
INTERNATIONAL LABOUR ORGANIZATION

Bureau for Workers' Activities

**Celebration of the 60th anniversary of Convention
No. 98: The right to organize and collective
bargaining in the twenty-first century**

Background paper

International Workers' Symposium
(Geneva, 12–15 October 2009)



INTERNATIONAL LABOUR OFFICE GENEVA

INTERNATIONAL LABOUR ORGANIZATION



**Collective bargaining – Sixty years
after its international recognition**

Bernard Gernigon

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Preface

On 1 July 1949 the International Labour Conference adopted Convention No. 98 in San Francisco. After 60 years of its existence, it is most appropriate for the Bureau of Workers' Activities and the Workers' group to celebrate the anniversary of a Convention which not only establishes the protection of the right to organize but also defines its essence and *raison d'être* – collective bargaining.

In recent years, the right to organize and to bargain collectively has faced the challenges stemming from falling trade union membership, increasing individualization of labour relations and the difficult quest for greater competitiveness and flexibility in the context of globalization. In the circumstances, the capacity of trade unions needs to be strengthened in order to face these challenges and enhance the right to organize and collective bargaining and other fundamental rights and principles such as the global platform rules governing the increasing globalization of the economy and the promotion of decent work for all.

The International Workers' Symposium on the Right to Organize and Collective Bargaining will therefore:

- examine recent trends and developments in collective bargaining and the protection of the right to organize;
- discuss the relationship between collective bargaining and the social and economic objectives of decent work;
- identify policies and strategies that would strengthen the capacity of trade unions to organize and to bargain collectively;
- identify ways and means of achieving the universal application of the right to organize and to bargain collectively.

I would like to thank Bernard Gernigon, who has written this background document which sets out the basis for the discussion, leaving to the trade union participants the choice on how to shape the way forward.

Dan Cunniah
Director ACTRAV

September 2009

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Introduction

On 1 July 1949 the International Labour Conference in Geneva adopted the Right to Organise and Collective Bargaining Convention (No. 98). For the International Labour Organization this was a landmark occasion, but so it was too – and perhaps above all – for workers and their trade union organizations all over the world.

The date was important for the ILO because it marked the completion of the task it had set for itself the year before with the adoption of the Freedom of Association and Protection of the Right to Organise Convention (No. 87). The ILO could now boast two fundamental instruments that guaranteed the independence of trade union organizations vis-à-vis public authorities, on the one hand, and employers, on the other. For the first time in the 30 years since its inception, the Organization had reached agreement on the inclusion in its body of standards Conventions guaranteeing the right to freedom of association and collective bargaining at every level. With the adoption of these two standards tripartism took on a whole new dimension, since in the future the Organization could refer to texts that had been endorsed by its highest body in order to promote and defend values that are essential for its constituents (governments, employers and workers) to have an autonomous existence within the ILO and to represent the interests they defend genuinely and effectively.

But the occasion was especially important for workers throughout the world and their trade union organizations, because for the first time their universal right to organize and to bargain collectively was recognized by two international Conventions. The Conventions guaranteed them the possibility of associating freely among themselves and of taking collective action to defend not only their economic and social interests but also their fundamental public freedom to exercise their trade union rights. Since trade union action opened the way for more effective implementation of other international labour standards, the exercise of these rights further proved indispensable as a means of bringing about better working conditions in keeping with human dignity. The introduction one year after the adoption of Convention No. 98 of the procedure for protecting trade union rights within the ILO structure subsequently provided an effective means of ensuring that those rights were respected, even in countries that had not ratified Conventions Nos 87 and 98.

Convention No. 98 is particularly significant because it both recognizes and protects an individual right conferred on workers (protection against acts of anti-union discrimination), a collective right attributed to trade union organizations (protection against acts of interference) and an individual right exercised collectively (the right of workers to be represented by trade unions in negotiating conditions of employment collectively). The importance that the ILO thereby attached to collective bargaining gave an international dimension to a phenomenon that had already become common practice by the end of the First World War, at least in industrialized countries. The recognition and application of that principle was based implicitly, on the one hand, on an essentially liberal concept – that is, that the best way to govern a relationship between parties is to allow them to regulate it themselves – and, on the other, on the acknowledgement that the employment relationship is grounded on economic inequality and juridical subordination, neither of which is conducive to fair negotiation of an individual contract between an employer and a worker. Thanks to the fact that workers can be represented by trade union organizations that can engage in discussions leading to collective agreements, collective bargaining can thus contribute to a better balance between the parties in an employment relationship.

The special importance of collective bargaining has been emphasized by the Committee on Freedom of Association, which states that one of the principal objectives of workers in exercising their rights is to collectively negotiate their terms of employment.

Laws or regulations that deny them that right are bound to be a barrier to the very purpose and principal activity for which their trade unions are conceived and, as such, are contrary not only to Article 4 of Convention No. 98 but also to Article 3 of Convention No. 87 stipulating that unions must have the right to organize their activities in full freedom.¹

Because it attaches such value to collective bargaining, the ILO has since supplemented Convention No. 98 by adopting other standards that were mainly designed to compensate for its limitations. In 1978, for example, some 30 years after its adoption, the International Labour Conference extended to public servants many of the guarantees provided under Convention No. 98 by adopting the Labour Relations (Public Service) Convention (No. 151), ratified by 44 countries, and its accompanying Recommendation (No. 159). In 1981 the Collective Bargaining Convention (No. 154), ratified by 39 countries, and its Recommendation (No. 163) broadened the concept of collective bargaining while at the same time extended it to all branches of activity, that is, both the private and the public sectors, except for the armed forces and the police.

The Conventions on freedom of association and collective bargaining were no sooner adopted than the workers voiced their fear that only a very few countries would ratify them. This was in fact one of the reasons for introducing the possibility of presenting complaints under the Committee of Freedom of Association procedure, even against countries that had not ratified the Conventions concerned. Sixty years later, this fear has proved largely unjustified, especially in the case of Convention No. 98 which has now been ratified by the vast majority of ILO member States (160 out of 183, or 87 per cent). That said, the Conventions dealing with freedom of association have in reality received fewer ratifications than the fundamental Conventions on the elimination of forced labour and discrimination and than the Worst Forms of Child Labour Convention, 1999 (No. 182). Of all the fundamental Conventions they are the ones that have been ratified least since the ratification campaign was launched in 1995. Another source of concern is that some of the economically most important and most highly populated States are among those that have not ratified these Conventions. In fact, because major countries such as Canada, China, India, Islamic Republic of Iran, Republic of Korea, Mexico, Thailand, United States and Viet Nam have not yet done so, approximately half of the world's economically active population is still not covered by Convention No. 98.

The situation in terms of ratification of Convention No. 98 varies considerably from one region of the world to another. While the percentage of ratifications is high in Europe and Central Asia (100 per cent, or 51 countries out of 51), in Africa (98 per cent, or 52 out of 53 – excluding Somalia) and in the Americas (91 per cent, or 32 out of 35 – excluding Canada, Mexico and the United States), the corresponding levels are much lower in the Asia-Pacific region (57 per cent, or 19 out of 22 – excluding Afghanistan, Brunei Darussalam, China, Marshall Islands, India, Islamic Republic of Iran, Republic of Korea, Lao People's Democratic Republic, Maldives, Burma/Myanmar, Solomon Islands, Thailand, Tuvalu and Viet Nam) and in the Arab States of Western Asia (55 per cent, or six out of 11 – excluding Bahrain, Oman, Qatar, Saudi Arabia and the United Arab Emirates).

