing labour market. In Sweden, there is a proposal to encourage, by means of tax subsidies, individuals and enterprises to make regular contributions into “individual learning accounts” (IKS) that can then be used for the individual’s competence development. In Denmark, employees may share the costs of training with the enterprise.

Purpose of the proposed new Recommendation

21. A new Recommendation is proposed that would reflect the new approach to training, elements of which have been described in paragraphs 16-20 above. The new Recommendation would replace the existing Human Resources Development Recommendation, 1975 (No. 150). The Conclusions called for “a more dynamic instrument that is more applicable and used by member States and the social partners in formulating and implementing human resources development policies”.¹² The new Recommendation would: (a) assist member States and the social partners in implementing human resources development and training policies as well as programmes that form an integrated part of comprehensive economic, labour market and social policies and programmes for economic growth and employment; (b) assist member States and the social partners in ensuring general access to, and increasing and optimizing overall investment in, basic education, initial training and continuous training and lifelong learning; (c) identify the respective roles and responsibilities of the State, the social partners, enterprises, employers’ and workers’ organizations, individuals and other partners and actors in policy-making, investment and provision for human resources development and training.

Contents of the new Recommendation

22. In the contemporary world, individuals’, enterprises’ and societies’ endowment of skills and knowledge largely determine individual employment outcomes, enterprise performance and, ultimately, the wealth and well-being of nations. The new Recommendation would therefore be universal in scope and reach out to all countries. It would define the fundamental objectives of, and embody the principles of shared responsibility in, human resources development and training. It would advocate ways and means of strengthening dialogue and partnerships between the social partners and with governments, and include provisions for tripartite, national and sector training arrangements. The terms of reference for the new Recommendation would be based on the Conclusions, the conclusions of the Cologne Charter 1999 and statements on this subject jointly made by international employers’ and trade union organizations; and should in particular:

¹² *ibid.*, para. 21.

- (a) address training and education needs in the modern world of work in both developing and developed countries, and promote social equity in the global economy;
- (b) advance the decent work concept through defining the role of education and training;
- (c) promote lifelong learning, enhance employability of the world's workers, and address the economic challenges;
- (d) recognize the various responsibilities for investment and funding of education and training;
- (e) promote national, regional and international qualifications frameworks which include provisions for prior learning;
- (f) improve access and equity of opportunity for all workers to education and training;
- (g) build the capacity of the social partners for partnerships in education and training;
- (h) address the need for increased technical and financial assistance for the less advantaged countries and societies.¹³

23. In addressing the training and education needs of the modern world of work, the new Recommendation would advocate policies and programmes that would: promote and maintain employability and productivity throughout an individual's life; build up basic employability skills in basic education; integrate the young into working life by means of useful initial training and work experience; and subsequently maintain the individual's employability through continuous training and lifelong learning. It would advocate policies, institutional frameworks and funding mechanisms that would assist individuals to have access to learning opportunities on a continuous basis. The Conclusions called for the new Recommendation to improve access and equity of opportunity for all workers to education and training. Hence, it would also include provisions for careful targeting of training, in particular on those groups that run the risk of social exclusion and discrimination. These include: women and persons with special needs; rural workers; people with disabilities; older workers; the long-term unemployed, including low-skilled workers; young people; migrant workers; and workers laid off as a result of economic reform programmes, or industrial and enterprise restructuring. In addressing the needs of these groups, particularly of young people, access to a combination of formal, off-the-job, and workplace learning would be emphasized.

24. The Recommendation would identify and recognize the various responsibilities for investment and funding of education and training of various stakeholders and partners in human resources development. It would make a distinction between funding responsibilities at three major levels: basic education; initial vocational education and training; and continuous training and lifelong learning. At these levels the respective responsibilities of various stakeholders are likely to differ. As a means of increasing the resource base of education and training, the Recommendation would advocate the establishment of partnerships for investing in training between the stakeholders: the State, enterprises, employers' and workers' organizations, sectoral and professional organizations, training institutions and individuals. Particular emphasis would be placed on

¹³ *ibid.*, para. 21.

the opportunities to encourage enterprises, by means of various incentive mechanisms, to upgrade staff skills on a continuous basis, and also for individuals to invest in their own education, training and self-improvement. Valuable insights into this element of the Recommendation would be provided by the ILO's recently started work to establish a database on investment in training.

25. The Recommendation would identify the rationale for, set out the principles and describe the ways and means of, establishing national qualifications frameworks. Such frameworks facilitate lifelong learning, help enterprises and employment agencies to match skill demand with supply, and guide individuals in their choice of training and career. They cover, for example, industry-based and professional competence standards, agreed upon by the tripartite partners, and mechanisms for assessing, recognizing and certifying skills, in whatever form these have been acquired: formally, non-formally or through work experience. The Office has just started examining various country experiences (e.g. Australia, New Zealand and South Africa) of establishing national qualifications frameworks. The findings of this work will be taken into account in drafting the proposed Recommendation.
26. The capacity and resources of those involved often limit the scope and effectiveness of social dialogue and partnerships in training. The Recommendation would advocate ways and means of raising this capacity, e.g. by means of technical cooperation, by giving public grants to workers' and employers' organizations, and by exchanging experiences and good practices among countries and social partners.

A practical guide and development of databases

27. A practical guide would supplement the new Recommendation. In addition, a database would assist member States and the social partners in implementing the provisions of the new Recommendation. The guide would be renewed on a continuing basis as part of the Office's regular work. It would contain examples of good practice on: training policy and programme formulation, funding and investment in training, skill recognition and certification, social dialogue, partnerships and all the other elements of education and training contained in the Recommendation. The guide would also identify the prerequisites for enhancing to the maximum the chances of successful emulation of such good practice in any given country. The work on the Recommendation and other relevant Office work on human resources development and training would provide inputs to the practical guide and the two databases called for in the Conclusions, i.e. on investment in training and on national qualifications frameworks.

Time schedule and preparatory work

28. A double discussion procedure is proposed for the preparation of the new Recommendation. Under this procedure, the first discussion of the law and practice report would take place at the International Labour Conference in 2003 and the second discussion would follow in 2004.
29. In the current biennium, workplans have been modified and resources allocated in order to undertake preparatory work on the new Recommendation, its accompanying practical guide, and other work that will provide inputs to the Recommendation, in particular on investment in training and on national qualifications frameworks. Such inputs have already been provided by a tripartite meeting in Bangkok in December 2000, particularly on the subject of investment in training. The meeting reached a "common understanding" on the role of governments and employers' and workers' organizations in promoting investment

in training. It also discussed issues concerning the measurement of such investment, in view of the preparation of the database on investment. In 2001, two similar meetings will be held in Africa and Europe.

30. A series of informal expert meetings will be organized in 2001 with a view to producing detailed outlines and workplans for the preparation of the law and practice report on human resources development and training. This report is expected to be sent out to member States in January 2002.
31. The work on the new Recommendation will also be able to draw on information that becomes available through the information base on national policies and experiences in employment and human resources development – based on the national reports on the Employment Policy Convention, 1964 (No. 122), and the Human Resources Development Convention, 1975 (No. 142) – which is being prepared and is scheduled to be completed in 2001.

2. The employment relationship (scope)

Summary

The situation of dependent workers who are not covered by legislation on the employment relationship, on account of their disguised or ambiguous employment status, is a worldwide problem which lies at the heart of labour law, as the effectiveness of national and international labour legislation depends upon it. This problem is prejudicial to the workers concerned, but it is also likely to prove damaging to enterprises, jeopardize social peace and place the health and safety of the population at risk. It is proposed to promote the adoption by member States of national policies to redefine the scope of application of legislation regarding the employment relationship, with the participation of the interested parties.

I. Background

32. The origins of this proposal are to be found in the resolution adopted by the 86th Session of the International Labour Conference (1998), following the discussion of an agenda item regarding contract labour.¹⁴ In this resolution, the Conference invited the Governing Body to instruct the Director-General to carry out studies on this question, to organize meetings of experts towards that end, and to place these issues on the agenda of a future session of the International Labour Conference with a view to the possible adoption of standards, with the procedure to be completed within a period of four years as of 1998.
33. The Office therefore commissioned national studies in 29 countries,¹⁵ which were complemented by the holding of five informal regional meetings.¹⁶ Finally, upon the

¹⁴ Resolution concerning the possible adoption of international instruments for the protection of workers in the situations identified by the Committee on Contract Labour, *Record of Proceedings*, International Labour Conference, 86th Session, Geneva, 1998, Vol. II, pp. 33-34.

¹⁵ The selected countries were: *Argentina, Australia, Brazil, Cameroon, Chile, Czech Republic, France, Germany, Hungary, India, Islamic Republic of Iran, Italy, Japan, Republic of Korea, Morocco, Mexico, Nigeria, Pakistan, Peru, Philippines, Poland, Russian Federation, Slovenia, South Africa, Trinidad and Tobago, United Kingdom, United States, Uruguay and Venezuela.*

invitation of the Governing Body, a Tripartite Meeting of Experts on Workers in Situations Needing Protection was held from 15 to 19 May 2000 in Geneva. A basic technical document,¹⁷ largely drawing upon the national studies and regional meetings, had been prepared by the Office for this Meeting. The report of the Meeting submitted to the Governing Body at its 279th Session¹⁸ contains, in particular, a common statement.¹⁹ In all, experts from 41 countries were consulted in this process and expressed their opinions in the light of their countries' law and practice.

