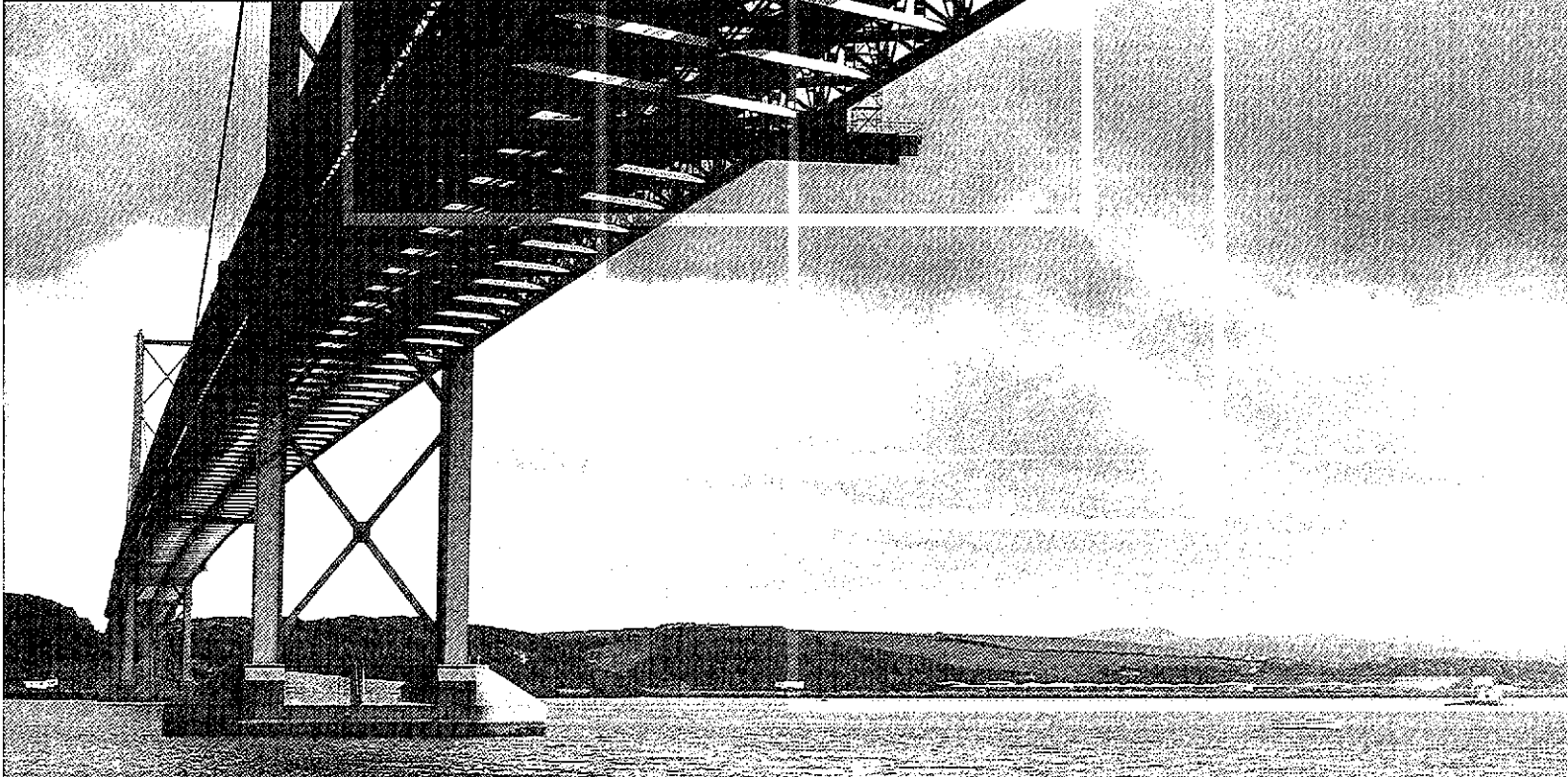




International  
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Office  
Geneva



# Labour clauses in public contracts

INTERNATIONAL LABOUR CONFERENCE  
97th SESSION, 2008



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International Labour Conference