Irrespective of its slow ratification, especially in North America and Asia, there is also the question of the actual implementation of Convention No. 98. It does not suffice to ratify the Convention; it must also be applied in practice. Unfortunately, it is all too clear that practical application is severely lacking. The truth is that Convention No. 98 is among those that give rise to the highest number of observations by the Committee of Experts on the Application of Conventions and Recommendations. Of the 160 countries that have

¹ See 344th Report of the Committee on Freedom of Association, para. 991.

ratified it, observations have been made in respect to 104, or two-thirds of the nations (not including direct requests addressed to governments). Similarly, the Conference Committee on the Application of Standards frequently chooses to discuss cases relating to the application of Convention No. 98, which shows the seriousness of the issues raised in the observations. Finally, if we look at the cases taken up by the Committee on Freedom of Association in just the last five years, almost half of the allegations presented concern matters covered by Convention No. 98 and some 15 per cent of all allegations have to do with collective bargaining issues.

The difficulties encountered by the ILO's supervisory bodies in applying the principles of collective bargaining can be explained in part by the profound transformation of the world of work that has taken place over the past 20 years as a result of globalization and of the fiercer economic and commercial competition it has engendered, as well as by the crisis which to one degree or another today faces every economy in the world. Until the current crisis, economic and social policy was often inclined to doubt the value and usefulness of labour standards and labour market institutions; the catchword everywhere was how to reduce the role of the State, deregulate the labour market and restructure the public sector. A more liberal approach with less state intervention might have been expected to lead to increased reliance on collective bargaining, which by its nature is conducive to greater flexibility and pragmatism in the determination of conditions of employment.

But in practice one of the main features of globalization – the capital mobility that profoundly enhanced the bargaining power of enterprises vis-à-vis the State and the workers – was not open to such reasoning. The ability of companies that are becoming increasingly transnational to relocate rapidly certainly weakened the negotiating power of the workers and their unions. The mere threat of relocation can profoundly modify the relationship between the parties involved. In many cases, this unfavourable environment from the standpoint of trade union organizations is aggravated by public policies which, in a bid to attract investment, destabilized traditional forms of social protection. Such an atmosphere could of course only be detrimental to the development of trade union action and influence. True, the virulence of the crisis that burst upon the world in 2008 has persuaded a number of governments to reintroduce social goals into their political programmes in order to mitigate the dramatic effect it has had on unemployment and on workers' living standards. But unfortunately, at least for the time being, this recent trend has had little impact on collective employment relationships in a global economy.

This, then, is the background to the present document, which examines the problems facing collective bargaining from the international standpoint and from that of the relevant international labour standards. The main points taken up below this include: representation of workers by trade unions and their recognition by employers, workers and the branches of activity covered, state intervention (issues covered by collective agreements, stabilization policies, prior approval by the authorities, compulsory arbitration), changes in the structure of collective bargaining (fragmentation of collective bargaining, competition between individual contracts and collective agreements, changing labour relationships) and internationalization of collective bargaining.

Representation of workers by trade unions and their recognition by employers

Collective bargaining, of course, presupposes that there are recognized partners to the negotiation process: on the one hand, an employer or an employers' organization and, on the other, one or more workers' organizations. Necessary though this is, however, there are other conditions that have to be fulfilled before negotiations can be considered as reflecting the will of the parties, and specifically that of the workers. In the first place, the

organizations have to be sufficiently representative of the interests they are supposed to be defending and totally independent vis-à-vis the employer, the other party to the negotiations. According to the Committee on Freedom of Association, any organization meeting these two criteria must be in a position, if necessary alone, to sign collective agreements if it so wishes. It is only on this condition that its participation in the collective bargaining process can be altogether effective and real.

How organizations are judged to be representative of the workers for collective bargaining purposes varies widely from one part of the world to another, according to a country's history of labour relations, the structure of the national trade union movement and the economic system in which it operates. In some countries the law stipulates that any existing or registered trade union organization has the right to bargain collectively; elsewhere, this right is restricted to organizations that are deemed sufficiently representative, or even to a single such organization. During the discussion that led to the adoption of Convention No. 98, the International Labour Conference raised the question of representativity, and it accepted that the most representative organizations could be granted a preferential right to engage in collective bargaining. According to the ILO's supervisory bodies, it is immaterial whether the prevailing system provides for representation by just one organization or by several. The important point is that the organization or organizations with a preferential or exclusive right to negotiate should be determined on the basis of objective and pre-established criteria, so as to avoid any possibility of bias or abuse. In systems where representation is by a single organization, the supervisory bodies have suggested² that the procedure for designating unions as sole bargaining agents should comprise a number of guarantees, for example: the issue of a certification of the most representative union by an independent body; the selection of the representative body by majority vote of the workers in the unit considered; the right for an organization that has failed to win a sufficient number of votes in a previous election to call for a new election after a certain period; the right for a new organization to call for new elections after a reasonable period. Should there be a change in the relative strength of the trade unions applying for a preferential right or the sole right to represent workers in collective bargaining, there ought to be a possibility for the criteria on which that right is based to be reviewed. Otherwise, a majority of the workers concerned might find themselves represented by a union which, in practice or in law, is prevented for an unreasonable period of time from promoting and defending its members' interests through collective bargaining.

Though admissible, systems that are based on organizations designated as most representative must not, however, degenerate to a point where negotiating becomes impossible in practice. This can happen when the required degree of representativity is set so high that it is beyond the reach of any existing organization (for example, 40 per cent in Sri Lanka, 50 per cent Ecuador, Lesotho, Swaziland, Trinidad and Tobago, and Uganda, and as much as 60 per cent in Lebanon and, in Turkey, 10 per cent of the economic sector plus more than half of the workers employed in the establishment concerned). The threshold in Hungary is 65 per cent for individual trade unions or 50 per cent for all the signatory organizations combined (this provision has been declared unconstitutional by the Constitutional Court). If this threshold is not attained, a collective agreement can nevertheless be concluded if over 50 per cent of the workers vote in favour. These requirements have been deemed too stringent by the Committee of Experts on the Application of Conventions and Recommendations.

² See *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, fifth (revised) edition, 2006, para. 969, and *Freedom of association and collective bargaining*, International Labour Conference, 81st Session, 1994, para. 240.

Depending on the national system, trade union organizations engaged in collective bargaining may represent either their members alone or all the workers in a bargaining unit. The supervisory bodies consider that both these systems are compatible with Convention No. 98. In a case concerning Bulgaria,³ in which the complainant organization argued that certain collective agreements applied only to the contracting parties and their members and not to all the workers, the Committee on Freedom of Association considered that practice referred to was legitimate – as would be the contrary practice – and did not appear to violate the principles of association; it was in fact the practice in several countries.

In addition to being sufficiently representative, trade union organizations must, in order to take part in collective bargaining and sign agreements, be independent of the employer or employers' organization and of the public authorities, as the Committee on Freedom of Association emphasized in a case concerning Luxemburg. Only when their independence has been established can they enter into negotiations. Which organizations meet these criteria should be determined by a body whose independence and objectivity can be guaranteed.

An obstacle to collective bargaining is deemed to exist when organizations have to cover an economic sector where their right to represent the workers in negotiations is defined in great detail. This kind of legislative provision, in which the authorities have declared that trade unions whose membership does not correspond exactly to the definition of the sector are not competent to engage in collective bargaining, has posed serious difficulties in Malaysia and Turkey.

