FIRST ITEM ON THE AGENDA

Possible amendments to the Constitution and Conference Standing Orders to enable the Conference to abrogate or otherwise terminate obsolete international labour Conventions

Introduction

1. At the 261st Session of the Governing Body, the Working Party on Policy regarding the Revision of Standards, on the basis of an Office document, (1) examined the legal problems posed by the abrogation or termination of international labour Conventions considered obsolete and the possible methods of procedure.

2. Of the various policy options which had been presented to resolve these problems without disrupting the long-established constitutional practice of the Organization, the Working Party expressed its preference in principle for the solution of a constitutional amendment authorizing the Conference to proceed to such an abrogation, since this appeared to be both the most correct from the legal point of view and the most effective. (2) When they entrusted the Office with drawing up more specific proposals with a view to such an amendment, however, members on various sides expressed the concern that the proposed amendment should be accompanied by a number of guarantees (the need for which, moreover, had already been mentioned in the Office document) so that the abrogation of a Convention could occur only at the end of a carefully considered process, and to ensure that it benefited from the broadest possible support.

3. The proposals indicated below have been drafted to give effect to this policy agreement with account being taken of these concerns. They are grouped around three points: the purpose and scope of the constitutional amendment; the procedure for its application (and the implementation of the abrogation...
I. Purpose and scope of the constitutional amendment

4. As appears from the preceding document, the proposed constitutional amendment does not seek as such to abrogate Conventions which have become or are recognized as obsolete; it simply seeks to authorize the Conference to proceed to such abrogation in cases in which it considers appropriate. The precise purpose of this amendment (i.e. the Conventions to which the abrogation could be applied) as well as the scope of its effects should, however, be carefully indicated.

1. Concerning the purpose of the abrogation: Instruments recognized as obsolete

(a) Conventions in force and Conventions not in force

5. Under the term "abrogation" the constitutional practice of the Organization and the previous documents on the subject have tended to lump together the abolition of all Conventions considered as obsolete, whether or not they are in force. Although the Constitution does not make such a distinction or, more exactly, does not say anything about the conditions of entry into force of Conventions (these conditions appear in the final provisions of Conventions), the situation is not at all the same in each case. Beyond the obligation of placing an instrument before the competent authority, a Convention which has not come into force does not create legal obligations either with regard to other member States or to the Organization itself. If it is not closed to ratification, its most specific legal effect is that it may receive other ratifications (even if such ratifications have been discouraged, the Director-General does not, however, have the power to refuse them) and thus enter into force at any time.

6. The fact that a Convention is meant to enter into force exists, however, only through the will of the Conference, expressed in the final clauses of the Convention. This is why, even within the framework of the orthodox contractual doctrine of the pre-war period, it had been noted that the Conference could, by an acte contraire, decide to withdraw a Convention from further ratification if, in the absence of the required number of ratifications, it would not or no longer result in obligations between States.

7. It is clear that if a constitutional amendment which authorizes the Conference to abrogate Conventions in force is adopted, this point will no longer have hardly any importance since it would be subsumed by such an amendment. It would, however, be regrettable if the impression were inadvertently given that this amendment is also necessary to authorize the Conference to withdraw Conventions which have not entered into force, in particular if the constitutional amendment in question here took a long time to come into effect. This is why it seems timely to indicate in an appropriate manner that this amendment does not in any way prejudice the power of the Conference to close to any further ratification a Convention which has not come into force and to thus cancel that Convention's capacity to produce its legal effects. Since the concept of coming into force does not appear in the Constitution, it would seem preferable to establish an appropriate distinction between abrogation and withdrawal in the
Standing Orders (see the proposed text of articles 12bis (new) of the Standing Orders of the Governing Body, and 11 and 45bis of the Conference Standing Orders).