97th Session, 2008

## Report III (Part 1B)

General Survey concerning the Labour Clauses  
(Public Contracts) Convention, 1949 (No. 94) and  
Recommendation (No. 84)

Third item on the agenda:  
Information and reports on the application  
of Conventions and Recommendations

Report of the Committee of Experts  
on the Application of Conventions and Recommendations  
(articles 19, 22 and 35 of the Constitution)

International Labour Office Geneva

# **Labour clauses in public contracts**

**Integrating the social dimension into procurement  
policies and practices**

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*Throughout the survey, only those member States which have ratified the Convention and for whom the Convention is currently in force are listed in italics. The numbers appearing in parentheses in the footnotes refer to selected pieces of legislation which are listed by country in Appendix III.*

## List of abbreviations

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APEC	Asia-Pacific Economic Cooperation
AfDB	African Development Bank
AsDB	Asian Development Bank
BOT	build-operate-transfer
BSTDB	Black Sea Trade and Development Bank
BWI	Building and Wood Workers' International
CICA	Confederation of International Contractors' Associations
CDB	Caribbean Development Bank
COEB	Council of Europe Development Bank
COMESA	Common Market for Eastern and Southern Africa
CPAR	Country Procurement Assessment Report
EBRD	European Bank for Reconstruction and Development
ECOWAS	Economic Community of West African States
EIB	European Investment Bank
EPFIs	Equator Principles Financial Institutions
EU	European Union
FIDIC	International Federation of Consulting Engineers
GPA	Government Procurement Agreement
IDB	Inter-American Development Bank
IFC	International Finance Corporation
IFIs	international financial institutions
MDBs	Multilateral Development Banks
MDBHC	Multilateral Development Bank Harmonised Conditions of Contract
MERCOSUR	Southern Common Market
NAFTA	North American Free Trade Agreement
OAU	Organisation for African Unity
OECD–DAC	Organisation for Economic Co-operation and Development– Development Assistance Committee

PPP	public–private partnership
PTA	Preferential Trade Area for Eastern and Southern Africa
SPE	special purpose entity
UNDP	United Nations Development Programme
WAEMU	West African Economic and Monetary Union
WB	World Bank
WTO	World Trade Organization
UNCITRAL	United Nations Commission on International Trade Law

## Summary

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The Labour Clauses (Public Contracts) Convention, 1949 (No. 94), and Recommendation (No. 84) have been largely misunderstood, almost from the moment of their adoption at the start of the second-half of the twentieth century – the era of the ILO’s Declaration of Philadelphia, post-Second World War reconstruction, and the birth of the United Nations and international financial institutions. *The objectives of the instruments are twofold. First, to remove labour costs being used as an element of competition among bidders for public contracts, by requiring that all bidders respect as a minimum certain locally established standards. Second, to ensure that public contracts do not exert a downward pressure on wages and working conditions, by placing a standard clause in the public contract to the effect that workers employed to execute the contract shall receive wages and shall enjoy working conditions that are not less favourable than those established for the same work in the area where the work is being done by collective agreement, arbitration award or national laws and regulations.*

The application of the two instruments has not been consistent. Although there are countries that have formally accepted Convention No. 94 and implemented it from the moment it came into force, there are others that have not fully complied with their obligations under the ratified Convention. Most significantly, several of these countries consider that the Convention is implemented by the mere fact that national labour legislation is of general application and thus covers work done in connection with the public contract. Today, only about one fourth of the 60 member States which have ratified the Convention are substantially implementing it.

The ILO’s constituents have clearly and repeatedly determined that these standards continue to be relevant and valid, and that their ratification and implementation should be promoted by the Office. Yet, the ratification record of Convention No. 94 has not significantly changed in recent years (only three ratifications have been received in the past ten years). Based on the law and practice reports reviewed by the Committee, it would appear that the Convention has suffered in recent years from a lack of interest underpinned by “modern” public procurement policies which, in promoting competition at all costs among potential contractors, go against the Convention’s aim of requiring the application by all bidders of the best locally established working conditions, i.e. those set by collective agreement, arbitration award or national laws or regulations. This aim seems somehow contrary to the current prevalent view – promoted by many international organizations and institutions – that unrestricted competition and “value for money” are the primary objectives of public procurement policy. Yet, experience shows that the problem raised and dealt with by the instruments is a real one, and that it is most acute where national laws fail to establish a relevant floor of binding labour standards.