Specific problems can also arise when collective bargaining is open to entities other than trade unions. This is the case with collective pacts in several Latin American countries, as well as in the Russian Federation where workers can be represented not only by trade union organizations but also by the workers' elected representatives. All standards dealing with collective bargaining stipulate that the parties to it are, on the one hand, employers or their organizations and, on the other, workers' organizations. It is only where such organizations do not exist that workers' representatives can take part in collective bargaining outside of a trade union structure. This principle, which was already expressed in the Collective Agreements Recommendation, 1951 (No. 91), has since been incorporated into the Workers' Representatives Convention, 1971 (No. 135), and the Collective Bargaining Convention, 1981 (No. 154), which state that the presence of elected workers' representatives can only weaken the position of the workers' organization concerned.

Given these standards-setting requirements, the Committee on Freedom of Association considers that direct negotiations between an enterprise and its staff which take no account of existing representative organizations may run counter to the principle that collective bargaining between employers and workers' organizations must be encouraged and promoted.⁴ The issue has been raised in a substantial number of cases that have been brought before the Committee over the past ten years – for example, concerning Chile, Colombia, Peru and Ukraine. In Costa Rica the number of direct agreements between workers and an enterprise is far higher than that of collective agreements concluded with trade unions (74 direct agreements were in force in 2008, as apposed to a mere 13 collective agreements); generally speaking, moreover, it is the employer who

³ See 305th Report of the Committee on Freedom of Association, para. 100.

⁴ See *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, op. cit., para. 945.

takes the initiative to discuss these negotiated agreements without consulting the trade unions.

The Committee on Freedom of Association has also been called upon to examine cases concerning several Central American countries (Guatemala, Honduras and, especially, Costa Rica) involving associations (known as *Solidarista* associations) which are not trade unions but which nevertheless exercise functions that are normally carried out by the latter. These are workers' associations which are dependent for their existence on the employer for whom their members work and which, following the principle of mutual benefit, are financed by the workers and employers for economic and social objectives that have to do with their material well-being (savings, credit, investment, housing schemes, educational programmes, etc.), as well as in the interest of solidarity and cooperation between workers and employers. The membership of the various bodies set up by the associations must consist of workers, but a representative of the employer with the right to speak – but not the right to vote – may participate in them. In the view of the Committee on Freedom of Association, these associations cannot play the part of independent organizations within the collective bargaining process, which must be between an employer or employers' organization or one or more workers' organizations that are totally independent of the employer. This situation thus raises issues under Article 2 of Convention No. 98, which lays down the principle of the total independence of workers' organizations in the exercise of their activities. The Committees' efforts in this area and the various missions within the country that have been carried out have achieved substantial progress in term of the applicable legislation, though some problems still exist in practice.

Negotiating collective agreements presupposes that the employer or employers' organization recognize the trade union or unions representing the workers. Collective bargaining is inherently a voluntary process, but countries sometimes need to establish a framework within which it can be encouraged and promoted both through legislation and the creation of support institutions. This is especially useful where the labour market is fragmented, where there is a plethora of small economic units, where there are new economic sectors with no experience of negotiating and where the informal sector and other production systems such as subcontracting have become increasingly prevalent. A balance therefore needs to be found between government intervention to encourage collective bargaining and its smooth functioning, on the one hand, and the freedom of the parties to conduct successful negotiations in total autonomy, on the other.

The lack of formal recognition by the employer of a trade union that is party to the negotiation of a collective agreement can have serious negative implications in systems of labour relations where it is a precondition for collective bargaining, as is the case in certain countries – in English-speaking Africa, for example – that have inherited British legal traditions.

The question of the employer's recognition of the negotiating organizations is closely bound up with that of the obligation to negotiate. Provisions of this kind exist in certain countries (for instance, in France, for enterprises with no trade union section and for certain issues, Romania for enterprises with more than 21 employees and, more recently, Fiji). The Committee on Freedom of Association was called upon to rule on a provision of this kind in Romania,⁵ following a complaint lodged by a national employers' organization. The Committee considered that Article 4 of Convention No. 98 does not require the government to make collective bargaining compulsory, however it is also not contrary to that same Article to oblige the social partners to enter into negotiations on terms and conditions of employment in order to encourage and promote the development

⁵ See 328th Report of the Committee on Freedom of Association, para. 581.

and use of the collective bargaining machinery. In other words, national legislation may make it compulsory to negotiate with partners that provide evidence of a specified level of representativity.

Once the partners have been recognized, it is important that the negotiations be conducted in good faith. This requirement was emphasized during the preparatory work on the Collective Bargaining Convention No. 154, when the committee discussing the agenda item recognised that collective bargaining could only function efficiently if it was conducted in all good faith by the two parties. It further stressed that good faith could not be imposed by law but could only be the outcome of voluntary and sustained efforts by the social partners. If it is to be respected, this principle of good faith presupposes that a number of conditions be met in addition to the recognition of the representative organizations; specifically that a genuine effort be made to reach agreement, that the negotiations be genuine and constructive and that any unjustified delay be avoided and that the terms of the agreement be respected and applied. Failure to meet these requirements is sometimes prohibited and looked upon as an unfair labour practice that is punishable by law (Canada, Japan, Spain, United Kingdom and some Caribbean countries).

More generally, the identification of the parties to the negotiations poses the problem of maintaining a fair balance. If there is to be such a balance, the workers' organizations that are parties to the negotiations must not only be sufficiently strong and representative but they must also be correctly informed of the economic and financial situation of the enterprise and the economic sector concerned. The employer's side must likewise be encouraged to negotiate in good faith. Here, the possibility for workers' organizations to call a strike in the event of the breakdown of negotiations is essential for there to be a genuine desire on both sides to reach an agreement.

Workers and economic sectors covered by collective bargaining

The way the coverage of workers by collective bargaining has evolved differs widely from one part of the world to another.⁶ While coverage is still high in some (mainly European) countries, elsewhere it has tended to decline. For the last years for which statistics are available (2007 or 2008, depending on the country) the rate of coverage is around 70 per cent in Europe (except for Hungary, Poland, Switzerland and the United Kingdom where it is under 50 per cent, and most notably in Latvia and Lithuania where the rate is below 15 per cent). Coverage has dropped in several countries (Czech Republic, Germany, Netherlands, Slovakia and the United Kingdom). By contrast, thanks to a widely applied system of extending collective agreements, coverage in Austria and Slovenia is close to 100 per cent. In Asia the average rate is around 15 per cent, but in a substantial number of countries it is below 5 per cent. In recent years the number of workers covered in Latin America has declined markedly (less than 8 per cent in Peru, for instance), with the notable exception of Argentina, Bolivia and Uruguay where the proportion is over 70 per cent. Because of the preponderance of the informal sector it is difficult to determine figures for Africa. While coverage is high in Ethiopia, Niger and Senegal and is tending to improve in South Africa, the overall rate is low in many countries. In Ghana, for example, trade unions are well established in the formal sector of the economy, but the informal sector accounts for 88 per cent of the country's manpower and so the overall coverage figure is low.

⁶ For more information on this aspect, see ILO: *Global Wage Report 2008–09: Minimum wages and collective bargaining: Towards policy coherence*, table 3, p. 8.

This decline in collective bargaining can be explained by the more or less general fragmentation of collective bargaining and the multiplication of atypical forms of employment in recent years. By and large, sectoral agreements cover more workers than do enterprise-level agreements as a whole, and jobs not covered by traditional labour contracts are also very often excluded from collective bargaining.