II. Ambiguous employment relationships: A worldwide phenomenon

34. The issue of workers lacking protection on account of labour legislation not being applied to them has been raised within the ILO for a number of years. As a consequence of changes which have taken place for various reasons in the employment relationship, it has however taken on considerable proportions and special characteristics in recent decades. This problem may be encountered in all kinds of enterprises and in all regions. It is at the very heart of labour law, given that the effectiveness of national and international labour legislation depends upon it.
35. In the course of its discussions in 1997 and 1998, the Committee on Contract Labour of the International Labour Conference did not complete its work, but it nevertheless succeeded in identifying the workers who should be granted protection by an international standard as persons who “for a physical or moral person perform work (...) personally under actual conditions of dependency on or subordination to the user enterprise and these conditions are similar to those that characterize an employment relationship under national law and practice but where the person who performs this work does not have a recognized employment relationship with the user enterprise”.²⁰ The expression “contract labour” was thus abandoned and the aforementioned resolution referred provisionally to “workers in situations needing protection”.
36. The process engaged in 1998, which built upon the progress made during the Conference debate as well as its preparatory work, made it possible to address the problem from a new angle. What emerges above all from the observation of the world of work is the existence of a growing sector of workers who perform services for other parties in conditions of

¹⁶ In Santiago (Chile) for the Latin American countries, Manila for the Asian and Pacific countries, Budapest for the countries of Central and Eastern Europe, Yaoundé (Cameroon) for the African countries and New York (United States) for the English-speaking countries not included in the other groups. Moreover, a preliminary meeting for the countries of Central and Eastern Europe was held in Geneva.

¹⁷ ILO: Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope), Basic technical document, Geneva, 15-19 May 2000 (MEWNP/2000). This document may also be consulted on-line through the ILO's website at the following address: <http://mirror/public/English/dialogue/govlab/papers/2000/mewnp/index.htm>. The national documents can also be consulted at the same site, at the following address: <http://www.ilo.org/gllad>.

¹⁸ cf. document (MEWNP/2000/4(Rev.)), GB.279/2, *Report of the discussion*, annexed to document GB.279/2; and <http://www.ilo.org/public/english/standards/reln/gb/docs/gb279/pdf/gb-2.pdf>.

¹⁹ *Report of the discussion*, op. cit., para. 107.

²⁰ cf. *Record of Proceedings* Vol. I, International Labour Conference, 86th Session, 1998, Report of the Committee on Contract Labour, p. 16/56, para. 167.

dependency and to whom labour legislation is not applied in practice. Some of them, for example, are not recognized as dependent workers, while others are unable to identify their true employers.

37. Naturally, there is no doubt that in numerous cases the kind of relationship between these workers and the enterprise for which these services are performed is of a civil or commercial order, all of which justifies the relationship between the concerned parties not falling within the scope of application of labour legislation. However, it is equally true that in other cases the relationship established between the various parties is in all respects similar to an employment relationship, with the exception that it tends to be presented in a legal form different from the typical contract of employment. One such example is the false self-employed worker recruited on the basis of an agreement of a civil or commercial nature or other basis but which, in any event, is distinct from a contract of employment; or workers whose terms of employment may not easily fit into the categories established by legislation which is insufficiently explicit, is incomplete or is outdated in respect of developments in employment relationships; or the worker who has employment relationships with several parties, each of which may be his/her employer, without being able to identify the person or persons who must assume responsibility in that capacity.
38. What ultimately emerges is the existence of employment relationships in disguise or of a truly ambiguous and complex nature. Hence, genuine employment relationships have, as it were, been excluded from the scope of application of labour law, either by the express action of the concerned parties or on account of the complexity of such relationships.
39. The national studies commissioned by the Office and other recent information tend to indicate that this phenomenon has now taken on global proportions, although the situations and forms it takes vary from country to country and from sector to sector within the same country. For example, in June 2000 an official report in the United States revealed the existence of millions of workers who, more often than others, had low family incomes or even incomes below the federal poverty threshold, lacked health, pension and unemployment benefits and were not covered by key laws designed to protect workers; a draft law was submitted in July 2000 with the aim of ensuring that employees were not improperly excluded from retirement and welfare benefits owing to a false qualification of their employment status.²¹ In August 2000, the National Labor Relations Board issued an important decision which established that many of the workers covered by the aforementioned report would be entitled to representation under the National Labor Relations Act,²² although they had been deprived of such representation for years. As for ambiguous relationships and “outsourcing” operations, the social chamber of the Court of Cassation of France on 19 December 2000 ruled that a driver who entered into a rental contract for a vehicle equipped as a taxi was in fact a salaried employee;²³ the same court issued two rulings on the same day against a company which had transferred workers to a subcontractor that was no more than a dismantled part of the company’s central services,

²¹ cf. United States General Accounting Office, *Contingent Workers: Income and Benefits Lag behind Those of the Rest of the Workforce*, GAO/HEHS-00-76, June 2000; <http://www.gao.gov>; and Employee Benefits Eligibility Fairness Act of 2000 (submitted to the House of Representatives on 26 July 2000 and in the Senate on 27 July 2000), HR4962 IH, S2946 IS; <http://thomas.loc.gov/>.

²² cf. NLRB Slip Opinion No. 331-173, M.B. Sturgis, Inc., Case No. 14-RC-11572, in <http://www.nlr.gov/decision.htm/>.

²³ Ruling of 19 December 2000. cf. *Le Monde*, 22 Dec. 2000.

and did not constitute an independent economic entity.²⁴ In Australia, in September 2000, a Federal Court in the State of Victoria ordered the reinstatement of 70 public workers who had been dismissed because their jobs had illegally been subcontracted.²⁵ During a recent meeting of European labour court judges, it was confirmed that such bodies encountered this problem all too frequently, which has led them to distinguish between those relationships which are within the scope of labour legislation and those which are not.²⁶ The European Commission on 26 June 2000 began consulting the social partners on modernization and the improvement of labour relations in general, and on teleworking and “economically dependent workers” in particular, while the European Parliament on 21 September 2000 adopted a resolution on the Commission communication on undeclared work which addressed, inter alia, the issue of responsibility in the event of the subcontracting of fictitiously independent work.²⁷ Lastly, in December 2000 the first national collective framework agreement for non-subordinate labour relations was signed in Italy, in the market research sector; it followed similar agreements signed in 1999 and 2000 with public establishments and private companies. This agreement, which covers approximately 7,000 workers, establishes the basis for future individual contracts,²⁸ pending adoption of a draft law currently under consideration by the Senate²⁹ on labour relations, coordinated collaboration and follow-up and “para-subordinated” work.

- 40.** Lacunae in the legislation give rise to objectively ambiguous labour relations, in which the worker’s situation, whether dependent or independent, may be difficult to establish and whereby identifying the employer may be complicated owing to the coexistence of several persons with whom the worker has contact as possible employers or users of his or her services. These legislative shortcomings also make it easy to seek out such ambiguity, in particular in certain economic sectors where significant changes are taking place in industrial relations.³⁰
- 41.** The repercussions of this phenomenon are serious for the workers concerned. Not only are they deprived of their rights as established by labour law but, furthermore, the labour

²⁴ cf. *Le Monde*, 20 July 2000; Gérard Couturier, *L'article L.122-12 du Code du travail et les pratiques d'externalisation* (Les arrêts Perrier Vittel France du 18 juillet 2000) (article L.122-12 of the Labour Code and “outsourcing” practices (the Perrier Vittel France rulings of 18 July 2000)), *Droit social*, No. 9/10, Sep.-Oct. 2000, pp. 845-849.

²⁵ cf. *The Age*, 6 Sep. 2000.

²⁶ VIIIth Meeting of European Labour Court Judges. Jerusalem, 3 Sep. 2000. Theme II, The Employment Contract and Protection of Workers. The overall report and the reports on seven European countries may be consulted on-line (in English only) at the following address: <http://www.ilo.org/public/English/dialogue/govlab/papers/2000/mlcj8/index.htm>.

²⁷ cf. European Parliament, COM (1998) 219-C4-0566/1998-1998/2082(COS), A5-0220/2000.

²⁸ The agreement also contains provisions for social guarantees, occupational safety and accidents, trade union activities, the right of association and vocational training; it provides for the establishment of a joint disputes resolution committee and an observatory. See a summary of this agreement dated 15 December 2000 in *eironline*, 20 January 2001, European Foundation, <http://www.eiro.eufofound.ie/2001/01/inbrief/IT0101171N.html>; and also in <http://www.cgil.it/nidil/nuovi%20file%20html/contrattieaccordicollettivi.htm>, which includes a summary of the aforementioned agreements.

²⁹ See the draft at <http://www.cgil.it/nidil/nuovi%20file%20html/testidilegge.htm>.

³⁰ For more details and examples, cf. Basic technical document, op. cit., Ch. III, paras. 128 ff.

inspectorate has difficulty in dealing with their situation, just as their access to industrial tribunals is impaired, a further source of discrimination in comparison with other workers. In several countries they are also without social security or only enjoy the least favourable conditions granted to workers recognized as salaried employees. Women workers working in such conditions are in an even less secure position.

42. The negative effects of workers being without protection can also hit employers themselves, given that this situation is a disincentive to productivity and distorts competition between employers both within countries or sectors and internationally, and is often to the detriment of employers who are respectful of the law.³¹ The lack of legal security which arises because legislation is not sufficiently explicit is likely to give rise to judicial decisions whereby workers are reclassified, with considerable unexpected economic consequences for enterprises.³²
43. Governments too are affected by the consequences of a lack of worker protection. Firstly, worker dissatisfaction threatens social peace. In addition, the negative repercussions on the financing and functioning of social security, vocational training and tax systems may also be significant. Lastly, work performed outside the law or in ambiguous legal situations and beyond the control of the labour inspectorate creates or worsens the risk of occupational accidents and illness, which also jeopardizes the health and safety of the population at large.³³

III. Refocusing labour legislation

44. In response to this phenomenon, several countries have either already adjusted the scope of application of the employment relationship or are now doing so in order to give protection, through labour legislation, to persons working in the conditions of subordination inherent in an employment relationship, irrespective of the legal framework in which the interested parties wish to place that relationship. This adjustment is generally made by adapting the concept of the employee. Generally, these solutions are designed to establish a distinction between legitimate commercial or other activities that have not been addressed by labour legislation on the one hand, and on the other hand genuine employment relationships of dependency, which are defined as a function of the actual relationships between the concerned parties and not in accordance with the legal form that such parties wish to give to their relationship. In this way, it becomes possible to clarify and “refocus” labour legislation in respect of the individuals to whom it applies, by basing it on the true nature

³¹ The subject of competition is expressly addressed by the Italian framework agreement mentioned in para. 39 and note 24. The parties to the agreement undertake to ensure proper competition and to establish the first standard guarantees required for workers and companies “in order to protect workers and to discourage recourse to illegal work which distorts competition” (eironline, op. cit.).

