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67th Session 1981

Report VIII (2)

**Termination of Employment
at the Initiative of the Employer**

Eighth Item on the Agenda



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INTRODUCTION

The Governing Body of the International Labour Office, at its 211th (November 1979) Session, decided to place on the agenda of the 67th (1981) Session of the International Labour Conference an item entitled "Termination of employment at the initiative of the employer".

In accordance with article 39 of the Standing Orders of the Conference, concerning the preparatory stages in the double discussion procedure, the Office prepared a preliminary report¹ intended to serve as a basis for the first discussion of the question. That report, after giving a summary of the antecedents to the Governing Body's action, examined the relevant law and practice in different countries. It was accompanied by a questionnaire and was communicated to the governments of member States of the ILO, which were asked to send their replies so as to reach the Office not later than 30 September 1980.

When the present report was prepared, the Office had received replies from the governments of the following 50 member States: Austria, Bahrain, Belgium, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Madagascar, Malta, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Philippines, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Switzerland, Trinidad and Tobago, Tunisia, USSR, United Kingdom, United States, Uruguay and Yugoslavia.²

The Commission of the European Communities also communicated replies to certain questions, indicating that the aspects of the problem dealt with in these questions are subject to provisions of Community directives. The relevant replies (to questions 33, 34, 35 and 40) are reflected in the replies of the governments of individual member States of the Communities, to which the Commission also indicates that reference should be made.

The attention of governments was drawn to the recommendation addressed to them by the Governing Body of the ILO at its 183rd Session in June 1971 that they consult the most representative organisations of employers and workers before finalising their replies, and governments were asked to indicate which organisations had been so consulted.

The governments of 30 member States (Austria, Bahrain, Belgium, Botswana, Byelorussian SSR, Colombia, Cyprus, Czechoslovakia, Denmark, Egypt, Finland,

¹ ILO: *Termination of employment at the initiative of the employer*, Report VIII (1), International Labour Conference, 67th Session, Geneva, 1981.

² Replies from Algeria, Australia, Bangladesh, Bulgaria, Burundi, Chile, Fiji, Greece, Italy, Ireland, Jamaica, Japan, Panama, Papua New Guinea, Peru, Portugal, Rwanda, Senegal, Sri Lanka, Tanzania and Ukrainian SSR were received too late for inclusion in this report. They will be available for consultation by delegates at the Conference.

German Democratic Republic, Hungary, India, Kenya, Madagascar, Norway, Poland, Romania, Singapore, Suriname, Swaziland, Sweden, Switzerland, Tunisia, USSR, United Kingdom, United States, Uruguay and Yugoslavia) stated that their replies had been drawn up after consultation with the most representative organisations of employers and workers or included in their replies the opinions expressed on certain points by these organisations. Nine governments (Cyprus, Finland, France, Federal Republic of Germany, Netherlands, New Zealand, Pakistan, Spain and Switzerland) communicated separately the opinions of employers' or workers' organisations. These opinions have not been included in the present report.

This report has been prepared on the basis of replies received from member States, the substance of which is reproduced hereafter,¹ together with brief commentaries; the Proposed Conclusions are given at the end of the report.

If the Conference considers it advisable to adopt one or more international instruments concerning termination of employment at the initiative of the employer, the Office, on the basis of the Conclusions as approved by the Conference, will prepare a draft instrument or draft instruments for submission to governments. It will then be for the Conference to take a final decision in the matter at a future session.

¹ To meet the wishes of the Conference an effort has been made to present the replies as concisely as possible.

REPLIES FROM GOVERNMENTS AND COMMENTARIES

This section gives the substance of, first, the general observations and, then, the observations on the questions to which governments were asked to reply. In certain instances, the general observations submitted by governments serve to elucidate their replies to individual questions.

Each question is reproduced and followed by the total number of replies, a list indicating the governments that replied to it and the nature of the reply. Asterisks after the names of countries denote those governments which made observations the substance of which is reproduced; observations that may be regarded as equivalent to a simple affirmative or negative reply to a question or part of a question are not reproduced. Where a government deals with several questions in one reply, the substance of its reply is given under only one of these questions and is referred to in footnotes to the other questions covered by the same reply. Some governments supplied information concerning their national law and practice. This information, which is very useful for the work of the Office, has been reproduced only where essential to an understanding of the government's reply.

The summary of the observations on each question is followed by short Office commentaries referring to the corresponding Point or Points in the Proposed Conclusions at the end of the report.

General Observations

Belgium. The Government indicates that certain aspects of the matter covered by the questionnaire are subject to provisions adopted pursuant to the Treaty establishing the European Economic Community and that the reply takes these provisions into account.

Denmark. The Government indicates that the questions dealt with are, in part, the subject-matter of provisions laid down by virtue of the Treaty establishing the European Economic Community and that the reply gives due consideration to such provisions.

Finland. The problem of security of employment is being considered in Finland by a committee in which public authorities and employers' and workers' organisations are represented and which is to complete its work before 31 December 1980. The committee is to investigate the need for and possibilities of developing legal protection of the continuity of employment in the light of legislative developments internationally. Since the results of this review are not yet available, the Government cannot express its final view on all questions covered by the report.

France. The Government indicates that the matter covered is in part the subject of provisions adopted pursuant to the Treaty establishing the European Economic Community and that the reply takes these provisions into account.

Federal Republic of Germany. The Government indicates that in certain respects the matter covered is subject to provisions adopted pursuant to the Treaty establishing the European Economic Community and that the Government's reply takes these provisions into account.

India. The proposed instrument, particularly if it takes the form of a Convention or of a Convention supplemented by a Recommendation, should be as flexible as possible so as to

take into account the socio-economic conditions and practices in different countries. Only an approach of this kind is likely to lead to maximum possible ratifications. The situation in developing countries should, in particular, be kept in view.

Netherlands. The Government indicates that in some respects the matter dealt with is the subject of provisions adopted pursuant to the Treaty establishing the European Economic Community and that the reply is given with due regard to these provisions.

Yugoslavia. In view of the importance of providing protection for workers in employment and particularly protection against arbitrary acts in respect of termination of employment by the employer, the Government fully supports the placing of this item on the agenda of the Conference. While the existing Recommendation has made a full contribution on this matter, conditions are now ripe for the ILO, on the basis of the experience acquired, to regulate this matter by standards laid down in a Convention.

I. Form of International Instrument

Qu. 1 *Should the International Labour Conference adopt an international instrument or instruments concerning termination of employment at the initiative of the employer?*

Total number of replies: 50.

Affirmative: 46. Austria, Bahrain, Belgium*, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, German Democratic Republic, Guyana, Honduras, Hungary, India, Kenya*, Kuwait, Madagascar, Malta, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Spain, Suriname, Swaziland, Sweden, Switzerland, Trinidad and Tobago, Tunisia, USSR, United Kingdom, United States, Uruguay, Yugoslavia.

Negative: 1. Philippines*.

Other: 3. Colombia*, Federal Republic of Germany*, Singapore*.

Belgium. Yes. Discretionary termination of employment at the initiative of the employer brings into question stability of employment. During the current period of economic crisis characterised by closures and restructuring of undertakings, stability of employment is one of the fundamental problems of labour law and an important trade union demand. It is therefore necessary to find an equilibrium between a somewhat utopian absolute stability of employment and the discretionary power of the employer as regards termination of employment. Without necessarily calling into question the right of the employer to dismiss, it seems desirable that the employer should be able to do so only for valid reasons, which in case of dispute would be submitted for examination to a labour tribunal or other body in accordance with national practice.

Colombia. Termination of employment at the initiative of the employer is fully covered by current labour legislation.

Federal Republic of Germany. There are no objections to the adoption of such an instrument.

*Substance of observations reproduced below.

Kenya. Yes. The Federation of Kenya Employers is of the belief that the adoption of any form of international instrument on this subject is not necessary, having regard to the differences in conditions of law and practice relating to contracts of employment in various countries and the fact that the Termination of Employment Recommendation, 1963 (No. 119), more than adequately covers the question.

Philippines. An international instrument concerning termination of employment at the initiative of the employer is not really a matter of extreme urgency. The subject is adequately covered by the national law of most countries, due perhaps to the influence of Recommendation No. 119, or to the recognition by a particular country of the importance of having some laws to govern labour standards. The prescription of standards and procedures of a general nature for all nations may not be appropriate as the needs and national conditions vary from country to country. It is therefore best for each country to prescribe its own rules, standards and procedures, attuned to the conditions of the country and to the needs, the culture and perhaps the temperament of the people. Recommendation No. 119 ensures adequate protection of workers and a new instrument is not necessary.

Singapore. The Government has no objection to the adoption of a new instrument on the subject.

Since the great majority of governments replied in the affirmative, the Proposed Conclusions presented at the end of this report have been drafted with a view to the adoption of international instruments on the subject (*Point 1*).

If so, should the instrument(s) take the form of:

Qu. 2

- (a) a Convention;
- (b) a Recommendation; or
- (c) a Convention supplemented by a Recommendation?

Total number of replies: 49.

Convention: 3. Egypt, Ethiopia, German Democratic Republic*.

Recommendation: 18. Bahrain*, Botswana, United Republic of Cameroon*, Colombia, Cyprus, France*, Kuwait, Netherlands*, New Zealand*, Sierra Leone, Singapore, Suriname, Swaziland, Switzerland*, Trinidad and Tobago, United Kingdom*, United States*, Uruguay*.

Convention supplemented by a Recommendation: 25. Austria, Belgium*, Byelorussian SSR, Canada*, Cuba, Czechoslovakia, Denmark*, Finland, Guyana, Hungary, India, Kenya, Madagascar, Malta, Mexico, Morocco, Nigeria, Norway*, Pakistan, Poland, Romania, Sweden, Tunisia, USSR, Yugoslavia.

Other: 3. Federal Republic of Germany*, Honduras*, Spain*.

Bahrain. Initially a Recommendation would be the most suitable form, providing guidelines for the desirable objectives, supplemented possibly by an annex setting out flexible methods of implementation to accommodate the variety of national conditions.

* Substance of observations reproduced below.

Belgium. It is difficult to take a position at this time on the form of the instrument to be adopted. However, experience has often shown that adoption of a Convention supplemented by a Recommendation is liable to attract a larger consensus during the Conference.

United Republic of Cameroon. The instrument should take the form of a Recommendation revising and supplementing Recommendation No. 119.

Canada. While initially supporting the adoption of a Convention supplemented by a Recommendation, the Government would wish to reserve judgement since the actual resolution of various questions will affect their acceptability and thus the Government's preference for their inclusion in a Convention or a Recommendation.

Denmark. In principle the objective should be the drafting of a Convention, perhaps supplemented by a Recommendation. However, the Government's final position on the question, including the distribution of provisions between the two instruments, must await the results of the discussions concerning the content of the provisions.

France. A Recommendation should be adopted, replacing Recommendation No. 119 in preference to a Convention supplemented by a Recommendation. The adoption of a Convention would give rise to difficulties, particularly that of obtaining many ratifications of an instrument requiring acceptance by States of a set of uniform legal rules in a particularly complex field in which national provisions are very diverse. It seems preferable to adopt a Recommendation which, while setting the objective to be attained, allows for adaptations to each national system.

German Democratic Republic. A Convention is preferred because of the importance attaching to the problems that may arise for a worker whose employment is terminated by the undertaking, and because a significant aspect of the exercise of the fundamental right to work is involved. A Convention should not only contain principles and rules on the rights and duties of the undertaking and the worker on termination of the employment relationship but should also provide for measures to ensure the exercise of the fundamental right to work when it becomes necessary to terminate employment. If supplementary or explanatory clauses are necessary, there is no objection to a supplementary Recommendation.

Federal Republic of Germany. The question as to the form to be taken by the instrument can only be answered definitively when its contents are known.

Honduras. The instruments should be sufficiently flexible to permit of ratification by the developing countries.

Netherlands. Legislation on termination of employment is, in terms of procedures and jurisprudence, one of the most complicated sections of labour law in many countries. Amendments to bring legislation into line with international commitments, which themselves are equally detailed, often encounter difficulties, not so much because there are objections to their content, but more often because they are impossible to incorporate into the existing framework. A special feature in Netherlands law is the double safeguard of the requirement of prior permission of the head of the local employment office for termination of employment and protection after termination of employment by the Court. Adjustment of this legislation to another system of legislation on termination of employment cannot easily be effected (see question 43). For these reasons the Government advocates an instrument involving a number of general basic standards which have not been worked out in great detail. For the same reasons, it objects to a Convention on this issue and favours the adoption of a Recommendation, as in 1963.

New Zealand. Rules governing the termination of employment in New Zealand result from negotiations through collective bargaining and from common-law decisions as well as from statutory law. It is therefore not appropriate from New Zealand's point of view for this instrument to take the form of a Convention.

Norway. The Government states that the Norwegian Employers' Confederation (NAF) is of the opinion that only a Recommendation should be prepared to cover this field.

Spain. The Government reserves its opinion on the form of the instrument or instruments, pending the outcome of the discussions.

Switzerland. The Government is not yet able to take a definitive position on the form of the instrument. At this stage it expresses its preference for a Recommendation.

United Kingdom. A Recommendation. This is the status of the existing instrument and is the most appropriate form for an instrument of this kind which will cover a wide range of employees' rights and will apply to the wide variety of employment conditions throughout ILO member States.

United States. Since the proposed instrument would revise Recommendation No. 119, and given the highly detailed nature of the proposed instrument together with the wide disparity in practices throughout the world, the Recommendation form would provide the necessary flexibility to permit maximum implementation of the principles to be enunciated.

Uruguay. If a Convention is to be adopted, it should take into account the diversity of conditions and possibilities of member States by offering a wide margin of flexibility. The possibility of accepting one or more parts of a Convention or of ratifying subject to defined exceptions would contribute to such flexibility.

Among governments expressing an opinion on the form of the instrument or instruments, a majority favoured a Convention supplemented by a Recommendation or a Convention alone, while a significant minority favoured a Recommendation alone. In these circumstances, the Proposed Conclusions have been drafted in the form of a Convention supplemented by a Recommendation (*Point 2*).

A number of governments, in reply to this or other questions, have emphasised that the proposed instruments should be drafted in a flexible manner, to take into account the considerable diversity in the way basic principles are applied in different countries. The Office has sought to draft the Proposed Conclusions in as flexible a way as possible so as to leave considerable latitude to governments to implement the principles contained therein in accordance with national circumstances.

Some governments have expressed the view that the draft instrument or instruments should focus on basic principles and avoid matters of detail, or that matters of detail should be left to the Recommendation. In this regard, it should be recalled that this item has been placed on the agenda of the Conference largely as a result of the views expressed by the Conference Committee on the Application of Conventions and Recommendations, at the 59th (1974) Session of the International Labour Conference, in connection with its review of the general survey of the application of Recommendation No. 119 by the Committee of Experts on the Application of Conventions and Recommendations. The Conference Committee concluded that this question should again be brought before the Conference with a view to the adoption of new standards which would take into account developments in national law and practice since 1963. Since many of these developments have occurred in respect of what might be considered to be questions of detail in the protection of workers in connection with termination of employment at the initiative of the employer (although the distinction between basic principle and matter of detail is not always clear), the Office has not found it possible to avoid inclusion of such matters in the Proposed Conclusions. It has, however, sought to draft the Proposed Conclusions concerning such matters in as flexible a manner as possible.

Qu. 3 *If you consider that the International Labour Conference should adopt a Convention supplemented by a Recommendation, which of the provisions to be included in these instruments should appear in the Convention and which in the Recommendation?'*

¹ In reply to this question governments might wish to consider whether, for instance, the provisions referred to in the following questions might be included in a Convention: 4-15, 18-23, 26 (1) and (2), 27-29, 30 or 31, 32, 33, 35, 36, 38-40 and 42 and the provisions referred to in the following questions might be included in a Recommendation: 16, 17, 24, 25, 26 (3), 34, 37 and 41.

This question was irrelevant for a number of governments. Summaries are given below of the replies of 27 other governments, namely those of Austria, Belgium, Byelorussian SSR, Canada, Cuba, Cyprus, Czechoslovakia, Denmark, Finland, Guyana, Honduras, Hungary, India, Kenya, Madagascar, Malta, Mexico, Morocco, Nigeria, Norway, Pakistan, Poland, Romania, Sweden, Tunisia, USSR, Yugoslavia.

Austria. The points to be included in a Convention and those to appear in a Recommendation will have to be examined for each individual subject. The Convention should, however, be devoted solely to questions of principle.

Belgium. It is premature to reply to this question at present. It appears, however, that the provisions referred to in questions 7-29 including the substantive provisions dealing with such matters as the obligation to give reasons for termination of employment, with compensation, and with appeals against termination should be included in a Convention. The provisions concerning collective termination of employment (questions 32-35) and the intervention of the public authorities on behalf of the workers dismissed (questions 40-42) should be dealt with in a separate instrument since they are less connected with the concrete problem of the obligation to give reasons for individual dismissals. On the other hand, questions 30 and 36-39 might be included in a Recommendation.

Byelorussian SSR. The Convention might include the provisions referred to in questions 4-12, 16-23, 25-27, 28 (1), 29, 30 (1), 31 (1), 32 (1), (2) and (4), 33, 35 (1), 36, 38 (1), 39 (1) and (5), 40 (1) and (3), 41 (1), 42. The Recommendation should include the provisions referred to in questions 13-15, 24, 28 (2), 30 (2), 31 (2), 32 (3), 34, 35 (2)-(4), 37, 38 (2), 39 (2)-(4), 40 (2) and (4), 41 (2), 45.

Canada. The Government's initial position would be to support, in the main, the division suggested in the questionnaire, except that the matters dealt with in questions 32 and 36 should be included in the Recommendation.

Cuba. The Convention should include the provisions referred to in questions 4-5, 18-23, 26 (1), (2) and (3) (c), 27-29, 32, 33, 35, 38-40. The Recommendation should include the provisions referred to in questions 16, 17, 24, 25, 30, 31, 34, 36, 37, 41 and 42.

Cyprus. The provisions in questions 32, 35 (2), 36-38, 39 (3)-(5), 40 and 41 should be included in the Recommendation.

Czechoslovakia. The Convention should include the provisions mentioned in questions 4-15, 17-23, 26 (1), (2), 27-29, 31-36, 38-40 and 42. The Recommendation should include the provisions mentioned in questions 16, 24, 25, 26 (3), 37 and 41. The provision in question 17 should be included in the Convention because it deals with an important issue from the point of view of job security. Inclusion of the provisions in question 16 in a Recommendation is preferable because misconduct may be of different kinds and in the case of a dispute it is easier to judge these objectively than to make an objective assessment of a worker's performance. The problems mentioned in question 34 should be considered in connection with question 33. When planning major changes of production, organisation, structure, technology, etc., management should also consider their possible consequences

for employment and conditions of work. The Convention should include provision for obligatory consultation with trade unions on these problems. If such consultation were delayed until the terminations occur, this would substantially limit the possibilities of action of the workers and their organisations. It would probably be desirable to begin, in the Convention, with the requirement in question 34, followed by the provision in question 33 relating to the cases not covered by the basic obligation. The differentiation between the two and the concrete application of the obligations would be left to national legislation under question 6.

Denmark. See the reply to question 2.

Finland. The main principles should be included in the Convention, while detailed provisions, special aspects and clarifications supplementing the Convention should be included in the Recommendation.

Guyana. Questions 4-8, 12-14, 18-29 and 32-35 should be covered by a Convention.

Honduras. The provisions to be included in the Convention and the Recommendation should be in accordance with the ILO definitions of Conventions as international agreements establishing general policy objectives or concrete labour standards and of Recommendations as specifying methods for implementing the objectives and standards established in Conventions.

Hungary. Provided that the Government's replies are taken into account, the Convention should include questions 4-15, 20-23, 26-35, 38-40 and 42, and the Recommendation should include questions 16-19, 24, 25, 36, 37 and 41.

India. The matters dealt with in questions 30-41 could be included in the Recommendation.

Kenya. The Convention should contain basic principles on the subject whereas the Recommendation should provide comprehensive details to facilitate easier application of the instruments.

Madagascar. The Convention should include the essential provisions guaranteeing job security by reinforcing preventive measures and remedies in cases of unjustified termination. The Recommendation should provide in detail for the various stages of the procedure prior to termination, appeal after termination and remedies.

Malta. The Recommendation should include questions 36-38, 40 and 41, to provide sufficient flexibility when dealing with various situations.

Mexico. The Convention should include the provisions referred to in questions 4-7, 11-15, 19, 21-24, 26 (1), (2), 27, 29, 30, 32, 33 (1) and (4), 35 (1), 38, 39 (1), (2) and (5). The Recommendation should include the provisions referred to in questions 16-18, 20, 26 (3), 28, 33 (2), (3), 34, 35 (2), (3), 36, 37, 39 (3), (4), 40, 41.

Morocco. The provisions included in the Convention and in the Recommendation should be as suggested in the footnote to this question.

Nigeria. Recommendation No. 119 should be updated; suitable provisions in the said Recommendation in addition to relevant provisions in other relevant instruments should be reviewed for possible inclusion in the proposed instrument(s).

Norway. Since the preparatory work in this matter is at an early stage the Government finds it difficult to take a clear-cut standpoint on the questions. It is nevertheless of the opinion that the central provisions in Parts V and VI should be included in a Convention.

Pakistan. The Convention should lay down general principles and the Recommendation should contain indications concerning their detailed application.

Poland. The Government agrees in principle to the proposals of the Office.

Romania. The Convention should include the principles of application and the Recommendation should lay down the methods of application of the standards.

Sweden. It is too early to decide how the individual provisions should be distributed between a Convention and a Recommendation. This will depend on the content of the new international instruments. However, the distribution outlined in the questionnaire should be appropriate on the whole (see also the reply to question 43).

Tunisia. The Convention should include rather flexible general principles so as to facilitate ratification by most member States and particularly by the developing countries. The Recommendation should provide for the conditions and methods of termination of employment at the initiative of the employer.

USSR. The Convention should include the provisions referred to in questions 4-12, 16-23, 25-27, 28 (1), 29, 30 (1), 32, 33 (1), (2) and (4), 35 (1), 36, 38 (1), 39 (1) and (5), 40 (1) and (3), 41 (1) and 42. The Recommendation should include the provisions referred to in questions 13-15, 24, 28 (2), 30 (2), 31 (2), 33 (3), 34, 35 (2)-(4), 37, 38 (2), 39 (2)-(4), 40 (2) and (4), 41 (2) and 45.

Yugoslavia. In addition to the proposed provisions, the provision in question 25 should, because of its importance, be included in the Convention, while the provision in question 26 (3) should be included in the Recommendation.

In order to provide governments with a preliminary basis for reflection in formulating an answer to this question, the Office provided in the questionnaire an indication of a possible division of the subject-matter between a Convention and a Recommendation (see footnote to question 3).

Several governments stated that it was too early to take a position on this question, while some governments confined themselves to indicating that the Convention should lay down basic principles on the subject, while the Recommendation should include matters of detail or methods of applying the basic principles.

A number of other governments were more specific, most apparently taking as their point of departure the possible division between the two instruments given by the Office. Several governments accepted in a preliminary way the division suggested by the Office. Most, however, have suggested moving one or more Points from the Convention to the Recommendation, or from the Recommendation to the Convention. There appears to be no consensus on which Points should be so transferred. Usually, only a few governments proposed moving any particular Point from the instrument in which the Office's preliminary suggestions had placed it. However, seven governments favoured including the provision referred to in question 36 in the Recommendation, while six governments favoured including the provisions in question 25 and in question 26 (3), respectively, in the Convention.

In dividing the Points dealt with in the questionnaire between the Proposed Conclusions with a view to a Convention and the Proposed Conclusions with a view to a Recommendation, the Office has taken into account the views of governments regarding the general principles that should govern this division as well as their specific suggestions regarding the place of individual points. As far as possible, the Office has included in the Proposed Conclusions with a view to a Convention Points containing basic principles on which there appears to be a wide agreement among governments and which governments may be expected to implement by legislation to the extent that collective bargaining or other methods of implementation do not do so. It has included in the Proposed Conclusions with a view to a Recommendation Points containing matters of relative detail or methods of applying more general principles, as well as Points on which there is not as full agreement among governments and Points which a number of governments prefer

to leave for implementation to methods of implementation other than legislation, such as collective bargaining. While the Office has sought generally to follow these principles of division, in several instances it has included certain matters of relative detail in the Proposed Conclusions with a view to a Convention, because of their importance and the widespread agreement of governments thereon or because they are very closely related to more general principles also included in the Proposed Conclusions with a view to a Convention.

Accordingly, the Points dealt with in the questionnaire (revised in the light of the substantive replies of governments given below) have been divided as follows between the Proposed Conclusions with a view to a Convention and the Proposed Conclusions with a view to a Recommendation. The former include those Points covered by questions 4-10 (Preamble, Methods of Implementation, Scope and Definitions); questions 12-14 (requirement of justification for termination of employment and reasons that should not constitute valid reasons for termination); 18 (right to a hearing before certain terminations); 19 (waiver of right to terminate for misconduct); 22 (right to a written statement of the reasons for termination); 23 (right to appeal against termination); 26 (1) and (2) (powers of the competent bodies); 27 (remedies in case of a finding of unjustified termination); 28 (period of notice); 29 (certificate of employment); 31 (income protection); 33 (consultation of workers' representatives in case of terminations of employment for economic, technological, structural or similar reasons); 35 (notification to the competent public authorities); and 40 (limited to the underlying principle that placement in suitable alternative employment, with training or retraining where appropriate, should be promoted).

The Proposed Conclusions with a view to a Recommendation include the Points covered by questions 6-10 (Methods of Implementation (duly revised for inclusion in the Recommendation), Scope and Definitions); 16-17 (requirement of a warning before termination for certain reasons); 20 (consultation of workers' representatives before individual terminations); 21 (written notification of termination); 24 (recourse to conciliation procedures before or during the procedure of appeal against termination); 25 (possible suspension of the effects of termination pending the outcome of an appeal); 26 (3) (methods of ensuring that the worker does not bear the burden of proof); 30 (severance allowance); 32 (requirement to seek to avert or minimise terminations for economic and similar reasons and to mitigate their adverse effects on the workers concerned); 34 (consultation of workers' representatives in case of major changes in the undertaking liable to entail substantial terminations); 36-37 (measures with a view to averting or minimising terminations for economic and similar reasons); 38 (criteria for selection for termination); 39 (priority of rehiring); 40-41 (mitigating the effects of terminations); and 42 (superseding Recommendation No. 119).

II. Preamble

Should the Preamble of the instrument(s) refer to the existing international standards contained in the Termination of Employment Recommendation, 1963?

Qu. 4

Total number of replies: 48.

Affirmative: 43. Austria, Bahrain, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Madagascar, Mexico, Morocco, New Zealand, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia*, USSR, United Kingdom*, United States, Uruguay, Yugoslavia.

Negative: 1. Malta.

Other: 4. Belgium*, Federal Republic of Germany*, Netherlands*, Switzerland*.

Belgium. This is useful but not indispensable.

Federal Republic of Germany. There are no objections to a reference of this kind in the Preamble.

Netherlands. No objection.

Switzerland. The Government is not opposed to referring in the Preamble to the standards contained in Recommendation No. 119.

Tunisia. Yes. However, the new instruments should not replace Recommendation No. 119, which can continue to guide the action of certain member States not able to comply immediately with the provisions of the new instruments.

United Kingdom. Yes. The Preamble might also refer to the Older Workers Recommendation, 1980 (No. 162).

As the great majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 3*).

The suggestion that the Preamble also contain a reference to Recommendation No. 162, has not been retained. Although several provisions of that Recommendation have a bearing on the termination of employment of older workers, certain other international labour Conventions or Recommendations also contain provisions with relevance to the subject-matter of the Proposed Conclusions. It has been thought advisable to limit the reference in the Preamble to the existing instrument devoted to termination of employment at the initiative of the employer.

Qu. 5 *Should the Preamble of the instrument(s) note that while the Termination of Employment Recommendation, 1963, has had an important influence on national law and practice, many developments have occurred since that date that have made it appropriate to adopt new international standards on the subject?*

Total number of replies: 48.

Affirmative: 41. Austria, Bahrain, Belgium*, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Denmark,

* Substance of observations reproduced below.

Egypt, Ethiopia, Finland, German Democratic Republic, Guyana, Hungary, India, Kenya*, Kuwait, Madagascar, Malta, Mexico, Morocco, New Zealand, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Sweden, Trinidad and Tobago, USSR, United Kingdom, United States, Uruguay, Yugoslavia.

Negative: 1. Switzerland.*

Other: 6. France, Federal Republic of Germany*, Honduras*, Netherlands*, Philippines*, Tunisia¹.*

Belgium. Yes. It is necessary to emphasise that the present economic crisis, which affects almost the whole world, is characterised everywhere by closures and restructuring of undertakings. It is therefore necessary to ensure a better protection of workers who are victims of these measures.

France. The Preamble should note the developments in the law of many States since the adoption of Recommendation No. 119 and should indicate that this Recommendation has had an important influence on these developments and that it is appropriate to adopt new international standards on this question with a view to achieving still further progress.

Federal Republic of Germany. There are no objections to a reference of this kind in the Preamble.

Honduras. The Government has no objection to this proposal.

Kenya. Yes, provided that this provision is worded as follows: "that while the Termination of Employment Recommendation, 1963, has had an important influence on national law and practice of some member States, many developments have occurred since that date that have made it appropriate to adopt new international standards on the subject."

Netherlands. No objection.

Philippines. A new international standard which would impose more rigid obligations on employers and governments may hinder rather than promote the viability of industries and social and economic development, especially in a developing nation. Workers' protection is important but it must be balanced with the promotion of the viability and growth of industries and undertakings to ensure employment.

Switzerland. It does not seem appropriate to include such a statement in the Preamble.

As the large majority of governments have replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 4*).

The drafting has, however, been revised to take into account the suggestions of several governments, particularly to point out the bearing on the need for new standards of the economic difficulties and technological change experienced in recent years in many countries.

III. Methods of Implementation

Should the instrument(s) provide that the provisions of the instrument(s) should, except in so far as they are otherwise made effective by means of collective agreements or arbitration awards or in such other manner as may be consistent with national practice, be given effect by laws or regulations?

Qu. 6

* Substance of observations reproduced below.

¹ See under question 4.

Total number of replies: 50.

Affirmative: 29. Austria, Bahrain, Botswana, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia*, Ethiopia, Finland, Guyana, Honduras*, Hungary, India, Kenya, Malta, Mexico, Morocco, Nigeria*, Norway, Poland, Romania, Sierra Leone, Singapore, Suriname, Swaziland, Sweden*, United States*, Uruguay.

Negative: 7. Belgium*, France*, Federal Republic of Germany*, Netherlands*, New Zealand*, Philippines*, Trinidad and Tobago*.

Other: 14. Byelorussian SSR*, Colombia*, Denmark*, Egypt*, German Democratic Republic*, Kuwait*, Madagascar*, Pakistan*, Spain*, Switzerland*, Tunisia*, USSR*, United Kingdom*, Yugoslavia*.

Belgium. The choice of methods of implementation should be left to each member State in accordance with national practice. It would be preferable to adopt the wording of Paragraph 1 of Recommendation No. 119 so that the text is adapted to the situations existing in different countries. This wording allows for implementation by contractual instruments as well as by legislation, thus corresponding to Belgian practice.

Byelorussian SSR. The Convention should provide that the main principles should be implemented through legislation by ratifying States; the remaining provisions may be implemented through the adoption by the competent bodies of regulations, the conclusion of collective agreements and other methods consistent with national practice.

Colombia. The provisions are implemented by national legislation in Colombia.

Czechoslovakia. Yes. The instruments, and particularly the Convention, should be applied in the first place by legislation. Collective agreements should as far as possible improve the minimum standards laid down by legislation, having regard to the provisions included in the Recommendation. Without basic protection in legislation, collective agreements cannot be considered to be an adequate protection nor a guarantee of respect for the agreed principles, nor would effective supervision by ILO bodies be possible.

Denmark. The instruments should be drafted to take due account of the fact that in countries like Denmark job security and termination of employment are matters which are more appropriately governed by collective agreement than by laws and regulations.

Egypt. No objections.

France. The wording of the questionnaire establishes a hierarchy between the different norms of national law, giving legislation a supplementary character to collective agreements or other sources of law. It would seem preferable for the instrument to contain a provision on methods of implementation identical to that included in Recommendation No. 119.

German Democratic Republic. Having regard to the importance of problems connected with termination of employment as they affect workers, particularly as regards protection against unjustified dismissal, effect should be given to the provisions mainly by laws and regulations.

Federal Republic of Germany. As in Paragraph 1 of Recommendation No. 119, the wording should refer to national laws or regulations and to alternative methods of application.

Honduras. Yes, but it would be desirable for the implementation of the instruments to be guaranteed by national legislation.

* Substance of observations reproduced below.

Kuwait. The methods of application should be left to member States, in accordance with national legislation.

Madagascar. The instruments should provide that their provisions should be implemented by legislation.

Netherlands. This formulation is usual for a Convention. In view of the fact that the Government can only accept a Recommendation, the provision should read as follows: "Provisions of the instrument may be applied by national laws or regulations, collective agreements, arbitration awards or in any other manner consistent with national practice."

New Zealand. No. National practice in New Zealand with respect to termination of employment develops by a process of negotiation and collective bargaining between the parties as well as by court decisions. This is an on-going process. New Zealand does not believe that the State must legislate or regulate all areas not at present settled in collective bargaining or required by statute. Rather than being obliged to legislate to give effect to this instrument where it is not given effect to by means of awards and collective agreements, the Government would favour a different wording of this clause to suit national conditions. The following would be more appropriate to this Recommendation: "Effect may be given to this Recommendation through national laws or regulations, awards or collective agreements, or court decisions, or in such other manner consistent with national practice as may be appropriate under national conditions."

Nigeria. the proposed instrument(s) should be sufficiently flexible to attract ratification by the largest number of member States.

Pakistan. The instrument should be applied through national legislation.

Philippines. Since most countries have existing laws or regulations governing the subject of employment termination, the adoption of a new international instrument requiring the passage of such laws or regulations may be superfluous.

Spain. Termination of the employment relationship is deemed by the national legal system to be a matter not left to the free will of the parties.

Sweden. Yes. The instrument(s) should provide scope for the type of interaction between legislation and collective agreements which has been found suitable in Sweden and other countries.

Switzerland. The methods of implementation referred to in this provision correspond to those in force in Switzerland. Consequently, the Government is not opposed to their being mentioned to the extent that many aspects raised by the questionnaire can be settled directly by collective agreement.

Trinidad and Tobago. This may not be desirable.

Tunisia. The instruments should provide that their implementation should be ensured by legislation, but also by collective agreements. Collective agreements in Tunisia have been much concerned with problems of termination of employment.

USSR. The Convention should provide that the main principles should be implemented through legislation by ratifying States; the remaining provisions may be implemented through the adoption by the competent bodies of regulations, the conclusion of collective agreements and other methods consistent with national practice.

United Kingdom. It is important that each member State should be able to use means other than legislation to make effective the provisions of the instrument. Within the British system, which takes particular account of the different circumstances in each case of dismissal by avoiding too much detail and rigidity in legislation and which relies on codes of industrial relations practice to supplement its employment protection legislation, it would not always be appropriate to give effect to the provisions of the instrument by legislation.

United States. Yes, the implementation by laws or regulations where provisions are not implemented privately is satisfactory. The wording of Paragraph 1 of Recommendation No. 119 remains satisfactory for a new Recommendation. This wording has been

incorporated into a number of ILO Conventions and Recommendations in recent years. It is important for the proposed instrument to be flexible enough to reflect the widely varying approaches in different countries in respect of the method of guaranteeing protection of the type envisaged.

Yugoslavia. The instrument should be applied by legislation.

The majority of governments replied in the affirmative to this question. A number of governments, particularly governments that favoured adoption of a Recommendation alone, have expressed the view that the implementation of the instrument should be left to the methods found appropriate in each member State, with a view to providing the greatest possible flexibility. These governments generally preferred the wording of Paragraph 1 of Recommendation No. 119 to that included in this question.

Since the Proposed Conclusions are in the form of proposals with a view to a Convention supplemented by a Recommendation, the wording of the present question, which is the wording normally used in international labour Conventions, has been retained in the Proposed Conclusions with a view to a Convention (*Point 5*). Ratification of a Convention would require adoption of legislation, to the extent that effect were not given to its provisions by collective agreements, arbitration awards, court decisions or by other methods consistent with national practice.

On the other hand, a Point has been included in the Proposed Conclusions with a view to a Recommendation, patterned on Paragraph 1 of Recommendation No. 119, which would leave it to each member State to decide whether the provisions of the Recommendation should be implemented by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice (*Point 26*). As previously indicated, the Office has included in the Proposed Conclusions with a view to a Recommendation certain Points contained in the questionnaire which a number of governments felt should be left for implementation by collective bargaining or methods other than legislation.

IV. Scope of the Instrument(s) and Definitions

Qu. 7 *Should the instrument(s) apply to all branches of activity and all employed persons other than those who may be excluded under questions 8 and 9?*

Total number of replies: 49.

Affirmative: 28. Austria, Bahrain*, Botswana, Canada, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland, France, Federal Republic of Germany*, Guyana, Honduras, Hungary, Kuwait, Madagascar*, Malta, Morocco, New Zealand*, Nigeria, Norway*, Poland, Romania, Sierra Leone, Suriname, Swaziland, United States.

* Substance of observations reproduced below.

Negative: 1. Philippines.*

Other: 20. Belgium, Byelorussian SSR*, United Republic of Cameroon*, Colombia*, Denmark*, German Democratic Republic*, India*, Kenya*, Mexico*, Netherlands*, Pakistan*, Singapore*, Spain*, Sweden*, Switzerland*, Trinidad and Tobago*, USSR*, United Kingdom*, Uruguay*, Yugoslavia*.*

Bahrain. Yes, but subject to the scope of application of the term "worker" in national legislation.

Belgium. It would not be appropriate to exclude, *a priori*, branches of activity or categories of workers other than those who may be excluded in accordance with the reply to questions 8-9. However, it would seem desirable to provide for partial exclusion of those categories of manual workers who are subject, by their activities, to considerable mobility (e.g. port and construction workers).

Byelorussian SSR. The instruments should apply to all branches of activity employing hired labour and all workers in these branches; there could be some special provisions regarding the level of guarantees for individual categories of workers. There is no reason to exclude workers employed in the administration of the State. The scope might be limited (bearing in mind the categories of undertakings listed in these questions) only in respect of family undertakings, with an indication of which persons constitute a family.

United Republic of Cameroon. The instrument should apply to all employed persons.

Colombia. The Recommendation should cover all sectors of the national economy.

Czechoslovakia. Yes. An employment relationship for a specified period of time or task should not exclude protection of the worker concerned.

Denmark. General exclusions as regards certain branches of activity, groups of employees, undertakings up to a certain size, etc., or the public sector should, as far as possible, be avoided. However, it should be considered more closely whether there should be certain requirements as regards the employment relationship (minimum age, period of probation, etc.).

German Democratic Republic. In principle, the instrument should apply to all branches of activity and all persons who are in an employment relationship by virtue of a contract of employment.

Federal Republic of Germany. Yes, but see reply to question 8.

India. Past experience indicates that a number of countries cannot ratify certain Conventions merely because their coverage is far too wide. In certain cases, they apply to all sectors of economic activity, irrespective of the stage of development. In many developing countries the bulk of labour is engaged in the unorganised agricultural sector which has its own peculiarities and priorities (e.g. those resulting from the seasonal nature and instability of employment). This sector is thus not in a position to meet the requirements of such Conventions, from the point of view of organisation and resources. Governments may not always be financially or administratively able to enforce the relevant laws or regulations properly. This problem is all the more acute in the case of a vast country such as India. Thus, the Government considers that the scope of the instruments should be left to be decided by the governments concerned. Alternatively, the proposed Convention should indicate sectors to be covered as a minimum in the first instance, while mentioning gradual coverage of all branches of economic activity as the ultimate goal.

Kenya. The instruments should apply to all ranges of activity and to all employed persons including those employed on a casual basis for a longer period than that provided for as a probationary period.

* Substance of observations reproduced below.

Madagascar. Yes, the instruments should apply to all branches of economic activity and to all permanent workers.

Mexico. The instruments should apply to all branches of economic activity except (a) the public administration, (b) the armed forces, (c) the police, (d) family undertakings and (e) agricultural work. Employment relations in these kinds of activities do not have the same characteristics as those in the other branches of economic activities.

Netherlands. The point of departure may indeed be for the scope of the instrument to be as broad as possible, with the possibility of exceptions by law.

New Zealand. The Government has no objection to a Recommendation applying to all branches of activity as a general principle.

Norway. Yes, but allowing for the necessity of supplementary special rules in respect of seafarers.

Pakistan. The instrument should be flexible. Governments should have powers to extend it to such branches of activity as may be deemed appropriate in the national circumstances.