Provisions and interpretations of the law that broaden the concept of supervisor or manager also often have the effect of denying large categories of workers the right to organize and to bargain collectively. Decisions along these lines were taken by the United States National Labor Relations Board in the “Oakwood Trilogy” cases, where head nurses employed in hospitals, even if working only part time, were considered to be part of the supervisory staff and therefore denied the right to join trade unions and to bargain collectively. In the view of the Committee of Freedom of Association, exclusions of this nature should be restricted to employees who genuinely represent the interests of their employer.⁷

Another explanation for this generally low coverage stems from the specific difficulties encountered in certain sectors that represent a large section of the workforce, such as the public service, the agricultural sector, the informal sector and export processing zones (EPZs).

The public sector

Broadly speaking, workers in the public sector have more difficulties in pursuing collective bargaining. Yet changes in the way public services operate have undoubtedly had a major impact on collective labour relations. All over the world, although the form and extent of this trend varies widely from country to country, there seems to be a general move away from the unilateral fixing of terms of employment by the State as an employer.

Though in many countries this kind of approach may be a thing of the past, the fact remains that sometimes, in Asia especially, the State as employer is confused with the sovereign State whose prerogatives cannot be shared. Public officials, who are both servants of the State and the privileged beneficiaries of working conditions that are usually more advantageous than the norm (stability of employment, career development, social and pension benefits, equality of treatment between men and women), are involved neither individually nor collectively in the determination of their terms of employment. One of the first inroads into the all-powerful nature of the State was the progressive recognition of trade union rights in the public service which is now generally the case all over the world, although some restrictions may still apply compared to the situation of workers in the private sector (notably in Latin America and Asia). The subsequent appearance of public sector trade union organizations inevitably led to their involvement in the decision-making process linked to labour relations.

The trend in international labour relations in the years immediately following the First World War is particularly relevant here. To begin with, the trade union rights of public servants were recognized by Convention No. 87, even though a large proportion of them – public officials responsible for the administration of the State (i.e. officials of ministries and other comparable government bodies) – were denied protection against anti-union discrimination and the right to bargain collectively (Convention No. 98). This was corrected some 30 years later by a standard that provided for the promotion of bargaining procedures for public sector workers or other means of determining conditions of

⁷ See 349th Report of the Committee on Freedom of Association, para. 854.

employment in the public service, with the exception of a few categories of high-level officials and officials occupying highly confidential posts (Convention No. 151). The final step was the promotion of collective bargaining for the public administration as a whole (except, as usual, the armed forces and the police), just as in the private sector. The State can no longer limit itself to consultations but must actually enter into collective bargaining, the only restriction being that it can set “special methods of application” of the relevant Convention (No. 154) to the public sector.

The overall situation as regards labour relations in the public and semi-public sector in the world today reflects the successive stages in this trend, according to the degree of flexibility in the process of determining terms of employment. The systems applied therefore vary enormously, with the participation of workers and their organizations ranging from such simple forms as ad hoc informal consultation to comprehensive machinery for free collective bargaining, as well as intermediate methods such as the involvement of independent third parties following hearings of the trade union organizations, formal consultation in permanent negotiating bodies and institutionalized collective bargaining as required and defined by law.

Nowadays it is a more or less accepted fact that the underlying trend in labour relations in the public and semi-public sectors is towards a system of collective bargaining akin to that applied in the private sector. True, that system is by no means commonplace in the majority of the world’s public sectors and, in some countries, particularly in Latin America, it is even prohibited. The Committee on Freedom of Association examined complaints against a significant number of countries concerning both refusals to bargain collectively or serious violations of collective bargaining rights in the following nations: Argentina (non-participation of an organization in collective bargaining in the Secretariat for the Environment), Barbados (impossibility to negotiate on the introduction of a port surveillance system with the trade union representing customs workers), Bolivia (restrictions on negotiations in the health sector), Burundi (refusal to negotiate in the university sector and non-application of an agreement on judges), Canada (legislative intervention), Chad (non-recognition of a trade union alliance), Hong Kong, China (unilateral wage fixing), Colombia (refusal to negotiate, change of status of university workers thereby denying them the right to bargain collectively and rendering the agreement in force inapplicable), Costa Rica (some clauses of collective agreements declared unconstitutional), El Salvador (negotiating problems in an institution attached to the Ministry of Tourism), Ecuador (administrative review of collective agreements when the authority deems that the contractual provisions give rise to excessive and unwanted privileges that are contrary to the general interest), Estonia (barriers to wage negotiations), Guatemala (non-application by the Ministry of Public Health and Social Assistance of the provisions of a collective agreement on union dues and union leave), India (denial of the right to bargain collectively), Japan (restrictions imposed as part of the reform of the public service), Republic of Korea (non-binding nature of the provisions of collective agreements when they concern issues covered by legislation, regulations or the budget), Nicaragua (non-application of collective agreements in the Ministry of Transport and Infrastructure), Nigeria (problems in the university sector), Peru (barriers to collective bargaining in the education sector), Romania (problems in the education sector), Tunisia (representation of workers in higher education and research), United States (denial of the right of municipal workers in North Carolina to bargain collectively and non-coverage of certain federal employees, including airport security staff), Bolivarian Republic of Venezuela (denial of an organization’s right to bargain collectively in the Ministry of Health and Development).

A lot of countries nowadays, including some with a long history of active trade unionism (France for certain matters not covered by agreements, Germany for the *Beampte*, Japan for public officials, the United States for public employees in certain States and for certain issues) have an essentially consultative approach to labour relations in the public service. If one looks at national trends, however, there has been a steady

increase in the importance attached to collective bargaining between trade unions, on the one hand, and public or semi-public administrations and bodies, on the other, irrespective of the political orientation of the governments concerned. Either the State has become less involved in the economic and social life of the country, in which case a large number of workers find themselves covered by the general labour legislation as it relates specifically to collective labour relations, or else it has continued to play a decisive or important role and has every reason to avoid collective disputes, which would mean resorting to joint decision-making with regard to conditions of employment.

The number of countries engaging in collective bargaining in the recent past to fix terms and conditions of employment in the public service has thus risen (Greece and Lithuania, for instance, have passed laws to this effect). Others (Argentina, New Zealand and Spain) have expanded their system of collective bargaining. In November 2005, Colombia's Constitutional Court ruled that the legislature was required to regulate the procedure for establishing the right of public employees' organizations to bargain collectively, within a reasonable time and, as far as possible, in consultation with those organizations.⁸ In a recent ruling on the public sector,⁹ Canada's Supreme Court has stated that the right of workers to bargain collectively was inherent in their freedom of association and that recognizing that right reasserted the values of dignity, personal autonomy, equality and democracy, which were intrinsic to the Canadian Charter of Rights and Freedoms.

That said, the international standards themselves and Convention No. 154 in particular do allow collective bargaining in the public sector to be appropriately adapted, and they usually differ somewhat from the system applied in the private sector. Indeed, it is difficult in practice to classify countries in terms of their use of a consultation procedure or of a bargaining system. Consultation frequently ends in the signing of a protocol that is implemented by laws or regulations, while the outcome of bargaining is often the conclusion of an agreement that needs to be formalized by a law or decree before it can be effectively applied. But whatever approach it opts for, the fact remains that the outcome is generally a hybrid system in which the State reserves certain prerogatives that go beyond the traditional powers of an employer in collective labour relationships in the private sector.

The limits thus imposed on pure and simple bargaining usually take the form of regulations on consultation and negotiation that are more detailed than for the private sector; these may deal with the issues covered, the procedures themselves, identification of the parties, the legal implications of the formal or informal agreements reached, and so on. On all these points the State's objective is to adapt the system so that it takes into account the special requirements and constraints of the public sector, such as the need to maintain a public service (especially in essential services), the usual desire to limit budget deficits and public expenditure, and proper respect for the prerogatives of the budgetary authority.