³² In this regard, see, e.g. the decisions regarding a large computer company and a major brewery, Basic technical document, op. cit., p. 28, footnote 14 and p. 40, footnote. 39.

³³ The basic technical document (op. cit., para. 121) mentions, for example, a collision between a heavy commercial vehicle and two cars, in which six persons were killed. The accident occurred on account of the extreme fatigue of a non-salaried truck-driver who had been driving long hours under the effects of stimulants.

of the relationships between the persons performing work or a service and the party for whom it is performed.³⁴

45. Taking account of this development, at their meeting in May 2000 the experts “agreed that countries should adopt or continue a national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation of the employment relationship in the country’s legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners”.³⁵ According to the experts, such a national policy should include the following measures:

- providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
- providing effective appropriate protection for workers;
- combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
- not interfering with genuine commercial or genuine independent contracting;
- providing access to appropriate resolution mechanisms to determine the status of workers.³⁶

IV. Prospects for international action

46. The experts agreed that the ILO should play a major role in assisting countries to develop policies to ensure that legislation governing labour relations extends to workers in need of protection. In their opinion, the action to be taken could include international standards, technical cooperation and assistance and providing guidance for appropriate national policies and the collation and exchange of information concerning changes in the employment relationship.³⁷ In this connection, it is proposed to include this item on the agenda of the 91st Session of the International Labour Conference (2003). In the light of

³⁴ For example, the New Zealand Employment Relations Act which entered into force in October 2000, after defining in section 6.1(a) the meaning of the term “employee”, sets out the following provisions: (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them. (3) For the purposes of subsection (2), the Court or the Authority – (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

³⁵ *Report of the discussion*, op. cit., *Common statement*, para. 107.5.

³⁶ *Report of the discussion*, op. cit., *Common statement*, para. 107.6.

³⁷ *Report of the discussion*, op. cit., *Common statement*, para. 107.7 and 8.

the discussions held by the Governing Body at its 279th Session,³⁸ two options may be considered: (a) standards-related activities and (b) a general discussion.

(a) Option: Standards-related activities

47. The possibility of standards-related activities is provided for in the abovementioned Conference resolution that invites "... the Governing Body of the ILO to place these issues on the agenda of a future session of the International Labour Conference with a view to the possible adoption of a Convention supplemented by a Recommendation if such adoption is, according to normal procedures, considered necessary by that Conference. The Office has examined the possible content and form of such activities so as to encompass the various types of unprotected subordinate employment in a legal framework sufficiently flexible – but also efficient – to correspond to very diverse national situations. The Office has therefore proposed the development and adoption of standards of a promotional nature, in accordance with the very appropriate formula contained in the Recommendation.

Nature and content of the proposed instruments

48. A promotional instrument would be designed to guide member States' action towards the formulation and progressive implementation of policies adapted to the national situation based on the observation of developments in employment relationships, in consultation with employers' and workers' organizations.

49. In this respect, a Convention could provide:

- (a) for the formulation and application of a worker protection policy aimed at reconsidering the employment relationship, at appropriate intervals and, if necessary, at more clearly defining and adapting its scope, taking into consideration the actual employment situation;
- (b) for the establishment or designation of appropriate mechanisms to analyse the way in which employment evolves and to advise the government with a view to adopting and implementing the required measures; these mechanisms could call for the participation of the public authorities and of the most representative employers' and workers' organizations.

50. A complementary Recommendation specifying the means of government action could contain:

- practical indications of criteria for dependence or subordination and the definition of the employment relationship, qualification and dispute settlement procedures and the ease of proof;

³⁸ When this issue was being examined in first discussion, a number of members of the Governing Body gave their views. Among those governments who agreed that this matter should be included in the Conference agenda, some stated that they were in favour of standards-related activities whereas others proposed a general discussion; yet others wished for further information. The Employers' group seemed to agree with the idea of a general discussion – but not of one that would necessarily lead to subsequent standards-related activities. The Workers' group was of the opinion that this matter should be an item on the Conference agenda in 2003, either for standards-related activities or for a general discussion that might lead up to standards-related activities.

- a clarification that none of the provisions of these instruments should be interpreted as limiting in any way the right of employers to establish truly independent contractual relationships or genuinely civil or commercial relationships with other persons.
51. The proposed instruments could be considered under the double-discussion procedure, which would allow more time to delegates to exchange information and consider the question. However, the Governing Body may decide to include this matter in the Conference agenda with a view to a single discussion.
 52. Two factors which did not exist during the discussions on subcontracting work in 1997 and 1998 could contribute to forging a consensus on this proposal for standards-related activity.
 53. First, during the preparatory work and at the Meeting of Experts, the linguistic and conceptual problems which had previously been encountered did not arise. The approach now proposed is based on the universally known concept of the employment relationship, and refers to the situation of dependent workers who are not protected by labour legislation.
 54. Secondly, the proposed action would have the aim of fostering the adoption by States parties of national policies with a common basis, while the technical and specific aspects concerning the scope of the employment relationship would be for each State to decide. Some guidance would be provided in the Recommendation. This approach, which consists in promoting a national policy to refocus labour legislation, enjoyed the unanimous support of the experts.
 55. The proposed promotional standards-related activities could provide member States with useful tools with which to set up flexible programmes adaptable to national conditions and which fill the need to adjust the scope of their labour legislation. In that sense, such standards-related instruments would contribute to achieving the objective of decent work.

(b) Option: General discussion

56. The possibility of a general discussion was raised during the 279th Session of the Governing Body. It would make it possible to define more clearly the scope of the employment relationship.
57. A general discussion could indeed make it possible for the Office to obtain more information and for the International Labour Conference to consider the scope of the employment relationship more openly than it would if it adopted standards-related texts. On the other hand, it would also delay the possibility of subsequently taking standards-related action.
58. To prepare for such a discussion, more studies would be necessary and an exchange of information might be required so as to draw attention to the data available, as recommended by the Meeting of Experts.³⁹

Subjects of discussion

59. Four main topics could be the subjects of this general discussion on the scope of the employment relationship:

³⁹ *Report of the discussion, op. cit., Common statement, para. 107.4.*

- (a) What are the most widespread forms of unprotected dependent labour in the employment relationships currently taking shape? What are the most widespread forms in employment relationships which also include other users of the worker's labour? What are the most widespread forms in employment relationships at worksites where the employees of several enterprises work side by side? For what reasons have unprotected labour relations proliferated in the various countries?
- (b) What are the possible solutions which could be implemented to remedy the situation of dependent workers so as to extend effective protection to them? How can the employment relationship be regulated so as to identify clearly such a relationship when it exists in practice, either by formulating criteria or indices, by establishing mechanisms to prove its existence, or by other means? What kind of simple and clear standards could be adopted to make it possible to identify the employer and others who might have responsibilities to the worker? What mechanisms could be introduced or enhanced to promote the application of the legislation and to ensure that workers have access to the law?
- (c) What can be done to ensure that measures to protect dependent workers are taken based upon the actual employment situation observed, with the participation of the most representative employers' and workers' organizations? What sort of advisory mechanism should be established or adapted, with the participation of the public authorities and employers' and workers' organizations, to observe the actual employment situation and consider policies and measures to strengthen the protection of dependent workers? In what way should such mechanisms be supported by the technical services responsible for observing the employment situation and preparing the necessary policies and measures?
- (d) What are the prospects for international action to promote a definition of the scope of the employment relationship with a view to protecting dependent workers? How can consensus among ILO member States be fostered so that they undertake joint action to protect dependent workers in the various countries, and workers deprived of such protection in particular? What role should the social partners play in such activities? What would a possible standards-related action entail? Should it cover substantive matters, with specific obligations for action on the part of States, or should it instead be promotional? What should the nature, modalities and aims of technical cooperation and assistance provided by the Office be in this field?
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3. Migrant workers ⁴⁰

Summary

International labour migration has become more complex and diverse and involves a much larger number of countries than ever before. There are growing problems with irregular migration, and much contemporary migration is organized by private intermediaries. The large majority of today's migrant workers are admitted only for temporary periods, which in many instances makes them subject to unequal treatment. In response to the low and declining rate of the ILO's existing standards on this subject, the Committee of Experts on the Application of Conventions and Recommendations was requested by the Governing Body at its 267th Session to undertake a General Survey on the state of law and practice. The Committee of Experts clearly saw the need for a general discussion of the subject of migrant workers at a future session of the International Labour Conference, with a view to reviewing and possibly revising the instruments.

60. Today, between 40 and 45 million persons are estimated to be economically active in a country other than their own, with or without authorization, and they are accompanied by at least as many dependants. This estimate does not include the millions of Russians, Kazakhs, Ukrainians, and others scattered across the successor States of the USSR. More countries than ever before are now engaged in migration either as receiving countries or countries of origin, or both. The 64 countries that were major senders or receivers in 1970 have grown to 98, 20 years later. By the beginning of the 1990s nearly 100 countries were significantly involved in international economic migration.

I. Contemporary trends in international migration

A. New forms of labour migration

61. International labour migration has become more diverse and complex than in previous decades. Farmers or peasants with few skills to offer who leave their lands temporarily or permanently in search of wage-paid activities still represent an important component of cross-border migrants. Skilled industrial and construction workers ⁴¹ who move individually or as part of an enterprise's labour force and who may be tied to a specific project or perform recurrent tasks for a contractor, constitute an increasing proportion of present-day migrants, as do young women who undertake jobs as domestic helpers or caregivers for the aged in foreign countries. Highly qualified professionals, managers, technicians, and service providers circulate across the globe to a much greater extent than previously, both within and outside transnational enterprises, but their movements are seldom recorded. Young persons admitted as trainees for the purpose of upgrading their skills in foreign enterprises, and who may perform regular work as a result of their assignment, are just as much part of contemporary economic migration as are entrepreneurs who are admitted with the promise of future citizenship if they bring along enough funds to create employment for themselves and for others. No classification can neatly and comprehensively capture the variety of today's international labour migrants. Even the distinctions between temporary migrants and permanent settlers have become blurred.