Philippines. No. An international instrument on termination of employment which will apply to all branches of activity is not called for. Voluntary negotiations between workers' and employers' representatives on the matter of employment termination could yield better results.

Singapore. The scope and definition to be adopted should allow for differences in national laws and practice.

Spain. There should be no subjective exclusions from the scope of these standards.

Sweden. The initial premise should be for the instrument(s) to apply to all fields of activity and all employed persons. A basic measure of job security, for example in the form of a ban on termination for reasons referred to in question 13, ought in principle to be conferred on all employees. This need not preclude contracts of employment for a limited period or a particular assignment as referred to in question 8 (a) to (c) and the exclusion of such employment from certain of the provisions of the instrument(s). Special rules may then be needed to guard against circumvention of job security. There may possibly be a call for special rules concerning certain categories of workers such as seamen. Special rules may also be needed for workers given assistance of one form or another by a labour market authority, e.g. persons employed on relief work projects or in sheltered workshops. In so far as special rules are laid down for persons employed in the public sector, they should not confer a job security which is generally inferior to that enjoyed by other workers.

Switzerland. To safeguard the special nature of certain types of contracts of employment, such as contracts of apprenticeship, of commercial travellers and for home work, either special conditions should be provided for these categories of workers or they should be excluded.

Trinidad and Tobago. The instrument should apply to all branches of activity and all employed persons other than those who may be excluded under national law.

USSR. The instruments should apply to all branches of activity employing hired labour and all workers in these branches; there could be some special provisions regarding the level of guarantees for individual categories of workers. There is no reason to exclude workers employed in the administration of the State. The scope might be limited (bearing in mind the categories of undertakings listed in these questions) only in respect of family undertakings, with an indication of which persons constitute a family.

United Kingdom. It would be more appropriate to permit each member State to limit or exclude the application of the instrument to specific categories of employees who are not covered by its laws or practice. However, the Government could accept provisions along the lines of questions 7 to 9, provided that they did not cut across the particular exceptions and exclusions which the United Kingdom has found appropriate in its own laws and practice. See in this regard the replies to questions 8 and 9.

Uruguay. The possibility should expressly be left to the national legislation of each country to exclude whichever sectors and/or persons it considers appropriate.

Yugoslavia. The instrument should apply to all branches of economic activity, excluding the workers indicated in question 8 and those in question 9 who have acquired entitlement to an old-age pension.

The majority of governments replied in the affirmative to this question. Most governments which made substantive comments accepted that the instrument(s) be general in coverage, but proposed exclusion of or special rules for one or more categories of workers. Several governments, on the other hand, expressed the view that the scope of application of the instruments should be left to the discretion of member States. As a large majority of governments appear in their replies to approve of the principle that the instruments should be general in coverage, subject to the possibility of excluding certain categories of workers, the Proposed Conclusions have been worded accordingly (*Point 6(1)*). The proposed exclusions or special rules will be considered in connection with questions 8 and 9.

Should the instrument(s) provide that the extent to which the guarantees provided for in the instrument(s) should apply to the following categories of workers should be determined by national laws or regulations:

Qu. 8

- (a) *workers engaged for a specified period of time or a specified task who, owing to the nature of the work to be effected or the circumstances under which it is to be effected, cannot be employed under a contract of employment of indeterminate duration;*
- (b) *workers serving a period of probation, or during a qualifying period of employment, determined in advance and of reasonable duration;*
- (c) *workers engaged on a casual basis for a short period;*
- (d) *public servants engaged in the administration of the State to the extent only that constitutional provisions preclude the application to them of one or more provisions of the instrument(s)?*

Total number of replies: 50.

Affirmative: 27. Austria, Bahrain, Botswana, Canada, Cuba, Cyprus*, Czechoslovakia, Egypt, Finland*, German Democratic Republic*, Guyana, Honduras*, Hungary, Kenya, Kuwait, Morocco, Nigeria, Norway*, Poland*, Romania, Sierra Leone, Suriname, Swaziland*, Trinidad and Tobago, United States, Uruguay, Yugoslavia.

Negative: 3. United Republic of Cameroon, Malta, New Zealand*.

Other: 20. Belgium*, Byelorussian SSR¹, Colombia*, Denmark¹, Ethiopia*, France*, Federal Republic of Germany*, India*, Madagascar*, Mexico*, Nether-

* Substance of observations reproduced below.

¹ See under question 7.

lands*, Pakistan*, Philippines*, Singapore¹, Spain*, Sweden¹, Switzerland*, Tunisia*, USSR¹, United Kingdom*.

Belgium. (a) The contract of employment for a specific time or a specified task excludes, in principle, termination by the employer, since the contract automatically ends at the given date or at the moment of completion of work. The instrument might, however, be applied to cases of termination before the expiry of the term or completion of work. Moreover, the distinction proposed between contracts that are fixed-term contracts by nature and other fixed-term contracts (not justified by the nature of the work to be carried out) appears to be very difficult to make. This question raises the problem of defining cases in which the employer may legally make a contract for a specified time or task. Should complete freedom be left to the contracting parties or should recourse to this type of contract be limited? When the contract is by nature for a specific time there is less of a risk of abuse by the employer.

(b) Contracts for a period of probation by definition derogate from the common law; the guarantees envisaged by the ILO should not automatically be extended to these contracts.

(c) Here, too, this refers to contracts of a specified duration; the risk of abuse or termination before term will be rare and does not justify special protection.

(d) Public servants may be excluded from the protection envisaged since they benefit from a statutory régime ensuring them absolute stability of employment.

Colombia. National legislation should contain exceptions in certain cases.

Cyprus. Yes. In respect of (b), the Pancyprian Federation of Labour suggests that the period of probation should not exceed six months.

Ethiopia. (a) to (c) Yes.

Finland. (a), (b) and (d) Yes.

(c) Yes, provided that the duration of a short employment relationship is clearly defined.

France. The instrument should provide that national legislation should determine the categories of workers to which the guarantees provided thereby would not apply—that is, workers engaged for a specified period of time, workers serving a period of probation, temporary workers, public servants and public employees to the extent that they are subject to rules of public law or if constitutional provisions preclude the application to them of the instrument.

German Democratic Republic. Yes. There should, however, be a recommendation to the effect that the guarantees provided for in the instrument should be applied as fully as possible to such workers by national legislation. In this connection an appropriate part of the instrument should provide for special protection for young persons under apprenticeship contracts. In particular, this protection should extend to further employment after training. Consideration should be given to imposing an obligation on the undertaking to continue to employ young persons who have completed their apprenticeship until they take up work elsewhere in the undertaking, and to providing special protection against dismissal for a certain period following completion of the apprenticeship. Arrangements of this kind would make it possible for young persons to consolidate their occupational skills as specialised workers and to acquire experience.

Federal Republic of Germany. The determination of the scope of the instrument(s) should be left to national laws or regulations.

Honduras. Yes, it will be necessary for national legislation to determine the scope of application of the provisions of the instrument.

* Substance of observations reproduced below.

¹ See under question 7.

India. (a) to (c) Yes.

(d) The extent to which public servants are excluded from the purview of the proposed instrument(s) should be left to be determined in accordance with national laws and practice, in preference to using the wording taken from Recommendation No. 119.

Madagascar. National legislation should be able to exclude from the scope of the instruments the workers defined in (a) to (c). The guarantees provided by the instruments should apply to public servants if constitutional provisions are not opposed to this.

Mexico. This point should not be included in general terms. With respect to (b), national law does not provide for contracts of employment for a probationary period otherwise than by stipulating that the employer may terminate the employment relationship without liability, within 30 days, if the worker or the trade union which proposed or recommended him deceives the employer by means of false certificates or references. The wording of (d) cannot be accepted since public servants in the administration of the State are subject to a special law distinct from the law governing other workers in general. Moreover, there are international instruments which refer exclusively to the public administration.

Netherlands. This question is an example of a too detailed approach. Exceptions of certain categories of workers should be possible, but it would suffice to state that these exceptions have been laid down in national laws or regulations and, for example, that these exceptions must be inherent in the special character of the employment (see (c) and (d)) or derive from the content of the contract of employment itself (for example, a contract of employment for a certain length of time; or a stipulation of a trial period). The category referred to under (d) would be a problem for the Netherlands because termination of employment is regulated differently and separately for all "public servants" and not only for "public servants engaged in the administration of the State".

New Zealand. The Government does not believe that the extent to which the Recommendation should apply to the four categories of workers should be determined by national laws or regulations.

Norway. (a) and (c) Yes, but a time-limit should be established in respect of this period.

(b) Yes, but in such a way that those persons employed for a period of probation are also protected against unfair termination of employment, and that the period of probation is limited to a maximum of one year.

(d) Yes, but in such a way that public servants do not have poorer protection against termination of employment than other workers.

Pakistan. (d) The Convention should not apply to public servants.

Philippines. If at all, not only should the extent of the guarantee against unjust termination be determined by national law but also the standards and the procedure for effecting termination of employment in consultation with workers' and employers' organisations.

Poland. Yes, but the protection against unjustified termination should above all relate to workers engaged for a period of indeterminate duration. National legislation should determine the measures of protection for the other categories of workers.

Spain. The situations envisaged in this question should be treated separately from the content of the instrument. Thus (a) refers to workers engaged for a specified period of time or a specified task and (c) to workers engaged on a casual basis. In both cases the termination of the contract of employment derives not from the will of the employer but from the fact that the contract, at the moment of conclusion, is by its very nature for a determinate rather than an indefinite period. The cause of the termination of the contract in the case of dismissal for disciplinary reasons, for objective reasons or for technological or economic reasons does not result from the nature of the contract but from the situation supervening for the worker in the first two cases and for the undertaking in the third. The Government is of the view that the procedures provided for in the instrument should apply also to contracts of definite duration, although not in cases in which the contract is

extinguished by its very nature as limited in time, but where any of the forementioned situations occur when the contract is in force.

(b) Under the national legal system, the contract may be freely terminated by either of the parties during the period of probation.

(d) The employment relationship of public servants is excluded from Spanish labour law.

Swaziland. (a) Yes; the worker should be informed of the estimated period.

(b) to (d) Yes.

Switzerland. (a) and (b) Yes.

(c) The concept of casual work for a short period is not recognised by national law. The general provisions of the law governing contracts of employment apply in such a case. It therefore does not seem necessary to include special rules regarding the application of the instrument for this category of workers.

(d) The personnel of the administration of the State come under a special administrative-law system which also governs the problem of termination of employment. The reference in this question to constitutional provisions precluding the application of the instrument does not seem adequate, since it does not seem to be this type of provision that is called into question by the instrument. In any case, public servants should be excluded from the scope of the instrument.

Tunisia. Exceptions should be made for certain categories of workers for reasons connected with conditions of work or the nature of the contract. To the extent that they are aware of the precarious nature of their situation, workers who are serving a period of probation, or who are hired on a casual basis or for a specified period of time may not be entitled to exceptional benefits such as severance allowance. However, it would be advisable to limit fixed-term contracts to a maximum period of time, renewable not more than twice, so as to put an end to the tendency of certain employers systematically to take on temporary workers who in fact (as a result of contract renewals) remain a long time in the undertaking.

United Kingdom. Further to the reply to question 7, the Government considers that the provision in clause (a) should be extended to include those workers who, although they could have been employed under contracts of indeterminate length, nevertheless choose to enter into fixed-term contracts. In respect of clause (d), it is important to clarify the extent to which any instrument will apply to public servants; it would be preferable for the extent of coverage of public servants to be left simply to be determined by national laws or regulations.

The majority of governments replied in the affirmative to this question. However, a number of governments had reservations regarding one or more of the possible exclusions mentioned or had difficulties with the formulation of these exclusions. Some governments considered that such exclusions should be avoided, while others proposed that additional possibilities of exclusion should be provided for (these latter proposals are considered in connection with question 9).

Fixed-term contracts. Certain replies to this question and the replies to question 11 show that a major difficulty arises for a number of countries with regard to the limited possibility of exclusion of workers employed under fixed-term contracts which results from the formulation of questions 8 (a) and 11. Question 8 (a) would authorise their exclusion (as did Paragraph 18 (a) of Recommendation No. 119) only if the contracts are for work of a kind that does not permit employment under a contract of indeterminate duration. It follows from this that for the guarantees provided by the instruments to be afforded to workers employed under fixed-term contracts for work which would permit of an indeterminate employment relation-

ship, those guarantees must apply to the expiry of such a contract (at least where that expiry was not desired by the worker) as if it were a termination of employment at the initiative of the employer. Question 11 sought to make this explicit. The differences between the replies of governments to questions 8 (a) and 11 seem to indicate that many governments may not have appreciated the consequences of the wording of question 8 (a). Several governments have sought to resolve the difficulty by suggesting that fixed-term contracts should be covered during their term, but not at their expiry. This, however, appears to be inappropriate, since the protection formulated in the questionnaire and the Proposed Conclusions does not take into account the principles applied in many countries to premature termination of a fixed-term contract. Under those principles an employer may terminate such a contract prematurely generally in case of misconduct or failure by the worker to fulfil his obligations under the contract, but not in case of operational difficulties of the undertaking; the remedy for unlawful breach of a fixed-term contract by the employer, before its term has expired, is frequently payment of remuneration for the remainder of the term.

While a number of governments have difficulty under their national law with extending to workers employed under fixed-term contracts for the kind of work mentioned, protection at the expiry of such contracts, a number of governments have recognised the need for safeguards against abusive recourse to fixed-term contracts with a view to avoiding this protection. Such safeguards exist in a number of countries. In some, for example, the legislation limits recourse to such contracts for work which is not of a casual or temporary nature; in others, continuation of the employment relationship after expiry of the term or renewal of the contract on one or more occasions is deemed to transform the contract from a fixed-term contract to one of indeterminate duration; in others still, the expiry of the contract itself is under certain conditions considered to be termination at the initiative of the employer.

Having regard to the difficulties mentioned, the Proposed Conclusions have been reworded to authorise exclusion of workers engaged under a contract of employment for a specified period of time or a specified task (*Point 6 (1) (a)*). On the other hand, a Point has been included in the Proposal Conclusions with a view to a Recommendation indicating that there should be adequate safeguards against recourse to fixed-term contracts with a view to avoiding the protection resulting from implementation of the Convention and Recommendation and suggesting certain kinds of safeguards that might be considered to this end (*Point 25*).

Periods of probation and qualifying periods. The possibility of excluding workers serving a period of probation or a qualifying period seems to be generally acceptable to governments. It has therefore been retained in the Proposed Conclusions (*Point 6 (2) (b)*). Several governments have suggested that a specific time-limit be laid down by the instrument for the duration of a period of probation (six months and one year have been suggested). It has been thought preferable to leave this matter to be determined by each member State.

Casual employment relationships. While the possibility of excluding workers engaged on a casual basis for a short period appears to be acceptable to most governments, several have indicated that such workers would be assimilated to

workers under contracts of fixed duration or that the concept of casual employment did not exist in national law and practice. As this possibility of exclusion seems to be acceptable to most governments and corresponds to a category of employment relationships in some countries, it has been retained in the Proposed Conclusions (*Point 6 (2) (c)*).

Public servants. The possible exclusion of public servants engaged in the administration of the State, subject to the conditions included in clause (*d*), appears to be acceptable to most governments. However, some governments had difficulty with the limitation deriving from the term "engaged in the administration of the State", since the special rules governing the termination of employment of public servants in these countries that might require their exclusion apply to all persons with the status of public servants, not only to those engaged in the administration of the State. Also, some governments proposed deletion of the words "to the extent only that constitutional provisions preclude the application to them of one or more provisions of the instrument(s)", apparently because the problems of application arising with respect to one or more provisions that may be included in the instruments would arise more because of special statutory rules governing the employment of public servants than because of constitutional provisions. On the other hand, the rules governing the employment of public servants in many countries provide a level of protection with respect to security of employment that is at least equivalent to that provided for other workers. With a view to meeting the difficulties expressed by a number of governments while at the same time providing adequate guarantees to public servants (as well as to other categories of workers who may in certain countries also be subject to special rules regarding termination of employment that provide equivalent guarantees, such as seafarers), the Office has revised the wording of this clause to provide greater flexibility for governments to exclude such categories of employed persons from the application of the instruments, while ensuring that they will benefit from protection at least equivalent to that afforded thereunder (*Point 6 (3)*).

Qu. 9 *Should the scope of the instrument(s) be limited in any other respect, for example with respect to small undertakings (if so please indicate how such undertakings should be defined), family undertakings, managerial employees or workers who have reached the age of retirement and are entitled to an old-age pension?*

Total number of replies: 49.

Affirmative: 24. Austria*, Botswana*, Canada*, Cuba, Cyprus*, Egypt*, Ethiopia*, France*, Guyana*, Honduras, India*, Kenya*, Kuwait*, Madagascar*, Morocco*, New Zealand*, Nigeria*, Norway*, Pakistan*, Romania, Sierra Leone, Suriname*, Swaziland*, United Kingdom*.

* Substance of observations reproduced below.

Negative: 7. Finland, German Democratic Republic, Malta, Mexico*, Poland, Switzerland*, Uruguay.

Other: 18. Bahrain*, Belgium*, Byelorussian SSR¹, United Republic of Cameroon*, Colombia², Czechoslovakia*, Denmark¹, Federal Republic of Germany², Hungary*, Netherlands*, Philippines^{1,2}, Singapore¹, Spain*, Sweden*, Trinidad and Tobago*, USSR¹, United States*, Yugoslavia*.

Austria. Yes, particularly workers who have reached the age of retirement. However, persons employed in small undertakings (i.e. undertakings with fewer than five employees) should be covered by basic protective provisions.

Bahrain. This should be left to the discretion of each member State.

Belgium. This question should be divided in two. In principle the instruments should apply to all workers without limitation, except for those excluded in accordance with the reply to question 8 (d). However, special modalities may be exceptionally provided for in respect of workers having reached the age of retirement. Moreover, in Belgium the size of the undertaking determines the application of certain provisions, since negotiating bodies do not exist in small undertakings and legislation and collective agreements on closure and collective dismissals are generally not applicable to small undertakings.

Botswana. Yes. Small undertakings should be defined in terms of the number and quality of the workforce and the profits of the undertaking. This should be left to national laws and regulations.

United Republic of Cameroon. The instrument should apply to all undertakings without distinction.

Canada. The Government would support an exemption from coverage of managerial employees, small undertakings (fewer than five employees), family undertakings and workers who have reached the age of retirement and are entitled to an old-age pension.

Cyprus. The only limitation should be with respect to workers who have reached the age of retirement, irrespective of whether they are entitled to an old-age pension under the state social insurance scheme.

Czechoslovakia. No. The protection of all workers should be guaranteed. An exception for workers at retirement age would be in contradiction with the Older Workers Recommendation, 1980 (No. 162). The only exception might be family undertakings.

Egypt. The scope of the instrument should be limited to undertakings which employ five or more workers.

Ethiopia. Yes, for example undertakings employing fewer than ten workers.

France. The scope of the instrument or of certain of its provisions should be subject to limitation in several respects. Small undertakings should be subject to exclusion. Workers who do not have a minimum length of service in the undertaking should also be subject to exclusion from the benefits of certain provisions. Since it would be inappropriate to provide for exclusions provision by provision, the instrument should provide that the determination of the conditions regarding the size of the undertakings, length of service or age that might exclude the application of the instrument should be left to the methods of application mentioned in question 6.

Guyana. Workers reaching retirement age and entitled to an old-age pension should be exempted.

Hungary. The protection granted by the instruments should concern the greatest possible number of workers.

* Substance of observations reproduced below.

¹ See under question 7. ² See under question 8.

India. Yes. The definition of “small undertakings”, “managerial employees”, etc., should be left to be decided in accordance with national law and practice.

Kenya. The only criteria should be the existence of a contract of employment. It may, however, not be practicable to demarcate the existence of a contract of employment in some small or family undertakings. Such difficulties should be taken into account so that the undertakings are excluded from the scope of the instruments.

Kuwait. The Recommendation should provide that its provisions should apply to all employers, with the exception of family undertakings, managerial employees and workers who have reached the age of retirement and are entitled to an old-age pension.

Madagascar. Workers who have reached the age of retirement and are entitled to an old-age pension should be excluded from the scope of the instruments.

Mexico. No. Under national legislation retirement is a right and not an obligation. Exclusion of workers in small undertakings, where there are employment relations and which are economic activities, would mean accepting that the rights of workers depend upon the amount of capital invested in the undertaking.

Morocco. Yes. The choice of these categories should be left to national legislation.

Netherlands. Not in the form of an exception, but perhaps in the form of the possibility of deviating rules.

New Zealand. The Recommendation should not apply to those people whose employment is terminated by reason only of having reached the age of retirement.

Nigeria. Yes, for small undertakings employing fewer than five persons; domestic homesteads; the armed forces; certain categories of security staff and specially defined categories of staff engaged in essential services.

Norway. It would be natural to make an exception in the case of workers who have reached a prescribed retirement age, provided that they are guaranteed an adequate pension. The remaining groups referred to should not be excepted.

Pakistan. Undertakings employing fewer than 50 workers, family undertakings, supervisors, managerial employees and workers who have reached the age of retirement should be excluded from the Convention.

Spain. The situations referred to could be accorded special treatment, which although different from the general rules should not exclude a minimum control and minimum guarantees, particularly with regard to the control of the legality of the termination of the contract.

Suriname. It should be further restricted with respect to workers who have reached the age of retirement and are entitled to an old-age pension.

Swaziland. The scope of the instrument should be limited in respect of family undertakings.

Sweden. No general exception should be made concerning persons employed by small firms or in family businesses. On the other hand, it should be made possible to establish exceptions or special rules concerning employees in managerial capacities, workers belonging to the employer's family, workers engaged for work in the employer's household and workers who have reached the age of retirement and are entitled to an old-age pension.

Switzerland. The national legal system does not distinguish between the categories of undertakings or of workers mentioned in this provision. Consequently such a limitation does not seem to be necessary.

Trinidad and Tobago. No, except perhaps with respect to family undertakings.

United Kingdom. Further to the reply to question 7, the Government considers that the scope of the instrument should be limited with respect to small undertakings (as defined by national law); where the employee is the wife or husband of the employer; and where

employees have reached the normal age of retirement. The scope of the instrument should also be limited with respect to part-time workers (as defined by national law), as employees who only work for a small number of hours each week should not be treated in the same way as full-time employees. The armed forces should also be excluded.

United States. Employees of the type enumerated should not be deprived of the rights accorded other workers with the single exception, perhaps, of very close relatives. The status of workers who have reached the age of retirement under that instrument should be consistent with the text of the Older Workers Recommendation, 1980 (No. 162).

Yugoslavia. The scope of the instrument might be limited only in the case of workers who have reached the pensionable age and have the right to an old-age pension.

A considerable number of governments, in their replies to this question or to questions 7 or 8, favoured provision for a possibility of excluding, or special rules for, one or more of the categories of undertakings or workers mentioned in this question (i.e. small undertakings, family undertakings, managerial employees and workers who have reached the normal age of retirement). Some countries opposed provision for exclusion of one or more of these categories. Certain governments proposed provision for the possible exclusion of, or special provision for, one or more other categories of workers, such as the armed forces, the police, defined categories of workers in essential services, workers subject by their activities to considerable mobility (such as port or construction workers), agricultural workers, seafarers, home workers, apprentices, commercial travellers, domestic employees and part-time workers.

While certain of these categories may be covered by the possibilities for exclusion already included in Point 6 (2) and (3), it would appear that a number of countries may indeed have difficulties in extending to one or more of these categories of workers the protection to be afforded pursuant to the instruments. With a view to providing some flexibility to governments in this matter, without including an unduly extensive list of possible exclusions, the Office has included in the Proposed Conclusions provisions patterned after those found in the Holidays with Pay Convention (Revised), 1970 (Article 2 (2) and (3)), authorising, after consultation with the organisations of employers and workers concerned, where such exist, the exclusion, in so far as necessary, from the application of the instruments or certain provisions thereof of other limited categories of employed persons in respect of whose employment special problems of a substantial nature arise. A provision has also been included to require indications regarding such exclusions in reports on the application of a ratified Convention, if one is adopted (Point 6 (4) and (5)).

Should the instrument(s) provide that for the purpose of the instrument(s) the terms "termination" and "termination of employment" should mean termination of employment at the initiative of the employer?

Qu. 10

Total number of replies: 49.

Affirmative: 39. Bahrain, Belgium*, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland, France, German Democratic Republic, Honduras, Hungary, India, Kuwait, Madagascar, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Romania, Sierra Leone, Suriname, Swaziland, Sweden, Switzerland*, Trinidad and Tobago, Tunisia*, USSR, United Kingdom, United States, Uruguay, Yugoslavia.

Negative: 1. Malta.

Other: 9. Austria*, Denmark¹, Federal Republic of Germany*, Kenya*, Mexico*, Nigeria*, Pakistan*, Singapore¹. Spain².

Austria. In connection with the termination of an employment relationship by the employer, Austrian labour law makes a distinction between dismissal with notice and dismissal without notice. Whereas the former may take place at any time without any statement of the reasons, as provided for in the Collective Labour Relations Act, on condition that the periods of notice stipulated by law or collective agreements are observed, a worker may be dismissed without notice only for serious reasons. In the preparation of a new instrument consideration should be given to whether its provisions should apply primarily to dismissal with notice or to dismissal without notice. In so far as the proposed provisions apply only in the event of dismissal with notice in the sense of Austrian legislation, the answer to this question is "yes".

Belgium. Yes, although the term "employment relationship" is wider than the term "contract of employment".

Federal Republic of Germany. There are no objections to a provision of this kind.

Kenya. The instruments should provide that, for the purpose of the instruments, the terms "dismissal, termination of employment and summary dismissal" mean termination of employment at the initiative of the employer.

Mexico. No, since termination of employment at the initiative of the employer constitutes an anticipated termination by a unilateral decision of the employer, that is, juridically, a rescission under provisions of national law laying down restrictively the grounds for rescission without liability for the employer, while other provisions refer to grounds for termination of employment by mutual consent, for reasons mentioned in the contract, etc. Thus to avoid confusion, the instruments should only refer to "termination of employment" as a synonym of "termination of employment at the initiative of the employer".

Nigeria. The rights and obligations should in some respects be reciprocal between an employer and employee.

Pakistan. The instrument(s) should also cover termination of employment at the initiative of the worker. Some responsibility in this regard should also devolve on the worker, who should also be required to give reasonable notice to the employer before termination.

Switzerland. The concept of termination of employment at the initiative of the employer is not used in the national system of private law governing the contract of employment. The termination of the employment relation is a legal concept and right that national law grants equally to employer and worker. However, since the instrument is to cover only termination of employment at the initiative of the employer, this concept is acceptable.

* Substance of observations reproduced below.

¹ See under question 7. ² See under question 8.

Tunisia. Yes. However, it is necessary for the same sanctions to be applied to workers in case of failure to observe the notice period.

As the large majority of governments have replied in the affirmative to this question, the Proposed Conclusions have been drafted accordingly (*Point 7*). It should be noted that this Point is intended solely to define convenient shorter terms for “termination of employment at the initiative of the employer” so as to avoid repeated use of this lengthy expression in the Proposed Conclusions, while avoiding certain particular terms that in certain languages have a specific meaning in certain countries (e.g. “dismissal” or “discharge” in English). This is a definition for the purpose of these instruments and would not require countries to alter the terminology used nationally, as long as the substantive provisions were applied to the persons covered by the instruments.

Several governments have proposed that the instruments apply to termination of employment at the initiative of the worker. As the item placed on the agenda of the Conference is “termination of employment at the initiative of the employer”, it has not been possible to give consideration to this suggestion.

Should the instrument(s) provide that for the purpose of the instrument(s) its provisions should apply to the expiry of a contract of employment for a specified period of time or a specified task to the extent that a worker employed under such contract is not excluded, under question 8 (a) above, from the guarantees provided for in the instrument(s)?

Qu. 11

Total number of replies: 50.

Affirmative: 22. Bahrain, Canada*, Cuba, Czechoslovakia, Ethiopia, Finland, German Democratic Republic, Guyana, Honduras, Hungary, India, Morocco, Nigeria, Pakistan, Philippines, Poland*, Romania, Sierra Leone, Suriname*, Swaziland, United States, Yugoslavia.

Negative: 15. Austria*, Botswana*, Byelorussian SSR*, United Republic of Cameroon, Egypt, Federal Republic of Germany*, Kuwait*, Madagascar*, Malta, Netherlands*, New Zealand, Switzerland*, Trinidad and Tobago, USSR*, Uruguay.

Other: 13. Belgium*, Colombia¹, Cyprus*, Denmark², France*, Kenya*, Mexico*, Norway*, Singapore², Spain¹, Sweden², Tunisia¹, United Kingdom³.

Austria. No. However, an uninterrupted series of contracts of employment for specified periods of time without compelling operational reasons should be regarded as a contract of employment for an unspecified period of time, unless it is in the interest of the worker to have a contract of limited duration.

Belgium. By definition there cannot be a termination of employment at the initiative of the employer in the case of a contract for a specified period of time ending on the expiry of

* Substance of observations reproduced below.

¹ See under question 8.

² See under question 7.

³ See under question 8 (a).

the agreed term; the protective rules could apply only in case of early breach of such a contract (see reply to question 8 (a)).

Botswana. These contracts should be dealt with under special agreements.

Byelorussian SSR. No, because the contract in these cases is not terminated at the initiative of the employer. At the same time, during the term of the contract, the general rules and guarantees should be extended to the workers concerned.

Canada. Yes. Otherwise a fixed contract of service would become a means of avoiding any laws passed to implement the standard.

Cyprus. This question is not clear. National legislation provides that where the competent tribunal considers that any fixed-term contract or series of fixed-term contracts should either alone or in conjunction be considered to be a contract of indeterminate duration, then such contract or series of contracts shall be deemed not to be a fixed-term contract.

France. The instrument should apply to the termination of a contract of employment concluded for a specified period of time or task only to the extent that the contract is requalified as a contract of indeterminate duration by the competent authority.

Federal Republic of Germany. If this question means that the provisions of the instrument(s) are to apply to contracts of employment for a specified period of time on the expiry of the contract or completion of the task, to the extent that national legislation contains no stipulations to the contrary in accordance with 8 (a), the answer to this question is "no". Automatic expiry of the contract cannot be assimilated to termination at the initiative of the employer.

Kenya. Some of the provisions of the instruments should apply to such contracts.

Kuwait. Contracts for a specified period of time or a specified task should be excluded.

Madagascar. No, having regard to the reply to question 8.

Mexico. Yes, national legislation provides that expiry of the period of the contract is a ground for termination of employment, as is completion of the work and exhaustion of the capital invested. Thus if the employer terminates the employment relation before the expiry of the period, completion of the work or exhaustion of the capital, the provisions of the instruments should apply.

Netherlands. The expiry of a contract of employment for a specified period of time is clearly distinct from the termination of employment at the initiative of the employer. It is not clear how the rules pertaining to the termination of employment can be automatically applied by the employer in the case of the contract of employment expiring after a specified and agreed period of time. This is not to say, however, that workers with a contract of employment for a specified period of time are in all cases unprotected or ought to be. For example, under Netherlands law, after the continuation of a contract of this kind, there are the same safeguards as those pertaining to a contract of employment for an indefinite period of time. However, in an international context, an explicit provision on this would not be called for.

Norway. The Government is in doubt as to whether the inclusion of this item has any justification when viewed in connection with and in addition to question 8.

Poland. Yes, but these questions should be decided by national legislation.

Suriname. Yes. Contracts which are not temporary should have the same protection as contracts of an indefinite duration.

Switzerland. This determination of scope does not appear to be necessary, having regard to the reply to question 8.

USSR. No, because the contract in these cases is not terminated at the initiative of the employer. At the same time, during the term of the contract, the general rules and guarantees should be extended to the workers concerned.

For the reasons indicated in the commentary to the replies to question 8 (a), this Point has not been included in the Proposed Conclusions. Instead, provision for safeguards against abusive recourse to fixed-term contracts with a view to avoiding the protection afforded under the instruments has been included in the Proposed Conclusions with a view to a Recommendation (Point 25).

V. Standards of General Application

Justification for Termination

Should the instrument(s) provide that the employment of a worker should not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service? **Qu. 12**

Total number of replies: 50.

Affirmative: 39. Austria, Bahrain, Belgium*, Botswana, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus*, Czechoslovakia, Denmark*, Egypt, Ethiopia, Finland, France, German Democratic Republic*, Federal Republic of Germany, Guyana, Honduras*, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, New Zealand, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Suriname*, Swaziland, Sweden*, United States*, Yugoslavia.

Negative: 2. Switzerland*, Trinidad and Tobago*.

Other: 9. Byelorussian SSR*, Madagascar*, Netherlands*, Philippines*, Spain*, Tunisia*, USSR*, United Kingdom*, Uruguay*.

Belgium. Yes, this is the definition of abusive dismissal included in national law but applicable at present only to manual workers. The organisations of employers and workers differ on the need for making similar provision for non-manual workers. The employers' representatives point out that non-manual workers benefit under national law from almost equivalent protection, since the long notice periods to which such workers are entitled constitute for employers a deterrent measure as constraining as control of dismissals. If such a procedure of control were generalised, revision of the régime governing notice periods for non-manual workers would be indispensable. The workers' representatives disagree and consider that the problem of motivation of dismissals and the problem of the length of notice periods are totally different and independent questions.

Byelorussian SSR. The Convention should list clearly and exhaustively the grounds for termination of employment at the initiative of the employer.

Cyprus. Yes. The Government agrees that as a matter of principle termination of employment should only occur where there is a valid reason. However, where termination is not for a valid reason the employer should be required to pay compensation. The Pancyprian Federation of Labour and the Cyprus Workers' Confederation both reply in the affirmative to this question.

* Substance of observations reproduced below.

Denmark. Yes. The instrument should provide that arbitrary termination of employment should not take place, but that the termination of employment should be connected with either the capacity or conduct of the worker or based on the operational requirements of the undertaking.

German Democratic Republic. Yes. The valid reasons for termination should be laid down exclusively by legislation, collective agreement or in any other verifiable form compatible with national conditions.

Honduras. Yes, having regard to the Labour Code that clearly determines the just causes entitling the employer to terminate the contract of employment without liability.

Madagascar. The instruments should provide that the employment of a worker should not be terminated unless there is a serious reason connected with the conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Mexico. Yes, national legislation specifies the grounds for termination of the employment relation without liability by the employer (justified causes).

Netherlands. If the provision included in this question would require national legislation to establish a list of reasons for termination of employment, the Government cannot reply affirmatively. While such a list exists in some countries, it does not in others, such as the Netherlands. If, however, the question implies that the instrument requires that workers be provided with adequate protection against unjust dismissal by their employer and that the definition of unjust dismissal may be made in accordance with the methods referred to in question 6, this question can be answered in the affirmative.

Philippines. The same guarantee is already embodied in the national law on termination of employment, inspired by the Constitution.

Spain. This definition of valid termination of the employment relationship is in terms similar to those in national law, thereby excluding the possibility of free dismissal or dismissal without a given reason.

Suriname. Yes. These concepts will cover most legitimate reasons for dismissal.

Sweden. Yes, but it should be provided that no valid reason for termination shall be considered to exist if the employer can reasonably be expected to provide the worker with alternative employment in his service. This duty of providing alternative employment, however, should not arise in the event of particularly serious misconduct of the kind referred to in question 28 (1).

Switzerland. No. National law does not require either of the parties who terminates the contract of employment to give the reasons for the termination, except in case of termination with immediate effect for just cause.

Trinidad and Tobago. No. It appears unlikely that the grounds on which a valid reason for termination could be based can be adequately prescribed by an instrument.

Tunisia. A manifest and objective justification for termination of employment must be required. This is a basic condition necessary to avoid abusive dismissal.

USSR. The initial position on which this question is based is unacceptable. It asks whether the instrument should provide that a worker's employment should not be terminated unless there is a valid reason therefor, defined in terms of the capacity or conduct of the worker or the operational requirements of the undertaking. Apart from the fact that the notion of "conduct" or even "capacity" of the worker cannot serve as a criterion to justify termination of employment, the question should be put in the opposite way. The Convention should establish clearly and exhaustively the list of reasons for termination of employment, that is, it should determine the cases in which a worker's employment may be terminated at the initiative of the employer, as in the fundamental principles governing the labour legislation of the USSR.

United Kingdom. Yes, but there should be included, as a reason, where continuation of the employment would contravene a statute.

United States. Yes, a general standard is acceptable in a Recommendation which permits of flexibility in the interpretation of its provisions.

Uruguay. Such a provision should not be in mandatory terms, although if a Convention is adopted it could be formulated as an exhortation.

The large majority of governments replied to this question in the affirmative. However, some governments had certain doubts regarding the definition of valid reasons for termination of employment by the employer set forth in this question. One government expressed the view that the kinds of reasons that justify termination of employment cannot be adequately defined in such an instrument. It has seemed to the Office, from its review of national law and practice on the subject in Report VIII (1), that the reasons generally held to justify termination by the employer, although formulated in varying degrees of generality or specificity and in varying ways in different countries, do fall within the general categories of reasons mentioned in this question (which is identical in wording to Paragraph 2 (1) of Recommendation No. 119), that is, reasons related to the capacity or conduct of the worker or the operational requirements of the undertaking, establishment or service.

Another government has suggested extending the definition of valid reasons by including a reference to the situation in which continued employment of a worker would entail contravention of a statute. The Office has not retained this suggestion for the reasons given in Report VIII (1) (p. 28). The examples of such situations that have come to the attention of the Office (and that do not contravene international standards regarding discrimination) consist of grounds relating to the capacity of the worker or the operational requirements of the undertaking. If there are other examples of such situations they might be brought to the attention of the competent Conference Committee for consideration.

Several governments opposed the reference to the "capacity" or "conduct" of the worker, considering that this would authorise termination of employment for matters that are not work related. It appears to the Office, however, that it is implicit in the formulation of this question that for grounds relating to the capacity or conduct of the worker to constitute valid reasons for termination, they must have a bearing on the work of the worker or the working environment.

Several governments expressed the view that in place of the formulation of this question, there should be an exhaustive list of valid reasons for termination of employment. The Office has not retained this suggestion, having regard to the great variety of ways in which the reasons justifying termination are defined nationally. Another government has asked whether this formulation would not require national legislation to include a list of valid reasons for termination of employment. The Office would call attention, in this connection, to Point 5 of the Proposed Conclusions, under which effect would have to be given to the provisions set forth in the Proposed Conclusions with a view to a Convention by laws or regulations to the extent that they are not implemented by other means, such as by court decision. Thus, if the relevant provision in national legislation were expressed in very general terms, for example by reference to the concept of "unjust"

termination of employment, compliance with the instrument could be ensured if the courts defined this concept in a way that protected workers against termination of their employment for reasons other than those referred to in this question.

Another government proposed including a provision to the effect that a valid reason should not be deemed to exist if the employer can reasonably be expected to provide the worker concerned with alternative employment in his service, except in case of termination for serious misconduct. As this qualification is rarely found in national law, the Office has not retained this suggestion. However, it should be noted that transfer to other suitable work is one of the measures that are mentioned in the Proposed Conclusions as a measure to be considered with a view to averting or minimising termination of employment for economic, technological, structural or similar reasons.

As the large majority of governments have replied in the affirmative to this question, and having regard to the above comments, the Proposed Conclusions have been worded accordingly (*Point 8*).

Qu. 13 *Should the instrument(s) provide that the following, inter alia, should not constitute valid reasons for termination:*

- (a) *union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;*
- (b) *seeking office as, or acting or having acted in the capacity of, a workers' representative;*
- (c) *the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violations of laws or regulations;*
- (d) *race, colour, sex, marital status, religion, political opinion, national extraction or social origin;*
- (e) *age;*
- (f) *pregnancy;*
- (g) *absence from work during maternity leave; or*
- (h) *absence from work due to compulsory military service or other civil obligations?*

Total number of replies: 50.

Affirmative: 36. Austria*, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada*, Cyprus*, Czechoslovakia*, Denmark*, Egypt, Ethiopia, Finland*, German Democratic Republic, Guyana, Honduras, Hungary*, India, Kenya, Kuwait, Madagascar, Malta, Mexico, Morocco*, New Zealand*, Nigeria, Pakistan, Poland, Romania, Swaziland, Sweden*, Tunisia, USSR, United States*, Uruguay, Yugoslavia.

* Substance of observations reproduced below.

Negative: 2. Federal Republic of Germany*, Singapore*.

Other: 12. Colombia*, Cuba*, France*, Netherlands*, Norway*, Philippines*, Sierra Leone*, Spain*, Suriname*, Switzerland*, Trinidad and Tobago*, United Kingdom*.

Austria. Yes. However, age should be allowed to constitute a valid reason for dismissal with notice if the worker can prove that he is eligible for an old-age pension.

Botswana. Yes. Except when retirement age is stated in national legislation, competent older workers should be left in employment.

Canada. Yes, on the assumption that there is an exception for retirement along the lines suggested in reply to question 9.