(b) Conventions recognized as obsolete

8. To meet the concern expressed during the preliminary discussion, the amendment should be conceived in such a way that the attribution to the Conference of the power to abrogate Conventions in force does not appear as discretionary, but strictly limited to obsolete Conventions. To reflect more specifically this idea, it would appear useful to stipulate that the amendment should concern Conventions which have lost their purpose (including cases in which their objective has been fully met) or which no longer contribute to promoting the goals of the Organization. Furthermore, it must be perfectly clear that this evaluation should be made for each Convention taken separately. This matter will be examined in more detail in the discussion on procedure.

(c) Recommendations

9. There has been a tendency so far to set aside this question since Recommendations do not create an obligation in the strict sense for either States or the Organization (since the supervisory machinery is not applicable and article 19.6(d) is discretionary), their obsolescence does not have any practical consequences. However, once the problem of the abrogation of Conventions is examined, it is no longer possible to avoid raising the question of obsolete Recommendations. Within the logic of the considerations set forth in document GB.265/LILS/WP/PRS/2 as well as those given above, it may however be considered that a constitutional amendment is not necessary for this purpose, since the Recommendation does not create any obligations between States, and a simple acte contraire would be sufficient to withdraw it if it became obsolete. This process could thus be regulated in the Standing Orders.

2. As regards effects: The possibility and limits of a "contracting out" clause

10. The question as outlined in the preceding document concerns whether the amendment may or should cancel the obligations created by the Convention even for Members which wanted to remain bound by it or whether at least provision should be made for a "contracting out" clause for such Members. A related concern was expressed concerning the question of whether to some extent such an abrogation would not infringe the will of national parliaments (or other competent authorities in the matter) which have made the very positive effort of giving their approval to the ratification act.

11. Even if a large majority seemed at any event to favour a full abrogation power without any "contracting out" clause, it would appear useful to introduce a distinction between the effects of abrogation between the parties bound by the Convention and its effects with regard to the Organization. This distinction would seem to be able to satisfy the concerns expressed and allow the widest possible consensus to be achieved.
12. The full abrogation of the Convention could be seen as covering two elements: the abrogation of the Convention as an international labour Convention comprising, under the Constitution, certain machinery for its application, and the abrogation of substantial obligations created by this Convention, including for the parties which wish inter se to remain bound by it.

13. Now it must be clear in this respect that there is nothing in treaty law which allows the ILO, even through recourse to a constitutional amendment, to prevent States parties to a Convention which wish to remain bound inter se by the obligations resulting from this Convention to decide to do so. It must also be clear that the abrogation of the Convention is not at all supposed to affect the national legislation which gives it effect if the Member does not wish to amend it. But conversely, nothing allows these States to claim from the Organization itself a kind of subjective right to the continued application of the constitutional procedure respecting the supervision of the application of these obligations; they may only claim in this respect the rights granted under the Constitution in its current wording, and to participate with all the other Members in the adoption of a constitutional amendment to alter these procedures.

14. In the light of this distinction between the two kinds of procedure, it may now be possible to determine in a manner which is more easily acceptable to Members as a whole the purpose and content of the "contracting out" clause, the purpose of which would not be one of purely and simply maintaining abrogated Conventions for Members which wish to remain bound by them, but to stipulate that the abrogation of a given Convention would not prevent those States which formally expressed the desire to do so to remain bound inter se by the obligations resulting from this Convention without its application mechanism. Such a solution would, it is important to emphasize, be very close to that already provided by article 21 of the Constitution, whereby if any Convention fails to secure the support of a two-thirds majority, any of the States accepting it may agree "to such Convention" among themselves; in this case, the Director-General shall merely transmit the Convention thus concluded for registration to the Secretary General. Thus, it can be said that the situation in which a Convention is abrogated, insofar as this means that the Convention no longer has the support of two thirds of the Conference, is not unlike that in which a Convention does not achieve the majority of two thirds of the votes of the Conference for its adoption.