⁴⁰ This proposal is identical to the proposal submitted to the Governing Body in March 2000, GB.277/2/1, paras. 133-159.

⁴¹ See ILO: *Social and labour issues concerning migrant workers in the construction industry*, Tripartite Meeting on Social and Labour Issues concerning Migrant Workers in the Construction Industry, Geneva, March 1996.

62. Several factors are combining to drive this rising cross-border mobility of workers.⁴² The intensification of trade and investments is certainly an important factor, but among the developing countries it has so far affected only a small number of Asian and Latin American countries. Because many poor countries have not yet benefited from increased capital flows, the widening income differentials between the North and the South over the last three decades have probably contributed to increasing migration pressures. The declining cost of transport, allied with the increasing availability of information, as well as the spread of personal and institutional networks, are no doubt facilitating mobility. To these may be added the political changes such as the collapse of the former USSR, which lifted some of the previous obstacles to the free movement of people. Finally, there is some evidence that the growth of the informal sector is associated with greater absorption of foreign labour in the industrialized countries. It is not in the large manufacturing enterprises where foreign workers are usually found, but in intensely competitive small manufacturing shops, construction subcontractors, retail trade outlets, low-technology services, and in agriculture, sectors where low-wage, unskilled jobs are not attracting nationals.

B. Problems and policy dilemmas

63. Many new problems and policy dilemmas have surfaced with the growth and emergence of new forms of labour migration. The most significant include the following.

1. Irregular migration and illegal employment of undocumented migrants

64. Although statistics on irregular migration are inherently weak, it is estimated that as much as a quarter of all international labour migrants are working without proper legal documents or authorization to work. While some are in privileged positions on account of their unique skills or education, most are ordinary workers who suffer exploitative treatment in terms of inferior wages and long hours of work. Among the most disturbing forms of irregular migration is the “trafficking”, by transnational criminal syndicates, of young women for employment in the sex sector. Equally significant in numbers are those who have been admitted legally but not for the purpose of employment, as well as those who were earlier permitted to work but for a period that has already lapsed. In some regions the more significant phenomenon is the employment of non-nationals simply as the consequence of the break-up of States, as well as the emergence in the labour market of foreigners authorized only to “transit” through the State’s territory.

2. Commercialization of migration processes

65. The commercialization of recruitment through the activities of private fee-charging agents has contributed significantly to growing mobility of labour of all kinds across national boundaries. Profit-motivated recruitment agencies have succeeded in bridging national labour markets where States permit the movement of labour. Private agents have proven particularly effective in quickly sensing skills shortages in labour markets, finding labour to fill the void, and providing flexible and appropriate responses as economies become more complex. Their operations have, in effect, made it possible to overcome the information gaps and institutional obstacles separating national labour markets. Owing to the reluctance of many migrant-receiving countries to enter into bilateral labour

⁴² See P. Stalker,; *Global nations: The impact of globalization on international migration*, International Migration Papers No. 17, ILO, Geneva, 1997.

agreements with sending countries, there are very few examples of labour migration processes organized under the auspices of public or state employment services.

- 66.** However, many serious problems have been observed in countries that have not effectively supervised the activities of private intermediaries, including the victimization of workers through offers of false or non-existent jobs and misleading or false information about working conditions, exorbitant fees extracted from potential migrants, detention in destination countries or deportation due to the forgery by the agents of the workers' travel documents and admission visas, and workers being prematurely laid off due to misdeclaration of qualifications. Much more serious in their consequences are activities that involve subverting immigration laws and regulations through fraud and deceit, which place workers in an illegal situation in destination countries.

3. Migrants in under-protected occupations

- 67.** Significant numbers of migrant workers, especially women, belong to occupations and sectors where conditions of employment fall far short of international and national standards because they are seldom effectively supervised by national authorities. For instance, there are no labour inspections in many countries of the conditions of employment of domestic service workers or helpers. In many countries foreign live-in maids regularly work in excess of normal hours but rarely receive the overtime compensation that is due to them. More serious problems have been reported in the case of "entertainers", whose employment in some countries is frequently controlled by agents, some with links to criminal elements. When they are admitted under the immigration category of "artists", they may fall outside the coverage of labour laws and are thus precluded from seeking official remedies for abusive and ill-treatment. Other such situations also arise, particularly for agricultural work, where many migrants are employed in some countries.

4. The growth of temporary migration for employment

- 68.** The recent increase and diversification of temporary migration has given rise to questions of equal treatment in matters of remuneration, social security, job security, job mobility, housing and family reunification. Many of these are already addressed by existing norms in the case of permanently settled migrant workers, but the bulk of new migration comprises workers who are brought in for temporary periods such as seasonal agricultural workers, project-tied workers (e.g. construction), trainees who actually perform regular jobs, international service providers brought in by contractors particularly for design or repair and maintenance work, and special-purpose workers. The temporary admission of non-nationals has undoubtedly short- and long-term benefits for a migrant-receiving country. The benefits derive, inter alia,⁴³ from the fact that a vacant job can be filled immediately; wages or salaries are unlikely to suffer upward pressure; while infrastructural expenditure on housing or schools may be significantly reduced compared with that for nationals, etc.
- 69.** The cross-border movements of international service providers are a phenomenon of growing importance, especially since the liberalization set in motion by the Uruguay Round. Persons rendering service in a country where they are not habitually resident

⁴³ The economic benefits for the various actors are set forth in Council of Europe: *Temporary migration for employment and training purposes: Report and guidelines*, Strasbourg, 1996, pp. 42 ff. See also K. Groenendijk and R. Hampsink: *Temporary employment of migrants in Europe*, Katholieke Universiteit, Faculteit der Rechtsgeleerdheid, Nijmegen, 1995.

include self-employed or own-account workers⁴⁴ engaged in consulting, advising, supervising, training others, etc., rather than in the production of commodities in the traditional sense. Examples of special-purpose workers are academics, artists, entertainers, athletes, and middle-level personnel moved within a multinational company. Artists and entertainers are often self-employed workers and tied to an agent or sponsor rather than to an employer in the traditional sense of the word.

70. There are a number of problems associated with the admission of foreign workers for temporary employment. These are inherent in a situation where several sets of national or international laws may govern the economic activity of a person who resides in one country and enters into a contract for the provision of services in another for a period of time. Equal treatment is often at issue, whether in the matter of wages and remuneration, social security, or mobility in the labour market. In some cases labour laws do not apply to seasonal foreign workers. Temporary migrant workers are usually tied to employers – they are not permitted to change jobs or to change employers. There are issues regarding who should be responsible for the workers' accommodation. Temporary foreign workers may also be excluded from membership of social security schemes or, where this is not a problem, entitlement to benefits in the migrant-receiving country or upon return to the migrant's country of origin may vary considerably and leave much to be desired.

5. High levels of unemployment among immigrant workers

71. There is a growing marginalization of settled immigrant workers in some industrialized countries, inter alia, on account of the decline in employment opportunities in manufacturing and because of discrimination.⁴⁵ Unemployment levels among ethnic minorities, especially among the young, are sometimes double or even triple the rate for nationals of the same age groups and educational attainment. Research undertaken by the Office in collaboration with local research institutions in these countries has confirmed that discriminatory practices in recruitment explain a significant part of their poor performance in the labour market.⁴⁶

⁴⁴ This sets them off from wage- or salary-earners moving inside a multinational enterprise from one country to another, who are included here under the earlier categories of special-purpose workers or project-tied workers.

⁴⁵ See W.R. Böhning and R. Zegers de Beijl: *The integration of migrant workers in the labour market: Policies and their impact*, International Migration Papers No. 8E, ILO, Geneva, 1995. See also J. Doomernik: *The effectiveness of integration policies towards immigrants and their descendants in France, Germany and the Netherlands*, International Migration Papers No. 27, ILO, Geneva, 1998.

⁴⁶ See for example P. Arriijn, S. Feld and A. Nayer: *Discrimination in access to employment on grounds of foreign origin: The case of Belgium*, International Migration Papers No. 23E, ILO, Geneva, 1998; M. Bendick, Jr.: *Discrimination against racial/ethnic minorities in access to employment in the United States, Empirical findings from situation testing*, International Migration Papers No. 12, ILO, Geneva, 1996.

II. Towards a comprehensive ILO strategy

A. ILO activities relating to the protection of migrant workers

1. ILO standard-setting activities

72. The protection of workers employed in a country other than their country of origin is part of the ILO constitutional mandate and has always had an important place among the activities of the ILO,⁴⁷ since more than any other workers they are vulnerable to exploitation, particularly if they are in an irregular situation or victims of manpower trafficking. Although all the ILO's instruments are of relevance to migrant workers, in so far as they are of general application to all workers, the ILO has adopted several standards of specific relevance to migrant workers: the Migration for Employment (Revised) Convention, (No. 97), and Recommendation (No. 86), 1949; and the Migrant Workers (Supplementary Provisions) Convention (No. 143) and Recommendation (No. 151), 1975.⁴⁸ The 1949 Convention, a milestone in international migration legislation, grew out of the turmoil of post-war Europe and the desire to facilitate the transfer of surplus labour from this continent to others. The 1975 Convention was the international community's first attempt to tackle the questions of irregular migration movements and illegal employment. It also aimed to promote greater equality of opportunity and treatment for lawful migrants in respect of employment and occupation. Convention No. 97 has so far been ratified by 41 and Convention No. 143 by 18 member States.

2. 1998 General Survey

73. The low number and declining rate of ratifications of the ILO's instruments on migrant workers were among the factors considered in the examination of these instruments by the Working Party on Policy regarding the Revision of Standards. This examination resulted in a decision by the Governing Body at its 267th Session (November 1996) to request the Committee of Experts on the Application of Conventions and Recommendations to undertake a General Survey⁴⁹ on the state of law and practice in member States in relation to Conventions Nos. 97 and 143 and their related Recommendations. It may be noted that this was the first time that a General Survey was initiated with the specific aim of re-examining "the possibility of including the question of migrant workers on the agenda of a forthcoming session of the Conference for a general discussion, and also in order to clarify

⁴⁷ For more details, see para. 32 of *Migrant workers*, General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949; and the Migrant Workers (Supplementary Provisions) Convention (No. 143) and Recommendation (No. 151), 1975, ILO, Geneva, 1999.