Colombia. The exceptions should be left to the legislature. However, the Government does not see why the exceptions given cannot constitute justified cause for dismissal when most of them are contained in legislation in force.

Cuba. (a) to (g) Yes.

Cyprus. Yes. However, with regard to (e) (age), termination should be considered justified if the employee has reached retirement age (see reply to question 9).

Czechoslovakia. Yes. This would restrict the valid reasons mentioned in question 12. It is suggested to include care of a child below a given age (e.g. 1, 2 or 3 years) by a male or female worker living alone.

Denmark. Yes, subject, however, to a certain reservation as regards age (e) and absence from work due to military service for a certain prolonged period of time (h).

Finland. (a) to (c) and (e) to (h) Yes.

(d) Yes, as well as other than political and religious opinions and the worker's participation in social activities or activities of other associations.

France. (a) to (g) Yes.

(h) The instrument should provide that absence from work due to compliance by the worker with civil or military obligations, as defined by the methods of application mentioned in question 6, should not constitute a valid reason for termination.

Federal Republic of Germany. It should be left to national laws or regulations to determine the valid reasons for termination. It would be inadvisable to list reasons, particularly reasons which are not valid in the sense of question 12, as this could result in wrong emphasis being laid on individual reasons. Furthermore, the choice of such reasons would be more or less arbitrary. If such a list were nevertheless included, the wording of (b) should be amended in the sense of Article 1 of the Workers' Representatives Convention, 1971 (No. 135), which provides that the acts of such representatives must be in conformity with existing laws or collective agreements or other jointly agreed arrangements.

Hungary. Yes. With respect to (e), due account being taken of national legislation on employment after retirement age.

Morocco. (a) to (d) and (f) to (h) Yes.

(e) Yes, subject to the provisions in question 9.

Netherlands. If the reasons given here were to be produced as the reasons for terminating employment, they would be defined as unjust in the majority of cases. Often, there will even be a ban on terminating employment for one of the reasons listed. The question is, however, whether it is desirable to give examples in an instrument with a worldwide application. It would be more advisable to include a provision of a general nature stipulating that a number of objectively determinable reasons should be laid down in legislation or regulations as invalid ones for terminating employment so that workers are

* Substance of observations reproduced below.

aware of them. For the rest, the Government has no objection to the list of examples itself. It should be noted that it must remain possible to terminate the employment of workers reaching pensionable age.

New Zealand. Yes. However, see reply to question 9 in respect of age being a reason for termination.

Norway. (a) to (d) Yes.

(e) Yes, apart from what the Government states in its reply to question 9.

Philippines. Under existing laws the enumerated activities or conditions do not constitute valid grounds for termination of employment.

Sierra Leone. Yes, except (e); here consideration might be taken of minimum age for employment, as provided in national law and international instruments, e.g. Convention No. 138.

Singapore. It is inadvisable to list in detail the invalid reasons and the procedures necessary for termination. There will be cases where the validity of the termination or the procedures followed will have to be examined on a case-by-case basis. Such cases are not amenable to consideration under general invalid reasons or procedures for termination.

Spain. This is a specification of the principle of non-discrimination in the employment relationship in respect of specific rights and liberties. The general principle of non-discrimination would be reinforced by the proposed standard in the concrete and decisive aspect of termination of the contract of employment.

Suriname. (a) to (d) and (f) to (h) Yes.

(e) Attainment of retirement or pensionable age should be a valid ground for dismissal.

Sweden. Yes, but it should be made clear that an enumeration of this kind is not to be considered exhaustive. The instrument(s) should lay down as a general rule that a valid reason for termination exists only when the employer cannot reasonably be required to allow the employment to continue. The decisive factor should be what can be expected of the employed person for the future. Error or neglect should not *per se* constitute valid grounds for termination other than in very serious cases. Absence from work during leave of absence for childbirth should comprise a reasonable period before and after confinement. Advanced age ought in special cases to be admissible as a valid reason for termination. Termination should not be occasioned by the employee's need for time off in order to discharge public duties. Nor should termination on account of participation in a legitimate strike or other legitimate industrial action be permissible.

Switzerland. Inasmuch as national law does not require either party to give the reasons for terminating the employment relation, the Government is unable to take a detailed position on this question. In national law, only military service does not constitute a reason for dismissal in the strict sense of the term. However, the civil law concept of abuse of right may be referred to when the termination of the contract of employment appears arbitrary. The different matters referred to in this question can be invoked in the context of abuse of right; however, the tribunals use and interpret this concept restrictively in the cases submitted to them.

Protection against termination of employment at the initiative of the employer has been the subject of several parliamentary initiatives, with a view to guaranteeing workers a better protection against terminations of the contract of employment that are arbitrary and unjustified from the social point of view. Moreover, a popular initiative "for the protection of workers against dismissal in the law on contracts of employment" is about to be launched. Having regard to the differences between these various proposals, it is not possible to determine the direction in which the legal system may evolve.

Trinidad and Tobago. (a) to (d) and (f) to (h) Yes.

(e) The Government entertains certain reservations on this point because of the necessity to keep under constant review the problems of young unemployed whose numbers are rapidly increasing.

United Kingdom. Generally, the grounds specified in this question should not (in the light of question 12) constitute valid reasons for dismissal (with the exception of "age" since employers must be able to terminate an employee's employment because he has reached retirement age). However, the following grounds are reasons deemed to be not valid under national law: those mentioned in (a); with respect to (d), racial grounds, sex, marital status (in the sense that marriage should not constitute a valid reason); the ground mentioned in (f) (provided that the pregnancy has not affected the employee's ability to perform her job). As any list of "not valid" reasons is likely to reflect the differing circumstances of each member State, it would be more appropriate for the instrument to leave the composition of the list of such reasons for dismissal to national laws and practice.

United States. Yes, none of the items (a) through (h) should be a valid reason for termination. Additionally, the Government suggests adding "handicap" to the list of conditions not constituting valid reasons for termination. In (h), the Government recommends the deletion of the word "compulsory" preceding "military service," and suggest that the term "other civil obligations" includes exercise of civil rights, i.e. voting and jury duty, as now being provided in laws of many states. Additionally, the Government recommends the inclusion of language which prohibits the discharge of any employee on the basis of any single indebtedness, and also limits the amount of an employee's disposable earnings which may be garnished in any one week.

Several governments expressed the view that it is undesirable to list reasons that should not be valid reasons for termination of employment at the initiative of the employer, but that this should be left to national law and practice. It should be noted, in this connection, that inclusion of such a list in the instrument would not necessarily require member States to adopt legislation explicitly prohibiting termination for the given reasons; the requirements of the instrument would be met if it could be shown that the competent bodies, such as the courts or tribunals, in applying the provisions of national law requiring a valid reason for termination, do not consider the reasons listed in the present question to be valid reasons for termination.

As the large majority of governments have replied to this question in the affirmative, a Point has been included in the Proposed Conclusions based on this question (Point 9).

Some governments have expressed certain reservations regarding one or more of the grounds mentioned in this question as invalid reasons for termination. With respect to (b), one government proposed inserting a similar qualification to that contained in Article 1 of the Workers' Representatives Convention, 1971 (No. 135), which extends protection to workers' representatives "in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements". The competent Conference Committee may wish to consider whether inclusion of such a limitation is desirable.

A number of governments made their approval of (e) conditional on the possibility of excluding from the application of the instruments workers who have reached the age of retirement. As the explicit authorisation to exclude such workers which was referred to in question 9 has been replaced by an authorisation worded in general terms (Point 6 (4)), the Office has considered it appropriate to subject the inclusion in the instrument of "age", as a ground that should not be a valid reason for termination, to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit. This qualification would leave it to governments to determine how this matter should be resolved, having regard to the Older Workers Recommendation, 1980 (No. 162).

Several governments suggested modifying the wording of (h) to extend it to the discharge of all public duties or to the exercise of all civil rights or to remove the word "compulsory" before "military service". The Office has thought it preferable to retain the present wording of this clause; it would of course be within the discretion of member States to provide for further protection in accordance with national circumstances.

Several governments have suggested including certain additional reasons as reasons that should not be considered to be valid reasons for termination of employment. These are discussed in connection with question 15.

Qu. 14 (1) *Should the instrument(s) provide that temporary absence from work because of duly certified illness or injury should not constitute a valid reason for termination?*

(2) *Should the instrument(s) provide that what constitutes temporary absence from work for the purpose of paragraph (1) should be determined by the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 38. Austria, Bahrain, Belgium*, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada*, Cuba, Cyprus, Czechoslovakia*, Denmark*, Egypt, Ethiopia, Finland, German Democratic Republic, Guyana, Honduras, Hungary*, India, Kuwait, Madagascar*, Malta, Mexico, Morocco, Nigeria, Norway*, Pakistan, Poland, Romania, Sierra Leone, Spain, Suriname*, Swaziland, Trinidad and Tobago, USSR, United States*, Uruguay, Yugoslavia.

Negative: 3. Federal Republic of Germany¹, Singapore¹, United Kingdom*.

Other: 8. Colombia*, France*, Kenya*, Netherlands¹, New Zealand*, Philippines*, Sweden*, Switzerland*.

Belgium. (1) Yes. National law prohibits dismissal of a sick worker during the first six months of sickness. However, the courts do not always consider such a dismissal to be abusive. Everything depends on the meaning of "capacity" of the worker under question 12; according to case law, repeated absence of short duration may disorganise work in the undertaking and possibly constitute a valid reason for dismissal.

(2) The instrument should define precise criteria for evaluating the temporary character of absence from work, to be implemented in accordance with national practice.

Botswana. (1) Yes, except where such absence is continuous.

(2) Yes.

Canada. (1) Yes.

(2) Yes. Where the question of what constitutes temporary absence can be resolved between the parties they should be free to do so, otherwise a regulated standard would be preferable to uncertainty.

Colombia. (1) Yes.

(2) See reply to questions 8 and 13.

* Substance of observations reproduced below.

¹ See under question 13.

Czechoslovakia. Yes. The legislation should stipulate what is meant by “temporary absence from work”.

Denmark. Yes; however, the Danish Employers' Confederation is of the opinion that absence due to illness may also be a valid reason for termination.

France. (1) The instrument should provide that temporary absence from work due to illness or accident should not constitute a valid reason for termination, except in case of absolute necessity to replace the absent worker, having regard to the operational requirements of the undertaking, or in case of serious misconduct by the worker that is extraneous to the illness or accident.

(2) Yes.

Hungary. Yes, except when temporary absence from work covers a longer period and involves disability, on condition that appropriate material support is provided for by national legislation.

Kenya. (1) Provided the length of temporary absence is determined.

(2) Yes.

Madagascar. (1) Yes, but the duration of this protection should be indicated.

(2) Yes.

New Zealand. (1) Yes.

(2) No. The Government does not consider that this is a matter to be specified in national laws and regulations. What constitutes temporary absence is a matter for the parties to determine in collective bargaining.

Norway. Yes, but a better solution would be to include in the instrument a restriction on the length of time one is protected against unfair termination of employment on grounds of illness.

Philippines. Temporary absence due to a duly certified illness or injury, provided that such absence does not constitute gross and habitual neglect of duty by the employee, is not a just cause for termination of employment under existing law.

Suriname. Yes, provided that the definition of a temporary absence in this respect is left to national law or regulation.

Sweden. Illness or injury ought not in principle to constitute a valid reason for termination unless it renders the employee incapable of performing any significant work in the employer's service. The mere duration of illness should not be material, unless there is sound reason to suppose that, owing to his illness, the employee will never be able to return to work.

Switzerland. (1) National law also provides a special protection of the employment relationship in case of illness or accident. Thus, after the probationary period, the employer may not terminate the contract during the first four weeks of incapacity resulting from an illness or accident not due to the worker's fault, a period increasing to eight weeks from the second year of service.

(2) Yes, this should be left to national practice.

United Kingdom. No. The validity of dismissal on grounds of sickness must depend on the circumstances of the particular case.

United States. Yes, temporary absence due to illness or injury, as defined in national law and practice, should not be a reason for termination.

As the great majority of governments have replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 10*). Several governments have stated that temporary absence that occurs on repeated occasions or is of long duration may affect the worker's capacity and thereby justify

termination of employment by the employer. However, as the present wording would leave it to each country to define the concept of "temporary absence from work", repeated or lengthy temporary absence from work may be deemed by national law or practice not to constitute temporary absence for the purpose of the protection afforded by this Point. Several governments have stated that the length of absence constituting temporary absence for the purpose of this provision should be defined by the instrument. As views may vary regarding the length of absence from work during which a worker's employment should be protected, it has been thought preferable to leave the definition of the concept of temporary absence from work to national methods of implementation.

The second paragraph in question 14, which expressly referred to determination of what constitutes "temporary absence from work" for the purpose of the first paragraph by national methods of implementation, has, however, been deleted from the Proposed Conclusions. On further consideration, it has seemed that this reference is superfluous, inasmuch as it will be in any case for each country ratifying a Convention in which the first paragraph is contained to define this general concept by national methods of implementation, in accordance with Point 5.

One government favoured extending the protection of this Point to all illness or injury, irrespective of the duration of absence, unless the worker is permanently incapacitated. The Office has considered it preferable to leave this to the discretion of each member State.

Another government proposed excepting from this Point cases in which the operational requirements of the undertaking make it necessary to replace the absent worker or cases of serious misconduct by the worker which is extraneous to the illness or accident. The Office has considered it to be reasonable to subject this Point to an exception for cases in which the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis and has modified the wording accordingly. However, it has not deemed it necessary to make an exception for the case of serious misconduct, as this is an entirely separate ground for termination.

Qu. 15 *Should the instrument(s) provide that any other reason should not constitute a valid reason for termination?*

Total number of replies: 44.

Affirmative: 23. Austria*, Belgium*, Canada*, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland*, France*, Honduras, Hungary, Kuwait, Madagascar*, Mexico*, Morocco, New Zealand*, Nigeria*, Poland*, Romania, Sierra Leone*, Spain*, United States*, Yugoslavia.

Negative: 15. Bahrain*, United Republic of Cameroon, Cuba, Federal Republic of Germany¹, Guyana, Kenya*, Malta, Netherlands*, Norway, Singapore¹, Suriname, Switzerland*, Trinidad and Tobago, United Kingdom, Uruguay*.

* Substance of observations reproduced below.

¹ See under question 13.

Other: 6. Botswana*, Colombia¹, German Democratic Republic*, India*, Philippines*, Sweden².

Austria. In so far as the legislation of member States has laid down legal standards for the employment of the disabled, it is recommended that these persons should be included in the list in question 13. The same might apply to the exercise of statutory rights (e.g. time off for treatment, holidays or stays in health resorts) or the exercise of civic rights (freedom of expression, freedom of association).

Bahrain. No, provided that such termination of employment must be justified and subject to prior grievance procedures and to appeal to an impartial body or to a court to establish the validity thereof.

Belgium. Yes, this results implicitly from the definition given in question 12.

Botswana. Only as determined by the methods of implementation referred to in question 6.

Canada. Consideration should be given to including a reference to temporary absence due to attending to "extraordinary family responsibilities", such as illness of a child or spouse.

Finland. In addition, participation in a labour conflict, illness not leading to an essential and permanent decrease in working capacity, and temporary reduction in the amount of work should not be valid reasons for termination of employment. A change in the ownership of the undertaking should not automatically cause a termination of employment.

France. The instrument should provide that seeking political office or a judicial function, or acting or having acted in such capacity, should not constitute a valid reason for termination.

German Democratic Republic. The discussion should seek to ascertain whether it is desirable to specify further reasons not constituting valid reasons for termination. The determination of further reasons might be left to national legislation.

India. This should be left to be decided by the competent authority in consultation with concerned employers' and workers' organisations.

Kenya. No, other reasons can be valid reasons for termination, such as mental illness, incapacity through accident, etc.

Madagascar. Yes, the enumeration in question 13 should not be a complete list of reasons not justifying termination.

Mexico. Yes, the grounds that should not constitute a justified reason for termination of the employment relation should be indicated in the instruments in an enunciative, not a restrictive way. Moreover, the instruments should, like national legislation, establish restrictively the grounds for termination of the employment relationship by the employer.

Netherlands. No. This is at odds with question 13, where examples are listed.

New Zealand. The following reasons should not constitute valid reasons for termination: that the worker was a member of a trade union; that a worker had made a claim on behalf of himself or another worker for some benefit of an award, order or collective agreement to which he was entitled.

Nigeria. Yes, if mutually agreed by contract.

Philippines. What should constitute a valid reason for termination should be decided by national legislation. An employee dismissed for reasons other than those provided for in the law shall be immediately ordered reinstated without loss of seniority and other rights.

* Substance of observations reproduced below.

¹ See under questions 8 and 13. ² See under question 13.

Poland. Yes, but this should be decided by national legislation.

Sierra Leone. Yes; this may be determined by the methods referred to in question 6.

Spain. Certain reasons included in the national legal system may be added, such as redundancy, deprivation of liberty, etc.

Switzerland. Not necessary, having regard to the reply to question 12.

United States. Yes, a Recommendation might include measures to avoid terminations while promoting solutions to social problems. In general, these measures might deal with personal difficulties that workers are resolving in a manner which is reasonably consistent with the operational requirements of the employer, such as participation in a programme of recovery from alcoholism, repayment of personal indebtedness, meeting family responsibilities, which may involve changes in their working schedule which the employer can accommodate.

Uruguay. In principle, no. This should be left to the law and practice of each member State.

While more governments replied in the affirmative than in the negative, relatively few mentioned the other reasons that they considered should be considered not to constitute valid reasons for termination of employment. Among the reasons so proposed were change in ownership of the undertaking, temporary reduction in the amount of work, disablement, illness not leading to a permanent decrease in capacity, temporary absence from work to attend to extraordinary family responsibilities such as the illness of a spouse or a child, care of a child under a given age, personal difficulties that a worker is seeking to resolve in a manner reasonably consistent with the operating requirements of the employer, the exercise of statutory rights, seeking political office or judicial function or acting or having acted in such a capacity, and participation in a labour dispute or a legitimate strike. As no single such reason has been supported for inclusion in the proposed instruments as an invalid reason for termination of employment by more than a few governments, these proposals have not been retained in the Proposed Conclusions. However, it would remain within the discretion of member States in their national law and practice to consider any such reason as an invalid reason for termination.

Procedures Prior to or on Termination

- Qu. 16** *Should the instrument(s) provide that, in the event of misconduct that under national law would justify termination of employment only if repeated, the employment of a worker should not be terminated unless—*
- (a) *the employer has given the worker a warning describing the misconduct and the action that the employer intends to take if the misconduct is repeated; and*
 - (b) *the worker is guilty of similar misconduct within a reasonably limited period of time, as determined by the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 28. Bahrain, Botswana, Colombia, Cuba, Cyprus, Czechoslovakia¹, Egypt, Ethiopia, Finland*, German Democratic Republic, Hungary, India, Kenya*, Kuwait, Madagascar, Malta, Mexico*, Morocco, Nigeria, Romania*, Sierra Leone*, Suriname, Swaziland*, Sweden*, Trinidad and Tobago*, Tunisia*, United States*, Uruguay.

Negative: 6. Byelorussian SSR*, United Republic of Cameroon*, Netherlands*, Pakistan*, Singapore², USSR*.

Other: 15. Austria*, Belgium*, Canada*, France*, Federal Republic of Germany*, Guyana*, Honduras*, New Zealand*, Norway*, Philippines*, Poland*, Spain*, Switzerland*, United Kingdom*, Yugoslavia*.

Austria. A warning should be required in the cases mentioned in questions 16 and 17, but there should be no "formalisation" of the procedure as proposed. The instruments should also refer to the functions of the workers' representatives in the undertaking in the event of dismissals with notice. There should be a binding provision to the effect that the workers' representatives should be informed in due time of all the circumstances of the termination (this is usually only possible beforehand) and that they are entitled to express an opinion and to represent the worker concerned in discussions with the employer if he so wishes.

Belgium. A distinction should be made between dismissal for serious misconduct without a period of notice or compensation and dismissal for less serious misconduct of the worker which does not justify immediate dismissal without compensation but justifies dismissal for reasons connected with the "conduct" of the worker. This question presumes that the legislature will establish a classification of misconduct in accordance with its seriousness. Such a classification would seem difficult to establish and even arbitrary and it would limit the power of the tribunals to evaluate, in case of dispute, the seriousness of the fault committed and to determine the applicable sanction. In evaluating serious misconduct, case law takes into account prior warnings given by the employer.

The instrument might, however, provide that when the employer considers the worker's misconduct not to be serious he is obliged to respect a procedure fixed by national law or collective agreement before effecting termination of employment.

The workers' representatives consider that an affirmative reply should be given to this question, while the employers' representatives recall their position referred to in the reply to question 12 and consider that an affirmative reply should not be given to this question.

Byelorussian SSR. Provisions regarding the concept of "conduct" should be deleted since an unfavourable appraisal by the employer of a worker's conduct not connected with the performance of his duties (covered by question 17) cannot constitute grounds for dismissal.

United Republic of Cameroon. No. Under national legislation it is the gravity of the misconduct and not the repetition thereof that justifies termination of employment.

Canada. (a) Yes.

(b) No. While the concept of repetitive action has been adopted by arbitration law, another equally serious misconduct should possibly give rise to the employee's dismissal. Moreover, to have the question of "reasonable period" established by law or regulation could be too inflexible. A detailed codification of repetitive misconduct as would appear to be envisioned is fraught with problems.

* Substance of observations reproduced below.

¹ See under question 3. ² See under question 13.

Finland. (a) Yes.

(b) Yes, but there should be definitions of the meaning of "similar misconduct" and of the kind of misconduct to which this provision would apply.

France. The provisions contained in questions 16 and 17 appear to belong solely to the methods of application mentioned in question 6, applied to the principle referred to in question 12.

Federal Republic of Germany. The determination of a period of time proposed under (b) could lead to practical difficulties, since it is hardly possible to fix periods for every conceivable instance of misconduct.

Guyana. This depends upon the gravity of the misconduct. It should apply to less grave misconduct.

Honduras. (a) National legislation provides that the right to dismiss a worker justifiably lapses within one month from the date of the reason therefor; if this date passes, the situation is as if no fault were committed,

(b) Yes.

Kenya. (a) Yes, except that such warning must be in writing and in a language the worker understands or it should be translated to him in a language he understands.

(b) Yes, except that the words "reasonably limited period" should be replaced with "specific period of time".

Mexico. Yes, a provision containing these objectives should be included. This type of protection should apply only to cases in which the worker has a minimum of 20 years' service and only when there is serious misconduct making it impossible for the employment relation to continue.

Netherlands. The procedures described in questions 16 to 22 are too specific and detailed for inclusion in an international instrument and even for inclusion in national legislation, although this does not mean that some of the elements referred to would not be reasonable. Under Netherlands law misconduct may in certain specific circumstances justify instant termination; the aspects referred to in these questions would be brought up as part of the evidence in any subsequent court proceedings. It should be noted that a contract of employment may be terminated under national law by the intervention of the court at the initiative of either party, but this is not called "dismissal".

New Zealand. (a) The Government has no objection in principle to this clause.

(b) It is accepted that the worker must be guilty of similar misconduct within a reasonably limited period of time, but not that the time period should be determined by national laws or regulation. This is a matter for negotiation through collective bargaining.

Norway. The question of prior warning is an important factor in the majority of terminations of employment, but cannot be made an absolute requirement.

Pakistan. The instrument should not go into such details. It would be enough to provide that the services of a workman shall not be terminated on account of misconduct unless he has been given a fair opportunity to explain the circumstances alleged against him.

Philippines. Under existing laws in this country, serious misconduct is a valid cause for termination of employment of an employee and such misconduct need not be repeated or habitual.

Poland. Such provisions might restrict the right of the establishment to terminate the contract of employment, in particular where there are reasons which make it objectively impossible to continue to employ the worker, for example as a result of an offence in relation to work. The prior application of educational measures would be justified where the continuation of the employment relation—despite the existence of reasons justifying its termination by the employer—would prejudice the interests of either party to the employment relation.

Romania. Yes, provided that the employment relationship may be terminated even if there is a single instance of misconduct if it is serious.

Sierra Leone. Yes, but depending on the gravity of the misconduct and the type of enterprise. This should preferably be provided by the methods of implementation referred to in question 6.

Spain. In most cases of conduct giving rise to dismissal (e.g. intoxication, diminution of output, lack of punctuality), there is an element of habitualness or repetition, i.e. a series of acts with respect to which it appears reasonable to have a certain gradation of sanctions. In such cases the procedures in (a) and (b) appear to be appropriate. However, in practice this would give rise to a formalistic element which may cause problems of application. There would have to be a definition of the conduct requiring repetition for dismissal and a procedure which would necessarily be casuistic. It would therefore be preferable to leave it to case law to evaluate the gravity of the worker's conduct. Since the possibility of abuse by the employer also arises, if he ignores minor misconduct that would through repetition justify dismissal, the instrument might include a reference to the necessity for a warning or a prior sanction in case of conduct which requires repetition to be of the gravity required for dismissal.

Swaziland. The warning referred to in (a) should be a written warning.

Sweden. This question is based on the inclusion in national legislation of provisions making certain phenomena valid cause for dismissal only if they are repeated. Subject to this proviso, the questions can be answered in the affirmative, but the general principle should be that a worker ought as a rule to be warned before the employer resorts to such a grave expedient as termination and that no importance should be attached to repetition unless it occurs reasonably soon after the first offence. Formal rules of the kind alluded to here should, however, be employed with restraint. Generally speaking a warning should not be stipulated without exception, while on the other hand termination should not automatically result from the repetition of misconduct after a warning has been administered.

Switzerland. National law does not define misconduct. The concept of fault resulting from the general part of the Code of Obligations refers to any failure to respect the obligations deriving from the contract of employment. The fault need not be repeated for it to constitute grounds for the employer to terminate the contract of employment. Many collective agreements specify certain cases of repeated faults (e.g. lateness for work) that justify, after warning, termination of the contract of employment.

Trinidad and Tobago. Although this is not specified in national legislation, in the case of countries where the situation described may occur, the Government's reply would be in the affirmative.

Tunisia. All the procedures mentioned in questions 16-22 are indispensable guarantees to protect the worker against abusive dismissal. However, the employer should be able to suspend provisionally, with immediate effect, the worker from his post in serious and exceptional circumstances, with the employer being obliged to refer the matter to the competent disciplinary instances within a given period of time.

USSR. Provisions regarding the concept of "conduct" should be deleted since an unfavourable appraisal by the employer of a worker's conduct not connected with the performance of his duties (covered by question 17) cannot constitute grounds for dismissal.

United Kingdom. With respect to questions 16-21, given that the circumstances surrounding each dismissal are different, the instrument should not specify in such great detail the procedures to be followed. The requirements set out in these questions are implicit in the requirement of national legislation that the employer must act reasonably in dismissing an employee. In determining whether the employer has acted reasonably, the adjudicating authorities take into consideration, as far as they consider appropriate in any particular case, a Code of Practice on disciplinary practice and procedures.

United States. Yes, but as noted in the Government's reply to question 6, this should not be confined to national law. It should extend to collective bargaining and personnel management practices, where these govern such situations, as is the case in the United States. Specifically, an employer's right to terminate an employee for misconduct should depend upon the nature and severity of the misconduct, and termination should be limited to cases where the misconduct is job-related. It is noted that question 28 (1) distinguishes between serious and non-serious misconduct, whereas question 16 does not.

Yugoslavia. A worker should not be dismissed in cases other than under (a).

The majority of governments have replied to this question in the affirmative. On the other hand, some governments considered this requirement to be too detailed or formalistic or believed that it would require countries to include in their legislation a detailed codification of the kinds of misconduct that must be repeated for termination of employment to be justified, considering that this kind of evaluation should be left to the courts. Several governments had difficulty with the concept of a "reasonably limited period of time" in clause (b). Certain other governments indicated that this matter should be left to collective bargaining. Having regard to these replies, the Office has revised the wording to make it more general and flexible and to make it clear that the distinction between misconduct justifying termination after a single instance and misconduct justifying termination only after repetition may be made by national law or practice (*Point 26*). Since this Point has been included in the Proposed Conclusions with a view to a Recommendation, it may be implemented, under Point 23, by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or by other methods.

Some governments have pointed out that certain kinds of misconduct justify termination of employment without repetition. The attention of these governments is called to the fact that the requirement included in this Point applies only to those cases of misconduct which under national law or practice would justify termination if repeated; it would leave it to national law or practice to determine which kinds of misconduct justify termination after a single instance and which kinds of misconduct justify termination only after repetition. It is only in the latter cases that the requirement of a warning would be recommended.

Several governments expressed the view that the warning referred to should be in writing. It has been thought preferable to leave it to each country to determine the kind of warning that should be required.

Several governments again expressed concern that the concept of misconduct should be limited to work-related conduct. The Office refers in this connection to the commentary to the replies to question 12.

Qu. 17 *Should the instrument(s) provide that in the event of unsatisfactory performance, the employment of a worker should not be terminated unless—*

- (a) *the employer has given the worker a warning describing the unsatisfactory performance and the action that the employer intends to take if the unsatisfactory performance is continued; and*

- (b) *the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed, such period to be determined by the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 36. Bahrain, Belgium*, Botswana, Byelorussian SSR, United Republic of Cameroon, Colombia, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland*, German Democratic Republic*, Federal Republic of Germany*, Guyana, Honduras*, Hungary, India, Kenya*, Kuwait, Madagascar, Malta, Morocco, New Zealand*, Nigeria, Norway, Philippines*, Poland, Romania, Sierra Leone, Suriname, Swaziland*, Trinidad and Tobago, Tunisia¹, USSR, United States*.

Negative: 6. Mexico*, Netherlands¹, Pakistan¹, Singapore², Switzerland*, Uruguay.

Other: 7. Austria¹, Canada*, France¹, Spain¹, Sweden*, United Kingdom¹, Yugoslavia*.

Belgium. Yes, but should this be subject to general regulation or be left to the initiative of each branch of activity? The views of the workers' and employers' representatives are divided (see reply to question 16).

Canada. (a) Yes.

(b) No. As stated in the Government's reply to question 16(b), an extensive codification of this nature is of questionable value. It would be far better to let this evolve in each jurisdiction as a result of the dispute-resolution mechanism with its flexibility.

Czechoslovakia. Yes. See also reply to question 3.

Finland. Yes, provisionally, pending the results of the current national review of protection of security of employment.

German Democratic Republic. Yes. Nor should the employment relationship be terminated if the unsatisfactory performance is essentially due to the fact that the worker has not been properly introduced to his job or instructed in his duties.

Federal Republic of Germany. Yes. It should be permissible to dispense with a warning in cases in which this is unlikely to lead to satisfactory performance. The determination of a period of time for improvement in clause (b) is subject to the same reservations as in the reply to question 16 (b).

Honduras. (a) Yes, for the same reasons as given in reply to question 16 (a).

(b) Yes, a worker should be given the opportunity to improve, but the gravity of the fault should be taken into account.

Kenya. (a) Yes, except that the warning should be in writing.

(b) Yes, except that a specific time-limit should be given as stated above.

Mexico. No. Under national law the written record of conditions of work must indicate the service or services to be provided by the worker, and workers are under a duty to carry out the work with due assiduity, care and attention and at the time and place agreed upon. If a worker's services are unsatisfactory, he is not complying with his duties under the

* Substance of observations reproduced below.

¹ See under question 16. ² See under question 13.

employment relation; it is for the works rules to indicate the procedure of warning and sanctions applicable.

New Zealand. (a) Yes.

(b) The period referred to in this clause will not be determined in New Zealand by national laws and regulations, but rather by the parties in negotiation or by the relevant Court.

Philippines. The matter herein treated appears to be a sound proposition and may guide member countries in the formulation, adoption or revision of their national legislations, rules and regulations concerning employment termination. The Government believes that workers need to be encouraged to develop their capability and except for reasons of inappropriate conduct should be given a second chance.

Swaziland. The warning referred to in clause (a) should be a written warning.

Sweden. See reply to question 16. It should be noted that valid cause for termination ought not invariably be deemed to exist when a worker does his work unsatisfactorily. Consideration should be given, for example, to the possibility of a worker having been assigned duties for which he lacks the necessary qualifications or of his work capacity having been impaired by illness or injury. Opportunities of transferring the worker to other duties in the employer's service must be taken first, and valid reason for termination should not be deemed to exist unless the worker discharges his duties in a manner which clearly falls short of what the employer is entitled to expect. The instrument(s) should be framed in accordance with this principle.

Switzerland. This possibility is not provided for by national law. While the Code of Obligations requires the worker to carry out the work entrusted to him with due care, it does not determine the sanction for violation of this provision, nor a procedure of warning. It is for the parties to provide for such a procedure under collective agreements. Such a provision in the instrument, regarding warning and justification of termination of the employment relation, would be contrary to the principle of freedom of contract which is the foundation of the national law on the subject.

United States. Yes. See reply to question 16. In a Recommendation one might add that the worker should be assisted by additional training supervision or similar measures consistent with the operational requirements of the employer in order to demonstrate that he can overcome his apparent deficiencies. This might be a new clause (b), and present (b) could be redesignated (c).

Yugoslavia. A worker should not be dismissed until he is offered another job corresponding to his ability, provided that the worker concerned does not refuse the job offered.

A large majority of governments replied in the affirmative to this question. Several governments had reservations regarding the wording of this question, particularly in respect of clause (b), considered the requirement included therein to be too detailed for inclusion in the instrument or felt that this should be left to collective bargaining, works rules or court decisions. Having regard to these comments, the Office has revised the wording of this provision to make it more general and flexible. Attention is also called to the fact that, included in the Proposed Conclusions with a view to a Recommendation, it is subject to implementation by the methods referred to in Point 23, that is national laws or regulations, collective agreements, works rules, arbitration awards, court decisions or other appropriate methods.

Several governments suggested that a worker's employment should not be terminated for unsatisfactory performance unless the employer also gives the

worker proper instruction or training for his job. As this appears to be a reasonable suggestion, the wording of this question has been modified to this end (*Point 27*).

One government has proposed including a requirement that, before terminating the employment of a worker for unsatisfactory performance, the employer first consider the possibility of transferring him to another job for which the worker is qualified. It has been thought preferable to leave such an additional requirement to the discretion of each member State.

Another government proposed making the requirement of a warning subject to an exception in cases in which this is unlikely to lead to satisfactory performance of duties. This suggestion has not been retained as it would seem to be implicit in this provision that, if the employer can show that in a specific case a warning with appropriate instruction could not assist a worker to perform his job satisfactorily, the requirement of a warning would have no purpose.

Several governments propose that the warning mentioned should be in writing. It has been thought preferable to leave it to each country to determine the kind of warning that should be required.

Should the instrument(s) provide that the employment of a worker should not be terminated for reasons related to the worker's conduct or performance before being afforded a hearing by the employer at which he is given an opportunity to defend himself against the allegations made, and that a worker should be entitled to be assisted at such a hearing by another person? **Qu. 18**

Total number of replies: 50.

Affirmative: 37. Austria, Bahrain, Belgium*, Botswana, Byelorussian SSR, Canada, Colombia, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland, German Democratic Republic*, Guyana, Hungary, India, Kenya*, Kuwait, Malta, Mexico*, Morocco, Nigeria, Norway*, Philippines*, Poland*, Romania, Sierra Leone*, Singapore*, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR*, United States*, Yugoslavia.

Negative: 4. Netherlands¹, New Zealand*, Pakistan¹, Uruguay*.

Other: 9. United Republic of Cameroon*, Denmark*, France*, Federal Republic of Germany*, Honduras*, Madagascar*, Spain¹, Switzerland*, United Kingdom¹.

Belgium. Yes. The workers' representatives consider that it is necessary for all decisions to dismiss to be preceded by a procedure of dialogue and reflection between the parties at the level of the undertaking. During such procedure, the decision envisaged by the employer and the reasons therefor should be notified to the worker who would be entitled to present

* Substance of observations reproduced below.

¹ See under question 16.

his objections and to be assisted by a trade union delegate or representative ; they therefore reply in the affirmative. The employers' representatives express the same views as in reply to question 12.

United Republic of Cameroon. This will depend on national legislation and practice, but in any case the last word on termination must be left to the employer.

Cyprus. Yes. The Government indicates that the Pancyprian Federation of Labour and the Cyprus Workers' Confederation suggest that the words "by a trade union representative or" be added before the words "another person" in the last sentence.

Denmark. The Government has a positive attitude especially to the desirability of conciliation (questions 18 and 24) before legal action is taken.

France. The instrument should provide that a worker's employment should not be terminated before he has been heard by the employer and has had an opportunity to defend himself, and that he should be entitled to be assisted by another person during such a hearing. It should be added that the conditions regarding size of undertaking or length of service required for this purpose may be specified by the methods of application referred to in question 6.

German Democratic Republic. Yes. In this connection it would seem desirable to emphasise that the worker is entitled to support from his union. Moreover, the trade union itself should be granted the right to take part in such hearings with the workers if it sees fit.

Federal Republic of Germany. The instrument(s) should include only provisions taking account of differences in national laws and regulations. Under the law of the Federal Republic of Germany, hearings for workers whose employment is to be terminated are not compulsory, contrary to what is indicated in the report. Provision is, however, made for consultation of the works council before any dismissal ; the works council may contest a case of dismissal with notice if certain conditions are met and may hear the views of the worker concerned before taking a decision. Independently of this procedure, the worker has the right to appeal to the works council.

Honduras. Various factors should be taken into account, such as the gravity of the fault, if it was committed before the other workers, etc. Under national law, the worker may bring the employer before the tribunals if he considers that he has been subject to an unjust sanction.

Kenya. Yes, provided that a worker is entitled to be assisted at such a hearing by his union or other persons.

Madagascar. A worker should not be dismissed for reasons connected with his conduct or performance before the procedure provided for this purpose has been exhausted. The instruments should provide that the non-respect of the right of defence should annul the dismissal.

Mexico. Yes, if this is provided for in a Recommendation, since the provision regarding entitlement to assistance at such a hearing by another person could only be implemented through provisions in collective agreements.

New Zealand. No. Discussions with the employer with the help of a representative occur after the termination has taken place.

Norway. Yes, provided this is feasible.

Philippines. Affording workers the right to be heard by the employer before effecting termination is a sound policy. In the Philippines a worker who is covered by a collective agreement should first resort to the grievance machinery under said agreement for all types of grievances for which he seeks redress, and, particularly, in case of termination. The grievance machinery is composed of representatives of both union and management. The procedure for processing grievances under such scheme is as may have been agreed upon by the contracting parties. The last stage in the grievance procedure is almost always voluntary

arbitration. This has been the practice in the Philippines over the years. All collective agreements are in fact required to provide for such a grievance machinery.

Poland. Yes, provided that the right to be assisted during the hearing with the employer would be granted to the worker on request.

Sierra Leone. Yes, but this could be better implemented by the methods referred to in question 6.

Singapore. Yes, whenever possible, but the person assisting must be a co-worker or union representative.

Switzerland. A right to a hearing, found in administrative law, is not included in the law governing contracts of employment. However, it is possible for the parties to provide for such a right to a hearing, as well as a right to be assisted by a third party during such hearing, in a contract of employment or a collective agreement.

USSR. Yes, in respect of reasons related to the non-performance or improper performance of duties.

United States. Yes, as to the worker's right to defend himself against allegations of misconduct or poor performance. The worker should be entitled to assistance at such a hearing by another person only if this is included in the collective bargaining agreement or personnel rules of the workplace, or by the methods referred to in question 6. It should not be the purpose of this provision to turn this "hearing" into an adversary proceeding when it might be a means of discovering underlying causes of difficulties and developing plans for correcting them.

Uruguay. No. This would limit or restrict the rights of the employer in situations of worker misconduct. There are administrative and judicial instances to which the worker may appeal to defend his rights which give all guarantees inherent in these procedures.

As a large majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 11*).

Some governments expressed reservations with respect to the wording of the last part of this question, which refers to the right of the worker to be assisted by another person at a hearing. Several governments indicated that this should be left to collective agreements or works rules. Inclusion of this provision in a Convention (as in the Proposed Conclusions), would require implementation by national laws or regulations to the extent that other methods did not give effect to the provision; it will be for the competent Conference Committee to consider whether this is appropriate. One government considered that only a co-worker or a union representative should be authorised to assist a worker at a hearing. The wording of the relevant Point has been modified to make it somewhat more flexible by permitting the right to be assisted by another person to be limited to assistance by another worker in the undertaking or a trade union representative.

One government considered that non-respect for this procedure should nullify the termination of employment. The Office has considered it preferable to leave the methods of enforcement of these procedural requirements to the discretion of each country.

Should the instrument(s) provide that the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct?

Qu. 19

Total number of replies: 49.

Affirmative: 39. Austria, Bahrain, Belgium*, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland, France, German Democratic Republic*, Guyana, Honduras, Hungary, India*, Kenya*, Kuwait, Madagascar*, Malta, Mexico, Morocco, Norway*, Pakistan, Poland, Romania, Sierra Leone*, Singapore, Spain, Suriname, Swaziland, Sweden*, Trinidad and Tobago, Tunisia¹, United States*, Yugoslavia.