3. As regards the conditions for the adoption and entry into force of the amendment: Alternative standard clause

15. If the Working Party confirms its interest in the solution of a constitutional amendment, it should at the appropriate time recommend the Committee to propose to the Governing Body to place the matter on the Conference agenda.

16. It goes without saying that the conditions for the adoption of the amendment instrument by the Conference and its entry into force will be those prescribed by article 36 of the Constitution, respectively at the time of the said adoption and when, after the said adoption, the threshold(s) required by this article for entry into force is reached.
17. As indicated in the document previously placed before the Working Party, these conditions should not, given the purpose of the amendment and provided that it is supported by an appropriate campaign, create insurmountable problems. It may however be asked whether, as a measure of precaution, it might not be appropriate to provide all Conventions adopted in the future (following the adoption of the amendment instrument and until its entry into force) with a clause authorizing the Conference to abrogate them. This clause would provide a kind of insurance against the risk of future Conventions lengthening the list of Conventions which have become obsolete and yet which have remained in force in the -- rather unlikely -- event that the amendment did not prosper. This standard clause could reflect in substance the elements of the procedure applicable within the framework of the constitutional amendment. For information purposes an example is given in the appendix.

II. Procedures and methods for applying the power of abrogation

18. The guarantees required by the Working Party may be sought at two levels: that of procedure and that of the majorities required for abrogation.

1. Procedure

19. It appears from the document, as well as its discussion, that there is broad agreement on the idea that the abrogation of a Convention is an act as serious and important as its adoption and that it should not be decided lightly; it must be inspired by the principle of the parallelism of forms and procedures. This has a number of specific consequences.

20. First, the act of abrogation must be individualized (even if it is, of course, conceivable that several Conventions could be grouped together within the same abrogation process). This means that for each Convention the abrogation of which is being envisaged, the Governing Body must, as in the case of a new Convention, decide whether the matter should be placed on the Conference agenda on the basis of an Office report, which would be the equivalent of the "law and practice" report for a new Convention.

21. Once the obsolete nature has been recognized, the Governing Body should proceed to the placing of the item on the Conference agenda and the Officers should prepare a report based, as for the adoption of new Conventions, on consultations with all Members as well as a proposal for discussion and decision; since there would be no need to weigh carefully the content of the proposed provisions one after the other, but to confirm the obsolete nature of a text as a whole, the discussion procedure of this report and proposal could take the form of a simplified version of the single-discussion procedure, it being understood that the Conference could make use -- much more so than in the case of adoption -- of the option to proceed directly to a plenary examination of the question, without sending it to a technical committee.

22. To apply this procedure, it would be necessary to complete the relevant provisions of the Standing Orders of the Governing Body and of the Conference Standing Orders. As regards the latter, these additional provisions could logically be placed after the specific provisions (articles 44 and 45)
concerning the revision of Conventions and Recommendations in a new article which could be entitled "Abrogation and withdrawal of Conventions and Recommendations".

23. It should be emphasized in this respect that the withdrawal of a Convention which has not come into force would follow the same procedure, the only difference being, as noted above, that legally the Conference would not need any constitutional authority to proceed. As a simple solution to the problem mentioned in the first part, it would be sufficient for the Conference, by adopting the corresponding amendments in part III, to note that as regards abrogation, this amendment will take effect only at the time of the entry into force of the constitutional amendment authorizing the Conference to proceed.

2. Required majorities

24. In order to strengthen the guarantee that abrogation decisions will not be taken lightly, the Working Party has discussed the possibility, mentioned in the previous document, of providing for a conditional majority, or even consensus; this concern reflects the quite legitimate desire (even if it may at first sight seem theoretical) to prevent a Convention being abrogated against the unanimous opinion of a group. This desire may however be perfectly taken into account without affecting the constitutional provisions and the very delicate balance which they establish concerning important decisions. This system combines the requirement of a two-thirds majority with the equally very important requirement of a record vote.