Beyond this, there have been developments in public contracting as well as in the world of work that tend to call into question the effectiveness of the standards set out in the Convention. These developments include:

- the increasing importance of subcontracting, global sourcing and the complexities of supply chain management, not only in construction and infrastructure maintenance works, but also in the manufacture of goods;
- the increasing availability and use of contractors that perform the work under the contract outside the borders of the country for which the work is being performed;
- the increasing use of concessions and other forms of public–private partnerships not covered by the Convention;
- the increasing devolution and decentralization of public procurement policy, putting substantial numbers of persons working under public contracts outside the reach of the Convention; and
- the increasing use of service- or labour-only contracting, particularly in the context of privatization, which has a particularly high risk of cost cutting through non observance of the principles of the Convention.

Finally, and running parallel with these developments, there is significant and growing international movement to apply labour standards to public contracting as well as to private contracting in public–private partnerships. These fall under a variety of names, including “sustainable procurement” or “social considerations in public contracts”. Some invoke the ILO’s fundamental principles and rights at work, others give more concrete, practical guidelines, but none refer to or are in line with Convention No. 94.

These developments give the Committee cause for concern. How is it that the ILO’s international labour standard in the area of public contracting – indeed, the world’s only binding, universal and systematically supervised instrument – seems to have fallen out of the limelight? In the face of the momentous changes taking place in public procurement, should the ILO step forward with improved international standards to meet the problems it first addressed almost 60 years ago? The Committee on the basis of its survey considers that Convention No. 94 and Recommendation No. 84 may need to be revisited. In the meantime, the Committee considers that there is much that can be done to infuse new life into the instruments and to enable the Organization to formulate coherent proposals for integrating social criteria into public contracting.

# Chapter I

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## Introduction

### Section 1. Background and scope of the General Survey

1. In accordance with the provisions of article 19, paragraph 5(e), of the Constitution of the International Labour Organization, the Governing Body of the International Labour Office decided at its 291st Session (November 2004) to request the governments of member States which had not ratified the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), to report on national law and practice in regard to the matters dealt with in the instrument.<sup>1</sup> By the same decision, and in accordance with article 19, paragraph 6(d), of the Constitution, the governments of all member States were invited to submit a report on national law and practice in regard to the matters dealt with in the Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84), which supplements the above instrument. These reports, in addition to those submitted in accordance with articles 22 and 35 of the Constitution by States which have ratified the Convention, have enabled the Committee of Experts on the Application of Conventions and Recommendations to prepare its second General Survey on the effect given in law and practice to the instruments under consideration.<sup>2</sup>

### Section 2. ILO standard-setting activities relating to public works and contracts

2. *The idea behind the adoption of an ILO standard on labour clauses in public contracts is that public authorities, in contracting for the execution of construction works, or for the supply of goods and services, should concern themselves with the working conditions under which the operations in question are carried out. The concern stems from the fact that government contracts are usually awarded to the lowest bidder and that contractors may be tempted, in view of the competition involved, to economize on labour costs. In such contexts, it is generally recognized that governments should not be seen as entering into contracts involving the employment of workers under conditions below a certain level of social protection, but, on the contrary, as setting an example by acting as model employers.*

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<sup>1</sup> GB.291/9(Rev.), para. 73.

<sup>2</sup> In 1954, replies from 25 countries were received to a request for reports under article 19 of the ILO Constitution; see International Labour Conference (hereinafter ILC), 37th Session, 1954, Report III (Part II). The Committee at that time did not provide a synthesis of the situation with respect to law and practice regarding the use of labour clauses in public contracts.