Other sectors of activity

The great majority of national economies have undergone extensive structural transformation in recent years: privatization and deregulation of public services (telecommunications, transport, health care, postal service), restructuring of enterprises,

⁸ Ruling C.1234 of 29 Nov. 2005.

⁹ Ruling 2007 SCC 27 (*Health Services and Support Facilities Subsector Bargaining Association vs. British Columbia*).

outsourcing of production, and rapid and far-reaching development of new industries linked to new technologies. Inevitably, these developments have all had an impact on the labour market, and hence on labour relations. With the increasing use of subcontracting, interim work and atypical forms of employment, collective bargaining is proving increasingly under threat, as access to the actual employer's decision-makers is not always simple. In some sectors, therefore, the trend has been somewhat negative as far as collective bargaining is concerned; in some cases, especially in agriculture, the informal economy and EPZs, the problems are quite widespread.

Agricultural sector

Because of the large number of small undertakings and the fact that they are widely scattered, the agricultural sector has always been a sticking point when it comes to trade union and collective bargaining rights. Moreover, the genuine employer can be hard to identify when the agricultural undertakings are part of a global supply chain operating all over the world. A lot of rural workers are independent, or else temporary or seasonal workers. It also often happens that the labour legislation does not apply to the sector, or includes special provisions that are less favourable than in the industrial sector. There are many such factors that account for the poor coverage of agricultural workers by collective agreements, even though in several countries (Canada, Romania, South Africa and Uruguay) there has been some progress in this area in recent years, both in law and in practice.

Informal economy

The constraints are much the same in the informal economy as a whole. In many countries the legislation governing collective labour relations does not apply to the informal sector, either because it is not covered by the law or because it defines workers' organizations as organizations of employees. Quite apart from the juridical difficulties involved, there are numerous practical obstacles that limit, if not exclude, the possibility of resorting to collective bargaining. These include the large number of non-wage jobs (own-account workers, family businesses, independent craft workers, etc.), the frequent resort to part-time, precarious or intermittent employment, the workers' isolation in scattered economic units that make joining a trade union difficult, and employment relationships that often exist with several employers in different economic sectors. The problems differ according to whether or not the workers are paid employees. If they are, the main problem is deciding who can act as the employers' representative in collective negotiations, often a difficult decision to reach because of the inability of micro-enterprises to negotiate collectively and the non-existence, or sometimes the plethora, of employers' organizations. As for independent workers, the problem is often to find a framework for negotiations with the public authorities (whether the State or a local community), as this assumes that appropriate organizations actually exist, which is not always possible given the often highly self-motivated behaviour of the workers concerned.

Considering how many workers face serious legal and practical obstacles to union membership and to collective bargaining in the informal sector (over 90 per cent in sub-Saharan Africa, over 75 per cent in Latin America and over 50 per cent in East Asia), in addition to having to contend with precarious and dangerous working conditions and extreme poverty, their plight definitely merits special attention.

Export processing zones

The advantages accorded to enterprises in EPZs set up to attract foreign investment do not always stop at tax benefits. Sometimes the zones are also exempted from certain

provisions of the labour legislation, specifically as regards trade union rights and collective bargaining, including frequently a ban on the right to strike (in Bangladesh, Namibia and Pakistan, for instance). Further difficulties can arise because of the negative attitude that companies adopt towards collective bargaining, since they pursue the maximum reduction of production costs.

Although some governments claim that these measures are only temporary incentives to promote investment and create jobs and that workers in EPZs often enjoy a higher standard of living, the ILO's supervisory bodies maintain that, like any other workers, workers in EPZs are entitled to the rights provided for in the Conventions dealing with freedom of association. The Committee on Freedom of Association has also observed¹⁰ that the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) stipulates that, where governments of host countries offer special incentives to attract foreign investment, they should not entail any limitation of the workers' freedom of association or the right to organize and bargain collectively. Legal provisions governing EPZs should therefore guarantee all workers the right to freely join trade unions and to bargain collectively.

In the past few years some governments have followed the supervisory bodies' comments and recommendations regarding workers in EPZs. For example, in Namibia the prohibition on collective action no longer applies; in Sri Lanka collective agreements have been signed in EPZs; in Turkey compulsory arbitration in collective disputes has been abandoned; in the Dominican Republic and Nicaragua labour inspection services have been introduced specializing in the protection of trade union rights; and in Fiji the legal requirement to enter into negotiations that was introduced in 2007 also applies now to EPZs.

State intervention

Issues covered by collective agreements

Collective agreements have proved an indispensable means of guaranteeing decent working conditions and a degree of industrial peace in the workplace. This does, however, mean that the social partners have to be in a position to negotiate all the terms of their employment relationship, including wages and other forms of remuneration, working time, annual leave, vocational training, the granting of trade union facilities, occupational safety and health and guarantees in the event of dismissal. All these points should be freely negotiable.

Some national systems fail to offer such freedoms by excluding certain matters relating to working conditions from the scope of collective agreements and reserving for the legislature the ability to determine certain aspects of working conditions. In Malaysia and Singapore the promotion, transfer, recruitment, elimination of assignments and jobs and the assignment of duties are usually excluded from collective bargaining, as they are considered to be internal prerogatives of the company management. On the other hand, these two countries have repealed provisions restricting the scope of collective bargaining in newly created businesses and in "pioneer enterprises". There has also been some progress in Argentina, which no longer requires for registration with the Ministry of Labour the observation of certain criteria in collective agreements conducted with

¹⁰ See *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, op. cit., para. 266

federations or confederations. The Committee on Freedom of Association has also been informed of restrictions imposed on collective bargaining with respect to retirement and pension schemes covered by legislation (Colombia, Greece, Mexico, Sweden), the fixing of official holidays (Malta) and part-time work (Denmark).

As has been pointed out by the Committee on Freedom of Association and the Committee of Experts,¹¹ measures taken unilaterally by the authorities to restrict the scope of negotiable issues are often incompatible with Convention No. 98. One particularly appropriate method of resolving these difficulties is to hold tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining. Even if some issues are not strictly speaking a matter for collective bargaining, such as the privatization of a public enterprise or the definition of an education policy, the impact of the decisions taken on conditions of employment can hardly be said to be irrelevant for the workers concerned. The only acceptable restrictions on negotiable issues could be a ban on clauses that are liable to undermine public freedoms (discriminatory clauses, for example) and trade union security (“closed shop”) clauses, since when it adopted Convention No. 98 the International Labour Conference made it clear that it should not be interpreted as in any way authorizing or prohibiting trade union security clauses, which were a matter for national regulations and practice to decide.

As labour market trends and new problems relating to work–life balance are taken into account, the range of issues dealt with in collective agreements has nevertheless tended steadily to widen. Collective bargaining nowadays tackles such new aspects as bankruptcy, restructuring, evaluation systems, parental leave, continuous training, equality of men and women and pension schemes, as well as occupational safety and health, including physical and psychological health. This development is of course more apparent in industrialized rather than in developing countries, where wages and hours of work continue to be the main focus of collective bargaining.

Wages especially are central to collective bargaining and as such justify regular negotiations to bring remuneration into line with the cost of living and with the economic situation. A broader coverage of collective bargaining also ensures that wages better follow economic growth and helps to close the wage gap between men and women and between groups at the opposite extremes of the wage scale. Even though it cannot be considered as a substitute for collective bargaining, minimum wage fixing also helps to meet this objective. The fixing of a minimum wage must at all events involve full consultation with the employers’ and workers’ organizations.