⁴⁸ A number of ILO standards make specific reference to migrant workers and urge member States to take into account their provisions. These include the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Private Employment Agencies Convention, 1997 (No. 181), the Maintenance of Social Security Rights Convention, 1982 (No. 157), and the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Although most ILO standards do not contain provisions dealing specifically with migrant workers, the Committee of Experts frequently refers to the situation of migrant workers in supervising their application. This includes the numerous comments formulated by the Committee during its supervision of the application of the maritime Conventions. See para. 38 of the General Survey for a *non-exhaustive* list of these instruments.

⁴⁹ See above.

the possible need for revision of Conventions Nos. 97 and 143".⁵⁰ The General Survey was discussed at the 88th Session (June 1999) of the International Labour Conference.

74. It is instructive to outline some of the most prominent changes that the Committee of Experts found had occurred in international migration since the adoption of the instruments and their effect on how these instruments are applied:

- It noted that the *gender stereotypes* that held when the instruments were drafted were no longer valid, and that women now form an increasingly significant proportion of migrants for employment. The Committee showed concern, in particular, over the lack of protection that the instruments offer to women trafficked for work in the sex sector.
- It observed that the *commercialization of recruitment* that had occurred in recent decades had led to a number of abusive practices, including the use of misleading propaganda, extraction of sometimes exorbitant fees from potential migrants, the withholding of information and the confiscation of travel documents – practices which may be insufficiently regulated by ILO instruments as well as by national law.
- It remarked that the recent *increase and diversification of temporary migration* had had important ramifications, and the Committee questioned whether the instruments' blanket coverage of permanent and temporary migrant workers reflected the contemporary diversity of their situations.
- It observed that the *effect of regional integration* on the movement of workers across borders has been significant, and in particular the application of the provisions respecting equality of opportunity and treatment of workers from outside regional groupings raised, in the Committee's opinion, questions of principle which needed to be addressed.
- It pointed to the fact that the *increase in irregular migration* had introduced difficulties in the interpretation of several of the provisions, in particular in relation to the lack of definition of the fundamental rights of migrant workers.
- It pointed out that the *growth of migration by air travel* had meant that some provisions of the instruments, such as Article 5 of Convention No. 97 (which requires medical examination both prior to departure from the home country and upon arrival in the host country) might be outdated. The Committee concluded its analysis of this point by stating "this question should be considered in the framework of a Conference discussion on migration for employment".⁵¹

75. In addition to the lacunae in Conventions Nos. 97 and 143 due to changes in practice, a comparison between national legislation and international labour standards relating to migrant workers has made it clear that other lacunae exist in these instruments. For example, they do not deal with the elaboration or establishment of a national migration policy, in consultation with employers' and workers' organizations, within the framework of national employment policy. Questions relating to migrant workers' contracts, which are of vital importance for protecting workers, are not addressed in existing instruments. The same can be said of questions touching certain aspects of the payment of migrant workers' wages. In addition, the Committee drew up a list of the provisions mentioned by

⁵⁰ See GB.267/LILS/4/2; see also GB.267/9/2, para. 14, and GB.267/PV, p. IV/6.

⁵¹ See para. 653 of the General Survey.

governments in their reports as giving rise to difficulties, and observed that nearly all of the provisions of the Conventions, the annexes, and the relevant Recommendations were cited.⁵² In the Committee's opinion, certain difficulties cited ought not to constitute fundamental obstacles to the ratification of these Conventions, and it seemed to be generally agreed that the principles enshrined in these instruments were still valid.

76. At the 276th Session (November 1999) of the Governing Body, 16 Governments and both the Workers' and Employers' groups supported the proposal for a general discussion in order to clarify the need for future standard-setting action.⁵³

3. Other ILO activities in the field of migration

77. In addition to the adoption and supervision of standards, the ILO has undertaken a number of activities in the field of migration aimed at improving the situation of millions of migrant workers across the globe.

(a) *Technical cooperation and technical advisory services*

78. The major part of the ILO's activities in the field of migration, in addition to promoting the ratification and application of ILO standards on migrant workers, consists of providing assistance to countries in the formulation of migration policies and legislation and in managing migratory flows more effectively, in line with the provisions of the ILO instruments. The Office also organizes training courses for the benefit of officials wishing to be familiar with best practices in migration policy and administration, the functions of labour attachés, and methodologies for migration surveys, etc. The ILO has also made use of less formal means of tackling such problems as helping member States to resolve specific problems which have been the subject of a complaint or a representation.

(b) *Other projects*

79. In the early 1990s, the Office launched a project entitled "Combating discrimination against (im)migrant workers and ethnic minorities in the world of work". The aim was to reduce discrimination against migrant workers and ethnic minorities by informing policy-makers, legislators, employers, workers, NGOs and persons engaged in anti-discrimination training on how legislative measures plus training activities could be rendered more effective, based on an international comparison of the efficacy of such measures and activities. Another project was the 1994-95 "Interdepartmental Project on Migrant Workers" which resulted in a number of studies and publications on a variety of subjects pertinent to international migration. One of the most significant projects to be undertaken by the Office in recent years was a regional programme entitled "Informal network on foreign labour in Central and Eastern Europe" which brought together policy-makers and legislators from countries of the region in an informal setting to develop and improve bilateral and multilateral migration policies.

(c) *Recent ILO activities*

80. In April 1997, the ILO held a Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, which recommended two sets of *guidelines*: one on special protective

⁵² See para. 642 of the General Survey.

⁵³ The Governments that expressed support for a general discussion were: *Algeria, Brazil, France, Germany, Guatemala, India, Italy, Mexico, Peru, Philippines, Portugal, Slovakia, Switzerland, Sudan, United States and Venezuela.*

measures for migrant workers in time-bound activities; the other on special protective measures for migrant workers recruited by private agents. It also recommended the use of *pattern or practice studies* of the exploitation of migrant workers as a means of action not falling under Convention-based procedures.⁵⁴ Since the approval by the Governing Body in 1997 of the creation of the *International Labour Migration Database*, the Office has collected data on the magnitude and nature of contemporary migration flows which is now accessible via the Internet.⁵⁵ The ILO continues to undertake research in a number of regions of the world, and regularly publishes books and working papers.⁵⁶

4. Related developments

81. In 1990 the UN General Assembly adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*.⁵⁷ This convention, which recognizes and builds on the provisions contained in existing ILO Conventions, aimed at articulating the rights of migrant workers regardless of their legal status. Since only 12 States have so far become a party to the UN convention through ratification or accession, it has not yet entered into force.⁵⁸ When it does, the United Nations will create a separate body for its supervision. The reasons why this new convention has not yet received a sufficient number of ratifications to enter into force should be analysed and taken into account in future ILO work on this subject.

82. With respect to the specific question of liberalizing the rules governing the temporary movement of “natural” persons rendering specific time-bound services, it will be recalled that the World Trade Organization adopted the *General Agreement on Trade and Services (GATS)* in April 1994.⁵⁹ In the GATS, these natural persons are denominated

⁵⁴ See Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, MEIM/1997/D.4, ILO, Geneva, Apr. 1997.

⁵⁵ <http://www.ilo.org/public/english/protection/migrant/ilmdb/index.htm>.

⁵⁶ The Office's *International Migration Papers* series covers a large area of migration issues ranging from the evaluation of emigration pressures in some regions, to assessing the extent of discrimination against immigrants in the world of work, the effectiveness of employers' sanctions in reducing the illegal employment of undocumented migrants, the implications of EU accession on the migration policies of some Eastern European countries, and the impact of remittances on some Asian countries of origin. Mention may be made of recent ILO publications: *Employing foreign workers: A manual on policies and procedures of special interest to middle- and low-income countries*, by W.R. Böhning (Geneva, 1996); *Sending workers abroad: A manual for low- and middle-income countries*, by M.I. Abella (Geneva, 1997); and *International migration statistics: Guidelines for improvement of data collecting systems*, by R. Billsborrow, G. Hugo, A. Oberai and H. Zlotnik (Geneva, 1997); E. Hoffmann and S. Lawrence: *Statistics on international labour migration: A review of sources and methodological issues*, Interdepartmental Project on Migrant Workers, ILO, Geneva, 1996.

⁵⁷ See GB.249/IO/3/2.

⁵⁸ In 1998 a Global Campaign for Ratification of the Convention on Rights of Migrants was launched. For more details on the work of the United Nations and its specialized agencies, see paras. 49-61 of the General Survey.

⁵⁹ For the text of the GATS see WTO: *Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, June 1994, or Internet: <http://www.wto.org/services/gats.htm>.

“international service providers”. Three Governments⁶⁰ have proposed that the ILO examine this issue further.

B. Towards a comprehensive ILO strategy

83. Against this background (new forms of labour migration and the state of ratifications and ratification prospects of ILO Conventions on migrant workers), the Director-General stated in his Report to the International Labour Conference at its 87th Session (June 1999), that in the next biennium the ILO’s activities would “reflect the growing importance of labour migration in the global economy. The primary objective should be to help forge an international consensus [...] on how to ensure adequate protection for migrant women and men and their families, while allowing orderly and advantageous movements of workers in search of better lives”.⁶¹ It would thus seem highly relevant to develop a comprehensive ILO strategy for achieving this objective. Such a comprehensive strategy should be developed in order to guide ILO action in the following areas:

- to assist member States in understanding migration problems, in designing policy and improving administration;
- to follow up on the findings of the General Survey of ILO Conventions on migrant workers and campaign for wider ratification, or examine revision as determined by the Conference;
- to promote bilateral or multilateral agreements as a means of fostering more orderly forms of migration;
- to encourage the development of codes of conduct for the treatment of migrant workers;
- joint action with other UN and international as well as regional organizations in fostering orderly migration and promoting the integration of settled migrants;
- to expand the ILO’s international migration database and enhance its accessibility to constituents.