3. The International Labour Conference had prior to 1949 twice given consideration to the question of labour standards in public contracts and adopted relevant instruments. Unlike Convention No. 94, however, both those instruments dealt with the direct employment of workers by governments on their own account.
4. In 1936, the Conference adopted the Reduction of Hours of Work (Public Works) Convention, 1936 (No. 51), which applied to “persons directly employed on building or civil engineering works financed or subsidised by central Governments” and provided for a weekly average of working hours not exceeding 40 hours, overtime work up to a limit of 100 hours in any year (in exceptional cases of pressure of work) and overtime wage rates of not less than 25 per cent in excess of normal rates. The Convention was never ratified and was therefore withdrawn by the Conference in 2000.<sup>3</sup>
5. Moving from the subject of hours of work, the Conference in the Public Works (National Planning) Recommendation, 1937 (No. 51), reached conclusions concerning minimum standards of conditions of recruitment and wage rates of workers directly employed in public works. With respect to wage rates, the Recommendation provided that they –
  - ... should not be less favourable than those commonly recognised by workers’ organisations and employers for work of the same character in the district where the work is carried out [or] where there are no such rates recognised or prevailing in the district, those recognised or prevailing in the nearest district in which the general industrial circumstances are similar ... subject to the condition that the rates should in any case be such as to ensure to the workers a reasonable standard of life as this is understood in their time and country.
6. The Recommendation focused on advance planning of public works as a useful method of preventing unemployment especially in periods of economic depression. It was felt that the risk of wages being reduced unjustifiably was greater during depression and therefore safeguards were needed to protect workers against such a lowering of wages.<sup>4</sup> This instrument was one of 16 Recommendations withdrawn by the Conference in 2004.<sup>5</sup>
7. In its preparatory work for Convention No. 94, the International Labour Office made references to certain matters that have a bearing on issues discussed in this General Survey. The first had to do with the performance of work or provision of goods, services or persons for work in an internationalized context, particularly the setting of extraterritorial standards and the differences in the levels of wages and working conditions between workers geographically distant. The second concerned international movements of finance and capital in connection with public contracts, in particular the fact that the Conference had on earlier occasions considered the application of labour standards to international financial arrangements destined for government procurement.
8. The question of wages and working conditions disparity was observed in relation to the operation in the 1940s of the United States Federal Prevailing Wage Law and the United States Federal Public Contracts Law. The first law was applicable to contracts for construction works and the second to contracts for the manufacture and supply of

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<sup>3</sup> ILC, 88th Session, 2000, *Record of Proceedings*, 27/11. Convention No. 51 is one of five Conventions that have to date been withdrawn by the Conference. The others are the Hours of Work (Coal Mines) Convention, 1931 (No. 31); the Hours of Work (Coal Mines) Convention (Revised), 1935 (No. 46); the Reduction of Hours of Work (Textiles) Convention, 1937 (No. 61); and the Migration for Employment Convention, 1939 (No. 66).

<sup>4</sup> ILC, 23rd Session, 1937, *Record of Proceedings*, pp. 308–320 and 690–698.

<sup>5</sup> ILC, 92nd Session, 2004, *Record of Proceedings*, 26/7.

materials, goods and equipment. With respect to the prospect of having wages and working conditions of the locality required by an international standard, the Office noted that wages to be paid under the Prevailing Wage Law –

... are to be calculated on the basis of prevailing wage rates as determined by the Department of Labor for the corresponding categories of worker employed on work of a similar nature in the locality where the public works are carried out. In other words, the law requires that the kind of work and the locality in question are to be clearly stated, so as to guarantee the observance of current wage rates for the locality and the elimination of any unfair competition from outside. Construction works can easily be regulated in this way: the site is clearly defined and all contractors are obliged to carry out their work on this site; both skilled and unskilled workers normally come from the locality where the work is being done. Thus regulation can protect local labour without giving any advantage to one contractor as compared with his competitors.<sup>6</sup>

9. Under the Public Contracts Law, “the wage rates were to be fixed according to current rates in the locality over the whole of the industry or a group of similar industries”. Since the law applied to manufacture and supply of materials, goods and equipment, the Office observed that –