Negative: 4. Netherlands¹, New Zealand, Nigeria*, Uruguay.

Other: 6. Botswana*, Federal Republic of Germany*, Philippines*, Switzerland*, USSR*, United Kingdom¹.

Belgium. Yes, but what is a reasonable period? The workers' representatives are in favour of an affirmative reply, while the employers' representatives cannot agree to this proposal.

Botswana. Past offences should lapse after a specified period of time except in cases of misconduct still under investigation.

Czechoslovakia. Yes. A time limit (e.g. one month from having knowledge of such a reason for dismissal and at most one year from the time of the conduct) should be specified. A termination occurring after this period should be considered to be invalid.

German Democratic Republic. Yes. The termination itself should also be disallowed unless it takes place within a given period of time following the misconduct.

Federal Republic of Germany. There is no objection to a general provision of this kind covering dismissal with notice. The determination of the period of time would, however, involve practical difficulties in cases where termination of employment can be justified by a single instance of misconduct only if the worker has been warned of its consequences prior to its occurrence or by a series of instances of misconduct taken together. There are no objections to the determination of a period in the case of dismissal without notice for serious reasons (two weeks under national law).

India. Yes. The reasonable period may be determined by the methods referred to in question 6.

Kenya. Yes, provided "a reasonable period of time" is specified

Madagascar. Yes. The instruments should provide for a period of time during which it is possible for the employer to exercise his right to impose a sanction on a worker generally and to dismiss him in particular, after having knowledge of the fault and of the opinion of the workers' representatives or of the body established for this purpose.

Nigeria. No. The employer may be prevented by proper reasons from taking appropriate action within a "reasonable period of time".

Norway. Yes. It should be possible to demand that the employer, once he has received knowledge of the misconduct, take the action necessary to terminate the employment without undue delay.

Philippines. The failure of the employer to take appropriate action within a certain period of time on the misconduct of the worker, such misconduct having been brought to his

* Substance of observations reproduced below.

¹ See under question 16.

notice, may be considered as waiver, if not condonation, of the wrongful act by the worker. The same misconduct may not therefore be made the basis for termination of employment which may subsequently be effected. While the country's labour legislation does not specifically provide for such circumstance, civil courts and administrative tribunals have consistently recognised and applied the civil law principles of condonation and waiver in matters of defence.

Sierra Leone. Yes, except that the "reasonable period of time" should be defined as under question 23 (2). It is not unlikely that there might be difficulty in giving effect to this provision.

Sweden. Yes, but the rule should allow an employer to plead previous offences if they are repeated and if the latest offence or offences occurred within the period allowed. It should also be permissible to allow for the possibility of certain circumstances pleaded as cause for termination being of a continuous or on-going character. Furthermore, the employer should be allowed a reasonable amount of time to undertake an investigation when one is needed before deciding on termination.

Switzerland. In case of termination with immediate effect for just cause, court decisions and legal opinion consider that the employer is to be deemed to have waived this right if he does not do so within a reasonable period of time after he has knowledge of the just cause (in particular, serious misconduct). National law does not provide for any other measure of this type, particularly in the case of normal termination of the contract of employment.

USSR. The Convention should provide that the employer may terminate the employment of a worker charged with non-performance or improper performance of his duties only within a certain limited period after the facts of the case come to light.

United States. Yes, but this provision may need qualification as it is too rigid to meet the variety of forms of misconduct. The qualification should deal with a recurrence of misconduct in a serious form after a period of improvement. In such situation, the worker's entire record should be considered, to determine if termination of employment for misconduct is equitable and in the best interests of all involved.

As the large majority of governments replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 12*).

Several countries considered that difficulties might arise under this provision in certain cases in which there is a temporal element in the decision of the employer regarding termination, for example where a warning is first given to the worker, where repetition of the misconduct is necessary for termination to be justified or where time is required for the employer to investigate the circumstances of the misconduct. It would seem, however, that the concept of a "reasonable period of time" would cover this situation: clearly, this period of time would begin with knowledge of the instance of misconduct which justifies the termination, that is the last instance following warning in cases of repeated misconduct; also where investigation of the circumstances of misconduct is necessary, the time required for such an investigation would certainly come within the concept of a "reasonable period of time". The meaning to be given to this concept is left to the methods of interpretation referred to in *Point 5*, which includes court decisions, as well as legislation and other methods. Due to the need to allow flexibility in this regard, the Office has also not retained the suggestions of some governments that the instrument should specify the duration of a "reasonable period of time".

- Qu. 20** *Should the instrument(s) provide that the question whether the employer should consult with workers' representatives before a final decision is taken on individual cases of termination of employment should be left to the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 39. Austria, Bahrain, Belgium*, Botswana*, United Republic of Cameroon, Canada*, Colombia, Cuba, Cyprus, Egypt, Ethiopia, Finland*, France*, German Democratic Republic*, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, Nigeria, Norway, Philippines, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname*, Swaziland, Sweden*, Trinidad and Tobago, Tunisia¹, United States, Uruguay*, Yugoslavia.

Negative: 5. Federal Republic of Germany, Madagascar*, Netherlands¹, New Zealand*, Pakistan.

Other: 5. Byelorussian SSR*, Czechoslovakia*, Switzerland*, USSR*, United Kingdom¹.

Belgium. Yes. The procedure to be followed should be left to the different branches of activity to determine themselves. The workers' and employers' organisations consider that a negative reply should be given to this question, the workers' representatives referring to their views regarding a procedure of dialogue and reflection before termination (see reply to question 18).

Botswana. Yes. This should be left to collective agreements and arbitration awards, particularly with respect to well established workers' organisations.

Byelorussian SSR. The instrument should prohibit termination of employment at the initiative of the employer without the prior consent of the trade union or other workers' representative body.

Canada. Yes. There should be an obligation on the employer to discuss and consult with workers' representatives prior to making a final determination with respect to the dismissal of an individual employee.

Czechoslovakia. This procedure should be obligatory to ensure effective protection of workers and to reinforce the influence of workers' organisations.

Finland. Yes, provisionally, pending the outcome of the current national review of protection of security of employment.

France. The question whether and in what cases the employer should consult with workers' representatives should be left to the methods of implementation mentioned in question 6.

German Democratic Republic. Yes. It would, in fact, be highly desirable for the instrument to provide for the exercise of trade union influence in a more binding manner than by mere consultation.

Madagascar. No. No decision to terminate should be taken by the employer without the opinion of the workers' representatives.

Mexico. Yes, if this is included in a Recommendation, since an obligation of the employer to consult workers' representatives before termination is subject to negotiation between the parties and would be provided for by collective agreement.

* Substance of observations reproduced below.

¹ See under question 16.

New Zealand. No. In New Zealand there is no duty on an employer to consult with the workers' representative before the decision to terminate a worker's employment is taken. Representative involvement takes place at a later stage.

Suriname. Yes, this should depend on national circumstances.

Sweden. Yes, the workers' organisation should be consulted.

Switzerland. The procedure of consultation of workers' representatives is not provided for by national legislation in connection with termination of employment. The parties are free to provide contractually for this.

USSR. The instrument should prohibit termination of employment at the initiative of the employer without the prior consent of the trade union or other workers' representative body.

Uruguay. Yes. This should be left to national law and practice.

As a large majority of governments replied in the affirmative to this question (which was based on Paragraph 10 of Recommendation No. 119), the Proposed Conclusions have been worded accordingly (*Point 28*). This Point has been redrafted to express the meaning in a more direct manner. The reference to the Point regarding methods of implementation has been deleted as superfluous, Point 23 applying to all other Points in the Proposed Conclusions with a view to a Recommendation.

Should the instrument(s) provide that the employer should notify a worker in writing of a decision to terminate his employment? **Qu. 21**

Total number of replies: 49.

Affirmative: 41. Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Colombia, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland, France, German Democratic Republic*, Guyana, Honduras*, Hungary, India, Kenya, Kuwait, Madagascar, Malta, Mexico, Morocco, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR, United States, Uruguay, Yugoslavia.

Negative: 3. Austria, Netherlands¹, New Zealand.

Other: 5. Canada*, Federal Republic of Germany*, Philippines*, Switzerland*, United Kingdom¹.

Botswana. Yes. Although not very necessary on the part of the worker, this will assist the employer to produce records on cases of termination.

Canada. Yes, but not in all situations. There may well be circumstances, particularly where the employee is in his employer's eyes guilty of "serious" misconduct, in which the employer should have the right to dismiss the employee immediately, though subject to subsequent adjudication. Provision of immediate written notice would not always be possible.

* Substance of observations reproduced below.

¹ See under question 16.

Czechoslovakia. Yes, within an appropriate time limit before the date of the termination. The written notification should always indicate the reason for the termination.

German Democratic Republic. The worker should receive written notification of the termination of his employment, together with a statement of the reasons. This is of the greatest importance for the protection of the worker, since it enables him—and, in the event of contestation, the courts—to examine the grounds for dismissal and excludes the possibility of other reasons not mentioned in the notification being adduced at a later date in support of the decision to terminate employment.

Federal Republic of Germany. Notification in writing is desirable for the purpose of providing evidence, but it should not be made compulsory in every case of termination.

Honduras. Yes. Such a provision would ensure that, when having legally to prove just cause for dismissal, employers do not allege other reasons than those alleged to the worker, which frequently occurs when dismissal is oral.

Philippines. The requirement of written notice by the employer to the worker of the decision to terminate his employment is still another policy which the Government favours. In this country, the law is even more protective of the worker. The employer must not only give notice to his employee of the decision to terminate, but must also, with respect to regular employees with at least one year of service, seek clearance from the Ministry of Labour and Employment to effect such termination. As regards workers not covered by the clearance requirement, the employer just the same furnishes notice to the worker, notice being an element of due process.

Switzerland. National law does not require the parties to give written notification of termination of the contract of employment. This is due to the nature of the contract, which requires no special form for its conclusion. However, the Government has paid particular attention to this problem, in the course of certain parliamentary discussions, particularly with respect to termination of the contract with immediate effect, and has based its position on the protection of the personality and dignity of the worker.

As a large majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 29*). This provision has been included in the Proposed Conclusions with a view to a Recommendation, since it appears to be a matter which, although important, is more a matter of detail than of basic principle.

One government has expressed the view that provision of a written notification of the decision to terminate a worker's employment may not be possible in case of summary dismissal since immediate written notice may not be possible. It should be noted, however, that this Point would not require the employer to give immediate written notification; in case of summary dismissal, written notification by letter could follow the dismissal.

Qu. 22 *Should the instrument(s) provide that a worker who has received notification of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination?*

Total number of replies: 49.

Affirmative: 39. Austria*, Bahrain, Belgium*, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland*, France*, Guyana, Honduras*, Hungary, India, Kuwait, Madagascar, Malta, Mexico, Morocco, Norway, Poland, Romania, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR, United Kingdom, United States, Uruguay*, Yugoslavia.

Negative: 2. Netherlands¹, New Zealand.

Other: 8. German Democratic Republic², Federal Republic of Germany*, Kenya*, Nigeria*, Pakistan*, Philippines*, Sierra Leone*, Switzerland*.

Austria. Yes. Provision should be made for exceptions, for instance in the case of probation.

Belgium. Yes, but what is important is that in case of litigation the employer has the burden of proving the reasons invoked for the termination. The workers' representatives refer to their views expressed in reply to question 18 in favour of requiring written notification to the worker of the decision to terminate and the reasons therefor, and consider that an affirmative reply should be given. The employers' representatives cannot agree to this point and refer to their position in respect of question 12.

Czechoslovakia. Yes, to the extent that the notification of termination does not obligatorily mention the reason.

Finland. Yes, provisionally, pending the outcome of the current national review of protection of security of employment.

France. Yes. However, it should be added that the conditions regarding size of undertaking or length of service required for this purpose may be specified by the methods of implementation referred to in question 6.

Federal Republic of Germany. Under the law of the Federal Republic of Germany a worker may demand a written statement of the reasons for the termination only when his employment has been terminated without notice for serious reasons. An extension of this right to termination with notice might make it easier for the worker to decide on the desirability of taking legal action. On the other hand, a general provision of this kind might prejudice the worker's chances of obtaining other employment if all the reasons given by the employer were made public.

Honduras. The employer should not only give the reason but also indicate the legal provision on which the dismissal is founded.

Kenya. A written statement from the employer giving reason(s) for termination should be attached to the notification of termination of employment. Alternatively, the notification of termination of employment should contain reason(s) for termination.

Nigeria. Not in all cases; it should be enough that the termination of employment is carried out in accordance with the accepted procedure and the contract of employment.

Pakistan. The order of termination must explicitly state the reasons for the termination.

Philippines. Workers covered by the clearance requirement need not request a written statement of the cause for termination. The application for clearance states the cause for termination and it is the obligation of the employer, under the law, to furnish a copy of the application to the worker; otherwise, the application is deemed not duly filed and therefore no termination may be lawfully effected. The employee has the right to oppose the proposed

* Substance of observations reproduced below.

¹ See under question 16. ² See under question 21.

termination within 10 days from receipt of the copy of the application. With respect to a worker not covered by the clearance requirement, nothing in the law would prevent him from asking the employer to serve him a written statement of the cause or causes for his termination. Besides, every individual, under the constitution of the Philippines has the right to due process of law which consists in notice and hearing of all complaints or charges made against him.

Sierra Leone. This could be embodied in the notification to the worker.

Switzerland. The parties are not required to give reasons for notice of termination of employment, or to provide afterwards a statement giving the reason or reasons for the notice. But they may contractually agree to do so.

Uruguay. Yes. By defining in a private document the reasons for the termination, there would be a pre-constituted element of proof that would facilitate the subsequent task of the courts in case of controversy.

As a large majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 13*).

Several governments have expressed the view that this requirement should be made subject to exceptions, for example in respect of workers serving a period of probation or a qualifying period or who are employed by undertakings under a specified size. In this connection, the Office would draw attention to Point 6 (2) and (4) of the Proposed Conclusions, which make provision for the possibility of making certain exclusions from the application of the proposed instruments or certain provisions thereof.

One government expressed the view that while the requirement of written notification of the reasons for termination may assist workers in better deciding on the advisability of appealing against the termination, it may jeopardise the worker's chances of obtaining other employment if all the reasons for the termination were known. It would appear, however, that the entitlement referred to is a right to a private communication of the reasons for termination; there would seem to be little risk of this notification being made public if the worker did not so desire.

One government suggested that the employer be obliged to indicate not only the reasons for the termination but also the legal provision on which the termination is based. The Office has considered it preferable to leave it to the discretion of each member State to so require if it deems it appropriate.

Procedure of Appeal against Termination

- Qu. 23** (1) *Should the instrument(s) provide that a worker who feels that his employment has been unjustifiably terminated should be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee, arbitrator or similar body?*
- (2) *Should the instrument(s) provide that a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not so appealed within a reasonable period of time thereafter, such period to be determined by the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 43. Austria, Bahrain, Belgium*, Botswana*, Byelorussian SSR*, United Republic of Cameroon, Canada*, Colombia*, Cuba, Cyprus, Czechoslovakia*, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany, Guyana, Hungary, India*, Kenya*, Kuwait, Madagascar, Malta, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Suriname, Swaziland, Sweden, Tunisia, USSR*, United Kingdom, United States, Uruguay*, Yugoslavia.

Other: 6. Honduras*, New Zealand*, Philippines*, Spain*, Switzerland*, Trinidad and Tobago*.

Belgium. (1) Yes.

(2) Yes. However, it is necessary to know the meaning of the term "reasonable period of time". In Belgium the periods of prescription applicable to claims arising from the contract apply.

Botswana. (1) Yes.

(2) Yes. In addition, consideration should be given to the reasons for which the worker was not able to appeal against termination within the stipulated period of time.

Byelorussian SSR. Yes, but the reasonable period should be renewable where there are valid reasons.

Canada. (1) Yes, but the provision should stipulate that its implementation is subject to the principle set out in question 6.

(2) Yes.

Colombia. (1) The Recommendation should provide that a worker who feels that his employment has been unjustifiably terminated should be entitled to appeal against that termination.

(2) Yes.

Czechoslovakia. (1) Yes.

(2) Yes. The period of time should be specified by legislation.

Honduras. (1) Under national law a worker may bring the employer before the labour tribunals within 60 days to prove just cause for dismissal.

(2) National law lays down a period of prescription of two months in respect of claims not directly founded on the employment contract.

India. (1) Yes.

(2) Yes. The instrument should, however, indicate that the worker would normally require a longer period of time than that laid down for employers under question 19. This would be necessary in countries in which trade unionism is not yet fully developed and the workers are not aware of their legal rights.

Kenya. (1) Yes.

(2) Yes, except that the words "a reasonable period of time" must be defined.

New Zealand. (1) Yes. National legislation and common law provide several avenues of appeal to such an impartial body, depending upon the type of worker or the reason for the termination.

(2) No.

* Substance of observations reproduced below.

Philippines. (1) The Government favours the principle involved. Under national law a worker is entitled to oppose an application by the employer for clearance to terminate his employment. If the Ministry does not prevent or gives clearance for the termination, the worker may still file a complaint against the termination.

(2) Existing law recognises waiver as a defence against a claim by the worker. If the latter does not contest his termination within three years thereof, he is barred from filing a complaint in connection therewith.

Spain. (1) Provision for review by a neutral body of the employer's decision to dismiss a worker is acceptable. However, it is not clear if this system of appeal also applies to dismissal for technological reasons; in this respect it should be borne in mind that the system of control in Spain is administrative, a system to which the question does not seem to refer.

(2) Yes.

Switzerland. (1) A worker who considers that his employment has been terminated arbitrarily may bring an action against the employer before the civil courts, which at his request, examine the reasons for the termination and the other circumstances that they consider to be pertinent and take a decision on the justification of the termination. In general, the arbitral bodies provided for in collective agreements act in the same manner.

(2) Civil law lays down a time limit of 30 days from the end of the contract for the worker (or the employer) to bring a court action to claim compensation in case of termination of employment due to military service.

Trinidad and Tobago. (1) The Government entertains reservations on this question because of its policy of encouraging the growth of trade unionism and the existence of legislation which provides for representation only through majority unions where these exist or through any trade union in the absence of a majority union.

(2) Yes.

USSR. Yes, but the reasonable period should be renewable where there are valid reasons.

Uruguay. (1) Yes. However, the appeal of the worker against unjustified termination should not be admissible in those cases in which the worker has received, in conformity with national law and practice and to his entire satisfaction, the corresponding compensation.

(2) Yes. The instrument should leave to Member States the possibility of regulating the exercise by the worker of his rights, by establishing the time within which he can validly bring his claim. The prescription of claims in these cases contributes to the security of legal relations.

As the great majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 14*).

One government raised the question whether the right to appeal against a termination of employment considered by the worker to be unjustifiable also extends to cases of termination for technological reasons when national law requires prior authorisation by the competent administrative authority for such termination. As worded at present, this Point would apply to termination of employment for any reason. The competent Conference Committee may wish to consider whether it would be appropriate for the proposed instrument to provide for the possibility of excluding from the right to appeal against termination, workers whose employment is terminated for economic, technological, structural or similar reasons, when such termination is in pursuance of a prior authorisation by an impartial public authority which has determined the termination to be justified.

One government expressed reservations with respect to extending the right of appeal to the worker, instead of to the trade union concerned, because of a policy of encouraging the growth of trade unionism. As under most systems of protection, the worker himself is entitled to appeal, the present wording of this question has been retained in the Proposed Conclusions.

Several governments considered that the meaning of "a reasonable period of time" in paragraph (2) should be indicated or specified by legislation, while several other countries suggested that provision should be made for extension of this period of time if the worker had a sufficient reason for the delay in his appeal. It has been considered preferable to leave these matters to be determined by each country in accordance with the methods of implementation referred to in Point 5, as it would be for them to do under the present wording of this Point.

Should the instrument(s) provide that recourse to a procedure of conciliation may be required or authorised by methods of implementation referred to in question 6 before or during a procedure of appeal against unjustified termination of employment? **Qu. 24**

Total number of replies: 50.

Affirmative: 36. Austria*, Bahrain, Byelorussian SSR, United Republic of Cameroon*, Canada*, Colombia, Cuba, Czechoslovakia, Egypt, Ethiopia, Finland, France, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, Nigeria, Norway, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, United Kingdom, United States, Uruguay*, Yugoslavia.

Negative: 1. New Zealand*.

Other: 13. Belgium*, Botswana*, Cyprus*, Denmark¹, German Democratic Republic*, Federal Republic of Germany*, Madagascar*, Netherlands*, Pakistan*, Philippines*, Switzerland*, Tunisia*, USSR*.

Austria, Yes. However, recourse to a procedure of conciliation should merely be recommended.

Belgium. Any litigation regarding dismissal must obligatorily be preceded by an attempt at conciliation before the labour tribunal. The workers' representatives consider that a distinction must be made according to whether the procedure of appeal has begun or not. If it has not begun, the procedure of dialogue and reflection referred to in their reply to question 18 should apply before a final decision on dismissal, and the instrument should envisage recourse to a procedure of conciliation prior to a possible appeal. If the appeal has already begun, there should be an attempt at conciliation before the labour tribunal, and the reply to the question should therefore be in the affirmative. The employers' representatives consider that a negative reply should be given in the first hypothesis and refer to their views in reply to question 12.

Botswana. Recourse to conciliation procedures may be required if the worker consents, but if he feels that court or labour tribunals are the right channels to follow he must have the right to do so.

* Substance of observations reproduced below.

¹ See under question 18.

United Republic of Cameroon. Yes. The conciliation procedure is indispensable before recourse to the competent tribunal.

Canada. Yes, conciliation in alleged unjust termination cases, in those countries where such a procedure has been adopted, has proven to be most effective. However, the grievance procedure adopted by Canadian collective agreements does not normally envision the intervention of a third party. Therefore, any provision of this nature in the instrument should make reference to the implementation procedure as suggested in question 6.

Cyprus. Recourse to a procedure of conciliation should not be obligatory.

German Democratic Republic. The instrument should allow recourse to a procedure of conciliation but should not require it.

Federal Republic of Germany. Under the law of the Federal Republic of Germany the views of the works council must be obtained before dismissal; it may communicate any objections to the dismissal to the employer and under certain circumstances contest a dismissal with notice. A worker who considers his dismissal to be socially unwarranted may lodge an objection with the works council which may seek to bring about a reconciliation with the employer if it deems the objection to be justified. The instrument(s) should contain only provisions under which procedures of this kind are adequate and should avoid the term "procedure of conciliation", which in many States applies only to disputes regarding collective agreements.

Madagascar. The instruments should provide that recourse to a conciliation procedure may be required by the methods of application mentioned in question 6, before a procedure of appeal against unjustified termination of employment.

Mexico. Yes. Conciliation should be a preliminary stage of the procedure of judgement brought by the worker against dismissal; conciliation should be possible at any stage of the termination procedure.

Netherlands. This is not in accordance with the Netherlands system, but there is no objection, provided that its optional nature is maintained.

New Zealand. No. A procedure of conciliation is required by many statutes, but no such procedure may be required by those covered by the common law alone.

Pakistan. This should not be binding.

Philippines. The Government favours conciliation as the preferred mode of settling all disputes. Thus conciliation is not only authorised but encouraged at all levels and in all types of disputes.

Switzerland. Where such a conciliation procedure is provided for in collective agreements, it takes place before the body established by the agreement. In Switzerland the conciliation procedure is often the first stage of the general procedure of appeal against the decision to termination of the contract of employment by one of the parties thereto, even if appeal is to the civil courts.

Tunisia. It would be useful to require recourse to conciliation before the judicial phase.

USSR. Recourse to a conciliation procedure could be dealt with in the Recommendation.

Uruguay. There are various systems of conciliation procedures as an initial stage in the judicial procedure which have had very positive results. It would be desirable for the instrument to authorise their use.

As the large majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 30*).

A number of governments considered this provision to be acceptable if it were not obligatory or if it were left to national law or practice. It should be noted that

this Point has been included in the Proposed Conclusions with a view to a Recommendation and has been drafted in a non-binding manner. Several governments commented on the stage at which they considered that conciliation should occur. As this Point is now drafted, it remains open to each member State to determine the stage at which conciliation should occur.

Should the instrument(s) provide that national laws or regulations may provide that a worker who feels that his employment has been unjustifiably terminated should be entitled to request an impartial body, such as a body referred to in question 23, to suspend, and that such body should be empowered to suspend, the effects of the termination, pending decision by the competent body on his appeal against that termination? **Qu. 25**

Total number of replies: 48.

Affirmative: 24. Austria*, Bahrain, Byelorussian SSR, Canada*, Cuba, Czechoslovakia, Egypt, Ethiopia, Finland*, Guyana, Hungary, India*, Kuwait, Madagascar, Malta, Mexico*, Morocco, Norway*, Sierra Leone, Suriname, Swaziland, Sweden*, USSR, Yugoslavia.

Negative: 17. Botswana*, United Republic of Cameroon, Colombia*, Cyprus*, France*, German Democratic Republic, Honduras*, Kenya*, New Zealand, Nigeria*, Pakistan, Poland*, Singapore*, Trinidad and Tobago, United Kingdom*, United States*, Uruguay*.

Other: 7. Belgium*, Denmark*, Federal Republic of Germany*, Netherlands¹, Philippines*, Switzerland*, Tunisia*.

Austria. Yes. The worker should have the possibility of requesting suspension of the termination under a procedure of contestation. In such a case the national legislation would have to determine the criteria according to which the decision on the appeal is to be rendered. The legal effects of the provisional continuation of the employment relationship would likewise need to be clearly stated in the law.

Belgium. This question raises the problem of control *a priori* or *a posteriori* of the reasons for dismissal. Two solutions are possible: empowering an impartial body to authorise or refuse the dismissal envisaged; or leaving the responsibility of dismissal to the employer, subject to *a posteriori* judicial control of the reasons invoked. The instrument should leave the choice between these two systems to member States. Apart from the particular procedure for dismissal for serious misconduct of a member of the works council or the safety and health committee, suspension of dismissal is not in accord with Belgian legal tradition; besides the public administration does not appear at present to be sufficiently prepared to perform such a mission.

Botswana. The effects of the termination should not be suspended, since if the impartial body concludes that the worker had been unfairly dismissed there must be either reinstatement or compensation.

Canada. Yes. Current Canadian law calls for the adjudication of the dismissal subsequent to the employer's action but with authority to correct retroactively any error and

* Substance of observations reproduced below.

¹ See under question 24.

related consequences. The principle put forward here is analogous to criminal law where one is innocent until proven guilty. As a principle to strive toward, it is worthy of support.

Colombia. The Recommendation should provide that a worker who considers his termination of employment to be unjustified should be entitled to compensation.

Cyprus. No. Implementation of such a provision would create practical difficulties.

Denmark. The Government indicates that the Danish Employers' Confederation is opposed to the inclusion of provisions concerning suspension of the effects of the termination both in a Convention and a Recommendation.

Finland. Yes. Provisionally, pending the outcome of the current national review of protection of security of employment.

France. This provision should not be included in the instrument, since it may call into question, in certain countries, the rules of procedure of general character or the principle of separation of powers.

Federal Republic of Germany. There are no objections to this provision. It should, however, be stipulated that the conditions under which such an appeal may be allowed may be determined by national laws or regulations.

Honduras. No. National legislation provides that from the moment the employment relationship of a dismissed worker terminates, the worker may bring the employer before the tribunals and if the judgement is favourable to him, the employer must pay the wages for the duration of the judicial procedure.

India. Yes, subject to the observations in respect of question 23.

Kenya. No, the administration of such a procedure would be most cumbersome and inconveniencing to the employer. It is sufficient to give the employee a chance to appeal against termination.

Mexico. Yes, if included in a Recommendation, since the possibility of suspending the termination would require the State to modify its legal system where the authorities are not empowered to do this.

Nigeria. No, because it should be possible for the worker, his case having been upheld, to obtain retroactive restitution.

Norway. Yes. Provisions should be included corresponding to section 61 of the Norwegian Working Environment Act. This Act provides, inter alia, that a worker shall be entitled to remain in his situation while the dispute is subject to negotiations under the Act and, if legal proceedings have been instituted within a specified period of time, until a binding court decision; the court may order, on request by the employer, that the worker shall leave his situation if it finds it unreasonable that the employment should continue while the case is in progress.

Philippines. Under existing law the effects of termination of employment of a worker covered by the clearance requirement are suspended if the worker opposes the application for clearance to terminate, pending a decision to authorise the termination after investigation or compulsory arbitration. In case of authorisation the termination may still be suspended by appealing the decision. Workers not covered by the clearance requirement may contest their termination of employment, but this does not suspend the termination. But the Ministry may direct the employer to desist from the termination or reinstate the worker.

Poland. No. The adoption of such a solution might lead to considerable difficulties in practice. For example, during the period of suspension, which might be prolonged, while awaiting a decision on the question, the worker would not be interested in the proper accomplishment of his work.

Singapore. No. It is not advisable for a worker who has been alleged to have committed certain offences to remain in the undertaking. His continued presence may have undesirable

consequences, including greater strain in his relationship with his employer. It would be better if the termination remains effective and the worker is either reinstated or compensated if the termination is found to be unjustified.

Sweden. Yes, in principle. But the main rule should be the reverse, namely that the worker remains in the employer's service pending a judicial decision if the worker alleges that the termination lacks valid cause. In particularly grave cases, however, the continuation of employment pending a final decision should be subject to approval by the impartial body.

Switzerland. It does not seem possible to introduce in the law governing the contract of employment, as it is today, a provision concerning suspension of the effects of a termination.

Tunisia. The suspension of the effects of termination of employment may be recommended only in certain defined cases.

United Kingdom. No. It is better to await the full decision of the competent body. Otherwise, it is likely that every dismissal would lead to two decisions by the adjudicating authorities. Furthermore, it could be harmful to industrial relations and would represent an undue burden on employers to require them to keep a dismissed employee in employment pending the final decision of the adjudicating authorities.

United States. No. The Government does not favour this specific wording, although it recognises the need for a safeguard. Although such laws exist in some nations, the Government feels it is an adequate protection for the worker that everyone understands that a termination can be reversed and the worker will be "made whole" as to all lost wages and benefits if the termination is adjudged to have been in violation of his contractual rights or of the laws (see under question 27).

Uruguay. No. It is considered that the instrument should not mention, nor even leave to national legislation, suspension of the effects of termination, since this not only interferes in the free management of the undertaking but also forces the prolongation of a relation that only one person wishes to maintain.

Of governments expressing views in favour of or opposed to the provision mentioned in this question, a majority replied in the affirmative. Several countries indicated their support of such a provision, if it were modified to reflect the conditions in which suspension of the termination of employment is allowed under national law or to permit national law to determine these conditions. A number of governments opposed inclusion of such a provision in a new instrument, since suspension of termination is not provided for in national law or since they considered that the right to appeal against termination constituted a sufficient guarantee. As more governments replied in the affirmative than in the negative, a Point relating to suspension of termination has been included in the Proposed Conclusions (*Point 31*). The wording of this Point has, however, been revised with a view to better reflecting the different national systems providing for suspension of the effects of termination, certain of which provide for automatic suspension if the worker appeals against the termination, while others provide for suspension only under specified conditions. This Point has been included in the Proposed Conclusions with a view to a Recommendation.

(1) *Should the instrument(s) provide that the bodies referred to in question 23 should be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on the justification of the termination?*

Qu. 26

(2) *Should the instrument(s) provide that in cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in question 23 should be empowered to find whether the termination was indeed for these reasons, but the extent to which they should also be empowered to decide whether these reasons are sufficient to justify that termination should be determined by the methods of implementation referred to in question 6?*

(3) *Should the instrument(s) provide that in proceedings referred to in paragraph (1), a worker who has appealed against the termination of his employment should not bear the burden of proving that the termination was not justified, and that to this end—*

- (a) *the employer should bear the burden of proving that the termination was for a valid reason; or*
- (b) *the bodies concerned should be empowered to investigate the facts and circumstances of the case so as to be able to form a judgement regarding the justification of the termination; or*
- (c) *both (a) and (b)?*

Paragraph (1):

Total number of replies: 48.

Affirmative: 41. Austria, Bahrain, Belgium, Botswana, Byelorussian SSR, United Republic of Cameroon, Canada*, Cuba, Cyprus, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany, Guyana, Hungary, India, Kenya, Kuwait, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, USSR, United Kingdom, United States, Uruguay, Yugoslavia.

Negative: 1. Nigeria.

Other: 6. Colombia*, Czechoslovakia*, Honduras*, Madagascar*, Philippines*, Switzerland*.

Paragraph (2):

Total number of replies: 48.

Affirmative: 34. Austria, Bahrain, Belgium, Botswana, United Republic of Cameroon, Canada*, Colombia, Cuba, Czechoslovakia, Egypt, Ethiopia, France, Guyana, Hungary, India, Kuwait, Malta, Mexico, Morocco, Norway, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, United Kingdom, United States*, Uruguay, Yugoslavia.

Negative: 3. Netherlands*, New Zealand*, Nigeria.

* Substance of observations reproduced below.

Other: 11. Byelorussian SSR*, Cyprus*, Finland*, German Democratic Republic*, Federal Republic of Germany*, Honduras*, Kenya*, Madagascar*, Philippines*, Switzerland*, USSR*.

Paragraph (3):

Total number of replies: 50.

Affirmative: 14. Bahrain, United Republic of Cameroon, Colombia, Cuba, Egypt, Guyana, Hungary, Kuwait, Madagascar*, Malta, Mexico, Poland, Romania, Yugoslavia.

Negative: 3. Netherlands*, Nigeria, United Kingdom*.

Other: 33. Austria*, Belgium*, Botswana*, Byelorussian SSR*, Canada*, Cyprus*, Czechoslovakia*, Denmark*, Ethiopia*, Finland*, France*, German Democratic Republic*, Federal Republic of Germany*, Honduras*, India*, Kenya*, Morocco*, New Zealand*, Norway*, Pakistan*, Philippines*, Sierra Leone*, Singapore*, Spain, Suriname*, Swaziland*, Sweden*, Switzerland*, Trinidad and Tobago*, Tunisia*, USSR*, United States*, Uruguay*.

Austria. (1) and (2) Yes.

(3) Preference is given to (c).

Belgium. (1) and (2) Yes.

(3) In principle, under Belgian law, the burden of proof lies on the person who brings an action to claim rights he considers to have been violated. However, in case of appeal against abusive dismissal and in other cases where the reasons for dismissal must be given, labour law derogates from this general principle and places the burden of proof on the employer. In Belgium the combination of solutions mentioned in clause (c) applies. The workers' representatives consider that an affirmative reply should be given to this question, while the employers' representatives cannot agree on this point and refer to their position with regard to question 12.

Botswana. (1) and (2) Yes.

(3) A worker should prove, as far as possible, that the termination was not justified; the employer should bear the burden of proving that the termination was for a valid reason. In addition, impartial bodies should be empowered to investigate and examine the facts and circumstances of the case before making judgement.

Byelorussian SSR. (1) Yes.

(2) The bodies responsible for labour disputes should be empowered to evaluate the reasons given by the employer for the termination and to determine whether these reasons are sufficient to justify that termination as well as to take decisions resulting from the evaluation.

(3) The Convention should provide that the employer should bear the burden of proving valid reasons for termination of employment.

Canada. (1) Yes, the appellate bodies should have such authority. See the reference to question 6 in the Government's reply to question 23 (1).

(2) Yes. These bodies should be empowered to decide whether the dismissal was indeed for operational reasons by the methods of implementation referred to in question 6.

* Substance of observations reproduced below.

(3) Since it is only the employer who knows absolutely the reasons for dismissal, the obligation should be upon him to show that it was for good cause or out of operational necessity. The Canadian arbitration system and the unjust dismissal legislation to date are based on "the fair hearing" concept and do not envision an "investigating" authority. For these reasons, the Government would support the option in clause (a).

Colombia. (1) The Recommendation should provide for facilities to examine the reasons invoked to justify the termination of employment.

(2) and (3) Yes.

Cyprus. (1) Yes.

(2) Yes. Since the two issues (reasons for dismissal and sufficiency of reasons) are inter-related, it would be preferable if the competent bodies were empowered to deal with both, as in Cyprus.

(3) (a) Yes.

(b) and (c) No.

Czechoslovakia. (1) Only the reasons given in the written notification referred to in question 22 should be examined.

(2) and (3) (c) Yes.

Denmark. The problems in connection with the burden of proof should be solved according to recognised legal principles and with due consideration to the question of who is in the best position to provide the information required.

Ethiopia. (1) and (2) Yes.

(3) (a) Yes.

(b) and (c) No.

Finland. (1) Yes.

(2) See General Observations.

(3) Yes, in accordance with (c).

France. (1) and (2) Yes.

(3) (b) Yes.

German Democratic Republic. (1) Yes.

(2) The proposed powers of the bodies mentioned in question 23 should be specified in the instrument.

(3) The instrument should provide for both (a) and (b).

Federal Republic of Germany. (1) Yes.

(2) Yes. However, the bodies mentioned should also be empowered to decide whether the operational requirements of the undertaking are in themselves sufficient to justify the termination. This should not be left to other methods of application within the meaning of question 6.

(3) (a) Yes.

(b) and (c) No, but see the reply to paragraph (2).

Honduras. (1) Under national law these powers are given to the labour tribunals, which are empowered to decide legal disputes arising directly or indirectly from the contract of employment.

(2) The worker may bring the employer to the tribunal to prove the just cause for the dismissal.

(3) See reply to question 23 (1) and to paragraph (1) above.

India. (1) and (2) Yes.

(3) Both (a) and (b).

Kenya. (1) Yes.

(2) Termination based on operational requirements of the undertaking, establishment or service should be referred to the bodies such as those mentioned in question 23 above for examination before action to terminate is taken.

(3) The worker who appeals against termination of his employment should bear the burden of proving that the termination was not justified. In response to this proof, the employer should give counter-evidence to disprove the worker's grounds for considering the termination to be unjustified. The authorities concerned should investigate the facts produced by both parties and be able to form a judgement regarding the justification of the termination.

Madagascar. (1) The instruments should provide that the bodies mentioned in question 23 should be empowered to elicit all the elements liable to clarify everything relating to the reasons and circumstances of the termination before confirming or invalidating the measures decided on by the employer.

(2) The instruments should provide that all decisions to terminate a worker's employment motivated by the operational requirements of the undertaking should be referred beforehand to the bodies mentioned in question 23.

(3) Yes. A combination of the solutions mentioned in (a) and (b) should be applied.

Morocco. (1) and (2) Yes.

(3) A combination of the solutions mentioned in (a) and (b).

Netherlands. (1) Yes.

(2) No. This encroaches too much upon the powers of the judiciary. The provision under paragraph (1) is adequate to guarantee that a judgement will be given about whether the termination of employment was justified or not.

(3) No; there are serious objections to this.

(a) The instrument should not contain an obligation to lay down detailed legislation on proof. This assumes that there are a number of specifically defined, valid reasons for the termination of employment throughout the world. This is, for example in the Netherlands, not the case; on the contrary, there are some specifically defined prohibitions on the termination of employment; the periods of notice applying may be disregarded; and there may be allegedly unreasonable termination of employment. The worker will have to put up a plausible case that one of these three situations has occurred. Subsequently, the employer will have to demonstrate that this is not the case. A change to the existing rules of procedure would not be viable and not desirable.

(b) No, this does not fit in with the Netherlands system of legal proceedings.

(c) No, for the reasons referred to above.

For the rest, the idea that the worker should not bear the sole responsibility for producing all the proof is in itself acceptable. This idea would be better formulated in a general way, for example, as follows: "The instrument should provide that in proceedings referred to in paragraph (1), a worker who has appealed against the termination of his employment should not bear the whole burden of proving that the termination was not justified".

New Zealand. (1) Yes.

(2) No. This clause seems to add nothing to paragraph (1). Nor is it appropriate for the appeal body to review the operational requirements of an undertaking.

(3) The Government agrees that the worker should not bear the burden of proving that the termination was not justified.

(a) No. The employer should not bear the burden of proving that the termination was for a valid reason, although this is the situation in several cases under New Zealand law.

(b) Yes.

Norway. (1) and (2) Yes.

(3) The employer should, in the event of court proceedings in a dispute concerning termination of employment, provide evidence of the basis for the termination of employment, so as to enable the courts of law to scrutinise anew the employer's assessment.

Pakistan. The Government supports paragraphs (1), (2) and (3) (c).

Philippines. (1) Under existing laws and practice, the Ministry has the power to conduct hearings and receive evidence on the validity of the ground relied upon by the employer for the intended termination and to render a decision thereon.

(2) Under existing law, termination based on operational requirements of the undertaking is valid. Nevertheless, the employer has to seek an authority from the Ministry to effect such termination of employees covered by the clearance requirement. Nothing in the law would prevent the Ministry from conducting hearings to determine the truth of the alleged cause for termination of workers, whether or not covered by the clearance requirement.