At a time when the share of wages in the gross domestic product (GDP) is steadily declining and is likely to continue to do so in the current economic crisis, extending the coverage of collective bargaining (especially to the most vulnerable groups such as informal sector workers, domestic workers and workers with atypical contracts) is probably the best way to limit the repercussions of the crisis on remuneration.

Stabilization policies

One of the factors that slows the development of collective bargaining is the constraint imposed by stabilization and structural adjustment policies and by restrictions on public spending, which have increased the level of state intervention in the determination of wages and conditions of work. Such restriction are evident both in developing countries – because of conditionalities imposed by the World Bank and the International Monetary

¹¹ *ibid.*, para. 912, and *Freedom of association and collective bargaining*, para. 250.

Fund – and in developed countries – where decisions are taken unilaterally by the executive or legislative authorities in the public and semi-public sectors (this is the case in Canada at the federal level and in some provinces such as Alberta, British Columbia, Newfoundland and Labrador, Ontario and Quebec), and even in the private sector in order to limit the economic consequences of a surge in remuneration or a major or prolonged collective dispute (Iceland in the fishing sector, Norway in the petroleum, financial and elevator sectors).

The ILO supervisory bodies' view is that these restrictions can be imposed only in exceptional circumstances, must be kept to a minimum, must not last too long and must be accompanied by appropriate guarantees to effectively protect the standard of living of the workers concerned, especially those likely to be most severely affected.¹²

It is interesting to note that Canada's Supreme Court has changed its jurisprudence on the subject of state intervention in collective bargaining and has declared unconstitutional a law on the health sector passed in British Columbia that would have invalidated the provisions of any collective agreements past or future that did not comply with the terms of that law. The Supreme Court ruling resulted in an agreement between the provincial government and the organizations representing workers in the health sector that managed to settle a large number of outstanding issues connected with collective bargaining. By contrast, there has been no progress in collective bargaining in the teaching sector, and the British Columbia Teachers' Federation has signified its intent to contest the constitutionality of the law as it applies to the education sector.

Prior approval by the authorities

In some countries the law states that, before they can enter into force, all collective agreements must be submitted for approval to an administrative authority, generally the Ministry of Labour or an institution attached to it (Libyan Arab Jamahiriya, Nigeria, Papua New Guinea and Yemen). Provisions such as these are acceptable so long as approval is limited to technicalities or checking that the agreement meets the minimum standards provided for in labour legislation. On the other hand, if it is a means for the public authorities to make sure that any agreement signed between the parties is compatible with the government's economic policy or complies with criteria set by them, then it would be a clear violation of the principle of autonomy of the parties. Rather than making the validity of collective agreements subject to administrative or judicial approval, the Committee of Experts believes¹³ it would be preferable to prescribe that any agreement submitted to the Ministry of Labour would normally enter into force within a reasonable period after being filed. Should the public authority deem that the terms of the proposed agreement are manifestly contrary to economic policy objectives that are recognized as being in the general interest, the case could be submitted to an appropriate joint body, on the understanding that the final decision in the matter would rest with the parties concerned.

Compulsory arbitration

Another means of intervention for the public authorities is the use of compulsory arbitration if collective bargaining breaks down, as is the case in Cuba, Malaysia, Papua

¹² See *Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, op. cit., para. 1029.

¹³ See *Freedom of association and collective bargaining*, para. 253.

New Guinea, Uganda and Sudan. Though this would be acceptable in the case of legal disputes over the implementation or interpretation of a collective agreement, it does raise serious problems in conflicts of interest over the conclusion of a collective agreement or the modification of an agreement already in force. Such provisions are in effect fundamentally contrary to the principle of voluntary negotiation of collective agreements as it is embodied in Article 4 of Convention No. 98. Based on the principle that a negotiated agreement is preferable to a solution that is imposed, it should always be possible to return to the negotiating table voluntarily, which means that any dispute settlement machinery should include the option of suspending a compulsory arbitration process that has been initiated should the parties wish to resume negotiations.

There has been some progress in this area in recent years, notably in Brazil and Turkey where provisions imposing compulsory arbitration of collective disputes have been repealed.

Compulsory arbitration is also problematic when it can be initiated at the request of just one of the parties (Cuba, Republic of Moldova and Uganda).

Changes in the structure of collective bargaining

Other factors – often linked to prevailing economic circumstances – also have a major bearing on collective bargaining, including the level of collective bargaining, the choice between individual contracts and collective agreements and the juridical nature of the employment relationship.

Fragmentation of collective bargaining

One striking development is the increasingly visible tendency to negotiate working conditions at the level of the enterprise, even in countries with a strong tradition of centralized bargaining at the sectoral and even intersectoral level. France, for example, has adopted laws and regulations to give negotiations conducted at the enterprise level a wider scope. In Australia, amendments to the Labour Relations Act in 2006 tended to favour a system of labour relations that focused on the conclusion of agreements at the place of work. Accordingly, multi-enterprise agreements are required to receive prior authorization. Between 2006 and 2007 only six out of 22 requests for authorization were granted. Since then, the collective bargaining system has been extensively modified by the Fair Work Act that came into force on 1 July 2009. Negotiating with several employers is now easier for the most poorly paid workers, for whom it was previously impossible. The purpose of the new Act is mainly to improve the situation of workers employed in childcare, care for the elderly, security work, cleaning, etc.

Sectoral collective agreements nevertheless continue to be the norm in Western Europe (with the notable and traditional exception of the United Kingdom), although some trade unions in Germany have reached separate agreements at the enterprise level.

In its 1994 global survey on freedom of association,¹⁴ the Committee of Experts voiced its concern at the fragmentation of collective bargaining units. It is important to stop this trend from weakening the trade union side in negotiations. This fragmentation of bargaining unit makes it more difficult to maintain the balance among the negotiating

¹⁴ *ibid.*, para. 236.

parties, especially in small and medium-sized enterprises where trade unions do not always have enough human and material resources to conduct fair negotiations successfully. This demonstrates the importance of both providing training for union negotiators (without undermining the free choice of union representatives) and possibly receiving assistance from the corresponding federal and confederal trade union structures, if need be.

When different levels of negotiation coexist in the same economy, it is important, as the Collective Bargaining Recommendation, 1981 (No. 163), advocates, that effective coordination be maintained between the various types of collective agreements that are concluded, if only to prevent unfair competition between enterprises to the detriment of wages and working conditions. Though it does happen more often nowadays that lower level agreements differ from higher level agreements, coordination often derives from a hierarchical relationship between the various levels of negotiation (national, sectoral and enterprise). The important point is, in any case, that some issues can only be properly negotiated at a higher level than the enterprise, such as the general framework of social policies, the consultation of employers' and workers' organizations on economic and social policies, the introduction of systems to combat underemployment, unemployment compensation, etc. Higher bargaining levels are also sometimes necessary to workers in atypical and precarious employment, who often cannot be effectively protected under enterprise agreements.