... the term “locality” is not to be interpreted in a narrow sense; for example, two shoe manufacturers working in two different States can perfectly well sell their wares on the same market, and it would be unfair to give an advantage to one as compared with the other by authorising him to pay lower wages than that paid by his competitor merely because his factory was in a different locality. For this reason, the Public Contracts Division of the Department of Labor has given a very wide interpretation to the term “locality”, which may mean the whole of a region or even the whole of the United States. In fact, in 26 out of 35 industries for which wage rates had been fixed in April 1941, the minimum wage rates laid down applied to the country as a whole.<sup>7</sup>

10. The Office further noted that governments had experimented with the insertion of labour and social clauses in contracts for the procurement of strategic materials from other countries. In fact, the Office had conducted a study during the Second World War on the use by the United States of “Labour Conditions in War Contracts”, with a particular section on “Labour Clauses in Contracts for Imported Materials: An International ‘Fair Wages Clause’”. As the relevant part read:

... the acceptance by the United States Government of responsibility for securing the observance of fair conditions of employment on work done for its account has been carried an important stage further during the past year by the inclusion in all contracts for the procurement of strategic materials from other countries of a clause designed to maximize production by the maintenance of certain minimum standards of working conditions under which the production is to be carried on. The policy thus developed is the result of an understanding arrived at between the Coordinator of Inter-American Affairs, the State Department and the Board of Economic Warfare, and the basic principle underlying it is “the belief that men and women who work under decent conditions produce more per person than those who work under less desirable conditions; that work stoppages and labour shortages are less likely under better working conditions and that loss of man hours from accident or occupational disease is reduced by a programme of safety and sanitation”. ... It will be noted that the clause contains five main points: (1) a general obligation to maintain such conditions of labour as will maximise production; (2) an obligation to comply with all laws of the country of origin, so far as they affect labour relations, enumerating illustrative statutes; (3) a series of specific obligations regardless of the actual provisions of the law, to furnish adequate shelter, water, safety appliances, etc.; (4) an obligation to consult with the buyer as to whether the wage scale is such as to maximise production; and (5) a provision that the seller will co-operate in a plan to

<sup>6</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 20.

<sup>7</sup> *ibid.*, p. 21.



improve conditions of health and sanitation and will pay half the costs of the improvements, if the United States Government will pay the other half, it being understood that the total cost shall not exceed an amount stated in the contract.<sup>8</sup>

11. The international aspect of procurement was raised also in the context of international development work. In the words of the Office report:

... recent investigations have shown that in many parts of the world increased importance is being attached to public investment policies for the maintenance of employment, the reconstruction of devastated areas and the development of industrially backward countries and regions. It may therefore be foreseen that in many countries large numbers of workers are likely to be employed on public account, and interest in the labour conditions under which these workers are employed would be increased proportionately.<sup>9</sup>

12. Concerning labour standards and the international financing of government procurement, ILO organs had by 1948 made three pronouncements. First, in 1939, the Conference of American States Members of the Organization, meeting in Havana, urged “that all credit agreements concluded between the nations of the American Continent should make provision for the effective enforcement of fair labour standards upon all work financed in virtue of such agreements”.<sup>10</sup>

13. Five years later, in 1944, the International Labour Conference adopted two relevant resolutions at its 26th Session (Philadelphia). In the first resolution, the Conference expressed the view that the authorities responsible for promoting the international movement of capital needed for reconstruction, development and the raising of living standards in countries around the world –

... should consult the International Labour Organisation as to the appropriateness of including, in the terms under which the development works financed in whole or in part through such machinery are to be carried out, provisions regarding welfare and working conditions of the labour employed; and that such provisions should be framed in consultation with the International Labour Organisation.<sup>11</sup>

14. In the second resolution, the Conference declared that –

... the International Labour Organisation should be in a position to offer effective assistance in determining the appropriateness of including provisions concerning welfare and working conditions in the terms under which any international development works are to be carried out, and in framing and applying any such provisions; [and] request[ed] the Governing Body to examine the methods which might be adopted for determining the appropriateness in any particular case of the inclusion of such provisions for framing such provisions, and for ensuring their effective application.<sup>12</sup>

15. In March 1947, the Governing Body decided to place the question of wages on the agenda of the 31st Session of the International Labour Conference, meeting in San Francisco in June 1948. The question of wages was addressed in three parts: a general

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<sup>8</sup> ILO: *Labour conditions in war contracts with special reference to Canada, Great Britain and the United States*, Montreal, 1943, pp. 55–56.