1. Proposed action

84. The Office notes that it emerged from the discussions at the Conference that the ILO could opt between three main courses of action. It could decide:

- to include the subject of migrant workers on the agenda of a future session of the Conference for a general discussion, with a view to reviewing and possibly revising the relevant instruments;
- to place the revision of Conventions Nos. 97 and 143 on the agenda of a forthcoming session of the International Labour Conference;

⁶⁰ *Chile, Finland and Switzerland.*

⁶¹ *Decent work*, Report of the Director-General to the 87th Session (1999) of the International Labour Conference, “New programme on labour migration in the global economy”.

- to maintain the existing Conventions, while placing on the agenda of the Conference the question of adopting a new Convention to address contemporary migration concerns.

85. Although the general trend in the discussion of the General Survey tended towards revision of Conventions Nos. 97 and 143, a clear consensus was not reached on this issue. The Office proposes, therefore, to hold a general discussion on the question of migrant workers. Such a discussion might contribute to the development of a comprehensive strategy for the ILO in this area and of a common understanding on the most appropriate course of action to take.

2. Issues to be discussed

86. A general discussion of the issues raised by the growing mobility of workers and the alternatives for ILO action might be organized around the following subjects:

- (a) *International labour migration in the era of globalization.* How can migration be better managed in the era of globalization to ensure that it plays a positive role in the growth and development of countries of origin and countries of employment, while protecting migrant workers in their search for a better life? What role can the ILO play in bringing about an international consensus on how to manage migration?
- (b) *Best practices in dealing with irregular migration for employment.* What strategies compatible with the ILO's principles and basic human rights would be likely to have reasonable success in curbing irregular migration?
- (c) *Improving migrant workers' protection through standard setting.* What approach should be taken to ensure wider ratification and application of ILO Conventions on migrant workers? How can the international standards be made more relevant in view of the emerging new forms of migration? In particular, should the existing standards be revised?

4. ILO standards-related activities in the area of occupational safety and health: An in-depth discussion with a view to the adoption of a plan of action for such activities

Summary

At its 279th Session (November 2000) the Governing Body examined the question of "Possible improvements of the standards-related activities of the ILO" and approved a proposal to adopt an integrated approach to ILO standards-related activities. The integrated approach is aimed at reinforcing the coherence and relevance of ILO standards and their impact. It held a first discussion on a proposed first experimental application of this approach in the area of occupational safety and health and decided to ask the Office to submit to it further details on this proposal at its present session. Accordingly it is proposed to prepare an in-depth study of ILO standards-related activities in this area and that this study together with a proposed plan of action on ILO standards-related activities in the area of occupational safety and health be examined in the context of a general discussion at the Conference. While the substantive content of the study to be submitted to the Conference was presented to the Governing Body in November 2000, the present document focuses on the distinctive features of the in-depth examination to be carried out and the proposed method of work for the preparation of the study.

Introduction

87. At its 279th Session in November 2000, the Governing Body discussed the question of “Possible improvements of ILO standards-related activities of the ILO”.⁶² It examined a proposed integrated approach to ILO standards-related activities aimed at reinforcing the coherence and relevance of ILO standards and their impact.
88. The Governing Body also held a first discussion on a proposal to carry out such an integrated approach in the area of occupational safety and health on the basis of an in-depth study of ILO standards-related activities in this area.⁶³ The in-depth study, together with a proposed plan of action resulting from this analysis, would be submitted to the International Labour Conference for consideration in the context of a general discussion.
89. The Governing Body approved an experimental application of the integrated approach and, in the context of its examination of proposals for the Conference agenda in 2003, decided to ask the Office to submit further details on this proposal at its present session. The present proposal is submitted to the Governing Body for a second discussion on the proposal to place this question on the agenda of the Conference.
90. The proposal submitted to the Governing Body for its first discussion in November 2000 included a detailed outline of the substantive content of the in-depth study that would be carried out (appendix). The additional details and information submitted below therefore focus on the distinctive features of the in-depth study, the method and procedures envisaged for carrying out the examination and the envisaged study and plan of action and other end products. A tentative timetable for the main stages in preparing the discussion is included below.

Distinctive features

91. The item now proposed for examination at the International Labour Conference is neither a traditional general discussion item nor a standard-setting item. It would involve a new type of discussion having specific distinctive features as regards its scope and purpose and the method applied in the preparation of the discussion.

Scope

92. The scope of the proposed discussion differs from that of a traditional general discussion in that it aims at covering a whole subject area of ILO activities and relies on a holistic examination not only of ILO standard-setting activities but of ILO *standards-related* activities. It is proposed to examine such activities in the area of occupational safety and health (OSH). This was chosen because it is an area that is rich in general and sectoral standards that sometimes overlap and is also very diverse in terms of its means of action. Furthermore, following the examination by the Working Party on Policy regarding the Revision of Standards, five Conventions and six Recommendations in this area have been decided to be in need of revision.⁶⁴

⁶² GB.279/4.

⁶³ GB.279/5/1 and GB.279/5/2. The latter document is included as an appendix to this proposal.

⁶⁴ See GB.279/4, para. 19.

93. The tripartite discussion at the Conference will be based on an inventory and examination of ILO standards-related activities in the chosen area. The examination and ensuing discussion will thus feature not only ILO objectives and current standards-related activities based on the existing international labour standards, but also the impact of these standards and the tools at the ILO's disposal to create an impact in this area.

Purpose

94. The discussion will focus on ILO standards-related activities in the area chosen. As further detailed below,⁶⁵ the discussion is intended to result in a consensus on a *plan of action on ILO standards-related activities* to guide future ILO activities in this area. Against the background of such a plan of action the Governing Body would in future draw conclusions with respect to standard-setting and other action to be taken in accordance with its regular procedures.

Method for preparing the study

Consensus building

95. The integrated approach to the examination of ILO's standards-related activities in this area would have implications for the method of preparing the study in several respects. Given the nature of the study to be presented, consensus building with the constituents is a key element in the process of preparing the study, the plan of action and the discussion at the Conference. As is outlined in the following, a mix of formal and informal, oral and written consultations at different stages is proposed.
96. With a view to opening and maintaining a continuous dialogue with the constituents during this process, consideration would also be given to complementary means for involving the interested parties in this process. Assistance would be solicited from the ILO field structure, in particular the standards as well as employer and worker specialists. The possibility to organize meetings and seminars at the national or regional level would be considered. In addition, the possibilities offered by information technology would be taken into account. For example, an Internet home page would be set up, in order to provide access to relevant information. The creation of an Internet-based forum for discussion of OSH matters would also be examined. A special effort would be made to offer access to computer-based information to all constituents during the two sessions of the Conferences preceding the discussion in 2003.
97. Within the Office, measures would be taken to ensure that all relevant units became involved in the process right from the start and throughout the process. The work would be coordinated by POLNORM and would primarily involve this branch as well as other units of the International Labour Standards Department in particular APPL and the Safe Work Programme which is responsible for occupational safety and health. Other Office units would also be involved as the need arose. The setting up of a task force would be envisaged to oversee the preparation of the study and serve as a clearinghouse for exchanging information and ensuring that all relevant aspects of the question were taken into account.

⁶⁵ Para. 100.

Survey and other sources for information

98. The method proposed includes collection of information on the relevant aspects of this question, in particular on the basis of a standards-related activities survey among the constituents. The conduct of country studies in a selected number of countries would also be examined. The issues to be dealt with would cover the ILO's objectives, standards and other instruments in the OSH area as well as the implementation of such standards, including the needs for and ways of organizing technical cooperation related to OSH. The section on standards would cover the essential aspects of the existing standards to be examined. It is proposed to hold informal consultations on the issues to be covered prior to formally submitting this new type of survey to the Governing Body at its 282nd Session (November 2001).

In-depth study

99. The examination of the responses received would form the basis for the study and for the drawing up of a draft plan of action. The study would build upon an inventory and analysis of a vast amount of information. A conscious effort would be made to synthesize the presentation of the results and a careful selection would have to be made of the information that should be presented to the Conference in order not to overburden the study. At the same time, care should be taken to ensure that the information that is not included in the study is placed at the disposal of interested parties in some other form. In order to optimize the use of this information, the Office will examine the possibilities to render the information collected available to the constituents through the use, for example, of IT-technology.⁶⁶

Plan of action

100. A key element of the study will be the development of a proposed plan of action for ILO standards-related activities in the area of occupational safety and health. It would be based on the examination of the facts available and the results of the survey and would include proposed new standards including a possible consolidation of standards. As highlighted in November 2000 the area of OSH is particularly rich in terms of standards and these standards sometimes overlap. The plan of action should include: a formulation of the format and intended content of such consolidated or new standards (if gaps have been identified); proposed guidelines for the revision of five Conventions and three Recommendations; proposed means to promote OSH standards effectively and to contribute to an increased impact, through other means of action including through code of practice, technical cooperation, the collection and dissemination of information in databases, inter-agency cooperation and technical documents and information. Consultations should be held on this proposed plan of action prior to finalizing the study.

Knowledge base

101. It is envisaged that the preparation of the study would go hand in hand with an updating of the ILO's publicly available databases on national legislation (NATLEX) and on international labour standards (ILOLEX). The in-depth examination offers a unique opportunity for the ILO to ensure that its factual base is perfected and that as much data as possible becomes available electronically both for the public and for the Office. An up-to-date database on national legislation could help both the ILO's constituents and the Office in their work. Ways to create synergies with other fee-based databases such as the

⁶⁶ See further below, para.102.

bibliographic database of the International Occupational Safety and Health Information Centre (CISDOC/CISILO) should also be explored.

- 102.** Consideration should also be given to the possibilities offered by information technology in disseminating vast amounts of information, for example in the form of CD-ROMs. CD-ROMs of this kind could include a large amount of information required for understanding the issues in this area, but could also serve as a users' guide to ILO activities in this field, thereby becoming a promotional tool for the ILO's activities in the area of occupational safety and health.

Tentative timetable

2001

March-September	Preparation of survey
September-November	Consultations on substance of survey
November	GB: 282nd Session: Submission of substance of survey

2002

January	Communication of survey
May	Deadline for replies to survey
June-August	Analysis of responses
September-November	Consultations on results of study and draft plan of action

2003

January-February	Communication of study and proposed plan of action
June	Discussion at the Conference

5. Investment and employment ⁶⁷

Summary

Globalization has strengthened the importance of private investment at the national level. Globally, foreign direct investment (FDI), which companies make to only a limited number of countries, has largely replaced public investment, such as development aid. The share of portfolio investments has increased. These trends have a considerable impact on the level and structure of economic growth, employment and income distribution.