25. While abrogation is an act as serious as that of adoption, it is not a more serious act, and subject to what is proposed in the following paragraph, there does not seem in the end to be any reason to require a conditional majority. Furthermore, since it is a serious act, each government and non-government delegate must be committed individually. This is why it appears important to maintain the record vote rather than the anonymous system of consensus during the final vote at the Conference.

26. That being said, the legitimate desire to prevent the possibility of a coalition of two groups proceeding to abrogation against the desire of the third, may and must be taken into account. The simplest and most economic means of doing so and one which would be most consistent with the constitutional balance mentioned above would be to introduce this guarantee of consensus at the upstream stage, i.e. when the Governing Body must decide to place the matter on the Conference agenda.

27. The Standing Orders of the Governing Body stipulate that when the Governing Body discusses for the first time the inclusion of an item on the Conference agenda, it cannot, "without the unanimous support of the members present, take a decision until the following session". It could be stipulated in a new provision, which would follow the present article 12, that when the matter on the agenda concerns the abrogation of a Convention, the decision should as far as possible have to be taken by consensus or, failing that (during the second discussion of the proposal), by a three-quarters majority of the members of the Governing Body with the right to vote. This formula would seem preferable to that of a pure and simple consensus; it would encourage consensus without the risk of the latter becoming a veto.
III. Proposed texts

1. Constitution

**Article 19(9)**

(new)

9. By a majority of two thirds of the votes of delegates present, the Conference may abrogate any Convention adopted in accordance with the provisions of this article if it appears that it has lost its purpose or that it no longer makes a useful contribution to promoting the objectives of the Organization. The provisions of article 21 shall apply *mutatis mutandis* between two or more Members parties to a Convention that has thus been abrogated which, within a period of 12 months following its abrogation, inform the Director-General of their desire to remain bound *inter se* by the obligations created by the said Convention.

2. Standing Orders of the Governing Body

**Article 12bis**

*Procedure concerning the placing on the Conference agenda of the abrogation of a Convention in force or the withdrawal of a Convention which has not entered into force or of a Recommendation*

(new)

1. When an item to be placed on the agenda of the Conference concerns the abrogation of a Convention in force or the withdrawal of a Convention which has not entered into force or of a Recommendation, the Office will place before the Governing Body a report containing relevant information concerning in particular, as the case may be, the ratifications which it has received and the results of any studies carried out on it under the relevant provisions of the Constitution.

2. The provisions of article 18 concerning the fixing of the Conference agenda shall not apply to the decision to place on the agenda of a given session of the Conference an item on such an abrogation or a withdrawal. Such a decision should as far as possible be reached by consensus (or, if such a consensus cannot be reached in two successive sessions of the Governing Body, by a three-quarters majority of Members with a right to vote during the second of these sessions).

3. Standing Orders of the Conference

**Article 11**

[Text to be added is in bold print]
1. The procedure for examining proposed Conventions or Recommendations, as well as the procedure for the abrogation or withdrawal of an instrument adopted by the Conference, shall be regulated by the rules of procedure concerning Conventions and Recommendations which appear in section E of part II.

Article 45 bis
Procedure to be followed in the event of the abrogation or withdrawal of Conventions and Recommendations (new)

1. When an item to be placed on the agenda of the Conference concerns the abrogation of a Convention in force or the withdrawal of a Convention which is not in force or of a Recommendation, the Office shall place before the Governing Body a report containing relevant information in particular on the ratifications it has received and the results of any studies carried out on it under the relevant provisions of the Constitution.

2. When an item on the abrogation or withdrawal of an instrument is placed on the agenda of the Conference, the Office shall communicate to all governments, so that it reaches them 18 months before the session of the Conference, a short report and questionnaire requesting them to indicate within a period of 12 months their position, along with the reasons therefor, on the subject of the said abrogation or withdrawal, along with the relevant information. This questionnaire shall request governments to consult the most representative employers' and workers' organizations before preparing their final replies. On the basis of the replies received, the Office shall draw up a report containing a final proposal which shall be distributed to governments four months before the session of the Conference.