Giving preference to individual negotiation

This trend can sometimes go beyond the mere fragmentation of collective bargaining and entail systematically giving preference to individual negotiation. Without actually doing away with collective bargaining, these systems – which have mainly been employed in Australia and New Zealand – offer the employee the choice between an exclusive collective agreement or individual contract. If the conditions offered by the employer are invariably better under an individual contract, there is obviously going to be a drastic reduction in the coverage of collective agreements, and hence in the influence of trade unions and in their representativity. Even though in August 2007 the number of workers covered by collective agreements was still higher than those working under an individual Australian contract (respectively 1,773,600 and 830,000), the fact remains that the number of individual agreements had risen substantially since the law was passed. Statistics at the time pointed to a drop in union membership in Australia from 45.6 per cent in 1996 to 20.3 per cent in 2006. As noted above, the newly elected Government is pursuing an extensive review of labour relations that it began in 2008 to reform the entire system. The drop in union membership was likewise considerable in New Zealand in the 1990s and only stopped when the Employment Contracts Act giving precedence to individual contracts over collective agreements was repealed.

Changes in the employment relationship

In a similar development, more and more of the complaints brought before the ILO concern the transformation of employment contracts into civil or commercial service contracts, especially in the transport sector (notably in Latin America but also in certain developed countries). The workers concerned are no longer covered by labour legislation and therefore can no longer be covered by collective agreements. The subcontracting of company activities poses a similar problem, and the Committee on Freedom of Association recently examined a case concerning the Republic of Korea, where hotel workers whose regular contracts were changed to subcontracts were no longer covered by the sector's collective agreement and saw their wages drop by around 60 per cent. Workers in the country's building and metalworking sectors have also been denied the right to bargain collectively in subcontracting enterprises.

An interesting experiment in union membership for workers not covered by an employment contract has been conducted in the Netherlands. Realizing that the number of self-employed workers in the building sector (10 per cent) and in transport and communications was increasing, the Netherlands Trade Union Federation – FNV (starting in 1999 in an experimental form) and the National Federation of Christian Trade Unions – CNV (since 2007) decided to accept them as members. Self-employment is not always a deliberate choice on the part of the workers but is often imposed by companies when restructuring or when subcontracting out certain activities. The FNV has found that in the last few years more independent workers have joined it than wage-earners. As things stand at present self-employed workers do not yet have a collective agreement because the Competition Authority of the Netherlands feels that that would be tantamount to price-fixing but, along with the other unions, the FNV is contemplating including wage agreements in collective agreements that are applicable to the relevant companies. Health and accident insurance is available to affiliated independent workers, for whom pension schemes have also been set up.

Creating cooperatives in which the members do not have the right to join a trade union is another way of denying them of the possibility of negotiating their conditions of employment collectively through trade union rights. The Committee on Freedom of Association has examined an increasing number of such cases in Colombia, some of which have involved the dismissal of workers and their replacement by others from workers' cooperatives. The ILO's Promotion of Cooperatives Recommendation, 2002 (No. 193), invites governments to ensure that cooperatives are not set up for non-compliance with labour law or used to established disguised employment relationships.

On the more general subject of employment relationships that are covered by legal arrangements other than employment contracts, the point must be emphasized that the Employment Relationship Recommendation, 2006 (No. 198), specifies that national policy should combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the workers' true legal status.

International framework agreements: A new development in collective bargaining?

One feature of globalization that has actually had a positive impact on the spread of collective bargaining – even though they cannot be considered genuine collective agreements – is the proliferation of international framework agreements (IFAs) that have been concluded by multinational enterprises or at the international sectoral level. There are now over 70 of these agreements worldwide, covering some 6 million workers. If one includes all international (though not necessarily worldwide) agreements signed by workers' organizations regardless of their status, then the figure is in the hundreds (probably around 700), most of them having been signed over the last decade. Since 1988, when the first agreement was concluded between Danone (then BSN) and the International Union of Food Workers (IUF), the number of IFAs has grown rapidly, with more than half of them being concluded within the past five years.

IFAs are mainly intended to promote respect for core labour standards, generally with some reference to the ILO instruments, and establish a general framework for the harmonious development of labour relations, at the level of the signatory group itself and, sometimes, in subcontracting companies and suppliers. They are signed by a multinational enterprise and a Global Union Federation and are usually limited to proclaiming principles, without giving any detailed figures. In other words, provisions relating to wages, hours of work, paid leave and overtime, where such clauses exist, are not quantified, and they usually refer back to national laws and regulations on the subject.

One of the paradoxes of framework agreements at the world level is that they are signed on the workers' side by international sectoral organizations and yet they cover just one enterprise and not a whole economic sector (except for the maritime sector). This is probably because of the considerable expertise acquired by international trade union federations in this type of negotiation and possibly, in certain cases, to the fact that the IFA covers more than the company itself and extends to subcontractors and suppliers. However, worldwide company works' councils have already been involved in the conclusion of framework agreements, notably in the automobile sector (Volkswagen, Daimler Chrysler and Renault, for instance). In Europe, on the other hand, European works councils are not trade union bodies as such and are therefore not normally in a position to negotiate framework agreements, although this has happened in a very few cases.

It is possible to think that, in the future, coordinated worldwide trade union structures of employees of multinational enterprises can themselves be expected to embark upon the negotiation of IFAs, thereby enabling their various national correspondents to participate in the process, which at present is rarely the case. Currently, it is frequently the national organizations of the country where the multinational corporation has its headquarters that have precedence in the preliminary consultation process conducted by the international federations. The international registration of these trade union structures and of the examination of their representativity and independence may become a future issue. This development, if it occurs, should not necessarily entail the disappearance or weakening of the role of the global federations, whose experience in this area is irreplaceable and which are the only union structures which, in times of crisis, can look beyond what may be conflicting or contradictory national interests. National rivalry can arise, for example, when it comes to closing or relocating production units. In cases such as these, it is very often only an international federation that can overcome the rise of resulting difficulties.

There is still uncertainty as to the legal status of framework agreements at the national level, particularly as they relate to freedom of association, when the prevailing trade union system goes against ILO principles. What, for example, would be the status of an IFA that promoted the implementation of Conventions on freedom of association in countries where these principles are openly disregarded? There would be no way for national courts to uphold them since, apart from the fact that they do not always have the necessary independence from the Executive, they are first and foremost responsible for enforcing domestic legislation. Even if the agreement refers to the national legislation and to the competence of specific tribunals (as is the case with the Arcelor agreement, which stipulates that the laws governing the agreement and the competent tribunals are those of Luxembourg), it is questionable whether a national court would be in a position to issue rulings to be implemented extraterritorially. More thought therefore needs to be given, especially where internal procedures prove inadequate, to what international mechanisms could do to examine and resolve disputes arising from the application of framework agreements, and in particular to determine the role that the ILO might play in this regard.

That said, the extension of IFAs to a large number of economic sectors in widely differing countries does extend the international scope of the ILO's fundamental Conventions, since the enterprises concerned commit themselves to applying them even in countries that have not ratified the said Conventions. This can even be true of certain technical Conventions, as IFAs increasingly make reference to standards on safety and health and even – though this is still the exception rather than the rule – to wages and working conditions.

The most comprehensive framework agreement is the one signed in 2003 between the International Transport Workers' Federation (ITF) and the International Maritime Employers' Committee (IMEC), which has all the characteristics of an actual collective agreement on wages and conditions of employment of seafarers.

There remains the still largely unresolved problem of how these multinational agreements are to be enforced. Who is to supervise their application, and what role should the ILO play in the process? Nowadays, the follow-up work, which to be effective calls for considerable resources, is generally carried out by joint committees operating in practice more or less in accordance with the enterprise concerned. It is an issue that should be considered very carefully within the Organization, as it raises the question of the uniform interpretation of the ILO Conventions to which the agreements refer. From this standpoint, the ILO is unquestionably a unique, irreplaceable structure for providing the necessary information on the content and interpretation of the standards to which reference is made in the agreements.