(3) Under existing rules of procedure a worker who is covered by the clearance requirement and is dismissed without such clearance need not prove in his complaint that the termination is not justified. There is a presumption of illegality of dismissal and the worker shall immediately be ordered reinstated with all benefits. If the worker is not covered by the clearance requirement, the basic rule in civil procedure that he who alleges something should be able to prove his allegation applies. To provide otherwise in the law, rules or regulations is contrary to the spirit of the civil law procedures. The National Labor Relations Commission has the power to investigate the facts and circumstances of the case to make a rational judgement.

Sierra Leone. (1) and (2) Yes.

(3) Both (a) and (b), so as to enable the competent body to arrive at justifiable conditions.

Singapore. (1) and (2) Yes.

(3) The impartial body should base its judgement on the facts presented by the union and/or the worker and employer.

Spain. (1) and (2) Yes.

(3) It is relevant to provide that the employer should bear the burden of proving the reason for the dismissal.

Suriname. (1) and (2) Yes.

(3) (b) Yes.

Swaziland. (1) and (2) Yes.

(3) (c) Yes.

Sweden. (1) and (2) Yes.

(3) Yes. It should be for the employer to prove that the termination was justifiable (subject to the reservation alluded to in reply to question 25 (2)).

Switzerland. (1) See reply to question 23 (1).

(2) The employer is not required to motivate his decision to terminate the employment relation. With regard to examination of the reasons for termination, see reply to question 23 (1). National law does not provide that the operational requirements of the undertaking are a reason for termination.

(3) (a) It does not seem conceivable to institute a reversal of the burden of proof. The Civil Code provides that each party must, if the law makes no provision to the contrary, prove the facts that he alleges to found his claim. The Code of Obligations makes no exception to this rule as regards the contract of employment.

(b) See reply to question 23 (1).

(c) Such a combination is not possible within the context of national law as described under (a) above.

Trinidad and Tobago. (1) and (2) Yes.

(3) (a) No.

(b) Yes.

(c) No.

Tunisia. Whether the employer or worker should bear the burden of proof should be left to the tribunal to decide in accordance with the circumstances of each case and the nature of the allegations made by each of the parties.

USSR. (1) Yes.

(2) The bodies responsible for labour disputes should be empowered to give an evaluation of the reasons given by the employer for the termination and to determine if these reasons are sufficient to justify the termination as well as to take decisions resulting from the evaluation.

(3) The Convention should provide that the employer should bear the burden of proving valid reasons for termination of employment.

United Kingdom. (1) and (2) Yes.

(3) In view of the nature of the different legal systems operating in countries to which the instrument will apply, the Government does not feel that specific provisions of this nature in relation to the burden of proof would be appropriate.

United States. The Government agrees with these provisions, including both (3) (a) and (b). A statement should be added to make it clear that this provision should not be construed to imply that the neutral body is empowered to intervene in the determination of the size of the workforce of the employer.

Uruguay. (1) and (2) Yes. The competent bodies should be given wide powers, having regard to the social importance of labour questions.

(3) (a) Yes, stating that the employer having dismissed with just cause has the duty to prove the facts alleged.

(b) Yes. The bodies should have powers of investigation similar to those provided by the penal law system to establish proof, having regard to the social interest in all labour disputes.

Paragraph (1)

As the great majority of governments replied in the affirmative to this paragraph, the Proposed Conclusions have been worded accordingly (*Point 15 (1)*).

Paragraph (2)

While several governments considered that the competent bodies should be empowered to evaluate both the reality of the operational reasons given for termination of employment and their sufficiency, the great majority of countries replied in the affirmative with regard to this paragraph. The Proposed Conclusions have been worded accordingly (*Point 15 (2)*), with a view to providing a degree of flexibility by leaving it to each member State to determine the extent to which the competent bodies should be authorised to review the judgement of the employer regarding the sufficiency of operational reasons for termination of employment. One government proposed adding to this provision the wording originally used in Recommendation No. 119 (Paragraph 5 (2)), namely that the provision in paragraph (1) "should not be construed as implying that the neutral body should be empowered to intervene in the determination of the size of the workforce of the

undertaking, establishment or service". The intent of the Office in redrafting that provision as question 26 (2) was to convey the meaning expressed in Recommendation No. 119 in a clearer and more meaningful manner, having regard in particular to the possible inclusion of this provision in a Convention on the subject. The present wording of this provision in Point 15 (2) would allow each country to limit, as it deems appropriate, the powers of the competent body, when reviewing the justification for a termination, to review the judgement of the employer in respect of the size of the workforce.

Several governments have expressed the view that the justification for termination of employment based on the operational requirements of the undertaking should be examined by the competent bodies prior to the termination. It has seemed to the Office that, although a number of countries have adopted systems of prior authorisation of termination of employment for such reasons, it would not be appropriate to recommend such systems for more general use, having regard to the fundamental differences of views among countries regarding such systems. It would nevertheless remain open to each member State to institute such a system if it considered it desirable.

Paragraph (3)

Although only 13 governments replied to this paragraph of this question in the simple affirmative (three replying in the negative), a large number of governments expressed a preference for one or the other of the alternative ways of ensuring that the worker does not bear the burden of proving that termination was unjustified and thereby indicated their approval of the principle set forth in this paragraph. As, therefore, the majority of governments appeared to favour the principle included in this paragraph, the Proposed Conclusions have been worded accordingly (*Point 31*). The alternative ways of ensuring that effect is given to this principle have been retained, since there seems to be no agreement among governments regarding the preferable method. This Point has been included in the Proposed Conclusions with a view to a Recommendation.

Several governments expressed the view that the worker also should be required to produce evidence in support of his contention that the termination of his employment was unjustified. The Office considers that the present wording of this paragraph would not necessarily remove this responsibility from the worker. It would remain open to the competent bodies, before requiring the employer to provide evidence of the existence of a valid reason for termination or before resorting to their powers of investigation, to require the worker to show a *prima facie* case of unjustified termination.

Qu. 27 *Should the instrument(s) provide that the bodies referred to in question 23 should be empowered, if they find that the termination was unjustified, to—*

- (a) *annul the termination or order the reinstatement of the worker in his previous job or in another job, where appropriate with payment of*

unpaid wages from the date of termination, if the body considers reinstatement to be practicable; or

- (b) *if reinstatement is impracticable, to order payment of adequate compensation for unjustified termination of employment or such other adequate relief as may be deemed appropriate.*

Total number of replies: 49.

Affirmative: 31. Austria, Bahrain*, Byelorussian SSR*, United Republic of Cameroon, Canada*, Cuba, Czechoslovakia, Egypt, Finland*, Federal Republic of Germany, Guyana, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, New Zealand*, Norway, Poland, Romania, Sierra Leone, Singapore, Suriname, Switzerland*, Trinidad and Tobago, USSR*, United Kingdom*, United States, Yugoslavia.

Other: 18. Belgium*, Botswana*, Colombia*, Cyprus*, Denmark*, Ethiopia*, France*, German Democratic Republic*, Honduras*, Madagascar*, Netherlands*, Nigeria*, Pakistan*, Philippines*, Swaziland*, Sweden*, Tunisia*, Uruguay*.

Bahrain. (a) Yes, but only where reinstatement is practicable.

(b) Yes.

Belgium. Apart from several categories of workers (members of works councils, safety and health committees, trade union delegates, workers claiming equality of remuneration or treatment), obligatory reinstatement is not provided for by national legislation. The principle of obligatory reinstatement combined with payment of a substantial compensation in case of refusal to reinstate may be stated.

The workers' representatives consider that there should be a strict obligation to reinstate a worker if the labour tribunal considers that the employer has not respected his obligations regarding motivation of dismissal, except if the worker renounces his reinstatement and claims a right to compensation. The employers' representatives, subject to their reply to question 12, consider that there must be an alternative solution to the obligation to reinstate a worker; in case of bad will by one of the parties, it is illusory to maintain the employment relationship, as obligatory reinstatement would aggravate the tensions within the workplace; it is therefore necessary to provide for the payment of compensation.

Botswana. A court, labour tribunal or arbitration committee should be empowered, if reinstatement is impracticable, to order payment of adequate compensation for unjustified termination.

Byelorussian SSR. Yes, but it should be specified that reinstatement in another job can only be with the worker's consent.

Canada. (a) Yes.

(b) Yes. In many if not most cases, reinstatement is not practical, for instance in small operations where interpersonal relationships are important or in situations where the employer-employee trust has been irrevocably broken or where the employee has found other employment.

Colombia. If the termination of employment is unjustified, clause (a) should apply to the exceptions and clause (b) to the other cases.

* Substance of observations reproduced below.

Cyprus. Reinstatement should be possible only where both parties consent to it. The Pancyprrian Federation of Labour and the Cyprus Workers' Confederation reply in the affirmative, and suggest that the worker should not be prejudiced by reason of his appeal and eventual reinstatement.

Denmark. (b) Yes.

Ethiopia. If the termination is found to be unjustified the only remedy should be reinstatement in the worker's previous job or in another similar job.

Finland. (a) Yes, provisionally, pending the outcome of the current national review of protection of security of employment.

(b) Yes. In dealing with matters relating to this question, the confidential aspects of the employment relationship shall also be taken into consideration.

France. The instrument should provide that the bodies referred to in question 23 should be empowered, if they find that the termination was unjustified, to propose the reinstatement of the worker in his job, and in the absence of reinstatement, to order the payment of adequate compensation for unjustified termination of employment.

German Democratic Republic. The bodies mentioned in question 23 should have the powers referred to under clause (a).

Honduras. This coincides with national law.

Madagascar. If the bodies mentioned find that the termination was unjustified, they should be empowered to annul the termination and order the reinstatement of the worker in his previous job or in a similar job, with payment of unpaid wages from the date of the termination.

Mexico. Yes. There are situations in which the kind of work performance or the immediacy of the performance of duties with the employer would make the remedy provided in clause (a) unsuitable, in which case the option provided by clause (b) would apply.

Netherlands. This is only acceptable if clauses (a) and (b) are formulated as real alternatives, which implies that the words "if reinstatement is impracticable" in clause (b) be deleted.

New Zealand. Yes. The Government does not agree that any of the forms of relief outlined in clauses (a) and (b) should be mandatory. National law empowers a grievance committee or the Arbitration Court to order on a discretionary basis any one or more of the following: reimbursement of wages lost; reinstatement in the former position or one not less advantageous to the worker; payment of compensation by the employer. These forms of relief are all optional and discretionary. The common law does not generally provide for reinstatement or compensation for non-pecuniary loss.

Nigeria. (a) Yes, only if it is established that a valid contract was breached.

(b) Yes, only if the terms of (a) above are involved.

Pakistan. The Government favours clause (a).

Philippines. The Government agrees fully to the principles involved.

Swaziland. (a) The bodies referred to should only recommend reinstatement, failing which they should order the payment of all benefits.

(b) If reinstatement is impracticable the bodies should order payment of compensation.

Sweden. The worker ought, in principle, to be free to choose between having his dismissal quashed, possibly with the award of damages, and receiving monetary compensation only. In the ultimate analysis, however, there can be no question of anything but monetary compensation if the employer will not comply with an injunction to readmit the worker to his service.

Switzerland. Yes. Unless the worker has been reinstated, a court which considers the termination to have been unjustified must, in the case of normal termination, order the employer to pay compensation for the damage caused by the abuse of right (which may not be more than six months' wages in the specific case of dismissal due to military service) and, in case of termination with immediate effect, order the employer to pay the wages up until the normal expiry of the contract of employment, subject to deduction for the amount the worker has or could have earned by working elsewhere between the date of termination and the date of the normal expiry of the contract.

Tunisia. Provision should be made in case of abusive dismissal not only for the payment to the worker of a severance allowance but also of damages.

USSR. Yes, but it should be specified that reinstatement in another job can only be with the worker's consent.

United Kingdom. Yes, but annulment of termination or reinstatement should only be ordered where the employee wishes it and compensation should not be precluded where the employee does not want reinstatement.

Uruguay. (a) No. The powers granted to the competent bodies in labour disputes should be determined by each member State. The instrument to be adopted should not mention this so as to remain flexible.

(b) Yes. The bodies concerned should be able to order the payment of compensation by whoever makes abusive exercise of the right to dismiss.

Several governments considered that reinstatement should be the obligatory remedy in case of unjustified termination of employment by the employer. Some other governments referred to the need for flexibility, to permit alternative remedies if reinstatement is impracticable. One government considered that the competent bodies should have complete discretion in deciding on the remedy and, therefore, that the remedy of compensation should not be limited to cases in which reinstatement is found to be impracticable. Several governments expressed the view that the competent bodies should be empowered only to recommend or propose reinstatement, while several other governments felt that only compensation should be provided for as a remedy. As a considerable majority of governments replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 16*). The drafting of this Point has been modified to make it clear, as suggested by several governments, that reinstatement should not be awarded if not desired by the worker.

Several governments have expressed the view that if the employer refuses to reinstate a worker when reinstatement is awarded by the competent body, the only remedy can be compensation (although perhaps a higher level of compensation). The Office considers that the question of the enforcement of an award of reinstatement should be left to the discretion of each member State, in accordance with national circumstances.

Period of Notice and Certificate of Employment

(1) *Should the instrument(s) provide that a worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period?*

Qu. 28

(2) *Should the instrument(s) provide that during the period of notice the worker should be entitled to a reasonable amount of time off without loss of pay in order to seek other employment, taken at times that are convenient to both parties as agreed to by them?*

Total number of replies: 50.

Affirmative: 37. Austria, Bahrain*, Belgium*, Botswana*, United Republic of Cameroon, Canada*, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland*, France*, German Democratic Republic, Federal Republic of Germany*, Guyana, Hungary, India*, Kenya, Kuwait, Malta, Morocco, Nigeria, Norway, Poland, Romania, Sierra Leone*, Singapore, Suriname, Swaziland, Sweden, Trinidad and Tobago*, Tunisia, United States*, Yugoslavia.

Negative: 2. Mexico*, Uruguay*.

Other: 11. Byelorussian SSR*, Honduras*, Madagascar*, Netherlands*, New Zealand*, Pakistan*, Philippines*, Spain*, Switzerland*, USSR*, United Kingdom*.

Bahrain. Yes, as agreed by both parties concerned.

Belgium. (1) Yes. Although under national law the parties do not have the choice between giving a period of notice and paying compensation, nothing obliges the employer to require that the worker actually works during the notice period, if he pays the worker the remuneration to which he is entitled for that period.

The employers' representatives consider that in Belgium the length of the notice period applicable to non-manual workers is excessive compared with the notion of a reasonable length referred to in this question.

The questionnaire refers on several occasions to the concept of misconduct or serious misconduct (questions 16, 28 and 30), without including a specific question regarding serious misconduct. It would be desirable for the instrument to devote one provision to the definition of serious misconduct and its consequences.

(2) Yes. The meaning of "a reasonable amount of time off" should be specified.

Botswana. (1) Yes.

(2) Yes, but such time off must not jeopardise the employer's business.

Byelorussian SSR. (1) The Convention should provide that the worker should be entitled to a reasonable period of notice and be given the choice between agreeing to termination before the expiry of the notice period and receiving a severance allowance (see question 30) and using the period of notice to seek other employment without loss of pay.

(2) Yes.

Canada. (1) Yes.

(2) Yes, provided that such leave can be arranged without impeding the operation of the establishment.

Finland. (1) Yes, provided that the cases of serious misconduct are defined, for instance in the form of a list.

(2) Yes.

France. The proposals included in paragraphs (1) and (2) should be included in the instrument. However, the instrument should provide that the length of the notice period,

* Substance of observations reproduced below.

referred to in paragraph (1), may be specified, where necessary, by the methods of implementation mentioned in question 6, on the basis of length of service or the qualifications of the worker.

Federal Republic of Germany. (1) Yes, but there should not be reasonable compensation in lieu of a reasonable period of notice, since the reasons for this are not clear.

(2) Yes, but it should be left to national laws or regulations to determine the details regarding the continued payment of remuneration.

Honduras. This is in conformity with national law.

India. Yes. However, it may not be practical to allow time off without loss of pay and this may give rise to disputes within the undertaking.

Madagascar. (1) Yes, the instruments should provide that a worker whose employment is to be terminated should be entitled to a period of notice the minimum length of which is fixed according to the method referred to in question 6, or to compensation in lieu thereof, unless he is guilty of very serious misconduct duly evaluated by the bodies referred to in question 23.

(2) Yes, the instruments should provide that during the notice period the worker should be entitled to periods of time off fixed in accordance with the method mentioned in question 6 and without loss of pay, in order to be able to seek other employment, periods which should be taken at times that are convenient to the worker by notifying the employer.

Mexico. No. Under national legislation a notice period would be prejudicial to the worker since it would deprive him of the faculty of opting for reinstatement or compensation. Opting for the latter supposes that on account of the employer's attitude or for personal motives related to the dismissal the worker does not wish to continue the employment relation.

Netherlands. (1) Yes. A compulsory period of notice is extremely important and should really be at the beginning of the instrument. It would not seem to be right to equate "a reasonable period of notice" and "compensation in lieu thereof". The notice itself should be a general rule and compensation in lieu thereof should only be an issue if the period of notice is disregarded. This could be expressed in the following terms: "a reasonable period of notice on penalty of compensation in lieu thereof".

(2) No. Far-reaching and over-detailed regulations which are not specifically connected with the problem of the termination of employment should be guarded against. In fact, general leave regulations may suffice for this purpose.

New Zealand. (1) Yes.

(2) No.

Pakistan. (1) Yes.

(2) The instrument should not contain any hard and fast stipulation in this regard.

Philippines. (1) The procedure for termination prior to the promulgation of the Labour Code was as herein proposed. The Government may probably consider readoption of this practice to apply to workers not covered by the clearance requirement and when the termination is for any just cause other than serious misconduct or commission of a crime or offence against the employer.

(2) The Government's position may depend on factors such as the stage of economic development achieved by the country, viability of industries and other related factors. It may also consider such factors as the ground for termination and the employment record of the worker.

Sierra Leone. (1) Yes. The period of notice should be in accordance with national legislation or agreement, as envisaged under question 6.

(2) Yes.

Spain. The form of dismissal referred to here is dismissal that is not based on the combination of guilt and gravity that characterises disciplinary dismissal. The problem arising is to decide if these reasons for dismissal should be regulated or left to the application in practice of a general standard.

Switzerland. (1) National legislation makes provision for the periods of notice of termination of contracts of employment of indefinite duration increasing with length of service. In principle a fixed-term contract ends at the expiration of the term, without requirement of notice, unless tacitly prolonged or unless the parties agreed to a notice period. The contract of employment may be terminated with immediate effect in case of "just cause".

(2) National legislation entitles a dismissed worker to the time off required to find new employment, but does not indicate whether this time must be remunerated.

Trinidad and Tobago. (1) Yes.

(2) The principle appears to be acceptable, but implementation might pose problems.

USSR. (1) The Convention should provide that the worker be entitled to a reasonable period of notice and be given the choice between agreeing to dismissal before the expiry of the notice period and receiving a severance allowance (see question 30) and using the period of notice to seek other employment without loss of pay. It should also state that provision may be made in national legislation for cases of termination of employment at the initiative of the employer without payment of a severance allowance (e.g. on grounds of systematic non-performance without valid reasons of the duties specified in the contract of employment).

(2) The conditions relating to the search for other employment should be dealt with in the Recommendation.

United Kingdom. (1) Yes.

(2) No. This only applies to redundancy situations in the United Kingdom and it does not seem appropriate to extend this to cases in which dismissal is for other reasons.

United States. Yes, in a Recommendation.

Uruguay. (1) No. This should not be included in standards of universal application.

(2) No. This question presupposes the existence of a period of notice, which is not required by all States.

As a majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 17*).

Several governments expressed the view that paragraph (1) of this Point should not be framed in terms of an alternative between giving a period of notice and paying compensation in lieu thereof, but that there should be an obligation to provide a period of notice, subject to the penalty of compensation. However, the Office has retained the present wording of this Point having regard to the fact that this wording corresponds to the obligations existing in a number of countries and to the fact that the normal sanction in other countries for failure to give the period of notice required is payment of the amount of remuneration corresponding to the period of notice not given, often reduced by an amount equivalent to what the worker earned or could have earned if he had sought other employment. Thus by providing for the possibility of paying compensation in lieu of notice (normally being the remuneration for the notice period) at the time of termination, the worker would normally be in at least as favourable a position as if he sought compensation as a sanction for violation of his right to a period of notice.

One government considered that the instrument should provide that, where necessary, the methods of implementation referred to in question 6 may specify the length of the notice period on the basis of the length of service or the qualifications of the worker. The Office has thought it preferable to leave this to the discretion of each member State. In implementing the instrument by the methods referred to in Point 5, each member State would in any case have to determine the length of the period of notice to be required.

Another government expressed the view that the concept of serious misconduct should be defined. However, as the way in which this concept is defined varies from country to country, it seems preferable to leave this matter to the methods of implementation referred to in Point 5.

Several governments have expressed the view that the worker should be given the right to a reasonable period of notice and the option of agreeing to termination before the expiry of this period with the payment of severance allowance while using the notice period to seek new employment without loss of pay. The Office has considered it preferable to keep the matter of a period of notice and compensation in lieu thereof, on the one hand, and severance allowance, on the other, separate. Generally, where there is provision for severance pay, entitlement thereto is cumulative with the right to a period of notice.

Several governments indicated that the right to a reasonable amount of time off without loss of pay during the period of notice (mentioned in paragraph (2) of this question) should not impede the operation of the establishment, while a few governments expressed reservations regarding the duty to continue to pay the worker during the time off. One government considered that the instrument should specify what is meant by "a reasonable amount of time off". As the present wording of this paragraph provides for the taking of time off "at times convenient to both parties as agreed to by them", it appears to be unlikely that this obligation would substantially affect the operation of the establishment. As the large majority of governments have replied in the affirmative to the question as a whole, the present wording of this paragraph has been retained.

Should the instrument(s) provide that a worker whose employment has been terminated should be entitled to receive, on request, at the time of termination of his employment, a certificate from the employer specifying the dates of his engagement and termination of his employment and the type or types of work on which he was employed, but containing nothing unfavourable to the worker?

Qu. 29

Total number of replies: 49.

Affirmative: 42. Austria, Bahrain, Belgium, Botswana, Byelorussian SSR*, Canada*, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Egypt, Ethiopia, Finland, France, Federal Republic of Germany*, Guyana, Hungary, India, Kuwait,

* Substance of observations reproduced below.

Madagascar, Malta, Mexico*, Morocco, New Zealand*, Nigeria, Norway*, Pakistan, Poland, Romania, Sierra Leone, Singapore, Spain*, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia, USSR*, United States*, Uruguay*, Yugoslavia.

Negative: 1. United Kingdom.*

Other: 6. German Democratic Republic, Honduras*, Kenya*, Netherlands*, Philippines*, Switzerland*.*

Byelorussian SSR. Yes, but it should be worded as follows: "At the time of termination of a worker's employment the employer must furnish him, on request, with a certificate or other equivalent document specifying the dates of his engagement and termination of his employment and the type of work on which he was employed. The employer may not include any information whatsoever that is unfavourable to the worker concerned."

Canada. Yes. Current Canadian legislation requires an employer to provide terminated employees with a separation certificate. Information included identifies type of work performed, length and dates of service and, if dismissed for cause, the employer's reason for doing so. This certificate is used to determine the employee's unemployment insurance entitlement and benefit level. It is not forwarded to the public placement agency.

German Democratic Republic. The worker should be entitled to receive a certificate. In this connection, however, it should be stressed that if a certificate is drafted in purely formal terms there is the risk that assessments of the worker will be transmitted through other channels so that he will be unable to verify them, and this may jeopardise his chances of finding other employment. It would, therefore, seem desirable for the instrument to provide that the worker may demand a certificate containing factual information on his work performance and behaviour, and that he should be entitled to have it examined by a court for conformity with the regulations. The protection of the worker would also be served by a provision prohibiting the undertaking from furnishing other undertakings with assessments of the worker that are in contradiction with the contents of the certificate delivered to the worker on his request.

Federal Republic of Germany. Yes. However, the worker should also be entitled to receive a certificate containing details of his conduct and performance. Thus the last sentence should be deleted. In so far as remarks unfavourable to the worker are true, they should also be included in the detailed certificate, if the worker requests one.

Honduras. This coincides with national law.

Kenya. The certificate of service should always accompany the termination letter.

Mexico. Yes, but in all cases, not only when the worker requests it.

Netherlands. There is no objection to a certificate being issued at the request of the worker containing the dates of his engagement and termination of his employment and the types of work in which he was employed. It is not clear, however, how this-factual-information could ever be unfavourable to the worker. Information on the way in which the work has been carried out should only be added on special request of the worker; such information, however, ought to be objective and thus in certain cases perhaps cannot be entirely favourable to the person involved.

New Zealand. Yes. The Government agrees in principle to this clause, although only those who work in factories are eligible for such a certificate.

Norway. Yes. If the worker is dismissed because of serious misconduct, this may be entered in the certificate without further specification.

* Substance of observations reproduced below.

Philippines. The Government agrees to the principle. The terminating employer should not prejudice the worker's chances of finding other suitable employment.

Spain. This seems pertinent.

Switzerland. National legislation authorises a worker to ask the employer at any time to provide a certificate indicating the nature and duration of the employment relation, as well as the quality of his work and his conduct. If expressly requested, the certificate refers only to the nature and duration of the employment relation.

USSR. Yes, but the provision should be worded as follows: "At the time of termination of a worker's employment the employer must furnish him, on request, with a certificate or other equivalent document specifying the dates of his engagement and termination of his employment and the type of work on which he was employed. The employer may not include any information whatsoever that is unfavourable to the worker concerned."

United Kingdom. No. Although national law does provide that employees should receive a written statement of the main terms and conditions, containing the job title, and that this should be updated, where appropriate, by the employer, the burden of keeping a running record of types of jobs the employee had undertaken should not be placed on the employer.

United States. Yes, in a Recommendation.

Uruguay. Yes. The right to request evidence of the existence of an employment relation at its termination should be provided to all workers; however, the faculty for the employer to include a statement of the reasons for termination of employment should not be limited.

As the great majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 18*).

The words "at the time of termination of his employment" have been deleted, since this would restrict the right of the worker to request a certificate of employment to one specific point in time; if the worker failed to request an employment certificate until after the time of termination, he would lose his entitlement under the previous wording.

Several countries pointed out that the words "but containing nothing unfavourable to the worker" at the end of this question would prevent the employer from giving an honest appraisal of the worker's conduct or performance if the worker requested him to include such an appraisal in the certificate. The wording of the Proposed Conclusions has accordingly been modified to except from this limitation on what may be contained in the certificate cases in which the worker requests the employer to include an evaluation of his conduct or performance therein.

Severance Allowance and Other Income Protection

(1) *Should the instrument(s) provide that a worker whose employment has been terminated should be entitled to a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted of employers' contributions?*

Qu. 30

(2) *Should the instrument(s) provide that, in case of termination for serious misconduct of the kind mentioned in question 28 (1), the severance allowance or other separation benefits may be withheld?*

Total number of replies: 49.

Affirmative: 21. Austria, Botswana*, United Republic of Cameroon*, Canada, Cuba, Cyprus, Czechoslovakia, Egypt, Finland*, France, Guyana, Honduras, Hungary, Kenya*, Kuwait, Malta, Mexico*, Morocco, Nigeria*, Swaziland, Uruguay*.

Negative: 8. Denmark*, Netherlands*, New Zealand*, Norway, Romania*, Suriname*, Sweden*, Yugoslavia.

Other: 20. Belgium*, Byelorussian SSR*, Colombia*, Ethiopia*, German Democratic Republic*, Federal Republic of Germany*, India*, Madagascar*, Pakistan*, Philippines*, Poland*, Sierra Leone*, Singapore*, Spain*, Switzerland*, Trinidad and Tobago*, Tunisia*, USSR*, United Kingdom*, United States*.

Belgium. (1) Apart from compensation corresponding to the notice period and compensation for abusive dismissal or unjustified dismissal of a worker entitled to special protection, two kinds of compensation exist: compensation provided for by law in case of dismissal resulting from closure of an undertaking and compensation under collective agreements, which is left to the initiative of the signatory organisations. Thus, a negative reply must be given to question 30 (1), as far as contractual benefits are concerned.

(2) Yes.

Botswana. (1) Yes. This should be viewed in terms of compensation for unjustified termination of employment.

Byelorussian SSR. The Convention should provide that the severance allowance be paid out of the funds of the employer.

United Republic of Cameroon. (1) Yes, subject to the provisions of collective agreements referred to in question 6.

(2) Yes.

Colombia. (1) The Recommendation should provide that a worker whose employment has been terminated should be entitled to a severance allowance.

(2) The Recommendation should provide that in case of termination for serious misconduct the allowance may be withheld.

Denmark. The Government is of the opinion that provisions concerning severance allowance or other income protection should not be included in the instruments to be adopted.

Ethiopia. (1) Yes.

(2) No.

Finland. (1) Yes, in principle, but it should also be possible to finance the system otherwise.

(2) Yes, provided that the cases of serious misconduct are defined, for instance in the form of a list.

German Democratic Republic. The provisions mentioned should apply only in cases where the national legislation does not guarantee the worker suitable employment in another undertaking upon termination of his employment. Such provisions are unnecessary in the German Democratic Republic, as an employer may terminate the employment of a worker (except in the cases mentioned in question 28 (1)) only if he has offered the worker a

* Substance of reproduced below.

contract for other suitable employment in his own undertaking or in another and the worker has refused it. In addition, workers who change employment as a result of rationalisation measures or reorganisation and who are thereby prevented from reaching the level of their previous average wage in the foreseeable future receive a bridging allowance.

Federal Republic of Germany. (1) Because of differences in national legal systems such entitlements should be allowed only to the extent provided for by national laws or regulations. Under the law of the Federal Republic, a worker is entitled to a severance allowance only if the dismissal is socially unwarranted and thus ineffective and the court orders the dissolution of the employment relationship at the request of the worker or employer. In addition, entitlement to severance allowance may arise out of social plans agreed between the employer and the works council in connection with changes in the undertaking or a reduction in its operations.

(2) Yes.

India. (1) Yes, but the nature and amount of such allowance may differ from country to country.

(2) A blanket permission to employers to withhold the payment of severance allowance is liable to be misused. The circumstances under which an employer can do this should be clearly specified so that the worker affected is not put to undue hardship. For instance, it could be specified that severance allowance may be withheld or reduced in case the misconduct has caused financial damage to the employer and the amount so withheld should not exceed the extent of loss incurred. There could also be an enabling provision that the amount of severance allowance so withheld could be deposited with a prescribed independent authority.

Kenya. (1). Yes.

(2) Yes, depending on the degree of misconduct.

Madagascar. (1) Yes.

(2) The instrument should provide that in case of very serious misconduct duly evaluated by the bodies referred to in question 23, the severance allowance or other separation benefits may be withheld.

Mexico. (1) Yes.

(2) Yes, in so far as loss of compensation does not affect the length of service benefits nor other kinds of economic benefits that are already acquired and not covered in time by the employer.

Netherlands. No. A provision of this kind does not at all accord with Netherlands law. In the case of involuntary unemployment, which is the case in such situations, workers are entitled to an unemployment benefit often for up to 2½ years. The longer the period of service, the longer the period of notice, with pay remaining due during this time.

New Zealand. The Government does not agree that any of these provisions should be included in any Recommendation. Termination of employment for reasons of an economic, technological, structural or similar nature are justifiable reasons within New Zealand law. However, the Arbitration Court has recently held that the consequences of a decision to introduce new technology in an enterprise are negotiable between an employer and worker representatives. Therefore such matters as redundancy are covered in the collective bargaining procedure.

Nigeria. (1) Yes, as stipulated in the contract of employment.

(2) Yes.

Pakistan. (1) The term "increasing with the length of service" should be omitted.

(2) The employer should have the discretion to withhold such payments.

Philippines. (1) Entitlement to separation pay to be paid out of the employer's fund should depend on the ground for termination. If the termination is for a valid ground, the

worker need not be paid severance allowance or separation pay. Nothing should, however, preclude the employer from granting such allowance or separation pay voluntarily as a form of assistance to the worker. The Government, however, favours payment of separation benefits to a worker who is terminated for any just cause other than the employee's misconduct, neglect of duties or commission of crime or offence against the employer, out of a fund constituted by contributions by both employers and employees or from unemployment insurance or assistance. The Social Security System and the Social Security Commission are to undertake a study of the feasibility of setting up an unemployment insurance system for the workers.

(2) The Government favours the principle involved. This will be a disincentive for workers' misbehaviour.

Poland. (1) No. The right to a severance allowance or other similar benefit may not be required as compensation for termination as such, independently of whether the termination was for a justified reason or not.

(2) Yes.

Romania. (1) No, except for compensation based on wages for the notice period, for example 15 days.

(2) The compensation mentioned above should be granted in all cases, irrespective of the gravity of the fault.

Sierra Leone. The alternative in question 31 is preferred.

Singapore. Severance allowances may be paid in case of termination without just cause or excuse or retrenchment. The eligibility for and amount and manner of payment of such allowances should be left to national law and practice.

Spain. In national law there is no compensation in case of lawful disciplinary dismissal. In case of unlawful dismissal or dismissal for objective reasons, compensation is provided for and there is entitlement to unemployment benefits under the social security system.

Suriname. (1) No. Such a provision would create problems for countries in which no severance allowance is paid.

(2) If severance allowance is to be included in the instrument, it should be deemed to be an element of wages, postponed in order to provide the worker with some income protection during a period of unemployment. Thus the worker should be entitled to the allowance even in case of misconduct.

Sweden. The instrument(s) should not contain any provisions on these subjects. It should be observed that many of the benefits referred to in these questions are dependent on provisions on the subject being included in collective agreements. Certain groups of workers are not covered by collective agreements. There is not really any reason why the instrument(s) should include stipulations concerning unemployment insurance or other forms of compensation in connection with unemployment or concerning social benefits generally.

Switzerland. (1) A worker who is 50 years of age with 20 years' service in an undertaking is entitled to a long-service leaving grant at the end of the contract, which must be at least two months' wages; it is fixed contractually or on request of the worker by the courts. The age and length of service requirements may be modified contractually. The purpose of this grant is to replace at least partially benefits of provident institutions when these do not yet exist.

(2) Under national law the leaving grant may be reduced or suppressed in case of termination of the contract without just cause by the worker, termination with immediate effect for just cause by the employer and when its payment would cause hardship to the employer.

Trinidad and Tobago. (1) The principle of payment of a severance allowance or separation benefit is acceptable but due regard should be had to the existence or otherwise of pension funds.

Tunisia. (1) Severance allowance paid by a fund constituted by employers' contributions would be possible only in countries already having a system of employment insurance. In other countries provision should be made for payment of the allowance directly by the employer.

(2) Payment of the severance allowance should be refused to a worker guilty of serious misconduct.

USSR. (1) The Convention should provide that the severance allowance be paid out of the funds of the employer(s). The amount of the allowance fixed according to length of service or other conditions should be dealt with in the Recommendation in general principles pursuant to which States could adopt measures through the methods of implementation referred to in question 6, rather than in specific rules.

(2) See reply to question 28.

United Kingdom. The payment of severance allowance should be limited to dismissals for redundancy (as defined by national law). In the United Kingdom unemployment benefit is paid if the discharged worker becomes unemployed. Pensions and other benefits may be payable, if appropriate.

United States. In respect of questions 30-31, in view of the wide differences in the nature of severance benefits, unemployment benefits, old-age and invalidity benefits in the various nations, this is a particularly difficult issue for a Convention, and an example of the problems which lead the Government to prefer a Recommendation. To construct a proper formulation for a Recommendation is not difficult, as Paragraph 9 of Recommendation No. 119 is a good starting-point because it focuses on the key issue, which is providing some form of income protection. If greater specificity is desired as to the employer-financed benefits on termination, there is no objection to adding the requirement that such benefits should increase with the worker's length of service. The Government agrees that such benefits may be withheld in terminations for serious misconduct; in old-age or invalidity retirement of a worker who will begin receiving employer-financed pension benefits upon "termination"; in what is called "temporary layoffs" in the United States where the worker has the right and expectation of resuming his active employment in the enterprise upon future expansion of its workforce. Although the provision in question 31 (b) is provided for by law through the United States, the provision in clause (a) is also relatively common as a voluntary employer practice.

Uruguay. (1) Yes, if there is no just cause for termination.

(2) Yes. The benefits would lose their character of indemnity if they were granted to workers guilty of serious misconduct.

The replies of governments to this question are considered in conjunction with the replies to question 31.

(1) *Alternatively, should the instrument(s) provide that a worker whose employment has been terminated should be entitled either to—*

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- (a) *a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted of employers' contributions; or*
- (b) *benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or*
- (c) *a combination of such allowances or benefits?*

(2) *Should the instrument(s) provide that in case of termination for serious misconduct of the kind mentioned in question 28 (1), the allowance or benefits referred to in paragraph (1) (a) may be withheld?*

Total number of replies: 42.

Affirmative: 13. Bahrain*, Canada*, Cuba, Czechoslovakia*, Egypt*, Finland*, Guyana, Kenya*, Nigeria*, Romania*, Sierra Leone, Swaziland*, Yugoslavia.

Negative: 3. Denmark¹, New Zealand¹, Sweden¹.

Other: 26. Austria*, Belgium*, Botswana*, Ethiopia*, France*, German Democratic Republic¹, Federal Republic of Germany¹, Honduras*, Hungary¹, India*, Kuwait*, Malta*, Netherlands*, Norway*, Pakistan¹, Philippines¹, Poland*, Singapore¹, Spain¹, Suriname*, Switzerland*, Trinidad and Tobago*, Tunisia¹, USSR¹, United Kingdom¹, United States¹.

Austria. Entitlement to social security benefits should be independent of claims made against the employer following termination of employment.

Bahrain. (1) (a) Yes, where entitlement to severance allowance exists; current labour legislation provides for entitlement to severance allowance only in respect of workers to whom the provisions of the social insurance legislation are not yet applicable.

(b) Yes, where such benefits are applicable in terms of current social insurance legislation.

(c) No. This is not a practicable measure under current legislation.

(2) Yes.

Belgium. (1) (a) No (see reply to question 30 (1)).

(b) A worker dismissed for a serious reason does not lose his entitlement to benefits, but is subject to suspension of benefits for a certain period. A dismissed worker may retain his right to other social security benefits if he fulfils the usual conditions for such benefits. Thus, the reply to this point is affirmative, but subject to the above comments.

(c) No.

(2) Yes (see reply to question 30 (2)).

Botswana. (1) A severance allowance or other separation benefits may have a chance to be applied to Botswana. Other forms of social security may prove difficult.

(2) Yes.

Canada. (1) (c) and (2) Yes.

Czechoslovakia. (1) (c) and (2) Yes.

Egypt. (1) (a) Severance allowance or other separation benefits should be paid from a fund to which employers make contributions.

(b) and (c) Yes.

Ethiopia. (1) (a) This should be paid directly by the employer or by a fund constituted of employers' contributions.

(2) No.

* Substance of observations reproduced below.

¹ See under question 30.

Finland. (1) (c) Yes. The provisions concerning the structure of the system should be left, however, to national legislation and practice.

(2) Yes, provided that the cases of serious misconduct are defined, for instance in the form of a list.

France. The instrument should provide that a worker whose employment has been terminated should be entitled, in addition to the allowances or benefits under question 30, to benefits from unemployment insurance or assistance or other forms of social security, under conditions defined by the methods of implementation referred to in question 6.

Honduras. (1) It is preferable that the worker be entitled to the benefits referred to in (b).

(2) Yes.

India. (1) The question of payment of unemployment insurance, old-age and invalidity benefits, etc., is relevant only for those countries in which such schemes are already in operation. Thus, the alternatives (a) and (b) should not be applied to the exclusion of each other.

(2) See reply to question 30 (2).

Kenya. (1) Yes, except that some of the schemes mentioned are not yet established in most of the developing countries.

(2) Yes.

Kuwait. (1) (b) Yes.

Malta. (1) Yes.

(2) Provided that, irrespective of the conduct of the worker, the severance allowance shall not be withheld if redundancy is a factor contributing towards the discharge.

Netherlands. (1) This alternative is by far preferable because of the provision under (b).

(2) Not applicable.

Nigeria. (1) (a) Yes, as so specifically defined by previously agreed contract.

(b) Yes.

(c) Yes, as may be appropriate.

(2) Yes.

Norway. (1) Yes. However, the Government questions whether this should be included in the present instrument. It would consider it expedient for the instrument to be limited to entitling dismissed persons to unemployment benefit. The other forms of benefits referred to are of such a nature that they require regulation through collective agreements and there will therefore be groups of workers who fall outside the scope of such support schemes.

(2) See reply to paragraph (1). The Confederation of Trade Unions in Norway (LO) opposes this clause.