3. The Conference may decide to examine this report and the proposal which it contains directly in a plenary sitting or send it to a technical committee, a working group or the Selection Committee. At the end of this examination in the plenary or in the light of the report of the Committee or the working group, as appropriate, the Conference shall decide by consensus or, failing that, by a preliminary vote by a two-thirds majority to submit the formal proposal for the abrogation or withdrawal of the instrument to a final vote. This record final vote shall take place no earlier than the day following the preliminary decision.

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Conclusions

28. If the Working Party believes that the preceding analyses and resulting texts offer a valid basis for continuing the discussion on a constitutional amendment authorizing the Conference to abrogate international labour Conventions recognized as obsolete, it may wish to envisage making a Recommendation to the Committee on Legal Issues and International Labour Standards to place before
the Governing Body a formal proposal with a view to proceeding to such an amendment.

29. It appears useful in this respect to recall that the question of a possible amendment to the Constitution must be placed on the agenda of the Conference in the very precise conditions set forth in section F of the Standing Orders of the Conference. It will be noted in particular that the question must be defined exactly and that, if the Governing Body takes the initiative, it must place this item on the agenda of the Conference at least four months before the opening of the session at which it is to be considered. Since the spring session is now held in March, this means that, if such a recommendation were placed before the Governing Body in March, the question could not in any case be included on the agenda of the Conference before 1998.

30. In the light of the above, the Working Party is invited to give its opinion on a possible proposal for placing on the agenda of the Conference the question of a constitutional amendment authorizing the Conference to abrogate international labour Conventions recognized as obsolete, based on the texts appearing in part III above.

31. Whether or not the option of a constitutional amendment is pursued, the Working Party may wish to consider whether provision should be made for a new final clause in future international labour Conventions which would allow the Conference to abrogate them in the absence of or pending a constitutional amendment.

Geneva, 8 October 1996.

Points for decision: Paragraph 30; Paragraph 31.

Appendix

Proposed text of a new final clause to be inserted in Conventions which may be adopted pending the entry into force of the constitutional amendment

On the recommendation of the Governing Body, and in accordance with any procedure which the Conference may have established for this purpose, the Conference may proceed to the abrogation of the present Convention by a decision adopted by a majority of two thirds of the votes of delegates present. The provisions of article 21 of the Constitution shall apply *mutatis mutandis* between two or more Members parties to a Convention which has thus been abrogated and which, within 12 months from the date of abrogation, have informed the Director-General of their wish to remain bound by the obligations created by the said Convention.
1 Document GB.265/LILS/PR/RS/2.

2 Documents GB.265/LILS/5, GB.265/8/2.

3 Or at least it does not create more legal obligations than a Recommendation.

4 See: International Labour Conference, 12th Session, 1929, Record of Proceedings, p. 743; the term abrogation refers to Conventions which have come into force; for Conventions which have not entered into force, such a procedure should not be described as abrogation but as "withdrawal". This is the term which will be used in this connection below.

5 In the same way, it is not possible to consider that a constitutional amendment for the elimination of constitutional obligations relating to certain Conventions should infringe the prerogatives of national parliaments (or other competent authorities) which have approved ratification: as noted above, the abrogation of the Convention in no way obliges a parliament to amend the national legislation which gives it effect if it does not wish to do so, but conversely, no national parliament (or any other competent authority in the matter) may unilaterally claim from the Organization the maintenance of a constitutional mechanism, since by authorizing membership in the Organization it has accepted in advance the possibility of a modification under the procedures and conditions prescribed for this purpose; it may only claim the right to play a role where applicable in the approval of this constitutional amendment.

6 It will be recalled in this connection that the majority required for adoption by the Conference as well as the thresholds required for entry into force might be modified if the instrument for amendment to the 1986 Constitution came into force.