Final remarks

Sixty years on from the adoption of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), collective bargaining in the world today is still a very mixed bag.

To begin with, Convention No. 98 presents a somewhat confusing picture from the standpoint of ratification. On one hand, it is one of the ILO's Conventions that has been most widely ratified (160 ratifications). On the other, however, it is the one that has received the smallest number of ratifications (34) since the ratification campaign for the Organization's fundamental Conventions was launched in 1995. An effort is therefore needed, especially in North America and in Asia, where the shortfall is particularly striking, to intensify the ratification campaign specifically as it relates to Convention No. 98. Twenty-three member States, some of which are highly populated economic heavyweights, still need to be convinced before ratification can be deemed universal. Some of these countries could easily ratify the Convention without any major difficulty. Others are governed by legislation that raises major problems of implementation. In the latter case it would be useful for the ILO, as part of its technical assistance programme, to conduct an in-depth study of the law and practice in each of these States in order to establish whether there really are genuine obstacles to ratification and, if there are, to see how they can be overcome in the labour relations context of the country concerned.

The picture is equally mixed when it comes to the implementation of the principles embodied in the Convention. It is obvious, from the large number of comments from the Committee of Experts and of complaints concerning collective bargaining brought before the Committee on Freedom of Association, that the implementation of Convention No. 98 worldwide is far from satisfactory. If there is to be any significant improvement, then the countries that are most often the focus of the supervisory bodies' comments and observations need to make greater and more rapid use of ILO technical assistance in order to overcome any obstacles that exist.

Finally, the number of workers covered by collective bargaining also differs widely from country to country. In many cases coverage is still inadequate, and the number of workers who could come under collective agreements needs to be broadened. Special attention, too, has to be given to the definition of management staff, which is often used to exclude large segments of the labour force from the scope of collective bargaining. It must be made quite clear that only employees genuinely representing the company management can be excluded from such negotiations.

There are certain economic sectors where a special effort needs to be made to encourage and promote collective bargaining. As is obvious from the number and variety of countries against which complaints are lodged with the Committee on Freedom of Association, the public sector is still an area where restrictions on collective bargaining are both frequent and serious. Yet, by adopting the Labour Relations (Public Service)

Convention, 1978 (No. 151), and the Collective Bargaining Convention, 1981 (No. 154), the ILO has put in place instruments on the negotiation of conditions of employment that are applicable to the public sector, and the gaps that there used to be in the Organization's body of international labour standards have thus now been filled. Despite this, 30 years after their entry into force they are still very much under-ratified (44 ratifications for Convention No. 151 and 39 for Convention No. 154.). Efforts to familiarize governments more widely with the content and usefulness of these Conventions are therefore needed for member States to appreciate fully the possibility and usefulness of introducing collective bargaining in the public sector as well.

Other areas where collective bargaining encounters major difficulties, in terms of both legislation and practice, are those sectors where the workers' status is generally precarious or juridically ill defined, such as the agricultural sector and the informal economy in general. It is essential that there is special attention on the vast numbers of workers engaged in these activities throughout the world if they are to acquire the right to organize and to collectively negotiate their conditions of employment. The characteristics and constraints of these sectors and the barriers they face (the fact that their workplaces are often scattered, that they work independently, that they have many different employers) make it especially difficult for trade union organizations to sign them up as members and adopt collective bargaining that is adapted to their particular status. It is probably only when they are incorporated in the formal economy that these workers will be able to benefit completely from the benefits of collective bargaining. This, however, is bound to be a lengthy process. Meanwhile, trade union membership campaigns for workers in the sectors concerned should be encouraged and promoted, if necessary through such specific measures as amending union bye-laws to facilitate their direct membership in union organizations at every level. The latter would then be able to represent them in negotiations with the public authorities on such issues as access to health care, social welfare and vocational training and with the major employers' organizations on the determination of conditions of employment.

Another sector that calls for special treatment is that of EPZs. It is essential that these areas are no longer treated as legislation-free zones where the right to organize, to bargain collectively and to go on strike is greatly curtailed, if not denied altogether. Recognition of these rights is decisive if these zones are to enjoy balanced labour relations, if decent conditions of employment are to be applied and if enterprises are to be discouraged from engaging in "social dumping" to the detriment of the workers. Coordinated action is therefore required so that trade union rights, including collective bargaining and the right to strike, are recognized in EPZs. This means conducting public-awareness campaigns but also, and above all, negotiating and concluding framework agreements with the administering authorities so that basic labour rights are recognized and respected, along with the introduction of follow-up procedures in which the ILO could be associated.

The involvement of the public authorities in collective bargaining in order to make sure that employers do not have an entirely free hand in fixing wages and working conditions must be limited to what is absolutely necessary, or at least restricted to ensuring the provision of minimum social benefits. This is particularly relevant today because governments are even more inclined to interfere at times of serious economic difficulties such as the world is currently facing. If intervention is to be kept to a minimum in this way, governments have to be convinced of the risks involved; but intervention also calls for coordinated action on the part of the ILO and the international financial institutions, so that collective bargaining standards are taken fully into account when defining and implementing programmes and projects in member States.

The structure of collective bargaining must be such that the balance between the parties is fully guaranteed. In the present situation, where the tendency is for collective bargaining to be fragmented, trade union negotiators need to be properly trained and

informed of the situation of the economic branch and of the enterprise concerned, and when necessary they must be assisted by representatives at the federal or confederal level. The coexistence of different levels of negotiation means that there has to be coordination, and part of the answer is to establish a hierarchy between collective agreements according to their coverage (national, sectoral and enterprise level). Of course, this balance can only be maintained if the trade union organizations that are parties to the negotiations are sufficiently representative and fully independent and if they have the possibility of resorting to strike action in the event of a breakdown of negotiations. For there to be a proper balance between the parties, it is also important that no preference is given in labour relations to individual negotiations or to any disguised form of labour relations (such as civil and commercial contracts) which deny the workers the possibility to join trade unions and to bargain collectively.

In today's globalized world, the conclusion of IFAs appears to be the first sign of the international representation of workers in negotiations with multinational enterprises. It is a trend that can only be conducive to the achievement of the necessary balance between the parties to negotiations within these enterprises. As such, they should be encouraged above all as a means of ensuring the implementation of the ILO's Conventions. They will only really be effective, however, if they are combined with some form of follow-up machinery that is both efficient and permanent. Appropriate action is needed for this to come about. Above all, the ILO needs to ask itself what role it can play in the process, both in providing training for whatever bodies are established to supervise the agreements and in helping to set up an international dispute settlement mechanism. A review of the 1977 MNE Declaration, bringing it up to date so as to take into account the economic and social upheavals that have occurred since it was first adopted, could be a suitable occasion for the Organization to examine the situation and improve the effectiveness of its activities in this area.

It is no accident that the principle of collective bargaining is enshrined in the Constitution of the ILO and that Convention No. 98 was included among the Organization's fundamental Conventions. Collective bargaining is indeed the ideal means of determining terms and conditions of employment. By involving the representatives of the workers and of the employers in the process directly, it provides an approach to labour relations which is both pragmatic and efficient and which takes into account both the legitimate aspirations of the workers and the economic constraints faced by the employers. Its success, based on mutual concessions, requires the parties to the bargaining to act in good faith in the negotiations themselves as well as in the implementation of the collective agreement. Seen in this light, and though it may not be sufficient on its own, collective bargaining is unquestionably a precondition for the promotion of decent work for all and respect for human dignity.

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