Poland. (1) (a) No.

(b) Yes.

(c) No.

(2) Yes.

Romania. (1) (a) Yes. The compensation should be paid directly by the employer.

(b) and (c) Yes, under the same conditions.

Suriname. (1) Yes.

(2) No, see reply to question 30.

Swaziland. (1) The worker should be entitled to a combination of such allowances or benefits, as in (c).

(2) Yes.

Switzerland. Persons exercising a gainful activity in the service of an employer are obliged to contribute to unemployment insurance in Switzerland. An insured person who has been dismissed and is unemployed is entitled to unemployment benefits if he fulfils the conditions laid down by law. Unemployment assistance and social assistance are governed by cantonal legislation.

In case of termination of employment due to invalidity or attainment of the age of retirement, the worker is in principle entitled to social security benefits other than unemployment benefits, in accordance with conditions fixed by national legislation and the regulations of the pension funds. These include invalidity and old-age pensions, retirement pensions and periodic benefits in case of occupational accidents or diseases.

Trinidad and Tobago. (1) (b) and (c) These would appear to be acceptable where economic circumstances permit.

(2) Yes.

In including questions 30 and 31 in the questionnaire, the Office had sought to provide governments with alternative ways of treating the issue of income protection in any new instruments on termination of employment at the initiative of the employer. Question 30 envisaged provision for only one kind of income protection, severance allowance or other separation benefits paid by the employer. Question 31, with a view to providing somewhat greater flexibility, envisaged giving member States a choice between provision for severance allowance or other separation benefits paid by the employer or unemployment insurance or assistance or other social security benefits (as well as the possibility of providing for a combination of the two kinds of benefits), as in Recommendation No. 119.

Many governments appear not to have recognised that these questions were alternate in nature and replied to both questions without clearly indicating a preference regarding the inclusion of one or the other type of provision in the instruments.

It appears to the Office, from a general review of the replies to these two questions, that a number of member States which have appropriate protection under unemployment insurance or assistance schemes would have difficulty in giving effect to a provision in a Convention requiring payment by the employer of severance allowance or other separation benefits, since in these countries this matter is left to collective bargaining and is deemed to be inappropriate for legislation. On the other hand, it would seem that these countries would be able to implement a provision of the type envisaged in question 31, giving an alternative between provision for severance allowance or social security benefits. Consequently, it has seemed to the Office that if provision for income protection on termination of employment is to be included in the Proposed Conclusions with a view to a Convention, the more flexible terms of question 31 would be preferable to those of question 30. Accordingly, the Proposed Conclusions with a view to a Convention include a Point based on question 31 (*Point 19*). A new paragraph (2) has been included to make it clear that a country giving effect to this provision through a system of unemployment insurance or assistance of general scope would not be obliged to ensure provision of another type of income protection for a particular worker who failed to fulfil the qualifying conditions for the benefit under that scheme.

On the other hand, as a number of governments replied in the affirmative to question 30 (while few replied in the negative), a Point corresponding to this

question has been included in the Proposed Conclusions with a view to a Recommendation (*Point 33*). Included in the proposed Recommendation, this provision regarding severance allowance or other separation benefits paid by the employer (or by a fund constituted by employers' contributions) could be implemented by such methods as collective agreements or arbitration awards alone, without member States being under the residual obligation to implement the provision through laws or regulations to the extent that it was not given effect to by other methods. The difference of this Point from Point 19 has been made clear by indicating that the payment of severance allowance or other separation benefits is recommended irrespective of the availability of social security benefits. Also, since in a number of countries entitlement to severance allowance is limited to situations of redundancy, provision is made for the possibility of limiting entitlement to such allowance to termination of employment due to economic, technological, structural or similar reasons (paragraph (3)) as well as for loss of entitlement in case of termination for serious misconduct (paragraph (2)).

One government has proposed deleting the words "increasing with length of service". This suggestion has not been retained, since most severance allowance schemes provide for the payment of such allowance in an amount increasing with length of service. Another suggestion, that financing of such allowances be allowed by means other than payment by the employer or a fund constituted of employers' contributions, has not been retained, in the absence of any indication of the means of financing envisaged. One government considered that severance allowance should be provided for only where national legislation does not guarantee suitable alternative employment. This proposal has not been retained, since the legislation of very few countries provides a guarantee of alternative employment.

Some governments expressed their opposition to paragraph (2) of questions 30 and 31, which would authorise the withholding of severance allowance in case of termination for serious misconduct. Since most governments approved of this provision, and since many schemes providing for payment of severance allowance include an exception for cases of serious misconduct, this paragraph has been retained. It should be noted that inclusion of this provision in the Proposed Conclusions does not require the withholding of severance allowance in case of serious misconduct; in countries in which severance allowance is deemed to be a deferred wage, for example, employers could be required to pay the severance allowance in all cases of termination of employment, even when for serious misconduct.

VI. Supplementary Provisions concerning Termination of Employment for Economic, Technological, Structural or Similar Reasons

Should the instrument(s) provide that positive measures should be taken by all parties concerned, with the assistance of the competent public authorities where appropriate, to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation

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of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned?

Total number of replies: 50.

Affirmative: 42. Austria, Bahrain, Belgium*, Botswana, Byelorussian SSR*, United Republic of Cameroon, Canada*, Colombia, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland, Federal Republic of Germany, Guyana, Honduras, Hungary, India, Kuwait, Madagascar, Malta, Mexico, Morocco, Nigeria, Norway, Pakistan, Poland*, Romania, Sierra Leone, Singapore, Spain*, Suriname, Swaziland, Sweden, Switzerland, Trinidad and Tobago, Tunisia*, USSR*, United States*, Uruguay*, Yugoslavia.

Negative: 1. New Zealand¹.

Other: 7. Denmark*, France*, German Democratic Republic*, Kenya*, Netherlands*, Philippines*, United Kingdom².

Belgium. Yes. Special measures concerning collective dismissal have been adopted pursuant to the directive of the European Communities; other provisions are applicable in case of closure, merger or transfer of an undertaking.

Byelorussian SSR. Yes. At the same time it should be provided that appropriate measures must be taken to avert termination of employment for economic, technological, structural or similar reasons. The text of the Convention should not include the condition "without prejudice to the efficient operation of the undertaking".

Canada. Yes, this provision should be included in a Recommendation. While not a universal approach, it is a fairly common Canadian practice for the parties to work together to minimise or adjust to the impact of group terminations.

Cyprus. Yes, in the Recommendation.

Denmark. The Government has a positive attitude to such provisions and wants to stress the need for constant development of effective co-operation between the workers' and employers' organisations and between these organisations and public authorities responsible for labour-market matters.

France. The Government is favourable to the measures envisaged, subject to the following reservations: (1) the obligations are obligations of method and not of result; (2) all provisions regarding termination for reasons of an economic nature should apply only to terminations of a certain importance (terminations of at least ten workers); moreover, the following should be excluded from such provisions: workers employed by the State, local bodies and public establishments having an administrative character; workers engaged under a contract of employment for a specified duration or task; workers affected by the cessation of activity of an establishment if this results from a court decision (liquidation of debt by court order or winding up of undertakings which have ceased payments; temporary or definitive closure in conformity with national provisions on safety and health) or from an administrative decision (prefectural decision in the exercise of police powers regarding public health and safety); (3) it should be specified that there is a possibility for and not an obligation on the competent public authorities to provide assistance and that recourse to such assistance should be left to the initiative of one of the parties concerned.

* Substance of observations reproduced below.

¹ See under question 30. ² See under questions 33-41.

German Democratic Republic. Here it should be remarked that the obligation does not affect all parties concerned in the same way. The main responsibility must lie with the undertaking and the competent authorities.

Kenya. The competent public authority should be empowered to examine all cases of termination of employment before they are effected for reasons of economic, technological, structural and similar nature, without prejudice to the efficient operation of the undertaking, establishment or service and to mitigate the adverse effect on any termination of employment for these reasons on the worker(s) concerned. It is the competent authority that should authorise termination for the above reasons after examination as stated above.

Netherlands. No objection.

Philippines. It is proper that all parties concerned, workers, employers or their representatives and government should hold consultations and draft and adopt measures that will minimise the adverse effects of technological and structural advancement or economic reverses that would likely cause termination of employment.

Tripartite consultation to undertake a study of the consequences of the above-mentioned eventualities and to recommend appropriate measures to alleviate the plight of workers is ideal for the situation.

Poland. Yes, with a view to mitigating the negative effects of any termination.

Spain. Yes. Other measures that might help solve the problems and difficulties of the undertaking without recourse to workforce reductions or with such reductions limited as far as possible should be exhausted before terminations of employment for economic, technological, structural or similar reasons are carried out, having regard to the grave social consequences for the workers concerned. The instrument should thus envisage requiring the employer to exhaust other kinds of measures (financial, commercial, organisational, etc.) liable to establish the normal and balanced operation of the undertaking, before having recourse to workforce reductions.

If terminations of employment are effectuated for these reasons, the instrument should provide for a series of measures to attenuate the negative effects for the workers concerned. These should include compensation paid by the undertaking in an amount determined by length of service and, where necessary, by the family responsibilities of the worker; unemployment benefits; vocational training courses to update skills or retrain the workers concerned.

Tunisia. The proposals in questions 32-41 concerning the institution of a special system to control collective dismissals meet the needs of national policies for the protection of employment. National law establishes a special procedure of control of collective dismissals for economic or technological reasons. This procedure has been supplemented by collective agreements, particularly with respect to criteria for selection for dismissal.

USSR. Yes, in the Convention. At the same time the Recommendation should provide that appropriate measures must be taken to avert termination of employment for reasons of an economic, technological, structural or similar nature.

United States. Yes. The Government strongly favours the retention of a balance of considerations and of the responsibilities placed on all parties in order to achieve the desired results.

Uruguay. Yes, provided that the parties concerned come together on a voluntary basis, that their decisions are not obligatory and that they do not interfere with the free management of the undertaking.

The great majority of governments replied to this question in the affirmative. Several governments, while approving the underlying principle reflected in this question, emphasised that this provision should be included in the Recommendation, or should not impose strict obligations. Several governments have expressed

the view that the instrument should lay down an obligation to take measures to avert such terminations of employment, while one government suggested deleting the expression “without prejudice to the efficient operation of the undertaking”. It has seemed to the Office, on reconsidering this point, that, having regard to the variety of situations and possibilities in which the problem of termination of employment for these reasons arises, imposition of a strict obligation on the parties to take measures to avert or minimise termination of employment or to mitigate their adverse consequences would be inappropriate. It appears to be preferable to word this provision in terms of an objective to be pursued by the parties, through the measures referred to elsewhere in the Proposed Conclusions, rather than as an obligation to take such measures. For this reason, this Point has been included in the Proposed Conclusions with a view to a Recommendation and worded to emphasise that all parties should seek, with the assistance of the competent public authorities where appropriate, to avert or minimise as far as possible termination of employment for the reasons indicated, without prejudice to the efficient operation of the undertaking, and to mitigate the adverse effects of any terminations on the workers concerned (*Point 34*). The words “without prejudice to the efficient operation of the undertaking” have been retained, since they call attention to the need to take into account the needs of the undertaking as well as those of the workers.

One government expressed the view that certain categories of workers should be excluded from the application of this Point. In this connection, attention is called to Point 6, which authorises the exclusion of certain categories of workers.

One government proposed including a provision to require the employer to exhaust other methods that might help to solve the difficulties of the undertaking before having recourse to termination of employment for the reasons indicated. It would appear to be a consequence of Point 34, according to which all parties should seek to avert or minimise such terminations, that attention should first be directed to the possibility of taking alternative measures to solve the difficulties of the undertakings, such as the measures referred to in Point 36.

Another government suggested instituting a requirement of prior authorisation for termination of employment for such reasons. This proposal has not been retained for the reasons given in the commentary to question 26 (2).

Consultation of Workers' Representatives

- Qu. 33** *(1) Should the instrument(s) provide that, when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer should consult the workers' representatives concerned as early as possible on all appropriate questions, including measures to be taken to avert or minimise the terminations, the selection of the workers whose employment is to be terminated and measures to mitigate the adverse effects of any terminations on the workers concerned?*

(2) Should the instrument(s) provide that the employer should notify the workers' representatives concerned with a view to the consultations referred to in paragraph (1) a specified minimum period of time before carrying out the terminations, such period to be determined by the methods of implementation referred to in question 6?

(3) Should the instrument(s) provide that the applicability of paragraph (1) may be limited by the methods of implementation referred to in question 6 to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or a specified percentage of the workforce?

(4) Should the instrument(s) provide that, to enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1), the employer should supply them in good time with all relevant information, including a written statement of the reasons for the terminations contemplated, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out?

Paragraph (1).

Total number of replies: 50.

Affirmative: 39. Austria*, Bahrain, Belgium, Botswana*, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland, France*, German Democratic Republic, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Madagascar*, Malta, Mexico*, Morocco, Nigeria, Norway, Philippines*, Poland, Romania, Sierra Leone, Spain*, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, United Kingdom*, United States, Yugoslavia.

Negative: 1. New Zealand².

Other: 10. Byelorussian SSR*, Colombia*, Denmark¹, Federal Republic of Germany*, Netherlands*, Pakistan*, Singapore*, Switzerland*, USSR*, Uruguay*.

Paragraph (2).

Total number of replies: 50.

Affirmative: 37. Austria*, Bahrain, Byelorussian SSR, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland, France*, German Democratic Republic, Guyana, Hungary, India, Kenya, Kuwait*, Madagascar, Malta, Mexico, Morocco, Netherlands, Nigeria, Norway*, Poland, Romania, Sierra Leone, Spain*, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR, United Kingdom*, United States.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

Negative: 2. Belgium*, New Zealand².

Other: 11. Botswana*, Colombia*, Denmark¹, Federal Republic of Germany*, Honduras*, Pakistan*, Philippines*, Singapore*, Switzerland*, Uruguay*, Yugoslavia*.

Paragraph (3).

Total number of replies: 50.

Affirmative: 28. Bahrain, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Egypt, Ethiopia, Finland, France*, Federal Republic of Germany, Guyana, Honduras, Kenya, Kuwait*, Malta, Morocco, Netherlands, Nigeria, Poland, Romania, Sierra Leone, Suriname, Swaziland, Trinidad and Tobago, Tunisia¹, United Kingdom, United States.

Negative: 11. Byelorussian SSR*, Czechoslovakia*, German Democratic Republic, Madagascar*, Mexico*, New Zealand², Norway, Spain*, Sweden, USSR*, Uruguay*.

Other: 11. Austria*, Belgium*, Botswana*, Denmark¹, India*, Kuwait*, Pakistan*, Philippines*, Singapore*, Switzerland*, Yugoslavia*.

Paragraph (4).

Total number of replies: 49.

Affirmative: 40. Austria*, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia*, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland, France*, German Democratic Republic, Guyana, Honduras, Hungary, Kenya, Kuwait, Madagascar, Malta, Mexico*, Morocco, Netherlands, Nigeria, Norway*, Philippines*, Poland, Romania, Sierra Leone, Spain, Suriname, Swaziland, Sweden*, Tunisia¹, USSR, United Kingdom*, United States.

Negative: 2. New Zealand², Uruguay.

Other: 7. Denmark¹, Federal Republic of Germany, Pakistan*, Singapore*, Switzerland*, Trinidad and Tobago*, Yugoslavia*.

Austria. Yes. In addition, the instruments should recommend more specific participation rights of workers' representatives, such as the right to appeal to a conciliation committee and the right to veto the dismissal of workers in special social circumstances. Limitation of participation rights under paragraph 3 should be allowed only to a very limited extent. There should be safeguards against the possibility of abuse occurring if the employer terminates the employment of workers at successive intervals rather than all at the same time.

Belgium. (1) and (4) Yes.

(2) Precise time-limits for consultation are not laid down by national legislation or by collective agreements. Such provisions would not be appropriate and would be difficult of application as a general obligation, having regard to the great diversity of social and economic situations that might arise.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

(3) The obligation to consult should exist irrespective of the number of workers affected by a collective dismissal. However, there should be the possibility for specific rules in particular cases of dismissal, relating to a given number or percentage of workers, as provided for in the questionnaire.

Botswana. (1) It is very crucial for employers to consult workers' representatives on questions of redundancies and layoffs. This will enable the workers' representatives, together with the employer, to explain the situation to other workers and to explain procedures to be adopted. Lack of consultation on such matters may lead to industrial unrest in the industry or undertaking concerned.

(2) The employer should consult workers' representatives within an agreed period of time which should be adequate enough to allow consultation among the workers themselves, but this should not mean that workers should first approve that terminations by the employer be effected.

(3) The applicability of paragraph (1) may be limited through collective agreements and/or arbitration awards.

(4) It is true that without relevant information concerning contemplated termination of employment, workers' representatives will find it difficult to participate effectively in consultations of any kind.

Byelorussian SSR. In view of the growing importance of workers' participation in the management of production, the instrument should provide that decisions affecting such major questions as termination of employment for reasons of an economic, technological or structural nature must be taken in agreement with the workers' representatives. Thus, the title of this section should be "Agreement with workers' representatives" and the references to "consultation" in this part should be replaced by the concept of "agreement".

(1) The instrument should refer to the agreement of the workers' representatives.

(2) and (4) Yes.

(3) The procedures established in (1) should be applied irrespective of the number of workers affected.

Colombia. (1) and (2) There should be consultation if this has been agreed, and notification if not.

(3) Yes.

(4) Yes, having regard to the reply to paragraph (1)

Cyprus. (1)-(3) Yes.

(4) Yes. "Relevant information" should not include information that may be considered prejudicial to the interests of the undertaking.

Czechoslovakia. (1), (2) and (4) Yes.

(3) There is no reason not to consult the trade union with a view to averting or attenuating the effects of terminations, since the number of workers whose dismissal is envisaged is not determining.

France. (1) The Government is in favour in principle of consultation of workers' representatives (staff delegates or works councils, depending upon the number employed) to the extent that this applies only to terminations of at least ten workers in a 30-day period.

(2) Provision may be made for a minimum period of time for consultation before the terminations are effected, provided that the instrument is flexible with regard to the length of the period and the undertakings concerned. National legislation provides for a period of 15 days only in the case of undertakings employing at least 50 workers.

(3) The Government is in favour of a provision of this kind; however, provision should be made for the possibility of limiting the application not only of paragraph (1) by conditions relating to the numbers to be dismissed but also of paragraph (2) by conditions relating to the size of the undertaking.

(4) To the extent that there is an obligation to consult under paragraph (1), the employer should be obliged to provide the information referred to.

Federal Republic of Germany. (1) In large companies (e.g. those normally employing more than 20 workers with voting rights) the employer should inform the workers' representatives in full and good time of any proposed alterations which may entail substantial prejudice to the staff or a large sector thereof and consult the works council on the proposed alterations. Examples of such alterations are reduction of operations in, or closure of, the whole or important departments of the establishment; changes in organisations; and the introduction of new work methods or production processes. As regards measures to offset or mitigate the economic prejudice to the workers affected by such changes, the workers' representatives should have a right of co-determination rather than mere co-operation, to enable them, if necessary, to compel the employer to take such measures.

(2) The rigid specification of a minimum period of time, which it would be impossible to respect given the variety of contingencies that might arise, should be replaced by an obligation to notify the workers' representatives in good time, i.e. at a time when it is still possible to negotiate respecting the changes in the undertaking themselves and any measures that may need to be taken in connection with them.

(3) Yes.

(4) The content of the information should not be specified in detail, since there is the risk that certain items of information might be omitted. It is preferable to refer to "comprehensive information".

Honduras. (1) and (4) Yes.

(2) There is no provision in national law on this, but it is obligatory to give a period of notice of termination of employment, in accordance with length of service.

(3) Yes, but this should not be applicable when the number of workers whose employment is to be terminated is very small compared with the size of the staff.

India. (1) and (2) Yes.

(3) This may be left to be decided according to national law and practice. No firm guidelines can possibly be issued in this regard.

Kuwait. Yes. The smallest number of workers, not a specified percentage of the workforce.

Madagascar. (1) Yes. Consultation of workers' representatives should be required before the matter referred to the bodies mentioned in question 32.

(2) and (4) Yes.

(3) No. Consultation should be required in all cases of termination for reasons of an economic, technological, structural or similar nature.

Mexico. (1) Yes. The employer should be obliged, under collective agreements, to consult the workers' representatives on the appropriate measures to attenuate the adverse consequences of termination for the workers. If the collective agreement does not so provide, or if there is no agreement, the employer should obtain the authorisation of the competent body.

(2) Yes.

(3) No. Exclusion from the guarantees in paragraph (1) is not justified.

(4) Yes, with a view to attenuating the adverse consequences.

Netherlands. (1) Agreed in principle, but it is going too far to mention "the selection of the workers whose employment is to be terminated". It would be better to refer in general to "the number and categories of workers whose employment is to be terminated" or to stop after "all appropriate measures".

(2)-(4) Agreed.

Norway. (1) Yes.

(2) Yes, but the Government suggests that the words "before carrying out the terminations" should be deleted, and replaced by: "before any final decision is taken...".

(3) No.

(4) Yes. The Norwegian Employers' Confederation (NAF) also replies in the affirmative, but suggests that the last three lines should be deleted.

Pakistan. This should not be obligatory. Where national circumstances permit, national legislation may make such provision.

Philippines. (1) This consultation of workers' representatives is a valid proposal. The earlier the matter is discussed by the parties affected the better chances there are of minimising the impact of such terminations. Better courses of action to be taken are decided and suitable alternatives thereto are planned. Since the workers are the ones to be immediately affected, their representatives should be consulted on all matters affecting them. The implementation may, however, be left to each particular country. Tripartite consultations which have been working effectively in this country may be the ideal forum.

(2) The Government favours the giving of ample notice period to workers of the intended termination so that the workers will have sufficient time to prepare themselves and their families for the consequences of the termination or so that they would have enough time to find suitable alternative sources of income.

(3) If the terminations will affect a substantial number of workers, the Government should intervene and initiate such consultation. What is substantial should be determined by the circumstances of each particular case.

(4) The Government favours the rationale for the proposal.

Singapore. The employer should consult workers' representatives if he contemplates substantial terminations for economic, technological, structural or other similar reasons.

Spain. (1) Yes. Dialogue and negotiation are the principal methods for resolving disputes of interests between employer and workers. When an employer wishes to terminate any employment relationship for reasons of an economic, technological, structural or similar nature, he should commence a period of consultation with the workers' representatives with a view to arriving at a negotiated solution of all questions, such as the number of workers to be affected, the selection of the workers, compensation, or, if necessary, the adoption of other measures liable to avoid workforce reductions.

(2) Yes. The employer should inform the workers' representatives sufficiently in advance to permit them to determine whether the alleged reasons are present and a workforce reduction is necessary and, if so, to elaborate and propose other alternative solutions.

(3) It is not desirable to eliminate consultations with workers' representatives in any case; however, it seems reasonable to provide for different periods of notice according to the numbers of workers to be affected.

(4) Yes.

Sweden. (1) and (2) Yes.

(3) No.

(4) Yes, but the main emphasis should be on rules assuring workers of the information referred to. It is less important that this information be provided in the form referred to.

Switzerland. (1) National law does not oblige the employer to consult the workers' representatives before carrying out a dismissal. However, such an obligation may be provided for in collective agreements.

(2) Since only collective agreements can provide for such a procedure and the State does not intervene in the conclusion of such agreements, the Government is not able to take a position on the inclusion of such a provision.

(3) and (4) See above.

Trinidad and Tobago. (1)-(3) Yes.

(4) Yes, where practicable.

USSR. In view of the growing importance of workers' participation in the management of production, the instrument should provide that decisions affecting such major questions as termination of employment for reasons of an economic, technological or structural nature must be taken in agreement with the workers' representatives. Thus, the title of this section should be "Agreement with workers' representatives" and the references to "consultation" in this part should be replaced by the concept of "agreement". A requirement to take decisions in agreement with workers' representatives would oblige the employer to take the workers' views into account to a much greater extent than in the case of a requirement of consultation, where the employer may limit himself to sounding out the workers' opinions without having to take them into account when making his decision.

(1) The instrument should refer to the agreement of the workers' representatives.

(2) and (4) Yes.

(3) The procedures established in paragraph (1) should be applied irrespective of the number of workers affected.

United Kingdom. (1) Yes. The employer should consult workers' representatives (as defined by national law) with a view to reaching an agreement. Such consultations should, at least, cover ways and means of avoiding or reducing the number of redundancies, and mitigating the consequences.

(2) and (3) Yes.

(4) Yes. The employer should provide the workers' representatives with all relevant information, and in any event give the reasons for the redundancies, the number of workers affected, the number of workers normally employed and the period over which such redundancies are to be effected.

Uruguay. (1) The consultations referred to should not be given obligatory character by the instrument, although it is acceptable that member States do so or even be exhorted to do so.

(2) Yes, but only for those member States that have provided for such consultations in their national law.

(3) No, the application of the procedures provided for by the instrument should not vary according to the number of workers involved.

Yugoslavia. Yes, but subject to a reservation regarding paragraph (4).

Paragraph (1)

Several governments considered that consultation should be left to collective agreements or should be on a voluntary basis. Several other governments suggested a modification of the wording of this question to reflect national law or practice on the subject. Proposals with a view to modifying the wording of this paragraph to require the agreement of the workers' representatives for such terminations or to provide for co-determination rights in respect of mitigation of the consequences of terminations, for the right to appeal to a conciliation committee or the right of workers' representatives to veto termination in special social circumstances have not been retained, since such provisions are found only in particular systems and do not seem to be widely accepted.

As the large majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 20 (1)*).

Paragraph (2)

As the large majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 20 (3)*). Since several govern-

ments considered that greater flexibility should be allowed with respect to the length of the period of time allowed for consultation, the wording of this paragraph has been modified to refer to notification of the workers' representatives sufficiently in advance of carrying out the terminations to allow for effective consultations to take place, instead of requiring specification of a minimum period of time. A suggestion that the advance notification refer to the time a final decision on termination is taken rather than to the date of effecting the terminations has not been retained, since the latter date can be objectively determined while determination of the time a final decision is taken by management may be difficult.

Paragraph (3)

While a number of governments indicated that the obligation to consult the workers' representatives on the terminations referred to should apply irrespective of the number of workers whose employment is to be terminated, a considerable majority of governments replied in the affirmative to this question. The Proposed Conclusions have been worded accordingly (*Point 20 (2)*). Several governments considered that the employer should consult with the workers' representatives concerned if "substantial terminations of employment" for the given reasons are contemplated, while others felt that this obligation should apply to termination of employment of the smallest number of workers. As there is no consensus on the size of the workforce reduction that should give rise to the obligation to consult, it has seemed preferable to leave this to each country to determine pursuant to the methods mentioned in Point 5. Another government expressed the view that member States should be authorised to exclude undertakings below a minimum size. In this connection, attention is called to the possibilities of exclusion of certain categories of workers from the proposed instruments or certain provisions thereof, under Point 6 (4).

Paragraph (4)

As the great majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 20 (4)*). The requirement that the information be provided in writing has been deleted, to provide more flexibility, in response to the comment of one government which considered that the obligation to provide the information concerned was more important than the form in which that information was to be supplied. On the other hand, a suggestion that the reference to certain kinds of information that should be supplied (the reasons for the terminations, the number and categories of workers affected and the period over which the terminations are to be carried out) should be replaced by the words "comprehensive information" has not been retained, since it is felt that there should be some indication of the basic information that should be supplied. One government expressed the view that the information required to be supplied should not include information that may be prejudicial to the interests of the undertaking. This is a difficult question and the competent Conference Committee may wish to consider whether it is desirable to include in this provision a reservation with respect to the obligation to supply this kind of information.

- Qu. 34** (1) *Should the instrument(s) provide that when the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are liable to entail substantial terminations, the employer should consult the workers' representatives concerned, as early as possible, inter alia, on the introduction of such changes, the effects they are liable to have and the measures for averting or mitigating the adverse effects of such changes?*
- (2) *Should the instrument(s) provide that what constitutes a major change for the purpose of paragraph (1) should be left for determination by the methods of implementation referred to in question 6?*
- (3) *Should the instrument(s) provide that to enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1) the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are liable to have?*

Total number of replies: 49.

Affirmative: 33. Austria*, Bahrain, Belgium, Botswana*, United Republic of Cameroon, Canada, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland, Federal Republic of Germany¹, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Madagascar, Malta, Mexico*, Morocco, Netherlands*, Norway*, Poland, Sierra Leone, Spain, Suriname, Swaziland, Sweden*, Tunisia², United States*, Yugoslavia.

Negative: 2. New Zealand³, United Kingdom*.

Other: 14. Byelorussian SSR*, Colombia*, Denmark¹, France*, German Democratic Republic*, Nigeria*, Pakistan*, Philippines*, Romania*, Singapore², Switzerland*, Trinidad and Tobago*, USSR*, Uruguay*.

Austria. Yes. There should be guarantees of the right of the workers' representatives to call upon conciliation bodies outside the undertaking and to compel the employer to adopt arrangements (social plans) to compensate for any prejudice suffered by the workers as a result of innovations.

Botswana. (1) and (2) Yes.

(3) Yes, as long as the information is not prejudicial to the establishment.

Byelorussian SSR. See reply to question 33.

(1) In these cases, the procedure referred to in the reply to question 33 (1) should apply.

(2) and (3) Yes.

Colombia. (1) The Recommendation should provide that when the employer is going to introduce major changes in production, programme, organisation, structure or technology, he should consult with the workers or their representatives.

* Substance of observations reproduced below.

¹ See under question 33. ² See under question 32. ³ See under question 30.

(2) The Recommendation should provide that what constitutes the changes referred to in the previous question should be determined by national legislation and according to the will of the parties expressed in agreements and awards.

(3) Yes.

Cyprus. (1) and (2) Yes.

(3) With regard to "relevant information", see reply to question 33.

France. (1) The Government is in favour of a provision of this kind, provided that it is limited to undertakings employing a certain number of workers (under national law such an obligation applies only to works councils in undertakings employing at least 50 workers).

(2) The instrument should not impose an obligation to define the concept of "major change" in accordance with the methods of implementation referred to in question 6. It should only refer to such a possibility.

(3) The Government is not in favour of such a provision. The obligation to consult under paragraph (1) is too general in character for an obligation to be imposed regarding provision of written information, the scope of the information and the period of time in which it is to be supplied. This provision should be combined with that in paragraph (1) in flexible and general wording.

German Democratic Republic. The measures proposed in paragraphs (1) and (3) should be applied when any changes are contemplated in production, programme, organisation, structure or technology that are liable in any way to entail termination.

Mexico. Yes, since this would permit the workers' representatives to negotiate with the employer the methods of workforce reduction.

Netherlands. Yes. It is assumed in questions 33 and 34 that as usual the term "workers' representatives" refers to both trade unions and works councils (see Convention No. 135, Article 3).

Nigeria. (1) and (3) Yes.

(2) No. It is a matter more appropriate for collective bargaining.

Norway. (1) Yes, but the word "substantial" in the final line should be replaced by "a number of ...".

(2) and (3) Yes.

Pakistan. This should not be obligatory. Wherever possible, such a course should be adopted.

Philippines. (1) The Government favours the principle behind this proposal. In line with the promotion of industrial democracy, workers need to be involved or consulted in the decision-making process affecting not only the methods of work but also the nature of employment.

(2) The matter of what constitutes major changes should be left to the determination of the Government after due consultations with both the workers' and the employers' representatives.

(3) The Government agrees that workers' representatives should be supplied sufficient information. Both sectors must be on equal footing in respect of consultations such as this.

Romania. (1) and (3) Yes.

(2) No.

Sweden. (1) Yes, but this should not be confined to terminations of major proportions and significance.

(2) and (3) Yes.

Switzerland. (1) This form of consultation is not provided for in national legislation but can be in collective agreements.

(2) Yes, if it is left to collective agreements alone to make such provision.

(3) See reply to question 33 (4).

Trinidad and Tobago. (1) and (2) Yes.

(3) Yes, where practicable.

USSR. See reply to question 33.

(1) In these cases the procedure referred to in the reply to question 33 (1) should be adopted.

(2) and (3) Yes.

United Kingdom. When an employer envisages collective redundancies he should consult workers' representatives with a view to reaching an agreement (as in question 33). This question, however, extends the consultation to the introduction of changes that may lead to collective redundancies. To the extent that it is covered by question 33, it is superfluous. To the extent that it goes beyond question 33, it is not appropriate to this instrument, as an employer should not be required to begin consultations until he clearly envisages the collective redundancies in question.

United States. Yes. These provisions are in accord with requirements of United States labour-relations laws where collective bargaining exists. Such terminations adversely affect workers' wages and working conditions, and employers are obligated to negotiate with the representatives of the workers on how to minimise such adverse impacts.

Uruguay. This is acceptable only as an exhortation, but not as an obligatory procedure.

Paragraph (1)

A few governments proposed that the agreement of the workers' representatives should be required for the introduction of major changes in the undertaking. Several other governments considered that the obligation of consultation on such changes should not be confined to cases in which substantial terminations are anticipated. On the other hand, several governments expressed the view that consultation of workers' representatives in such cases should not be obligatory, one considering that consultation should not be required until the employer clearly envisages the terminations in question.

As a considerable majority of governments replied in the affirmative to this question, these suggestions have not been retained. The Proposed Conclusions have been worded accordingly (*Point 35 (1)*). This Point has been included in the Proposed Conclusions with a view to a Recommendation.

One government expressed the view that the proposed instruments should, in addition, provide for the right of the workers' representatives to call upon a conciliation committee to intervene to oblige the employer to adopt a social plan to compensate the workers concerned. As such a provision is found in very few countries, this proposal has not been retained.

Another government has indicated that it assumes that the expression "workers' representatives" is given the same meaning as in Article 3 of the Workers' Representatives Convention, 1971 (No. 135), which refers to trade union representatives or elected representatives. It is the understanding of the Office that the term "workers' representatives" would refer to the representatives of the workers concerned who are the appropriate representatives of the workers for the purpose of these consultations under national law and practice, whether these be trade union representatives or elected representatives.

Another government replied in the affirmative, provided that this point may be limited to undertakings of a minimum size. Attention is called in this connection to the possibilities of exclusion provided by Point 6 (4).

Paragraph (2)

Several governments expressed the view that what constitutes a major change in the undertaking for the purpose of this provision should be left to be determined by collective bargaining or other methods of implementation. One government considered that the instrument should not oblige member States to define the concept of major change but should only refer to this possibility. After further consideration of this matter, the Office has considered that this paragraph is superfluous, inasmuch as under Point 23 of the Proposed Conclusions, effect could be given to this provision (included in the Proposed Conclusions with a view to a Recommendation) through different methods of implementation, such as collective agreements and arbitral awards as well as legislation, and the concept of a "major change in the undertaking" would normally be left to such methods of implementation to define. Consequently, this paragraph has been deleted from the Proposed Conclusions.

Paragraph (3)

Several governments expressed the view that the proposed instruments should not provide for an obligation regarding the supply of information for the purpose of the consultations referred to under paragraph (1) or that such information should be supplied where practicable. However, as a considerable majority of governments approved of this paragraph, the Proposed Conclusions have been worded accordingly (*Point 35 (2)*).

Several governments considered that provision should be made for the supply of such information only if the information is not prejudicial to the establishment. As indicated in respect of the replies to question 33 (4), the question of how to deal with relevant information that may be prejudicial to the undertaking is a difficult one and the competent Conference Committee may wish to give consideration to whether a reservation should be included in the proposed instruments in regard to such information.

Notification of the Competent Public Authority

(1) Should the instrument(s) provide that when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he should notify the competent public authority thereof as early as possible, giving all relevant information, including a written statement of the reasons for the terminations, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out?

Qu. 35

(2) *Should the instrument(s) provide that, where appropriate, the competent public authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated?*

(3) *Should the instrument(s) provide that the employer should notify the competent public authority of the terminations referred to in paragraph (1) a specified minimum period of time before carrying out the terminations, such period to be determined by national laws or regulations?*

(4) *Should the instrument(s) provide that national laws or regulations may limit the applicability of paragraph (1) to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce?*

Paragraph (1).

Total number of replies: 50.

Affirmative: 41. Austria, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Malta, Mexico, Morocco, Netherlands, Norway, Pakistan, Poland, Romania, Sierra Leone*, Singapore, Spain*, Suriname, Swaziland, Sweden*, Trinidad and Tobago*, Tunisia¹, USSR*, United Kingdom*, Yugoslavia.

Negative: 2. New Zealand², Nigeria*.

Other: 7. Colombia*, Denmark¹, Madagascar*, Philippines*, Switzerland*, United States*, Uruguay*.

Paragraph (2).

Total number of replies: 50.

Affirmative: 43. Austria, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada*, Colombia, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland*, German Democratic Republic, Federal Republic of Germany, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Malta, Mexico, Morocco, Netherlands, Nigeria, Norway, Pakistan, Poland, Romania, Sierra Leone*, Singapore, Spain, Suriname, Swaziland, Sweden*, Trinidad and Tobago, Tunisia¹, USSR*, United Kingdom*, Uruguay, Yugoslavia.

Negative: 1. New Zealand².

Other: 6. Denmark¹, France*, Madagascar*, Philippines*, Switzerland*, United States*.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

*Paragraph (3).**Total number of replies: 50.*

Affirmative: 42. Austria, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Cyprus, Czechoslovakia, Egypt, Ethiopia, Finland, France*, German Democratic Republic, Federal Republic of Germany, Guyana, Honduras*, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, Netherlands, Norway, Pakistan, Poland, Romania, Sierra Leone*, Singapore, Spain, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR, United Kingdom, Yugoslavia.

Negative: 4. New Zealand², Nigeria, Switzerland*, Uruguay.

Other: 4. Denmark¹, Madagascar*, Philippines*, United States*.

*Paragraph (4).**Total number of replies: 49.*

Affirmative: 29. Austria*, Bahrain*, Belgium, United Republic of Cameroon, Canada, Colombia, Egypt, Ethiopia, Finland, Federal Republic of Germany, Honduras*, Hungary, India, Kenya, Kuwait*, Malta, Morocco, Netherlands, Norway, Pakistan, Poland, Romania, Singapore, Suriname, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, United Kingdom.

Negative: 12. Byelorussian SSR*, Cuba, Cyprus*, Czechoslovakia*, German Democratic Republic, Guyana*, Mexico*, New Zealand², Nigeria*, Spain*, USSR*, Uruguay.

Other: 8. Botswana*, Denmark¹, France*, Madagascar*, Philippines*, Sierra Leone*, United States*, Yugoslavia*.

Austria. Yes. Indications of minimum numbers (e.g. 5 per cent of the workforce) might be included in a Recommendation.

Bahrain. (1)-(3) Yes.

(4) Yes, this should be left to the discretion of each member State.

Botswana. (1) The information will be supplied to the competent public authority so that advice, if any, can be supplied to the parties concerned at the right time.

(2) Yes; as a third party, the competent public authority should assist workers and employers to arrive at solutions through mediation and conciliation.

(3) Yes, in as far as it is felt that the competent public authority may render assistance in the form of advice.

(4) National laws and regulations may generally limit the number of terminations because industries or undertakings have problems of varying degrees. It must be left to the parties concerned to set the limits.

Byelorussian SSR. (1)-(3) Yes.

(4) The applicability of the provision should not be limited as regards the number of workers affected.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

Canada. (1), (3) and (4) Yes.

(2) Yes, provided the phrase "where appropriate" is maintained. There may well be situations when the parties are perfectly capable of resolving the matter unaided. Involvement of the competent authority might in fact be interference and detrimental to the process. On the other hand, there are often situations when, as in other industrial relations, third-party assistance is helpful.

Colombia. (1) The Recommendation should provide that when the employer decides to terminate the employment relation for reasons of an economic, technological, structural or similar nature he should notify the competent authority thereof.

(2)-(4) Yes.

Cuba. (1)-(3) Yes.

(4) No.

Cyprus. (1) and (3) Yes.

(2) Yes, in the Recommendation.

(4) No. The employer should notify the appropriate authority of any proposed redundancy, irrespective of the number of persons involved, by giving as much advance notice as practicable.

Czechoslovakia. (1)-(3) Yes.

(4) No. See reply to question 33, paragraph (3).

Finland. (1), (3) and (4) Yes.

(2) Yes, provided that this task may be given to the labour force authorities in accordance with national practice.

France. (1) Yes.

(2) The instrument should provide that the competent authority may assist the parties in seeking solutions to the problems raised by the terminations. This should be a possibility, at the request of the interested parties, if the authorities consider it to be useful, and not an obligation.

(3) The Government is in favour of this provision. The minimum period of time before carrying out the terminations should be fixed by national legislation. Undertakings subject to court proceedings regarding liquidation of debt and winding up should be excluded.

(4) The instrument might include a provision of this nature.

Guyana. (1) and (3) Yes.

(4) No, there should be no limitation.

Honduras. (1) and (2) Yes.

(3) Yes, but this period should not be less than that provided by national law as a period of notice.