<sup>9</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 4–5, citing the experience of the United States and the United Kingdom in the context of colonial development.

<sup>10</sup> *ibid.*

<sup>11</sup> ILC, 26th Session, 1944, resolution concerning economic policies for the attainment of social objectives, *Record of Proceedings*, p. 529.

<sup>12</sup> Resolution requesting the Governing Body to examine problems involved in labour provisions for internationally financed development works, *Record of Proceedings*, *ibid.*, pp. 531–532.

report, the protection of wages, and the fair wages clauses in public contracts. The latter two items were both set down for first discussion with a view to standard setting.<sup>13</sup>

16. With these standards, observations and pronouncements having been made, when the subject of fair wages clauses was taken up by the Conference in 1948, it was seen as an opportunity to establish “international standards for national guidance and application, [and thus] regarded as a preliminary step towards giving effect to the international fair labour policy envisaged by the Havana and Philadelphia Conferences”.<sup>14</sup>

17. Historically, labour provisions contained in different national regulations applying to public contracts were known as “fair wages clauses”, since the original and primary concern of those regulations was the level of wages.<sup>15</sup> In the event, it was the need for “fair labour practices” – covering additionally such questions as hours of work and the health and safety of workers – in funding the gigantic effort of rebuilding devastated countries and restructuring ruined economies at the end of the Second World War that led to the adoption of Convention No. 94.<sup>16</sup>

### Section 3. Objectives and content of Convention No. 94 and Recommendation No. 84

18. As already mentioned, the rationale behind the adoption of Convention No. 94 and Recommendation No. 84 is that public authorities should seek to ensure the observance of socially acceptable standards in work performed for the public account. More generally, it is recognized that fair labour clauses in public contracts may play a useful role in attaining and maintaining a high standard of social protection at the national level. Furthermore, such clauses may have inter-state effects to the extent that countries insert labour clauses of one sort or another in contracts for procurement from foreign sources or condition grants or loans that finance local public procurement upon the effective maintenance of certain labour conditions in the execution of the resulting public contracts.

19. Convention No. 94 deals with three main subjects: (i) the types of public contracts that should contain labour clauses; (ii) the content of labour clauses and the means for determining such content at the national level; and (iii) the methods for enforcing the terms of labour clauses.

20. Firstly, with regard to the types of contracts to which labour clauses should apply, the Convention establishes that labour clauses should be inserted in contracts awarded by central public authorities for certain construction works, the manufacture of goods, shipment of supplies and equipment, or the supply of services. Principles are also

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<sup>13</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 1.

<sup>14</sup> *ibid.*, p. 6.

<sup>15</sup> The original Fair Wages resolution was passed by the House of Commons in Great Britain in 1891, while two more Fair Wages resolutions followed in 1909 and 1946. For more, see P.B. Beaumont: “The use of fair wages clauses in government contracts in Britain” in *Labour Law Journal*, Vol. 28, 1977, pp. 147–165. Similar legislation was introduced in the United States in 1936 by virtue of the Walsh-Healey Public Contracts Act. For more, see H.C. Morton: *Public contracts and private wages: Experience under the Walsh-Healey Act*, 1965. It is indicative, in this respect, that the item placed on the agenda of the Conference in 1948 by decision of the Governing Body referred to “Fair wages clauses in public contracts”.

<sup>16</sup> For the Conference discussions, see ILC, 31st Session, 1948, *Record of Proceedings*, pp. 445–455, and ILC, 32nd Session, 1949, *Record of Proceedings*, pp. 235–240 and 482–491.

established as to application of labour clauses to subcontractors, low-expenditure contracts and persons not involved in manual work.