As was made clear in the conclusions of the report submitted to the International Labour Conference in 1996 on "Employment policies in a global context", investment is a crucial element in the process of employment generation and output growth. Since then, concern has only intensified about how labour markets that remain local are affected by capital markets that are increasingly global.

Governments, trade unions and employers' organizations have several means to encourage investments in general, especially those with positive employment effects, even though the role of a State as an investor and provider of finance for investments has decreased radically. Changes in the composition, location and sources of finance for investments have affected the selection of available means to influence the investment decisions that are taken primarily in enterprises.

The discussion of investment and employment is motivated by the underlying question of how more and better jobs can be generated from investment in the changing context of decision-making, especially in areas where they are needed most: in least developed countries; in less developed regions within countries; and in smaller enterprises.

The role of enterprises in investment and employment

Areas of concern

- 103.** Until the mid-1980s, private and public investment tended to move at a more or less equal pace. Since then, the level of private investment has surpassed public investment initiatives. Increased privatization, deregulation and economic stabilization have expanded opportunities for private sector growth, and new sectors, such as infrastructure for public utilities, telecommunications and transportation, have been opened to private investment. The role of private enterprises as investors and contributors to employment has grown in importance.
- 104.** Over the last 20 years, and particularly in the 1990s, production has gradually shifted towards more knowledge-intensive products and services. It has been estimated that production will grow much faster in such industries and that consequently their share of total production will increase. Much of the value in goods such as cars also derives from computer software and other intangible inputs. Knowledge-intensive international firms showed their particular significance for employment creation in the early 1990s when they were able to expand employment while it was declining in other sectors.
- 105.** With respect to the availability of resources for research and development (R&D), home-market companies are in a disadvantaged position. Many such companies are relatively small and depend on the consumption of goods and services by international companies. In

⁶⁷ Subject to a reformulation of the first point for discussion in para. 137 below, this proposal is identical to the proposal submitted to the Governing Body in March 2000. GB.277/2/1, paras. 85-132.

recent years competition between these companies has increased as international enterprises are trying to reduce the number of their principal subcontractors.

- 106.** R&D is associated not only with knowledge-intensive products but also with knowledge-intensive organizations. In general, front-runners in the development of flexible forms of work organization – such as decentralized management responsibility, the use of work teams and job rotation, continuous skills development and the use of remuneration systems based on results and quality – are international, larger companies employing people with high levels of education. Companies that have pursued such innovations have, according to many comparative studies, shown improved productivity and profitability, as well as the ability to attract and retain highly skilled employees.

Points for discussion

- 107.** What are the survival strategies of companies that operate in traditionally labour-intensive industries? How is it possible to ensure that these companies make a successful transition towards better use of technology and human skills? Many traditionally capital-intensive companies face the same problems, especially in primary production. There are local projects concerning this issue, but the ideas and experience generated by these projects are not accessible to many because the information has not been compiled or organized globally.
- 108.** How can those companies that operate in regions where access to modern information and communication technology and infrastructure is very limited, such as sub-Saharan Africa, avoid being excluded from knowledge-intensive development? What can be learned from the experience of those European countries that have not been in the mainstream of globalization? For example, what have been the role of foreign direct investment (FDI) and the promotion of inward investment in the creation of jobs for skilled labour?
- 109.** What is the future of SMEs in an environment that stresses growth – including the growth of companies – as a key to survival? Is shifting from small to large a desirable or requisite aim for all small companies? If not, what are the determining factors – technology, organization, market conditions – that allow companies to remain small but successful in different industries and regions?

The State's role as an investor and contributor to investment

Areas of concern

- 110.** There is a global trend away from state ownership to private ownership, and from monopoly toward competition. Large-scale privatization of state property has occurred in most parts of the world. Consequently, the State's role as an owner of production facilities has declined and its role as an investor has changed.
- 111.** Until the mid-1980s, private and public investment tended to move together. Since then, the level of private investment has risen. As industries have been transferred to the private sector, deregulation and economic stabilization have increased growth opportunities, and new sectors such as infrastructure have opened to private investment.
- 112.** The State's role as an investor now lies increasingly in social services and especially in human resources. Development of human resources provides excellent investment opportunities in terms of its contribution to sustainable economic growth. There is a strong

positive association, for example, between school enrolment and average rates of growth. An educated population is the key to long-term growth and employment. In spite of this, education and training have been among the main targets for cuts in public expenditure in many developed countries.

113. The State's role has shifted from that of an investor to a promoter of private investments: even where a telecommunications network and service are provided by private companies, the government is expected to play a promotional and developmental role to facilitate and ensure the flow of investment funds to the sector. This role consists of research and development, pilot networks, purchasing policy, basic infrastructure, etc. Telecommunications is a good example of an industry that is a prerequisite for a modern network enterprise, and, at the same time, a business which itself requires developed infrastructure starting from the raw physical connectivity. A network enterprise is the actual unit of business operation, made up of different companies, or segments of companies, and of consultants and temporary workers attached to specific projects. The agents of the business project form, for each project, an enterprise that is defined by the task and the performance, not by its legal boundaries.
114. States allocate public funds also to the private sector's own investments, both in the national framework and international framework. Usually there is some conditionality involved in such funding, for example in the form of adjustment programmes.
115. At the national level, various investment incentives are tied to employment expansion: a grant or credit of a certain amount is provided for investments in businesses that commit themselves to increase net employment by an average of a certain number of full-time positions during a fiscal year. Although the short-term positive result is evident – new jobs – these types of incentives have been questioned. They are relevant if a company cannot otherwise afford an investment that would truly improve its performance.
116. It has been increasingly recognized that the capability of small and medium-sized enterprises to compete and survive is crucially affected by the quality of inter-firm and firm-institution networks in which they are embedded. Much policy attention is therefore directed at the needs of clusters of firms, rather than at individual firms. Firms may collaborate on such issues as product upgrading or training, and the initiative may come from the firms themselves, from a government agency, from a local training institution or, as with the Garment Industry Development Corporation in New York, from a tripartite body. Such firm clusters are by their nature regional or subregional, and encouraging cluster development can aid local development, investment and employment.
117. At the international level, grants and credits are parts of adjustment programmes. The selection of instruments for promoting growth and employment is an important consideration in the design of adjustment programmes. Adjustment programmes have increased growth in some of the countries where they have been effectively implemented, but in many regions only the numbers of the poor continue to grow, even in countries with strong adjustment programmes. Adjustment policies have been criticized for not taking into account local circumstances and traditions: in Africa the programmes have often failed to pay attention to the fact that most people live in rural areas and are self-employed smallholders, and adjustment programmes that move the terms of trade in favour of the rural sector and focus on broad-based growth in agriculture consequently offer the most immediate opportunity for alleviating poverty and promoting economic growth.

Points for discussion

118. Points for discussion might include:

- The different government roles that need to be balanced, including the creation of a sound macroeconomic framework; public investments in human resources; the promotion of private investment; the funding of private investment; special measures to support small and medium-sized enterprises to further employment-generating investment. In the balancing of these governmental roles, should priority be given to those which most evidently bring the wanted result in the long term, or on the development of new, experimental roles and means?
- As regards the formulation of guidelines for public sector expenditure that facilitate employment-generating investment, what are the short- and long-term prospects for investing the available public resources; for public and private sector contributions to the provision of essential services or to meet the demands of various services related to investment and employment (basic education, training, employment services, etc.)?
- As regards the formulation of guidelines for government intervention in private investment, should governments restrict their role to infrastructure building or intervene more directly in private capital formation? What means of intervention are appropriate in the national and international context, taking into account competition and other policies, as well as cultural, political and other differences between regions and States? Should adjustment programmes concentrate on supporting and developing existing structures or on creating new alternatives?

Targeting of investments

Areas of concern

119. The globally prevailing trend is away from labour-intensive production and towards capital-intensive production in almost all industries.
120. Technological advances have made it possible to develop technical solutions for various kinds of tasks that were formerly handled manually. The unpredictability of the economic context where many firms operate has made them more circumspect about employing workers.
121. The employment decision is similar to the investment decision for a firm, where it is desirable to hire a worker only when the net current value of the hiring decision is positive. A firm must compare the cost of investing in workers with that of investing in machines and equipment. In many cases, a worker is more flexible than a machine. Rising unit labour costs contribute to the erosion of competitiveness.
122. The key issue in the discussion on labour costs has been flexibility: employment security regulations affect labour market flexibility; in general they reduce numerical flexibility, but promote functional flexibility.
123. The degree of employment security that firms are willing to provide depends partly on the extent of their existing investment in staff. The firm calculates that providing employment security will also increase the return on the firm's investments in labour force training and skills development, both specific and general. Consequently, low-skilled employees are more vulnerable in times of economic downturns in the business concerned and in the region.
124. In addition to labour laws and collective bargaining, tax laws also affect labour costs and employment. The taxation of labour is often heavier than that of capital. Employee and employer payroll taxes – from which various social transfers are covered – have been at

the centre of the discussion on the relationship of taxation to employment creation. Payroll taxes raise the relative cost of labour, creating a disincentive for firms to create jobs. Moreover, as payroll taxes are not profit-based, they put pressure on firms during cyclical downturns.

- 125.** High labour costs in developed countries have been cited as an argument for investing in labour-saving, capital-intensive technology and outsourcing to countries where production is less expensive. This has had an impact by raising structural unemployment, and the associated costs have added to the fiscal burden. This in turn has necessitated higher tax rates, which have further discouraged investment and, consequently, job creation.
- 126.** Small and medium-sized enterprises account for a large share of employment, but for a much smaller share of investment. This is inevitable given that capital-intensive industries are likely to be large scale. However, many small and medium-sized enterprises need a higher level of investment in order to expand, to raise product quality and to compete more effectively. With greater investment, some of the inefficiency and waste generated by enterprise failure can be avoided, and with better quality equipment workers with a higher skill level can be taken on, thus contributing to the development of a broad-based training culture in the economy. Small and medium-sized enterprises clearly suffer from a number of constraints on their expansion and potential for increased profitability, such as problems of marketing, purchasing and location, etc.
- 127.** Employer payroll taxes are likely to affect small businesses differently than large businesses, for several reasons: payroll taxes constitute a much larger proportion of total taxes for small businesses; administrative costs are higher; smaller businesses tend to be labour intensive and to hire more low-income, low-skilled employees; short-term market adjustment effects can have a heavier impact on cash flow for small businesses; and payroll taxes are not sensitive to profit.