(4) See reply to question 33, paragraph (3).

Kuwait. (1)-(3) Yes.

(4) The smallest number possible.

Madagascar. The instruments should provide that an employer who contemplates terminations for these reasons should, beforehand, request the authorisation of the competent public authority, furnishing this authority with all information liable to clarify the situation of the undertaking.

Mexico. (1) and (2) Yes.

(3) Yes. This should be included in a Recommendation.

(4) No. The procedure should not be subject to a given number or percentage of the workforce.

Nigeria. (1) No. Such matters are best left to the two contractual parties.

(2) Yes.

(3) and (4) No.

Philippines. (1) All parties concerned, especially the government authorities, should be notified of any intended termination on the grounds mentioned before such action is effected.

(2) The Government believes that public authorities have the duty to assist the parties. It can call the parties concerned to a tripartite consultation, where they could agree on some measures that will help solve the problem.

(3) What is an appropriate notice period should be left to the determination of the Government after having consulted employers' and workers' representatives.

(4) The extent of the application of the measure herein contemplated should be left to the determination of the Government through appropriate legislation.

Sierra Leone. Yes, where such termination is of such a magnitude as to affect the national economy.

Spain. (1) Yes. While it is not desirable to provide for excessive interventionism by the administration in labour relations, it is not desirable either to exclude this totally, in particular in case of collective dismissals.

(2) and (3) Yes.

(4) Notification should be made in all cases, whatever the number of workers affected. The numbers affected may be taken into account in deciding on the extent of intervention by the public authorities.

Sweden. Yes. The assistance rendered to the parties by the public authority should focus on the problems connected with the workers' efforts to obtain new employment.

Switzerland. (1) National labour legislation does not oblige employers to inform public authorities before terminating contracts of employment for the reasons mentioned. However, an ordinance on labour-market statistics obliges employers to inform the authorities, but only in case of terminations based on economic reasons which have already been notified to workers. Establishments employing five workers or less are not subject to this obligation. Public authorities may play the role of mediator, but this is not expressly provided for by law. They intervene particularly to facilitate placement of dismissed persons.

(3) No, for the reasons mentioned above.

Trinidad and Tobago. (1) Yes, the practice should be encouraged.

(2)-(4) Yes.

USSR. In Russian, the term "competent state body" would be more correct.

(1)-(3) Yes.

(4) The applicability of the provision should not be limited as regards the numbers of workers affected.

United Kingdom. (1) Yes. The employer should notify the competent public authority in writing of any projected collective redundancies. Such notification should contain all relevant information concerning the projected collective redundancies and the consultations with workers' representatives, and particularly the reasons for the redundancies, the number of workers to be made redundant, the number of workers normally employed and the period over which the redundancies are to be effected.

(2) Yes. The competent public authority should, as appropriate, assist in seeking solutions to the problems caused by the projected redundancies.

(3) and (4) Yes.

United States. The Government has no objection to a Recommendation which includes provisions for advance notification to public authorities of "collective dismissals". A voluntary programme of this nature is being administered by United States employment

services, but major difficulties remain as regards obtaining information far enough in advance to assist the parties. Of course, public authorities offer assistance to terminated workers in such cases, but do not routinely involve themselves in the discussions between the parties as to how to minimise workforce reductions or the consequent adverse impact. Generally, the public authorities are informed of, or learn about, relatively large workforce reductions of larger employers. The Government would add a provision calling for employer and worker organisation assistance in locating jobs in other enterprises.

Uruguay. (1) This provision can be accepted only if it is not given compulsory character. The intervention of the State, requested by a party, can assist in the search for solutions favourable to the two parties to the employment relation.

(2) Yes.

(3) and (4) No.

Yugoslavia. Yes, with a reservation regarding paragraph (4).

Paragraph (1)

As the great majority of governments replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 21 (1)*).

The proposal of one government that the prior authorisation of the competent public authorities should be required for such termination of employment has not been retained, for the reasons mentioned in the commentary on the replies to question 26 (2).

Paragraph (2)

As the great majority of governments replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 21 (3)*).

Several governments considered that the competent public authority should not be obliged to assist the parties in all cases but should retain discretion to assist the parties, on request, where they consider it to be useful. It would seem that the words “where appropriate” provide governments with sufficient discretion in this respect. Another government expressed the view that the assistance of the public authority should focus on the problems related to obtaining new employment. The expression “where appropriate” would seem to allow governments to limit the provision of assistance in this way. With regard to the proposal of one government that the employer and the workers’ organisations concerned should assist the workers to find new jobs, see under question 40.

Paragraph (3)

As the great majority of governments replied to this question in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 21 (4)*).

One government expressed the view that the period of time referred to should not be less than the period of notice to which the worker concerned is entitled. It has been thought preferable to keep these two concepts separate.

Another government proposed that undertakings that are subject to court proceedings regarding liquidation of debt or winding up should be excluded from this obligation. Attention is called in this connection to the possibilities of exclusions under Point 6 (4).

Paragraph (4)

While a number of governments considered that the obligation to notify the competent public authority should apply irrespective of the number of workers whose termination of employment is contemplated, a significant majority of governments replied to this question in the affirmative. The Proposed Conclusions have been worded accordingly (*Point 21 (2)*).

One government expressed the view that this obligation should apply only when the number of terminations of employment is of a magnitude to affect the national economy. The Office has felt that such a qualification would excessively limit the obligation of notification and that it would be preferable to leave it to member States to determine the minimum number of contemplated terminations necessary for the notification requirements to apply.

Measures to Avert or Minimise Terminations

Should the instrument(s) provide that the measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature, should include restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work? **Qu. 36**

Total number of replies: 50.

Affirmative: 34. Austria*, Bahrain, Botswana, United Republic of Cameroon, Canada, Colombia*, Cuba, Cyprus*, Czechoslovakia*, Egypt, Ethiopia, Finland, Guyana, Honduras, Hungary, India, Kenya, Kuwait, Malta, Morocco, Nigeria*, Norway*, Pakistan*, Poland, Romania, Sierra Leone*, Singapore*, Spain*, Suriname, Swaziland, Trinidad and Tobago, Tunisia¹, United States*, Yugoslavia.

Negative: 6. Federal Republic of Germany*, Mexico*, Netherlands*, New Zealand², United Kingdom*, Uruguay*.

Other: 10. Belgium*, Byelorussian SSR*, Denmark¹, France*, German Democratic Republic*, Madagascar*, Philippines*, Sweden*, Switzerland*, USSR*.

Austria. Yes. Provision should be made for participation rights for the workers' representatives. In particular, short-time working should not be decided unilaterally by the employer.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

Belgium. The measures envisaged by this question are those generally stipulated by collective agreements on stability of employment. Such agreements have been concluded in Belgium in a certain number of branches of activity or undertakings, containing more or less developed provisions to guarantee employment. It is inappropriate to provide for obligatory general provisions on this matter, having regard to these practices and the diversity of situations and possibilities as regards branches of activity and undertakings.

Byelorussian SSR. The measures referred to should avoid infringing the workers' rights and making their social and economic situation worse. In particular it should be provided that reduction of normal hours of work must not result in a reduction of the workers' previous income.

Colombia. Yes, provided that in all cases the situation is submitted beforehand to study by the appropriate competent authority.

Cyprus. Yes, in the Recommendation.

Czechoslovakia. Yes, provided that early retirement is taken voluntarily, without any constraint being placed upon the worker.

France. The provision included in this question is much too constraining. The instrument should be limited to providing that measures may be considered with a view to averting or minimising terminations of employment for economic reasons. The measures enumerated should only be examples of possible measures, without being given either an obligatory or an exhaustive character.

German Democratic Republic. There is no objection to such measures as training, retraining and restriction of overtime. The introduction of measures that are not such as to guarantee the right to work should, however, be avoided.

Federal Republic of Germany. There should be no list of possible measures for minimising terminations of employment. The actual conditions in each undertaking will determine what measures are most suitable and the workers' representatives will be aware of these measures and attempt to have them carried out. Undertakings will undoubtedly restrict hiring with a view to avoiding terminations, provided that vacancies can be filled from within the undertaking; however, the instrument should avoid mentioning "restriction of hiring" in the interests of unemployed persons and the unimpeded operation of employment services. The Government also has reservations regarding the explicit suggestion that older workers should be terminated; such action, which is unfortunately already being taken, should not be allowed to become more widespread.

Madagascar. The instruments should provide that the measures which should be considered with a view to averting or minimising terminations of employment for the reasons mentioned should include prohibition of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, early retirement with appropriate income protection, prohibition of overtime and reduction of normal hours of work.

Mexico. No. The measures to be adopted for settling these disputes should not be predetermined, except that they should be appropriate to the concrete circumstances of the case without affecting the guarantees in favour of the workers in labour law.

Netherlands. It would be advisable if the instrument did not contain statements about the measures that could perhaps avert terminations of employment. This should be decided in each individual case in the consultations to be conducted.

Nigeria. Yes, as much as possible.

Norway. Yes, but provisions of this type should be included in a possible Recommendation. The Norwegian Employers' Confederation is of the opinion that such provisions should not be included in the instruments.

Pakistan. This is desirable, but should not be obligatory.

Philippines. The Government believes that all schemes which will help avert or minimise the adverse effects of the changes contemplated herein should be carefully studied and considered.

Sierra Leone. Yes, provided they are undertaken after due consultation with the workers' representatives.

Singapore. Yes, but consideration should be given to the stage of social and economic development of the member State.

Spain. Yes. The measures referred to seem appropriate to the end pursued, although certain measures would be more advisable than others due to the lower social cost involved.

Sweden. It is natural that measures of the kind referred to here should be contemplated with a view to avoiding or minimising workforce reductions, but any provisions on this subject should be confined to a Recommendation.

Switzerland. It is not possible to reply globally in respect of the large number of matters referred to. Certain are left to the social partners, others may be encouraged by the State. Draft legislation on compulsory unemployment insurance includes a series of preventive measures as instruments of employment policy.

USSR. The measures referred to should avoid infringing the workers' rights and making their social and economic situation worse. In particular, it should be provided that reduction in normal hours of work must not result in reduction in the workers' previous income. The list should not be exhaustive since national legislation could provide for other measures also aimed at averting or minimising terminations on the grounds referred to here, for example placement in other undertakings. To this end, "etc." should be added at the end of the list. Subject to these corrections, the Government has no objections to the measures referred to.

United Kingdom. No. Although such matters are likely to be covered in the consultations referred to in question 33 (1), the details of the discussion should be left to negotiation between employers' and workers' representatives; this is not an appropriate matter to set out specifically in this instrument.

United States. Yes. Such measures are usually taken where the employer continues in business.

Uruguay. It is not appropriate to enumerate the existing procedures for averting terminations since this may limit the search for solutions.

Several governments opposed inclusion in the proposed instrument of a reference to the kinds of measures that should be considered with a view to averting or minimising the terminations referred to. As a substantial majority of governments replied in the affirmative, the Proposed Conclusions have been worded accordingly (*Point 36*). However, as several governments expressed the view that consideration of such measures should not be obligatory or that the measures enumerated should be measures that might possibly be taken into account, among others, with a view to averting or minimising terminations, the wording of this Point has been modified to indicate that the measures enumerated are measures that "might" be taken into consideration. When considering these measures or others, the parties may take into account the stage of economic and social development of the country, as suggested by one government; explicit reference to this does not seem necessary.

Several governments considered that before the measures referred to are taken, the matter should first be submitted to the competent public authorities for study or the workers' representatives should first be consulted. However, this Point must

be read in conjunction with Points 20 and 21 ; normally the parties would discuss possible measures for averting or minimising terminations of employment in the course of the procedure of consultation, while the matter might be considered by the competent public authorities following notification of the terminations contemplated.

Several governments objected to the inclusion or drafting of one or more kinds of measures referred to in this Point. One government suggested that hiring and overtime should be prohibited (instead of being restricted or reduced) ; another felt that there should be no reference to restriction of hiring, due to the problems of the unemployed ; a further government emphasised the importance of ensuring that early retirement is voluntary ; while another government stressed that any reduction in normal hours should not entail a reduction of income. The Office has given due consideration to these points of view. It has considered that it would be appropriate to modify the wording of this Point to make clear that it is "voluntary" early retirement that is envisaged. On the other hand, it has not considered it appropriate to delete the reference to other measures since these are the measures that are typically considered in this context. The references to "restriction" of hiring and "reduction" of overtime have been retained to allow some flexibility on these matters in accordance with particular circumstances. With respect to the matter of income protection in the case of a reduction in normal hours of work, reference is made to question 37.

Qu. 37 *Should the instrument(s) provide that where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment, consideration should be given to payment of part of the wages for the normal hours not worked and to the possibility of partial reimbursement of such payments from public funds such as unemployment insurance funds?*

Total number of replies: 50.

Affirmative: 28. Austria, Bahrain*, Belgium*, Byelorussian SSR*, Canada, Cuba, Cyprus*, Czechoslovakia*, Egypt, Finland, France, Guyana, Honduras, Hungary, Kenya*, Kuwait, Madagascar, Mexico*, Morocco, Nigeria*, Norway¹, Sierra Leone¹, Singapore¹, Spain*, Suriname, USSR*, Uruguay, Yugoslavia*.

Negative: 6. United Republic of Cameroon*, Malta*, New Zealand², Poland, Romania, United Kingdom*.

Other: 16. Botswana*, Colombia*, Denmark³, Ethiopia*, German Democratic Republic*, Federal Republic of Germany*, India*, Netherlands*, Pakistan*, Philippines*, Swaziland*, Sweden¹, Switzerland*, Trinidad and Tobago*, Tunisia*, United States*.

* Substance of observations reproduced below.

¹ See under question 36.

² See under question 30.

³ See under question 32.

Bahrain. Yes, provided these measures are practicable under local conditions.

Belgium. Yes, but this raises the problem of non-manual workers becoming unemployed for economic reasons, which is not at present provided for in national legislation.

Botswana. The system suggested here would minimise terminations of employment where there are adequate social security arrangements, i.e. unemployment benefits.

Byelorussian SSR. Yes, subject to the reservation mentioned in the reply to question 36, that any measures aimed at averting or minimising terminations on the grounds referred to must not infringe the workers' rights or worsen their social and economic situation.

United Republic of Cameroon. No. National structures do not yet permit this.

Colombia. The situation referred to can only arise following prior authorisation by the competent authority.

Cyprus. Yes, in the Recommendation.

Czechoslovakia. Yes, but payment of all or part of the wages for normal hours not worked should be envisaged.

Ethiopia. This should be determined by national legislation as in question 6.

German Democratic Republic. Although, for the reasons given in the reply to question 36, the reduction of normal hours of work is not regarded as an appropriate solution for avoiding or limiting termination of employment, it is recommended that the instrument should spell out the obligation to reimburse the workers for the wages lost in the event of a reduction in their normal hours of work.

Federal Republic of Germany. Having regard to national law on the subject, there are no objections to the inclusion of a provision to this effect.

India. This may be possible only in countries where unemployment insurance schemes are already in operation. The possibility of setting up separate funds for this purpose, with contributions from government, workers and employers, could, however, be explored. Alternatively, the question of reimbursement may be left to be determined by methods of implementation contemplated in question 6.

Kenya. Yes, where such schemes exist.

Malta. The remedies available should be left open and should not be specified in the proposed instrument, so as to allow for flexibility when dealing with the particular situations that may arise.

Mexico. Yes, but this should be included in a Recommendation. Since this provision would require governments to set up a reserve fund for such cases, inclusion in a Convention would preclude ratification by developing countries.

Netherlands. The reduction of normal hours of work may in certain cases perhaps avert the danger of the termination of employment. An unemployment benefit is paid in the Netherlands for the hours not worked. It would, however, be incorrect to regard the reduction of normal hours of work as the only or one of the major methods of averting terminations.

Nigeria. Yes, where such unemployment insurance funds are available.

Pakistan. This does not seem feasible in developing countries.

Philippines. The proposal can be carefully considered with a view to possible adoption.

Spain. Yes. Partial unemployment should be covered either by agreement between the employer and an insurance company or by unemployment insurance; if the latter, to avoid possibilities of fraud there should be control by the public authorities.

Swaziland. There are no such schemes in developing countries and are not likely to be for some time as they are considered very expensive.

Switzerland. According to the transitional régime at present in force, unemployment benefits are also paid in case of partial unemployment, that is, when the normal hours of work are temporarily reduced in order to avert or limit dismissals. The draft legislation on compulsory unemployment insurance provides also for payment of benefits in case of reduction of hours of work, subject to certain conditions.

Trinidad and Tobago. This is desirable but is not practical for many countries.

Tunisia. It is not appropriate for public funds or unemployment funds to assume the burden of paying part of wages for normal hours not worked. All solutions of facility that may delay action which although more radical is more effective and durable should be avoided.

USSR. Yes, subject to the reservation made in the reply to question 36, that any measures aimed at averting or minimising terminations for the reasons mentioned must not infringe the workers' rights or worsen their social and economic situation.

United Kingdom. No. This should not be specified in the instrument. The introduction of short-time working is likely to be one of the matters discussed in the consultations referred to in question 33 (1). Partial reimbursement by the government of guaranteed payments during short-time working is a matter best reserved for government decision in the light of all the circumstances, and should not be specified in this instrument.

United States. Yes, provided that the provision is reworded to clarify the very limited applicability of "work-sharing" to correction of longer-term problems of the establishments or of the economy as a whole. The public subsidy may maintain inefficient operations and that may both disrupt employment opportunities of other groups and reduce future employment opportunities for the workers involved.

Yugoslavia. Yes. In addition, the possibility should be considered of establishing a fund for retraining of workers aimed at adapting them to technological and structural changes and new job creation.

A number of governments called attention to the fact that the measures envisaged by this question may not be feasible in developing countries or in countries in which social security schemes are inexistent. Several other governments considered that it is inappropriate to mention these measures in the proposed instruments. Another government emphasised that it should not be implied that reduction of hours of work is the most important means of averting workforce reductions. Several other governments emphasised that public subsidies for short-time working as a means of averting workforce reductions are inapplicable to long-term problems and should not be used to maintain in operation inefficient undertakings. Several countries expressed the view that such measures should not infringe workers' rights or worsen their social and economic situation.

As the majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 37*). The wording of this Point has, however, been modified to make clear that the measures referred to are relevant particularly to situations of temporary economic difficulties.

There is no implication in including this Point in the Proposed Conclusions that these measures are the most important kind of measures that might be taken to avert or minimise workforce reductions nor that they should be taken in any particular situation; it refers to one of the several possible measures that might be considered to this end which have been mentioned in Point 36.

As this Point, contained in the Proposed Conclusions with a view to a Recommendation, merely calls for consideration of the measures referred to and is

therefore quite flexible in drafting, it does not seem to be necessary to include further reservations with regard to difficulties that might be met in developing countries or countries not having social security schemes.

The suggestion that it should be guaranteed that the measures referred to do not infringe the workers' rights or worsen their social and economic situation has not been retained; these measures are in practice often deemed to be measures of last resort, when the only alternative to a reduction in normal hours of work is termination of the employment of the workers concerned. In such circumstances the workers concerned may prefer partial compensation for loss of wages for the normal hours not worked to loss of employment. These measures would normally be decided after consultation with the workers' representatives concerned, pursuant to Point 20, as suggested by one government, or based on agreement between the parties, thus providing certain safeguards for the workers in question.

One government referred to the possibility of establishing a fund for the retraining of workers with a view to adapting to technological or structural change. The matter of retraining is dealt with in Point 22, in the Proposed Conclusions with a view to a Convention, and in Point 40, in the Proposed Conclusions with a view to a Recommendation.

Criteria of Selection for Termination

(1) Should the instrument(s) provide that the selection of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to precise criteria, which should be established wherever possible in advance, and which give due weight both to the interest of the undertaking, establishment or service and to the interests of the workers?

Qu. 38

(2) Should the instrument(s) provide that these criteria may include—

- (a) need for the efficient operation of the undertaking, establishment or service;*
- (b) ability, experience, skill and occupational qualifications of individual workers;*
- (c) length of service;*
- (d) age;*
- (e) family situation;*
- (f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to be determined by the methods of implementation referred to in question 6?*

Total number of replies: 49.

Affirmative: 33. Austria, Bahrain, Belgium, Botswana, Byelorussian SSR*, United Republic of Cameroon, Cuba, Cyprus*, Czechoslovakia*, Egypt, Guyana,*

* Substance of observations reproduced below.

Honduras, Hungary, India, Kenya, Kuwait, Madagascar*, Mexico, Morocco, Nigeria, Norway, Pakistan, Poland, Sierra Leone, Singapore, Suriname*, Swaziland, Sweden, Trinidad and Tobago, Tunisia¹, USSR*, Uruguay*, Yugoslavia.

Negative: 4. Canada*, Federal Republic of Germany*, New Zealand², United Kingdom*.

Other: 12. Colombia*, Denmark¹, Ethiopia*, Finland*, France*, German Democratic Republic*, Malta*, Netherlands*, Philippines*, Spain*, Switzerland*, United States*.

Belgium. (1) Yes, these criteria are determined by the works council.

(2) These are generally the criteria used by the works council.

Byelorussian SSR. Yes, provided that the necessity of maintaining the incomes of the workers and keeping in mind their interests is provided for and included in the Recommendation; that the obligation to adopt firmly established criteria in advance is more clearly defined; that "family situation" is expanded to "family and material situation"; and that preference can be given to certain categories of workers.

Canada. (1) No. In several situations, particularly where a "buy-out" approach to workforce reductions has been used, employees have been able individually to choose their option (within limits). While well defined criteria may be helpful in certain circumstances, in others greater flexibility may well be warranted.

(2) Clause (e) (family situation) should be deleted. If implemented, this could serve to discriminate against women workers either directly by being chosen for workforce reductions or indirectly if their employment affects the status of their spouses' employment in a workforce reduction situation. Consideration should also be given to deleting clause (d) (age), which could give rise to adverse discrimination vis-à-vis older workers. It may be more appropriate to leave the establishment of criteria to national custom and practice.

Colombia. As decided by the competent authority.

Cyprus. (1) Yes, in the Recommendation. The Pancyprian Federation of Labour and the Cyprus Workers' Confederation suggest inserting the words "in consultation with workers' representatives" after the words "in advance".

(2) Yes, in the Recommendation.

Czechoslovakia. Yes, but state of health should also be included among the criteria.

Ethiopia. (1) Yes.

(2) (a) to (c) and (f) Yes.

(d) and (e) No.

Finland. (1) Yes.

(2) Factors relating to the worker's length of service and his social situation are also essential from the viewpoint of protection of security of employment.

France. (1) The instrument might include a provision of this nature. In France the general rules on this question are determined by works rules or by collective agreement.

(2) The criteria mentioned are widely used but are neither obligatory nor an exhaustive enumeration. The order and importance of the different criteria should be determined in a flexible manner (by the methods mentioned in question 6, but also, in the absence of collective agreement, by works rules established by the employer after hearing the opinion of the works council or staff delegates, if such exist).

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

German Democratic Republic. In the event that countries are unable to guarantee the workers concerned employment corresponding to their knowledge and skills, it would seem justified to establish criteria for the selection of workers whose employment is to be terminated. In any case, greater prominence should be given to social criteria, since the loss of employment has particularly severe consequences for certain groups of workers. These groups include the disabled, older workers, workers with large families and young workers. An additional safeguard for such persons might consist in permitting termination of employment only with the agreement of the competent authorities, subject to the guarantee of further employment in another suitable job.

Federal Republic of Germany. No. This provision is too strongly worded and can lead to injustice in individual cases. A more general provision is preferable, under which an employer must take sufficient account of social criteria in selecting workers whose employment is to be terminated, unless retention of certain workers in employment is incompatible with justified operational requirements and hence with selection on the basis of social criteria. If a list of criteria were to be included in the instrument(s) the following new clause should be inserted after clause (e): "the prospect of finding other suitable employment", since not all workers are equally easy to re-employ. Women with family responsibilities, for instance, have more difficulty in finding new jobs than others, both because of their dual role (which makes it impossible for them to live far from their place of employment) and because of their regional immobility. It would appear necessary to take this factor into account in the event of dismissals.

Madagascar. (1) Yes, taking into account the replies to questions 33 and 35.

(2) Yes, but these criteria should be used after the authorisation by the competent public authority.

Malta. (1) When redundancies are effected, those workers last employed should be discharged first.

(2) The criteria mentioned need not be specified in the proposed instrument.

Netherlands. It is largely a matter for workers and employers to come to agreement on this. The obligations on the part of the Government should be limited to establishing those criteria which may not be used (such as sex). One of these criteria is "family situation" (e). It is regrettable that this form of indirect discrimination on the grounds of sex has been included shortly after the Conclusions adopted by the 66th (1980) Session of the Conference in which the following was stated on the topic of an instrument for workers with family responsibilities: "The proposed instrument should provide that marital status, family situation or family responsibilities should not constitute valid reasons for refusal or termination of employment".

Philippines. (1) The Government agrees that there should be some pre-set criteria for selection of workers whose employment should be terminated. In the establishment of such criteria, the views of both the employers and the workers should be considered.

(2) The Government believes that the criteria suggested are appropriate.

Spain. (1) The reply to this question will depend on whether primacy is given to the purely economic interest of the undertaking or to the interest of the workers, since these interests are not the same. Both interests should be taken into account as indicated in the question.

(2) These criteria are appropriate. Trade union representation should also be included, since such workers should have the benefit of special protection with a view to guaranteeing the effective exercise of their functions.

Suriname. (1) Yes, to avoid arbitrary decisions.

(2) Yes, but handicapped workers and those who hold trade union office should also be mentioned.

Switzerland. (1) National legislation does not require reasons for dismissals nor does it establish any criteria for carrying them out. Such provisions may be included in collective

agreements alone, which would be one of the methods of implementing the instrument under question 6.

(2) These criteria are not referred to in national legislation, but may be included in contractual provisions.

USSR. In general, yes, with the following reservations: (i) it should be provided that the workers' interests must be taken into account first and foremost and a less categorical wording should be used in respect of the interests of the undertaking, establishment or service, which is the stronger side (e.g. "the interests of the undertaking may also be taken into account in the national legislation"); (ii) the obligation to establish criteria in advance should be defined more exactly and the words "wherever possible" deleted, the criteria should be clearly defined, their definition making it perfectly clear what function they perform and whose interests they protect (as presently worded the criteria of age and family situation can be interpreted as having either a protective or discriminatory character); (iii) the words "family situation" should be expanded to "family and material situation"; and (iv) the instrument should provide for the possibility of establishing in national legislation provisions for certain categories of workers to be given priority for maintenance at work.

United Kingdom. No. This is best left to negotiation between employers' and workers' representatives according to the circumstances of the individual case.

United States. (1) Yes.

(2) (a) to (c) and (f) Yes.

(d) and (e) The Government questions their inclusion, since these criteria are no longer valid in the United States and some other countries.

Uruguay. Yes, on condition that the provision is sufficiently broad. The criteria for selection should be established by national legislation alone.

It appears from the replies of some governments that this matter is left to collective bargaining or works rules in a number of countries and is not felt to be appropriate to legislative enactment. Several other governments, on the other hand, have indicated that these criteria should be laid down by legislation or that the obligations to specify these criteria under the instrument should be reinforced. On further consideration, the Office has concluded that considerable flexibility should be provided for in respect of the matter dealt with in this question and that allowance should be made for countries in which this matter is deemed to be appropriate for determination by the parties through collective bargaining. Accordingly, the subject of this question has been included in the Proposed Conclusions with a view to a Recommendation (*Point 38*).

Several governments have suggested that the wording of this question should be modified to enhance the importance of the social criteria based on the interests of the workers in relation to the criteria based on the interests of the undertaking. The Office has deemed it advisable to leave this question to be considered by the competent Conference Committee.

A number of governments have taken objection to two of the criteria mentioned in paragraph (2), "family situation" and "age". They were of the view that these criteria might authorise discriminatory selection for termination based on sex (permitting termination of women workers with wage-earning husbands before men workers) or on age (permitting selection of older workers before younger). However, the protection against discriminatory termination based on sex, marital status and age in question 13 and Point 9 should indicate that this was

not the interpretation intended to be given to these criteria. As the Office understands these criteria, which were derived from Paragraph 15 of Recommendation No. 119, they are intended to give priority for maintenance in employment to workers with large families ("family situation") and to older workers ("age"). However, as the term "family situation" is unclear, it has been replaced by the words "number of dependants" in Point 38 (1) (e). The term "age" has been retained since, in conjunction with Point 9 (e), it would operate in favour of older workers, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit.

A number of governments proposed the insertion of several additional criteria that might be considered in selecting workers for termination. These include the material situation of the worker, his state of health, his prospects of finding suitable alternative employment and whether he is a handicapped worker or a trade union officer or representative. These suggestions have not been retained, so as not to unduly extend the enumeration of possible criteria for selection, and having regard to (f) ("such other criteria as may be appropriate under national conditions"), which would allow for these other criteria to be taken into account as appropriate.

Priority of Rehiring

(1) Should the instrument(s) provide that workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given priority of rehiring when the employer again hires workers?

Qu. 39

(2) Should the instrument(s) provide that such priority of rehiring may be limited to a specified period of time?

(3) Should the instrument(s) provide that the question of retention of seniority rights in case of rehiring should be determined in accordance with the methods of implementation referred to in question 6?

(4) Should the instrument(s) provide that rehiring should be effected as far as possible on the basis of the principles set out in question 38?

(5) Should the instrument(s) provide that the rate of wages of rehired workers should not be adversely affected as a result of the interruption of their employment; this could be subject, however, to differences between their previous occupation and the occupation in which they are rehired and to any intervening changes in the structure and level of wages in the undertaking, establishment or service?

Total number of replies: 50.

Affirmative: 30. Bahrain, Byelorussian SSR, United Republic of Cameroon*, Colombia*, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland*, Guyana,*

* Substance of observations reproduced below.

Honduras, Hungary, India, Kenya, Kuwait, Malta, Mexico*, Morocco, Nigeria, Norway*, Pakistan*, Romania, Sierra Leone, Swaziland, Trinidad and Tobago, Tunisia¹, USSR*, United States, Yugoslavia.

Negative: 2. New Zealand², United Kingdom*.

Other: 18. Austria*, Belgium*, Botswana*, Canada*, Denmark¹, France*, German Democratic Republic*, Federal Republic of Germany*, Madagascar*, Netherlands*, Philippines*, Poland*, Singapore*, Spain*, Suriname*, Sweden*, Switzerland*, Uruguay*.

Austria. Recommendations of this kind could assist the labour market administration in its efforts to place workers. In order to ensure that the proposed measures are effective, however, penalties would need to be provided for in the event of non-compliance.

Belgium. (1) National legislation contains no obligation on this subject; but general criteria to be followed in case of rehiring are fixed by the works council. Priority of rehiring may be included in a Recommendation, and in this regard the replies to paragraphs (2) to (5) are positive.

Botswana. (1) Yes, priority should be determined by other factors such as qualification.

(2), (4) and (5) Yes.

(3) The question of retention of seniority rights in case of rehiring should be left to collective agreements, arbitration awards, etc.

Byelorussian SSR. Yes, in general, provided that in paragraph (2) there is no time limit, and in paragraph (4) the words "as far as possible" are deleted.

United Republic of Cameroon. (1) to (3) Yes.

(4) Yes, subject to the provisions in question 6.

Canada. (1) Yes, but depending on the means of workforce reductions. Employees who have opted for early retirement or a "buy-out" scheme can hardly have priority for recall. Otherwise, former employees should have priority.

(2) and (3) Yes.

(4) Yes, provided that age and family situation are not retained as criteria for either termination or rehiring.

(5) Yes, with the stated qualifications.

Colombia. Yes. By decision of the competent authority and under its supervision.

Cyprus. (1) and (2) Yes.

(3) to (5) Yes, in the Recommendation.

Finland. (1) and (2) Yes.

(3) Yes, in the case of rehiring, it is essential that the worker be entitled to all his seniority rights.

(4) Yes, but see reply to question 38 (2).

(5) Yes, in principle.

France. (1) Such a provision might be provided for, but it should be specified that the worker whose employment is terminated due to an economic reason must, to benefit from this priority of rehiring, manifest the desire to so benefit within a certain period of time after leaving the undertaking.

(2) Yes.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30.

(3) to (5) The Government is not in favour of provisions that are too specific and constraining.

German Democratic Republic. (1) Yes. Such provision should be made in countries which are unable to guarantee the right to work.

(2) The instrument should not provide that priority of rehiring may be limited to a specified period of time.

(3) and (5) Yes.

(4) The obligation to observe certain criteria when rehiring would appear appropriate only if priority is given to social considerations.

Federal Republic of Germany. Priority of rehiring should be for the parties to the employment contract or collective agreement to determine. Entitlement to such priority would conflict with the interests of unemployed persons not so entitled. Under national legislation the labour authorities might propose more suitable applicants for the vacancies to be filled.

Madagascar. (1) Yes. The Government's proposal to prohibit hiring, in its reply to question 36, is intended to ensure that the workers concerned benefit from a priority of rehiring.

(2) No. The instruments should provide for a priority of rehiring as long as the workers concerned remain unemployed.

(3) to (5) Yes.

Mexico. (1) to (3) and (5) Yes.

(4) Yes, except for point (1).

Netherlands. There are objections to the provisions put forward in this question. Although generally speaking it is a good thing that special measures be taken for the benefit of the long-term unemployed to ensure that they are rehired, the method of absolute priority of rehiring in all cases when the employer again hires workers would not seem to be the most obvious answer.

Norway. (1) to (4) Yes.

(5) Yes, but this should be included in a Recommendation. The Norwegian Employers' Confederation (NAF) holds the view that this item should not be included in any instrument whatsoever.

Pakistan. Yes, if the rehiring is within a specified period.

Philippines. (1) The Government agrees that workers terminated for reasons herein contemplated should enjoy priority in rehiring, but suggests that some criteria should also be established.

(2) and (3) The Government believes that the details with respect to the implementation of the rehiring priority scheme should be left to the determination of each particular country.

(4) The criteria suggested in question 38 may be considered in the priority of rehiring.

(5) The matter may be best left to the determination of each country, having regard to national conditions.

Poland. (1) and (3) to (5) Yes.

(2) No.

Singapore. Priority of rehiring of employees whose employment has been terminated would only be needed if there are no jobs available to those terminated. The basis of rehiring should be left to negotiations between the employer and workers concerned.

Spain. (1) and (2) Yes.

(3) This question should not be stipulated in the instrument, but should be left to each country to determine in accordance with national methods.

(4) The same criteria should apply to re-employment as to selection of the workers affected.

(5) This question should be resolved by each member State. In principle, the worker should maintain the same rights, since the reasons for interruption of the employment relationship were involuntary. If it is vacant, the worker should have priority for re-employment in a job like the one he occupied or in a similar job; this applies also to other conditions of work, such as the place of work, time, etc.

Suriname. (1) and (2) Yes.

(3) No.

(4) This seems to be the most logical way.

(5) No. The wage rate of rehired workers could be subject to so many factors, as mentioned, that it would be meaningless to include this provision.

Sweden. (1) to (4) Yes.

(5) The question of rates of pay on re-engagement should be settled with due regard for the content of the relevant collective agreements or else by agreement between employer and workers.

Switzerland. Although no compulsory provision exists in national legislation on this matter, the competent authority may intervene at the time of re-employment if the employer wishes to recruit foreign workers, under a Federal Ordinance of 17 October 1979. This is a question that should be governed by the social partners.

USSR. Yes, in general, provided that in paragraph (2) there is no time limit and in paragraph (4) the words "as far as possible" are deleted.

United Kingdom. No. Statutory provision for rehiring would be a completely new departure for legislation in the United Kingdom. It has always been one of the aims of the statutory redundancy payments scheme that workers displaced by technological change should be released into alternative employment. This result would not be secured if workers were encouraged to remain unemployed until their old jobs materialised again, or if other employers became reluctant to take on such workers, fearing to lose them as soon as they had a chance to return to their earlier employment. A redundancy payment is intended to compensate an employee for the problems of displacement and relocation, and it would seem illogical to require an employer both to pay such compensation and to offer re-employment if the chance arose.

Uruguay. (1) and (2) No. The employer should enjoy the widest freedom to contract with the personnel.

(3) and (5) Yes.

(4) Yes, but only to the extent possible.

A number of governments have expressed the view that the question of priority of rehiring, or certain aspects thereof, should be left to collective bargaining or arbitration awards or should be dealt with in a Recommendation. Several governments were of the view that this matter was inappropriate for inclusion in an instrument, one government pointing out that guaranteeing entitlement to rehiring might undermine the national policy favouring redeployment of redundant workers.

As a substantial majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 39*). Having regard to the above-mentioned views, this Point has been included in the Proposed Conclusions with a view to a Recommendation, to allow implementation, pursuant to Point 23 thereof, by collective agreements or arbitration awards alone.

Also, the wording of paragraph (1) has been modified to make clear that the entitlement to rehiring is intended to relate to rehiring when the employer again hires workers with comparable qualifications; where workers are replaced because they are made redundant by technological change, the employer would not normally again hire workers with the same qualifications. The new wording of paragraph (1), together with the possibility of limiting this entitlement in time, would tend to avoid extension of this entitlement to cases of change in the structure of the workforce or to declining industries. The suggestion that paragraph (2) be deleted has not been retained, as the majority of governments seem to approve of its inclusion. Moreover, an open-ended entitlement to priority of rehiring might be very difficult for the employer to administer.

Some governments objected to the inclusion in the instruments, or had reservations regarding the wording, of paragraphs (3) to (5). However, as these paragraphs were approved by the majority of governments and as an attempt has been made to draft these paragraphs in a flexible manner, they have been retained in the Proposed Conclusions.

Mitigating the Effects of Terminations

- (1) Should the instrument(s) provide that in the event of terminations of employment for reasons of an economic, technological, structural or similar nature, the employer, the workers' representatives concerned and the competent public authority should actively assist the workers affected in the search for suitable alternative employment and, where appropriate, in obtaining training or retraining to this end?* **Qu. 40**
- (2) Should the instrument(s) provide that the competent public authority should provide such assistance as early as possible after being notified of these terminations?*
- (3) Should the instrument(s) provide that the full utilisation of the appropriate employment agencies and training institutions should be promoted with a view to ensuring that the workers affected are trained for and placed in alternative employment as soon as possible?*
- (4) Should the instrument(s) provide that in this connection regard should be had to the Human Resources Development Convention and Recommendation, 1975?*

Total number of replies: 50.

Affirmative: 33. Austria, Bahrain, Belgium, Botswana*, Byelorussian SSR, United Republic of Cameroon*, Colombia, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland*, Guyana, Honduras*, Hungary, Kuwait, Madagascar*, Mexico*, Morocco, Nigeria*, Pakistan, Poland, Sierra Leone*, Singapore, Spain*,*

* Substance of observations reproduced below.

Suriname*, Swaziland*, Trinidad and Tobago*, Tunisia¹, USSR, United States*, Yugoslavia.

Negative: 3. New Zealand², Norway*, Uruguay*.

Other: 14. Canada*, Denmark¹, France*, German Democratic Republic*, Federal Republic of Germany*, India*, Kenya*, Malta*, Netherlands*, Philippines*, Romania*, Sweden*, Switzerland*, United Kingdom*.

Austria. Yes, on condition that such assistance in the search for alternative employment or in obtaining training or retraining is exclusively the responsibility of the labour market administration.

Botswana. (1) Efforts should be made by all concerned to find alternative employment, training or retraining for the workers concerned.

(2) Yes.

(3) Promotion of employment agencies and training institutions should be coupled with the creation of more job opportunities, otherwise these agencies and institutions will do little to alleviate the situation.

United Republic of Cameroon. (1) to (3) Yes.

(4) Yes, subject to ratification of that Convention.

Canada. (1) Yes, provided that the words "to the extent possible" are inserted.

(2) Yes. The competent authority should provide assistance on request.

(3) and (4) Yes.

Cyprus. Yes, in the Recommendation.

Finland. (1) Yes, in principle; in practice, the possibilities of the employer and the workers' representatives to act in the way referred to are relatively small.

(2) to (4) Yes.

France. (1) The Government is in favour of this provision. However, since the modalities for giving effect to these measures (assistance in finding a job, training, retraining) and those responsible for doing so, vary from country to country, it would be desirable to use rather general wording: "In case of termination of employment ... the competent public authorities, on the request and with the possible collaboration of the employer and/or the workers concerned or their representatives, should actively assist the workers affected...". In this field assistance is essentially within the competence of the public authorities. An obligation may not be imposed unconditionally on the employer or the representatives of the workers concerned, to assist the workers in the search for a new job or to obtain training.

(2) The instrument might provide that the competent public authority should provide such assistance as early as possible, but it must also be emphasised that access to training or retraining must be left to the initiative of those concerned. Mention should be made of the need for information on the possibilities of employment, training and retraining, which is more important and more appropriate.

(3) This provision is not of great practical interest. However, the Government is in favour of this provision to the extent that it involves an encouragement and not a legal obligation.