21. Secondly, as regards the content of labour clauses, the Convention provides that they should ensure to the workers concerned wages, hours of work and other conditions of labour which are not less favourable than those established by collective agreement, arbitration award, or national laws, for work of the same character in the trade or industry concerned in the district where the work is performed. Where the conditions of labour are not regulated by any of these means in the district where the contract is executed, reference must be made to the nearest appropriate district where such means are used, or the general level of conditions of work observed in the trade or industry in which the contractor is engaged by employers whose general circumstances are similar.

22. And, thirdly, concerning enforcement measures, the Convention requires the establishment and maintenance of an adequate system of inspection, as well as the imposition of specific remedies and sanctions as means of ensuring the implementation of the terms of labour clauses.

23. Recommendation No. 84 contains two substantive paragraphs. The first suggests that labour clauses substantially similar to those used in public contracts should be used where private employers are granted subsidies or are licensed to operate a public utility. The second specifies details of working conditions that should be prescribed in labour clauses.

24. Convention No. 94 and Recommendation No. 84 continue to be the main international instruments concerning labour clauses in public contracts. In addition, soon after the adoption of Convention No. 94, the Recommendation accompanying the Equal Remuneration Convention, 1951 (No. 100) (Recommendation No. 90) made express reference to the need to ensure application of the principle of equal remuneration for men and women workers for work of equal value, where work is executed under the terms of public contracts.<sup>17</sup> The importance of public procurement in securing equality in employment and occupation was again recognized in 1958, with the adoption of the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111), accompanying Convention No. 111, making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles of non-discrimination.<sup>18</sup> While there are regional instruments on public procurement,<sup>19</sup> the Committee is not aware of any other international agreement or text open to ratification that applies specifically to conditions of work to be applied in the execution of public contracts. The Committee notes that in proposing Convention No. 94 and Recommendation No. 84 to the Governing Body as the subject for a General Survey, the Office observed that these standards had recently been influential in the formulation of other international instruments, and had taken on greater significance as the volume and value of public contracts has increased in the context of a globalized economy.<sup>20</sup> This General Survey addresses these developments and the broader context in which the Convention and Recommendation operate. The Committee recalls, however, that its

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<sup>17</sup> Para. 2(c).

<sup>18</sup> Para. 3(b)(ii).

<sup>19</sup> See, for instance, EU Directives 2004/17/EC and 2004/18/EC examined in Chapter III below.

<sup>20</sup> GB.291/LILS/5, para. 8.

main focus is these international labour standards, the objectives they seek to achieve, and the current law and practice situation in all member States.

## Section 4. Labour clauses in public contracts and the importance of the sector

25. The two instruments reviewed here direct public administration to set up a very specific mechanism through which conditions of work in a potentially broad range of economic activities are to be maintained. As discussed further below and as has been noted elsewhere,<sup>21</sup> the standards for these working conditions are set by reference only to pre-existing national standards. This approach is at the same time quite unique and quite particular as compared with other international labour instruments which, for example, seek to fix new standards for work in a particular sector of economic activity, to guide activities in a particular area of labour administration, or to address issues challenging the world of work generally. Convention No. 94 calls only for a particular condition to be included in a contract for public procurement and for associated enforcement mechanisms to be established. In this sense, and as noted above, the examination undertaken in this General Survey is quite limited. The Committee considers, however, that the scope and potential significance of the matter becomes much more substantial when considering the magnitude of modern day public procurement.

26. Representative figures abound on this point.<sup>22</sup> According to the Organisation for Economic Co-operation and Development (OECD), public procurement spending is estimated to account for 15 per cent of the world's gross domestic product (GDP).<sup>23</sup> The same organization reports that "procurement is particularly prominent in developing countries with active infrastructure and social programmes" (see table 1). In Uganda, for example, 70 per cent of public spending, or 1.9 billion Ugandan shillings (approximately US\$1.1 million), goes through the public procurement system.<sup>24</sup> Public procurement in Europe is said to be worth over €1,500 billion annually – representing over 16 per cent of the European Union's total GDP.<sup>25</sup> In the United Kingdom, public authorities (such as central government departments, local authorities and agencies such as the National Health Service) spend about £125 billion per year on procurement.<sup>26</sup> In 2005, the United

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<sup>21</sup> See, for instance, K. Krüger, R. Nielsen and N. Bruun: *European public contracts in a labour law perspective* (Copenhagen: DJØF Publishing, 1998), p. 33.