Points for discussion

- 128.** Points for discussion under this section might include:
- How can labour laws and collective agreements be adjusted so that the regulations provide sufficient flexibility to the labour market without violating workers' rights and without reducing employment?
 - How can taxation be adjusted so that the cost burden is decreased without eroding the social protection system? What is the effect of the level and kind of taxes (e.g. taxes on earned income, consumption and property, as well as social insurance contributions) on employment?
 - How can regulations be reformed so that they promote employment in small and medium-sized enterprises?

Location of investments

Areas of concern

- 129.** Investment and production decisions are now made by companies on a global basis. Investors base decisions concerning capital expenditure on potential sales volumes, raw materials potential, proximity to clients, customers' demands, market and cost structures and the prevailing political and legal conditions.

- 130.** Globalization offers investors in the international capital markets a wider range of investment opportunities, higher returns on savings and greater portfolio diversification. For the global economy as a whole, globalization promotes the more efficient allocation of resources worldwide and thus greater world growth, investment and employment.
- 131.** Investments – including foreign direct investment (FDI) which contributes directly to employment – are distributed unevenly among the regions and countries. Countries and regions that are unable to participate in the expansion of world trade or to attract significant amounts of private investment run the risk of being left behind by the global economy. The countries and regions at greatest risk of being marginalized are precisely those most in need of the trade, investment and growth that globalization could bring.
- 132.** Developing countries as a whole received 37 per cent of FDI inflows in 1997, compared to 17 per cent at the beginning of the decade. However, among developing countries, FDI inflows are concentrated in a small number of countries and regions. The main recipient regions are East Asia and the Pacific, Latin America and the Caribbean. Compared with other parts of the world, the overall volume of FDI in Africa remains low, and is thus a source of concern. Between 1991 and 1996, Africa attracted less than 5 per cent of total FDI flows to developing countries.
- 133.** The reasons for lack of FDI are varied, and the relationship between them is not fully understood. In addition to economic, there are also political reasons, which are in turn related to other economic considerations. Political instability and lack of confidence in governments are regarded as the ostensible culprits. Investors may perceive that reforms have not yet been firmly rooted in a given country, or that private investment does not enjoy the full commitment of the government as an objective, and they are thus hesitant. Some observers allude to the fact that there is little by way of an organized private sector in such countries. Finally, the risks to foreign investors are relatively high, while the rewards are low.
- 134.** Although the merits of globalization and foreign direct investment are recognized, globalization has also evoked fears. It has been argued that multinational enterprises have exported jobs from developed countries to developing countries through foreign investment and export production in special economic zones, and that through trade liberalization, governments have encouraged the replacement of domestically produced goods by goods produced abroad.
- 135.** Special economic zones belong to the numerous incentives that governments use in order to attract foreign direct investment. Basically, a special economic zone – giving free trade status to exporters – is a practical intermediate step for countries that cannot make the move to free trade quickly. Free trade zones (FTZs) and export processing zones (EPZs) are sites where foreign or domestic merchandise may enter without formal customs clearance or the payment of customs duties or government excise taxes. EPZs are dedicated to manufacturing for export, whereas FTZs also handle imports. But attitudes toward them vary considerably. Where they have been successfully applied, as in East Asia, the schemes have made a big contribution to the success of manufactured exports. Furthermore, export success has led not only to economic growth but also to generating the momentum for trade liberalization. On the other hand, operators of special economic zones have been accused, inter alia, of violations of human rights.
- 136.** For the governance of globalization, a great number of regional organizations aimed at ensuring economic integration have been formed. As regards regional integration, three trends are visible: free trade areas develop into areas involving deeper economic integration. Either organizations are replaced with new ones, or new elements are added to existing organizations. Economic integration areas continue to enlarge, either by mergers

of organizations or the admission of new members to existing organizations. Cooperation agreements between regional groups are increasing.

Points for discussion

137. Points for discussion under this section might include:

- What are the conditions which enable more countries to benefit from the global economy through generating and attracting capital?
- How should the policies and activities of global organizations (such as UN agencies), regional organizations for economic integration or free trade (EU, ASEAN, NAFTA, CARICOM, MERCOSUR, SAARC, SADC, etc.) and national governments be coordinated and prioritized in order to avoid the uneven distribution of FDI and other benefits of globalization? Should they have some common macroeconomic policy goals concerning, for example, interest rates, or policies concerning various means to attract FDI?
- How should the more successful economies help the others in ensuring a favourable climate for job-creating investment? What kinds of advisory, assistance and information services are needed regarding policy formulation, the streamlining and strengthening of mechanisms and administrative procedures, and updating information on global market trends and the policies and practices of other countries?

Funding of investments

Areas of concern

138. In most developing countries, both public and private savings rates are far too low to finance the targeted levels of investment.

139. Private capital has displaced official development finance as the main source of external financing for developing countries, accounting for 85 per cent of the total in 1997, compared to only 41 per cent in 1990. Between 1990 and 1997, disbursements by official aid agencies declined from nearly 60 per cent of net long-term resource flows to developing countries, representing a reduction of 15 per cent. There has also been a decline in absolute terms. This decline reflects better access to capital markets by an increasing number of developing countries as well as decreasing demand for official assistance in financing public sector investment, such as infrastructure projects.

140. However, private FDI flows are heavily concentrated on a narrow range of countries, sectors and borrowers: 75 per cent of net private capital flows go to a dozen countries, which include the largest developing countries. This leaves over 100 developing countries with little access to private financing. Even among countries that receive private capital, borrowing is limited to a small set of top-tier countries, and is mainly targeted at extractive industries, infrastructure and the financial sector.

141. This concentration suggests that multilateral development banks (MDBs) should play a more selective role in financing development in the twenty-first century, focusing on areas not adequately financed from other sources. This poses a dilemma for the MDBs, since the findings on aid effectiveness suggest that to achieve greater impact they must concentrate assistance on countries where policies and institutions are reasonably supportive of development. These are also likely to be the countries that are the most attractive to private

investors. This raises the question of whether developing countries with good access to private finance should graduate from MDB borrowing. On the other hand, the point at which they should do so is likely to be difficult to define, as disparities in the level of development and access to financing can be as great within countries as between them: for example, there is a huge gulf between living standards in coastal China and those in the interior, or between São Paulo and Manaus.

- 142.** Demand for policy-based lending, which remains one of the World Bank's major capabilities, is likely to continue to fluctuate. The size of rescue packages has increased in recent years with each major crisis. With further liberalization might come even greater volatility. Thus, MDBs may retain a role as a lender of last resort to countries, even where their role in financing investment has ceased.
- 143.** The structure of private financing of investments has changed radically in recent years. Traditionally, dealings between borrowers and savers occurred through banks and securities firms, with banks lending depositors' funds direct to firms, and securities firms providing the distribution of new issues of debt and equity to individual investors, pension funds and insurance companies. Two notable trends have eroded this traditional view of financial intermediation.
- 144.** First, from the supply side, non-bank financial institutions have been slowly challenging banks' traditional assets, by facilitating the securitization of finance and by offering financial services that have historically been provided almost exclusively by banks. Investment banks, securities firms, asset managers, mutual funds, insurance companies, specialty and trade finance companies, hedge funds and even telecommunications, software and food companies are starting to provide services not unlike those traditionally provided by banks.
- 145.** Secondly, on the demand side, many households have bypassed bank deposits and securities firms in order to hold their funds with institutions better able to diversify risks, reduce tax burdens, and take advantage of economies of scale. The result has been a dramatic growth in the size and sophistication of institutions that specialize in investing money, increasingly on a global basis, on behalf of households.
- 146.** Non-bank financial sectors in the major advanced economies are very large. In the G7 countries, insurance companies, pension funds, investment companies and other non-bank institutional investors managed assets totalling more than US\$20 thousand billion (\$20,000,000,000,000) in 1995. To put this figure in perspective, this amounts to some 110 per cent of the GDP of all the G7 countries; it is more than half the value of all bonds and equities outstanding in these countries; and it represents 90 per cent of all assets in the banking systems in those countries. International financial capital movements have expanded enormously under the combined impact of financial deregulation and innovation. For example, cross-border transactions in bonds and equities soared in major industrial countries, from less than 10 per cent of GDP in 1980 to between 150 and 250 per cent in 1995.
- 147.** Although portfolio investments can make an important contribution to the financing of equity capital for local companies, host countries have expressed concerns, particularly regarding the volatility of these flows and their effect on exchange and interest rates. Tax policies have frequently supported the increasing share of portfolio investments.
- 148.** The abundance of sources tempts companies to use outside equity sparingly. Investment levels are kept high, even when the profitability is relatively low.

149. Increasing the profitable investment of public sector revenues has recently been under debate in many developed countries. The discussion has focused in particular on the funds of various social insurance programmes, especially social security funds. Traditionally, these funds have been placed only in areas regarded as safe investments, such as government securities, which are mainly long-term bonds. However, the funds could obtain a much higher return by investing the money in equities. There are, at least theoretically, also other options: governments – or whoever is to decide – could finance investments that have an employment-generating impact.

Points for discussion

150. Points for discussion under this section might include:

- What should be the role of MDBs and official development finance in general in financing investments in developing countries? How can effective aid and sustainable long-term development be combined?
- What kind of preventive safety nets are needed to avoid major economic crises and to reduce the need of MDBs to provide rescue packages? Should safety nets supplant or somehow strengthen private capital, monitoring, and closure mechanisms? What kind of risks should these safety nets take into account?
- Should the public financing of investments be somehow restored, for example by starting to invest the surplus money of social security funds extensively in stock markets?