(4) Yes.

German Democratic Republic. Yes. The responsibility should, however, lie with undertakings in collaboration with the competent authorities.

* Substance of observations reproduced below.

¹ See under question 32.

² See under question 30.

Federal Republic of Germany. The intention to provide for suitable alternative employment is welcomed. It is, however, unclear how the workers' representatives in the undertaking and the employer can take active steps to employ dismissed workers in another undertaking or train or retrain them once they have left the undertaking. The necessary steps should preferably be taken by means appropriate to each country. The obligation to notify the authorities under national law, the offer of free counselling and placement services and the possibilities of promoting vocational training are relevant in this regard.

Honduras. (1) Yes. The State should in these cases formulate policies and take measures to identify and carry out employment creation projects.

(2) to (4) Yes.

India. (1) to (3) Yes, as far as possible. In countries with large-scale unemployment and underemployment, workers affected by termination of employment may have to compete with those already in search of jobs. Various considerations, such as experience, qualifications, age, may be decisive factors in the displaced persons being able to get new jobs. However, such displaced persons do need and should get the assistance contemplated.

(4) Yes.

Kenya. (1) This is desirable except that in developing countries implementation would be difficult due to unemployment and lack of capacity in the employment services.

(2) Yes, subject to the observations made on paragraph (1) above.

(3) Yes, except that developing countries would lack the means and capacity for implementing such training.

(4) Yes.

Madagascar. (1), (3) and (4) Yes.

(2) The instruments should provide that the competent public authority should provide such assistance as early as possible after having authorised these terminations.

Malta. There should be redundancy payments on principle; however, the employers would have to contribute to such payments.

Mexico. Yes, in a Recommendation.

Netherlands. No objection.

Nigeria. (1) Yes, this should normally be the major responsibility of the public authorities in instituting policies with regard to general manpower utilisation strategy.

(2) to (4) Yes.

Norway. The Government is in agreement with the ideas presented here. However, this question falls outside the framework of these instruments and should therefore not be included in them. The Norwegian Employers' Confederation (NAF) is of the opinion that this should not be included in any instrument.

Philippines. (1) Indeed, all sectors of the economy should join hands and pool their efforts at helping the affected workers in finding and in qualifying for suitable alternative employment.

(2) The Government agrees that assistance by the public authorities should come as early as possible after being notified of such terminations.

(3) The Government favours the principles and reiterates that all institutions and agencies which may contribute to the alleviation of the effects of employment termination on grounds herein contemplated should be tapped and utilised.

(4) Yes.

Romania. (1) Yes; the instruments should provide for the obligation for public enterprises at least to offer another appropriate job to the dismissed workers. The offer should indicate the duration of its validity as established by national law.

Sierra Leone. (1) to (3) Yes, but implementation on a national scale would depend on how efficient the appropriate employment agencies are.

(4) Yes.

Spain. (1) Yes. Once terminations of employment have occurred for the reasons given, the first objective of the public authorities should be to give assistance, since in almost all national labour legislation work is considered a right and the State has the obligation to assist in finding employment for those who have lost their jobs, either in the same or a different occupation, with the training required being given.

(2) To attenuate the negative effects of unemployment the public authority should provide assistance automatically, once it has become aware of the termination of the employment relationship.

(3) and (4) Yes.

Suriname. (1) Yes, there is an extra need for assistance in case of termination for such reasons.

(2) to (4) Yes.

Swaziland. (1), (3) and (4) Yes.

(2) Yes, but this should read "should help to provide such assistance".

Sweden. The guidelines indicated here for measures of labour market policy and education policy are intrinsically correct and deserve all support. It is questionable, however, whether provisions on these points should be incorporated in one or more instruments dealing with the termination of employment at the initiative of the employer.

Switzerland. The role of public authorities is important in respect of measures to attenuate the effects of dismissals.

Trinidad and Tobago. (1) to (3) Yes, to the extent of the Government's capability.

(4) Yes.

United Kingdom. (1) to (3) It is primarily for the competent public authority to seek solutions to the problems raised by collective redundancies. It would be inappropriate for the instrument to require employers' and workers' representatives to assist the redundant workers to find new employment.

(4) Yes.

United States. Yes. The term "employment agencies" in paragraph (3) should be restricted to public or free employment services.

Uruguay. No. This provision is outside the subject of the instrument and concerns matters dealt with by other instruments.

While the basic intention of this question was very widely supported, a number of governments had reservations with respect to the way it was framed. Certain governments stressed that the ability of many developing countries to implement such a provision was limited due to the insufficiency of the employment services and due to extensive unemployment and underemployment. Certain other governments considered that the point should be made more flexible or should be addressed mainly to the public authorities and not to the employer and the workers' representatives as well. Several other governments felt that the responsibility for assisting the workers concerned should fall principally upon the employer and the competent authorities, but not on the workers' representatives.

After further consideration, the Office has come to the conclusion that, if a provision regarding assistance in obtaining alternative employment is to be included in a possible Convention, such a provision must be very general and

flexible in nature, to permit application by both industrialised and developing countries. It has, therefore, included in the Proposed Conclusions with a view to a Convention, a very brief Point which seeks to express the basic principle involved in a general way, by providing that the placement of the workers affected in alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by means suitable to national circumstances (*Point 22*).

The more elaborate formulation used in this question has been incorporated in the Proposed Conclusions with a view to a Recommendation (*Point 40*), since a substantial majority of governments replied in the affirmative. However, paragraph (1) of this Point has been reworded to place the principal responsibility for assisting workers in this regard upon the competent public authority, "where possible with the collaboration of the employer and the workers' representatives concerned". Since the employer, in particular, can sometimes play an important independent role in assisting workers in finding alternative employment, for example through direct contacts with other employers, a paragraph suggesting this has been included in this Point (new paragraph (2)). Paragraph (2) of the question has been deleted and the idea expressed therein incorporated in paragraph (1) of Point 40, while paragraph (3) of the question has also been deleted, since the point made therein seems adequately covered by Points 22 and 40 (1).

Several governments suggested that the substance of this question was outside the framework of the proposed instruments. It is the view of the Office that Points 22 and 40, as they deal with measures to mitigate the effects of termination of employment on the workers concerned, come within the terms of the item on the agenda of the Conference.

(1) Should the instrument(s) provide that the other measures which should be considered with a view to mitigating the adverse effects of terminations of employment for reasons of an economic, technological, structural or similar nature, should include income protection additional to that provided for in questions 30 or 31, income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence?

Qu. 41

(2) Should the instrument(s) provide that consideration should be given by the competent public authority to providing financial resources to support in full or in part the measures referred to in paragraph (1)?

Total number of replies: 50.

Affirmative: 28. Bahrain*, Belgium, Byelorussian SSR, Canada*, Cuba, Cyprus*, Czechoslovakia, Egypt, Ethiopia, Finland, France, German Democratic Republic, Federal Republic of Germany*, Guyana, Hungary, India*, Kuwait,

* Substance of observations reproduced below.

Mexico*, Morocco, Nigeria, Poland*, Sierra Leone*, Singapore, Swaziland, Tunisia¹, USSR, United States, Yugoslavia.

Negative: 10. Austria*, United Republic of Cameroon, Malta, New Zealand², Norway³, Pakistan, Romania, Suriname*, United Kingdom*, Uruguay³.

Other: 12. Botswana*, Colombia*, Denmark³, Honduras*, Kenya*, Madagascar*, Netherlands*, Philippines*, Spain*, Sweden¹, Switzerland¹, Trinidad and Tobago*.

Austria. Further measures to assist workers whose employment is terminated would be best decided taking into account the actual situation within the undertaking. Measures by the public authorities to assist persons who have lost their employment go far beyond the scope of the right to terminate employment and should therefore preferably be dealt with in other international instruments.

Bahrain. (1) Yes, where such conditions are practicable under local conditions.

(2) Yes. Financial support is already furnished, in respect of the development of manpower resources, for training and retraining programmes for localisation.

Botswana. Such provisions would be acceptable, in principle, in pursuance of social justice, but in practice it would be difficult for the less developed countries, including Botswana, to embark on such schemes.

Canada. (1) Yes.

(2) Yes. The Government can support a provision calling for partial financial support. Some obligation should remain with the employer.

Colombia. It would be the legislator who would be able to make a determination.

Cyprus. Yes, in the Recommendation.

Federal Republic of Germany. Yes. The mention of additional income protection is welcomed, although it is not possible to contemplate additional income protection out of unemployment insurance funds.

Honduras. (1) Yes.

(2) This responsibility should be shared with the employer.

India. Yes, as far as possible, depending on the national resources of each country.

Kenya. These targets are desirable but are at the same time too high for the developing countries. Implementation would, therefore, not be possible.

Madagascar. (1) The instruments should provide that the other measures which should be considered with a view to mitigating the adverse effects of such terminations should include income protection additional to that provided for in question 30 and free training or retraining.

(2) Yes. This is one way of ensuring free training or retraining for such workers.

Mexico. Yes, if included in a Recommendation, so that developing countries can ratify a Convention while taking into account the Recommendation.

Netherlands. The terms in which this is formulated are far too absolute. In certain circumstances, compensation for loss of income may be provided but not in all.

Philippines. (1) This is a sound principle but provided that the total economic condition of the country may be given due consideration.

(2) The Government agrees in principle. It believes that part of the burden for mitigating the effects of termination should be absorbed by the Government.

* Substance of observations reproduced below.

¹ See under question 32. ² See under question 30. ³ See under question 40.

Poland. (1) Yes, but during the period of training and retraining, the dismissed worker should obtain income as provided in question 31.

(2) Yes. The competent public authority should ensure, without charge, the training and retraining required for the re-employment of the dismissed worker. To this end, it should have at its disposal the necessary financial resources.

Sierra Leone. Yes, where such facilities exist.

Spain. The further measures referred to should be specifically contemplated in the employment policies and programmes adopted by member countries; such measures should be adopted above all in periods of economic crisis when the unemployment rate is high.

Suriname. No. This will be impossible for most developing countries.

Trinidad and Tobago. (1) The principle is commendable, but economic conditions in some countries may not permit implementation of the measures suggested.

(2) Where economic conditions permit, consideration might be given by the competent public authority to providing financial resources to support in part the measures referred to in paragraph (1).

United Kingdom. No. This should not be specified in the instrument. These are matters which may be discussed in the consultations referred to in question 33 (1). As regards financial support from the Government, this is a matter best reserved for government decision in the light of all the circumstances.

A number of governments expressed the view that the measures referred to in this question would be difficult to apply by developing countries. Certain governments therefore suggested that this Point be included in the Proposed Conclusions with a view to a Recommendation or should apply where practicable. Another government considered that the measures referred to should apply in certain circumstances, but not all.

As the majority of governments replied in the affirmative to this question, the Proposed Conclusions have been worded accordingly (*Point 41*). It should be noted that this Point has been included in the Proposed Conclusions with a view to a Recommendation and that it is limited to recommending that "consideration should be given where appropriate to national circumstances" to the measures enumerated, with a view to ensuring the greatest flexibility.

Several governments suggest that this Point is beyond the scope of the proposed instruments. It is the view of the Office that, as this Point recommends consideration of the measures mentioned with a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, it comes within the item on the agenda of the Conference.

One government proposed making reference in this Point to provision of free training or retraining. It is felt, however, that the more flexible drafting of this Point is preferable, having regard to the differences in national circumstances.

VII. Effect on Earlier Recommendation

Should the instrument(s) provide that the instrument(s) supersede(s) the Termination of Employment Recommendation, 1963?

Qu. 42

Total number of replies: 48.

Affirmative: 34. Austria, Bahrain, Belgium, Byelorussian SSR, United Republic of Cameroon, Canada, Colombia, Cuba, Czechoslovakia, Denmark, Egypt, Ethiopia, German Democratic Republic, Federal Republic of Germany, Guyana, Hungary, Kenya, Madagascar, Morocco, Netherlands, New Zealand, Norway, Pakistan, Poland, Romania, Sierra Leone*, Singapore, Swaziland, Sweden, Trinidad and Tobago, USSR, United Kingdom, United States, Yugoslavia.

Negative: 7. Botswana*, Kuwait, Malta*, Mexico*, Nigeria*, Philippines*, Switzerland*.

Other: 7. Cyprus*, Finland*, France*, India*, Spain*, Tunisia*, Uruguay*.

Botswana. The provisions of Recommendation No. 119 are in no way outdated. The new instrument emphasises job security and income protection.

Cyprus. Not necessarily. The aims of Recommendation No. 119 will remain valid while those of a new instrument may be unattainable for some member States.

Finland. This depends on the content of the new Convention and Recommendation.

France. A decision on this point can only be taken in the light of the instruments drawn up. *A priori*, the reply is affirmative since the purpose is to improve upon the provisions of Recommendation No. 119.

India. Only if a Recommendation is adopted. A decision on the question will depend on the form of the new instruments.

Malta. No. Recommendation No. 119 should remain separate so as to avoid complications when it comes to applying international standards.

Mexico. No. Recommendation No. 119 should be considered complementary to the new standards.

Nigeria. No. If a Convention is adopted it may not attract the widest possible ratification; Recommendation No. 119 may remain in force for a specified intervening period before it is deemed to be superseded. If, however, a Recommendation is adopted it should immediately supersede the earlier Recommendation, which it is expected to update.

Philippines. Recommendation No. 119 is generally honoured in most countries and proves to be adequate. What is urgent, perhaps, is for countries to further strengthen their employment protection legislation or to pass such legislation if they do not yet have any or to adopt such measures as would enhance employment protection.

Sierra Leone. Yes, if the scope of the final text is wider than that of Recommendation No. 119.

Spain. The Government reserves its position on this question. It might not be necessary to replace Recommendation No. 119 but be preferable to supplement it in given respects.

Switzerland. Since the national law is now rather close to the content of Recommendation No. 119, while the new instrument as envisaged in the report may include many provisions that would require an important modification of national legislation, it is considered that, in this field, the new instrument should not replace the earlier one.

Tunisia. The new instruments may replace Recommendation No. 119.

Uruguay. Only if a new Recommendation is adopted.

* Substance of observations reproduced below.

Several governments expressed the view that the standards contained in Recommendation No. 119 are still valid or that these standards should be retained as representing a level of protection that certain countries could comply with when they are unable to attain the higher level of protection set forth in the new instruments. Several other governments considered that that Recommendation should be retained, with the new instruments providing supplementary guarantees.

As a considerable majority of governments replied in the affirmative to this question and as the Proposed Conclusions with a view to a Convention and a supplementary Recommendation would cover the whole subject-matter of the previous Recommendation, while elaborating on certain particular matters or adding certain new provisions, it has been considered preferable to include a Point in the Proposed Conclusions providing for Recommendation No. 119 to be superseded (*Point 42*). If the instruments are adopted, member States which are unable to apply all the standards contained in them could, of course, while refraining from ratifying the Convention, give effect to those provisions of the Convention and Recommendation that they are able to implement.

VIII. Special Problems

- (1) *Are there any particularities of national law or practice which, in your view, are liable to create difficulties in the practical application of the international instrument(s) as conceived in this report?* **Qu. 43**
- (2) *If so, how would you suggest that these difficulties be met?*

Total number of replies: 46.

Affirmative: 13. Austria, Bahrain*, Botswana*, United Republic of Cameroon*, Federal Republic of Germany*, Honduras*, India*, Kuwait*, Nigeria*, Switzerland*, Trinidad and Tobago*, United States*, Uruguay*.

Negative: 21. Belgium, Byelorussian SSR*, Canada, Cuba, Cyprus*, Egypt, Ethiopia, German Democratic Republic, Guyana, Hungary*, Madagascar, Malta, Morocco, New Zealand, Norway*, Romania, Sierra Leone*, Singapore, Sweden*, USSR, Yugoslavia*.

Other: 12. Colombia*, Czechoslovakia*, Denmark*, Finland¹, Kenya*, Mexico*, Netherlands*, Pakistan*, Philippines*, Poland*, Swaziland*, United Kingdom*,

Bahrain. (1) Current social insurance legislation has yet to introduce measures for unemployment insurance; this is now under consideration.

(2) By the adoption of guidelines in the form of a Recommendation which could be applied progressively.

Botswana. National legislation does not provide for job security or income protection as proposed by the report. An employer can terminate employment of a worker at any time as

* Substance of observations reproduced below.

¹ See General Observations.

long as all terminal benefits are given to the worker and the employer does not have to give reasons for his decision. Machinery exists through which a trade dispute can be settled and in practice some cases have been dealt with and settled peacefully through this machinery. No provision exists for severance allowances or other forms of social security. Only through formulation of laws or regulations can workers' income be given some form of protection.

Byelorussian SSR. No, bearing in mind the observations and proposals made above.

United Republic of Cameroon. The absence of funds for unemployment insurance or assistance may create difficulties in the application of the instrument. The solution of these difficulties will depend on the development of the national economy.

Colombia. The Government refers to the view expressed by the National Association of Manufacturers that the introduction in the country of unemployment insurance as in the industrialised countries does not for the moment seem possible.

Cyprus. No, provided that provisions that may prove controversial are included in the Recommendation.

Czechoslovakia. In Czechoslovakia termination of employment for reasons of a technological, economic or structural nature do not occur on a significant scale. Since the supplementary provisions do not in principle have a practical import for Czechoslovakia, they need not be subject to detailed regulation by legislation (although a basic legislation exists).

Denmark. The Government would point out that job security and termination of employment are matters which in Denmark are mainly governed by collective agreements and not by legislation.

Federal Republic of Germany. The Works Constitution Act, which lays down the rights of participation of the works council on termination of employment, does not apply to all undertakings without distinction. It applies only in those which are subject to private law and which have at least five permanent workers with voting rights. Some of these rights, in addition, are enjoyed only by works councils in undertakings with a specified number of employees. Moreover, establishments for political, religious and other purposes have a special status, in that certain participation rights of the works council may be limited. The Act does not apply at all to religious communities or to their charitable and educational institutions. Furthermore, managerial staff are not in principle protected by the Act owing to their special status. The above-mentioned marginal areas would have to be left out of the instrument. Managerial staff would have to be excluded, at least as regards the participation rights of the workers' representatives. Special provisions should also be made for the crews of ocean-going ships, vessels on inland waterways and aircraft, and for industrial disputes.

Honduras. Yes, the Labour Code would have to be revised.

Hungary. No, provided that the Government's observations are reflected in the proposed instruments.

India. Countries like India with large-scale unemployment and underemployment in which there is a large unorganised segment of the workforce that is not within the purview of any protective labour legislation, may have difficulties implementing the measures envisaged. To meet these situations, the Convention should be limited to the essentials and the rest included in the Recommendation in the form of guidelines capable of being implemented in stages if necessary. See also the reply to question 7.

Kenya. Apart from the high targets envisaged in some parts of the instruments, practical difficulties are not envisaged.

Kuwait. It will be very difficult to apply the provisions of such a Recommendation in Kuwait where migrant workers constitute over 70 per cent of the labour force and where there is constant labour mobility.

Mexico. As observed in the replies to the previous questions, the socio-economic conditions of member States should be taken into account.

Netherlands. The point was made in reply to questions 1 to 3 that legislation on termination of employment that has already undergone a long period of development in many countries cannot be tackled at the international level in the detailed way that is being proposed here. If the majority of member States are to accept a new instrument, it will be necessary to attempt to formulate generally recognised principles whose further elaboration can be left to the member States. As far as the situation in the Netherlands is concerned, the head of the local employment office plays a major role under legislation on termination of employment, whether of individuals or of a group of workers. Before permission is granted for employment to be terminated, the permission of the head of the local employment office has, in principle, to be obtained in advance. The twofold protection (preventive and repressive) is a major element of Netherlands legislation on termination of employment which will have to be retained.

Nigeria. (1) Member States with a developing economy may not be in a position to match the required standards of the proposed instrument.

(2) By introducing considerable flexibility in the drafting of the instruments to take due account of the various levels of development and of the economic and social conditions of member States.

Norway. No. See detailed replies to questions above.

Pakistan. The instrument should be flexible, giving due consideration to the difficulties of the employers in the matter of terminations. The instruments should not cover public servants.

Philippines. (1) The country has not yet completely recovered from the effects of the emergency situation it once found itself in, although it is quickly moving to normalcy. A fixed and rigid international standard may hinder rather than promote such recovery. The Government feels that the country needs some degree of freedom to re-direct its policies as may be consistent with the demands of national development.

(2) The difficulty may be met if the country is allowed to establish its own standard in accordance with its needs and national conditions after due consultations with workers' and employers' organisations.

Poland. In principle, the application of the proposed instrument will not give rise to difficulties in practice. With regard to the application of that part of the instrument regarding severance allowance and other forms of income protection, national legislation may not be sufficient in case of termination of employment in circumstances not demonstrating an unjustified or illegal decision by the employer. To attenuate this difficulty in the practical application of the instrument, the inexistence of unemployment could be foreseen as well as the need to take measures that lighten its consequences for workers.

Sierra Leone. As far as is envisaged from the scope of the questionnaire, no difficulty might be created in the application of the international instrument.

Swaziland. Such difficulties would not arise in the case of a Recommendation.

Sweden. No, but it should be observed that international rules concerning the field now under consideration ought not to be made excessively detailed. It should be more important to establish a number of basic rules ensuring job security of a satisfactory quality than to frame rules which are so detailed and formal that difficulties may arise in accommodating national idiosyncrasies and special arrangements via legislation and collective agreements.

Switzerland. The practical application of a new instrument such as the one envisaged in the report would create difficulties to the extent that it would require the adoption of new legislative rules. The national system of labour law is a liberal system in which state intervention is restricted. Many collective agreements contain a good number of principles mentioned in the questionnaire. It would therefore be desirable that the instrument envisaged could be implemented by collective agreements, in conformity with national practice.

Trinidad and Tobago. (1) National law makes provision for all persons who fall under the definition of "worker" to pursue matters arising out of the termination of their employment through recognised majority unions where these exist or through any union in the absence of a recognised majority union. National law also provides for public servants to pursue a similar course of action through the various recognised public-service unions. Difficulties will be created where the proposed instrument differs from the national law in these respects.

(2) It is not possible to say at this stage.

United Kingdom. By its flexible nature, legislation in the United Kingdom recognises the wide range of circumstances found in particular cases in this area of industrial relations. The instrument should aim for the same degree of flexibility.

United States. (1) The United States could not ratify a Convention under which an employer's right to terminate employment would be limited to only certain enumerated "valid reasons". Under the legislation of the United States and the common law of the various states of this nation, the terminated worker can successfully challenge an employer's action only if that action violates specific statutes involving a public interest against employment discrimination or retaliation, or where only a private interest is involved (breach of contract).

(2) If the instrument is kept in the form of a Recommendation, and is reasonably flexible, such difficulties can be averted. A difficulty might arise under question 26 in gaining access to employers' records in view of the nature of competition in the free-enterprise system.

Uruguay. It will not be possible to ratify an instrument in the form of a Convention which makes it obligatory to justify terminations and which provides for a period of notice or compensation in lieu of notice, because these obligations are not included in national law.

Yugoslavia. There would be no difficulty in the application of the instrument under the national labour and legal system, since under national law a worker's employment relationship may not be terminated if, due to the integration of basic organisations, technological and other developments contributing to the raising of labour productivity and the greater success of the basic organisation, there is no longer need for his work in that organisation.

A number of governments have referred to situations of national law or practice that might create difficulties in the application of the proposed instruments. Certain governments have indicated that some of these difficulties could be met if the instruments were confined to basic principles and drafted in a flexible manner. The Office has sought, as far as possible, to deal with these difficulties in the commentaries to the preceding questions and by ensuring a flexible drafting of the corresponding Points in the Proposed Conclusions.

One government refers to problems arising from the high percentage of migrant workers in the country. In this connection, the Office calls attention to the fact that the Points included in the Proposed Conclusions are conceived of as applicable to migrant workers as well as to other workers.

Qu. 44 *(Federal States only) Do you consider that, in the event of the Conference adopting a Convention, its subject-matter would be appropriate for federal action, or wholly or in part for action by the state authorities or other constituent units of the federation?*

Most governments did not reply to this question or stated that it did not concern them. The replies of the remaining governments are summarised hereafter:

Austria. The legislation of the Länder applies to agricultural and forestry workers and (to the extent that public employees are covered at all by the instruments) to employees of Länder, municipalities and associations of municipalities.

Belgium. Within the framework of the regionalisation of state structure, while legislation on contracts of employment remains within the competence of the central authority, certain aspects of employment policy are within the competence of the regions.

Canada. Implementation of the instrument would require action at both the federal and provincial or territorial levels.

Czechoslovakia. The subject-matter would be within the competence in part of the federal bodies and in part of the bodies of the states constituting the federation.

Federal Republic of Germany. Measures by the Länder might be indicated as regards staff representation. This question is for the Federal Ministry of the Interior to answer.

India. Labour being a concurrent subject under the Indian Constitution, the adoption of a Convention would entail action on the part of both the Central and the State Governments.

Mexico. The provisions of a Convention would be for application by both the federal authorities and those of the states of the Republic.

Nigeria. The subject-matter would be appropriate for federal (especially legislative) action, but the state authorities would be adequately consulted.

USSR. For USSR action and in part for action by the Union Republics.

United States. A general instrument regulating termination of employment along the lines suggested could not be ratified by the Federal Government as employment contracts are in the domain of the common laws of the various states. Most workers in the United States are protected against abusive dismissals through private arrangements, the protection of the state courts against breaches of contract, and the laws, regulations and programmes of the Federal Government where public interests are involved.

Yugoslavia. The subject-matter of the instrument would be partly appropriate for federal action and partly for action by the republics and autonomous provinces.

Most federal governments replying to this question stated that the subject-matter of the proposed instruments would be appropriate for action by both the federal authorities and the constituent units of the federation. One government indicated that it would be appropriate for federal action, while another indicated that it would be mainly for action by the constituent units of the federation.

The Proposed Conclusions have been so drafted as to enable them to be applied in accordance with the constitutional system of each State.

Are there, in your opinion, any other pertinent problems not covered by the present questionnaire which ought to be taken into consideration when drafting the proposed instrument(s)? If so, please specify.

Qu. 45

Total number of replies: 27.

Affirmative: 5. Belgium*, Mexico*, Swaziland*, USSR*, United States*.

Negative: 21. Bahrain, Botswana, Canada, Cuba, Cyprus, Egypt, Federal Republic of Germany, Guyana, Hungary, Kenya, Madagascar, Malta, New Zealand, Norway, Philippines, Poland, Sierra Leone, Singapore, Trinidad and Tobago, United Kingdom, Yugoslavia*.

Other: 1. German Democratic Republic*.

Belgium. A specific question should be devoted to the various questions regarding serious misconduct justifying the summary dismissal of a worker, including the definition of misconduct, the procedure of dismissal and the consequences of the misconduct as regards maintenance of social benefits.

German Democratic Republic. The discussion should ascertain whether the instrument should include further provisions for the protection of workers. Consideration might be given, among other things, to prohibition of dismissal during pregnancy, during incapacity for work due to sickness or employment injury and during annual leave.

Mexico. The Convention and/or the Recommendation should oblige the employer to give the worker, directly or through the tribunal, written notice of the date and reason or reasons for the termination of the employment relation and provide that failure to give such notification is a ground for considering the dismissal to be unjustified. This would guarantee the right of the worker to be informed of the reason for his dismissal, thus enabling him to oppose it.

Swaziland. When the conduct of an employer towards an employee is proved to have been such that the employee can no longer reasonably be expected to continue in his employment and accordingly leaves it, whether with or without notice, then the services of the employee should be deemed to have been unfairly terminated by his employer. This would entitle the employee to all benefits.

USSR. In addition to providing in a Convention for compensation for termination of employment (severance allowance, etc.), which would require implementation by national legislation, it would be desirable to recommend the adoption of a similar practice in collective agreements.

United States. In response to various questions, the Government has suggested inclusion of provisions calling for co-operation between employers' and workers' representatives in assisting workers with personal difficulties where the worker is willing to undertake a serious effort to overcome them, where the adjustments required in working time, assignment and other arrangements are reasonably consistent with the employer's requirements for job performance and can be accommodated within his operations or where other measures can be taken that will avoid unemployment. The 1981 Session of the Conference will probably adopt one such standard for workers with family responsibilities and the 1980 Session of the Conference adopted standards recommending a movement away from compulsory retirement. Along these lines the Government believes that employers' and workers' organisations as well as governments could be asked to assist workers who must be terminated for lack of work to find alternative suitable employment in another undertaking. In the case of job performance inadequacy, the Government has suggested that the worker involved receive additional training and supervision as well as job assignments that will help improve his performance. Finally, the Government suggests consideration of a provision giving an employee the right of access to his or her personnel records or any other records on which an employment decision is based.

Yugoslavia. Not for the time being.

* Substance of observations reproduced below.

Several problems raised by governments in their replies to this question have already been dealt with in the commentaries to the preceding questions and in the corresponding Points in the Proposed Conclusions. Summary dismissal for serious misconduct is covered in Points 17 (1), 19 (3) and 33 (2), where the possible consequence of loss of entitlement to a period of notice and to severance allowance is mentioned. The procedure applicable prior to such dismissal is mentioned in Points 11, 12 and 26. These procedures are dealt with separately since they are considered to be applicable in respect of termination for misconduct generally, even if the notice period is given and severance allowance is paid. The suggestion of prohibiting termination during pregnancy or during incapacity for work due to sickness or employment injury and absence during annual leave has not been retained; several Points in the Proposed Conclusions provide protection against discriminatory termination on grounds of pregnancy and in cases of temporary absence due to illness or injury. It is felt that the matter of constructive dismissal—that is, treating as a termination by the employer departure by the worker due to conduct of the employer that makes it impossible for the worker to continue in employment—should be left to each member State to deal with as appropriate.

PROPOSED CONCLUSIONS

The following are the Proposed Conclusions, which have been prepared on the basis of the replies from Governments summarised and commented upon in the present report. They have been drafted in the usual form and are intended to serve as a basis for discussion by the International Labour Conference of the eighth item on the agenda of its 67th (1981) Session.

Some differences in drafting will be found between the Proposed Conclusions and the Office questionnaire that are not explained in the Office commentaries. These differences are due to concern both for concordance between the various languages and for the terminology to be adapted as far as possible to that already employed in existing instruments.

Form of the International Instruments

1. International instruments should be adopted concerning termination of employment at the initiative of the employer.
2. The instruments should take the form of a Convention supplemented by a Recommendation.

Proposed Conclusions with a View to a Convention

I. PREAMBLE

3. The Preamble should refer to the existing international standards contained in the Termination of Employment Recommendation, 1963.
4. The Preamble should note that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States that have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries.

II. METHODS OF IMPLEMENTATION

5. The provisions of the Convention should, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

III. SCOPE OF THE INSTRUMENT AND DEFINITIONS

6. (1) The Convention should apply to all branches of activity and all employed persons.

(2) The extent to which the provisions of the Convention should apply to the following categories of employed persons may be determined by the methods of implementation referred to in Point 5:

- (a) workers engaged under a contract of employment for a specified period of time or a specified task;
- (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;
- (c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, such as public servants, which as a whole provide protection which is at least equivalent to that afforded under the Convention.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organisations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of whose employment special problems of a substantial nature arise.

(5) Each Member which ratifies this Convention should list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 3 and 4 of this Point, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice in respect of the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

7. For the purpose of the Convention the terms “termination” and “termination of employment” should mean termination of employment at the initiative of the employer.

IV. STANDARDS OF GENERAL APPLICATION

Justification for Termination

8. The employment of a worker should not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

9. The following, inter alia, should not constitute valid reasons for termination:

- (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
- (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

- (c) the filing in good faith of a complaint or the participation in a proceeding against an employer involving alleged violations of laws or regulations;
- (d) race, colour, sex, marital status, pregnancy, religion, political opinion, national extraction or social origin;
- (e) age, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit;
- (f) absence from work during maternity leave; or
- (g) absence from work due to compulsory military service or other civil obligations.

10. Temporary absence from work because of duly certified illness or injury should not constitute a valid reason for termination, unless the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis.

Procedure Prior to or at the Time of Termination

11. (1) The employment of a worker should not be terminated for reasons related to the worker's conduct or performance before he is afforded a hearing by the employer at which he is given an opportunity to defend himself against the allegations made.

(2) A worker should be entitled to be assisted at such a hearing by another person; this right may be limited, by the methods of implementation referred to in Point 5, to assistance by another worker in the undertaking or a trade union representative.

12. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

13. A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

Procedure of Appeal against Termination

14. (1) A worker who considers that his employment has been unjustifiably terminated should be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

(2) A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not so appealed within a reasonable period of time thereafter.

15. (1) The bodies referred to in Point 14 should be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

(2) In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in

Point 14 should be empowered to find whether the termination was indeed for these reasons, but the extent to which they should also be empowered to decide whether these reasons are sufficient to justify that termination should be left to the methods of implementation referred to in Point 5 to determine.

16. The bodies referred to in Point 14 should be empowered, if they find that termination was unjustified, to—

- (a) nullify the termination or order the reinstatement of the worker in his previous job or in another job, where appropriate with payment of unpaid wages from the date of termination, if reinstatement is desired by the worker and the body considers it to be practicable; or
- (b) order payment of adequate compensation for unjustified termination of employment or such other relief as may be deemed appropriate, if reinstatement is not desired by the worker or if the body does not consider it to be practicable.

Period of Notice and Certificate of Employment

17. (1) A worker whose employment is to be terminated should be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

(2) During the period of notice the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties as agreed to by them.

18. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying the dates of his engagement and termination of his employment and the type or types of work on which he was employed, but containing nothing unfavourable to the worker unless the worker requests the employer to include an evaluation of his conduct or performance in the certificate.

Severance Allowance and Other Income Protection

19. (1) A worker whose employment has been terminated should be entitled to—

- (a) a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted by employers' contributions; or
- (b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
- (c) a combination of such allowance or benefits.

(2) Where benefits are normally payable, in accordance with paragraph 1 (b) of this Point, under an unemployment insurance or assistance scheme of general scope, and a particular worker does not fulfil the qualifying conditions for benefit

under that scheme, paragraph 1 of this Point need not be so applied as to require the payment of another allowance or benefit.

(3) In case of termination for serious misconduct of the kind mentioned in Point 17 (1), the allowance or benefits referred to in paragraph (1) (a) of this Point may be withheld.

V. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

Consultation of Workers' Representatives

20. (1) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer should consult the workers' representatives concerned as early as possible on all appropriate questions, including measures to be taken to avert or minimise the terminations, the selection of the workers whose employment is to be terminated and measures to mitigate the adverse effects of any terminations on the workers concerned.

(2) The applicability of paragraph (1) may be limited by the methods of implementation referred to in Point 5 to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

(3) The employer should notify the workers' representatives concerned with a view to the consultations referred to in paragraph (1) sufficiently before carrying out the terminations to allow effective consultations to take place.

(4) To enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1), the employer should supply them in good time with all relevant information, including the reasons for the terminations contemplated, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out.

Notification to the Competent Public Authority

21. (1) When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he should notify the competent public authority thereof as early as possible, giving all relevant information, including a written statement of the reasons for the terminations, the number and categories of workers liable to be affected and the period over which the terminations are intended to be carried out.

(2) National laws or regulations may limit the applicability of paragraph (1) to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

(3) Where appropriate, the competent public authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

(4) The employer should notify the competent public authority of the terminations referred to in paragraph (1) a minimum period of time before

carrying out the terminations, such period to be specified by national laws or regulations.

Mitigating the Effects of Termination

22. In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by means suitable to national circumstances.

Proposed Conclusions with a View to a Recommendation

I. METHODS OF IMPLEMENTATION

23. The provisions of the Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national circumstances.

II. SCOPE AND DEFINITIONS

24. Points 6 and 7 of these Conclusions should apply equally to the Recommendation.

25. (1) There should be adequate safeguards against recourse to contracts of employment for a specified period of time with a view to avoiding the protection resulting from implementation of the Convention and Recommendation.

(2) To this end, for example, one or more of the following safeguards may be provided:

- (a) limiting recourse to such contracts to cases in which, owing to the nature of the work to be effected or the circumstances under which it is to be effected, the employment relationship cannot be of an indeterminate duration;
- (b) deeming a contract of employment for a specified period of time, when renewed on one or more occasions, to have the same effects as a contract of employment of indeterminate duration;
- (c) considering expiry of such a contract, other than in cases mentioned in clause (a) above, to constitute termination of employment at the initiative of the employer for the purpose of the protection resulting from implementation of the Convention and Recommendation.

III. STANDARDS OF GENERAL APPLICATION

Procedures Prior to or at the Time of Termination

26. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions unless the employer has given the worker appropriate warning.

27. The employment of a worker should not be terminated for unsatisfactory performance unless the employer has given the worker appropriate warning and instruction and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

28. The employer may be required to consult workers' representatives before a final decision is taken on individual cases of termination of employment.

29. The employer should notify a worker in writing of a decision to terminate his employment.

Procedure of Appeal against Termination

30. Provision may be made for recourse to a procedure of conciliation before or during a procedure of appeal against unjustified termination of employment.

31. (1) National laws or regulations may provide that, in case of appeal by a worker against the termination of his employment pursuant to Point 14, the effects of termination may be suspended, pending decision by the competent body on the appeal.

(2) Suspension of the effects of termination pursuant to paragraph (1) of this Point may be limited, *inter alia*, to cases in which—

- (a) the worker concerned requests it;
- (b) the worker concerned is a workers' representative;
- (c) the workers' representatives concerned have objected to the termination.

32. In proceedings under Point 14, a worker who has appealed against the termination of his employment should not bear the burden of proving that the termination was unjustified, and to this end—

- (a) the employer should bear the burden of proving that the termination was for a valid reason; and/or
- (b) the bodies referred to in Point 14 should be empowered to investigate the facts and circumstances of the case so as to be able to form a judgement regarding whether termination was justified.

Severance Allowance

33. (1) Irrespective of the availability of social security benefits, a worker whose employment has been terminated should be entitled to a severance allowance or other separation benefits, increasing with length of service and paid directly by the employer or by a fund constituted by employers' contributions.

(2) In case of termination for serious misconduct of the kind mentioned in Point 17 (1), the severance allowance or other separation benefits may be withheld.

(3) Entitlement to severance allowance or other separation benefits may be limited to workers whose employment is terminated for economic, technological, structural or similar reasons.

IV. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATION OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

34. All parties concerned should seek, with the assistance of the competent public authorities where appropriate, to avert or minimise as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

Consultations on Major Changes in the Undertaking

35. (1) When the employer contemplates the introduction of major changes in production, programme, organisation, structure or technology that are liable to entail substantial terminations, the employer should consult the workers' representatives concerned, as early as possible, inter alia, on the introduction of such changes, the effects they are liable to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in paragraph (1) the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are liable to have.

Measures to Avert or Minimise Terminations

36. The measures which should be considered with a view to averting or minimising terminations of employment for reasons of an economic, technological, structural or similar nature, might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

37. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimise terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, by the employer or from public funds such as unemployment insurance funds.

Criteria for Selection for Termination

38. (1) The selection of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to precise criteria, which should be established wherever possible in advance, and which give due weight both to the interest of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria may include—

(a) need for the efficient operation of the undertaking, establishment or service ;

- (b) ability, experience, skill and occupational qualifications of individual workers ;
- (c) length of service ;
- (d) age ;
- (e) number of dependants ;
- (f) such other criteria as may be appropriate under national conditions, the order and relative weight of the criteria being left to be determined by the methods of implementation referred to in Point 23.

Priority of Rehiring

39. (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given priority of rehiring if the employer again hires workers with comparable qualifications.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The question of retention of seniority rights-in case of rehiring should be determined in accordance with the methods of implementation referred to in Point 23.

(4) Rehiring should be effected as far as possible on the basis of the principles set out in Point 38.

(5) The rate of wages of rehired workers should not be adversely affected as a result of the interruption of their employment, except that account may be taken of differences between their previous occupation and the occupation in which they are rehired and of any intervening changes in the structure and level of wages in the undertaking, establishment or service.

Mitigating the Effects of Termination

40. (1) With a view to promoting pursuant to Point 22 the placement in alternative employment of workers affected by termination of employment for reasons of an economic, technological, structural or similar nature, the competent public authority, where possible with the collaboration of the employer and the workers' representatives concerned, should assist the workers affected, as early as possible after being notified of these terminations or being requested to do so, in the search for suitable alternative employment and where appropriate in obtaining training or retraining to this end.

(2) Where possible, the employer concerned should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

(3) In assisting the workers affected in obtaining alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

41. (1) With a view to mitigating the adverse effects of terminations of employment for reasons of an economic, technological, structural or similar nature, consideration should be given, where appropriate to national circumstances, to

providing income protection additional to that provided for in Point 19, income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent public authority should consider providing financial resources to support in full or in part the measures referred to in paragraph (1).

V. EFFECT ON EARLIER RECOMMENDATION

42. This Convention and Recommendation should supersede the Termination of Employment Recommendation, 1963.