<sup>22</sup> See, for instance, OECD: *The size of government procurement markets*, Paris, 2002.

<sup>23</sup> OECD: *DAC Guidelines and Reference Series: Harmonising donor practices for effective aid delivery, Volume 3: Strengthening procurement capacities in developing countries*, Paris, 2005, p. 35. The OECD's statistics included the caveat that "[e]stimation of the global size of public procurement is very difficult since there is no consistency in data that is maintained or reported on procurement across countries. In addition, the reliability of procurement data is suspect in many places".

<sup>24</sup> *ibid*, p. 18.

<sup>25</sup> [http://ec.europa.eu/environment/gpp/facts\\_and\\_figures\\_en.htm](http://ec.europa.eu/environment/gpp/facts_and_figures_en.htm) (accessed 17 July 2007).

<sup>26</sup> Written evidence from the UK Commission for Racial Equality to the Parliamentary Committee on Human Rights, 22 Dec. 2006, also available at: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77we20.htm#n99> (accessed 17 July 2007), citing "Using public procurement to drive skills and innovation", *A report for the Department of Trade and Industry, James Blink, Local Futures Group*, Mar. 2006, p. 4.

States federal Government had procurement figures of US\$373 billion,<sup>27</sup> while in Canada, federal purchasing by departments and agencies subject to government contracts regulations amounted to 16 billion Canadian dollars (CAD).<sup>28</sup>

**Table 1. Size of procurement in selected countries in different regions**

Country	Procurement as per cent of total expenditures
Angola	58
Azerbaijan	34
Bulgaria	30
Dominican Republic	20
Malawi	40
Uganda	70
Viet Nam	40
<b>Global</b>	<b>12-20</b>

Source: OECD: *DAC Guidelines and Reference Series: Harmonising donor practices for effective aid delivery, Volume 3: Strengthening procurement capacities in developing countries*, Paris, 2005, p. 18.

27. The United Nations (UN) system is said to make available over US\$4 billion annually for the procurement of goods and services to support development and humanitarian aid. UN procurement in 2001 involved US\$2.8 billion in goods and US\$1.9 billion in services.<sup>29</sup> The World Bank committed approximately US\$5.9 billion in 2007 to fund contracts awarded under investment projects for civil works, goods, services, and consultancy.<sup>30</sup> In 2006, the African Development Bank procured units of account (UA) 460 million worth of goods, services, and works,<sup>31</sup> while the Asian Development Bank financed contract awards representing US\$6.5 billion in connection with project/programme loans and technical assistance operations.<sup>32</sup>

28. Although these sums do not reveal employment created in connection with public contracting activity, it has been assumed to be sufficiently significant to warrant the renewed attention of workers' organizations and civil society groups interested in promoting good working conditions. Governments' move to privatize and contract out their activities has no doubt contributed to the size of current procurement activities.<sup>33</sup> In

<sup>27</sup> Federal Procurement Report, FY 2005, section I: Total federal views, procurement history by total dollars, available at: [http://www.fpdnsng.com/downloads/FPR\\_Reports/2005\\_fpr\\_section\\_I\\_total\\_federal\\_views.pdf](http://www.fpdnsng.com/downloads/FPR_Reports/2005_fpr_section_I_total_federal_views.pdf) (accessed 17 July 2007).

<sup>28</sup> [http://www.tbs-sct.gc.ca/pubs\\_pol/dcgpubs/con\\_data/par-05-rpa\\_e.asp](http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/con_data/par-05-rpa_e.asp) (accessed 1 June 2007).

<sup>29</sup> <http://strategis.ic.gc.ca/epic/site/si-is.nsf/en/ai02095e.html> (accessed 17 July 2007).

<sup>30</sup> For more information, see <http://go.worldbank.org/BY6HRBV4EO> (accessed 4 December 2007).

<sup>31</sup> [http://www.afdb.org/portal/page?\\_pageid=473,969665&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,969665&_dad=portal&_schema=PORTAL) (accessed 15 October 2007).

<sup>32</sup> <http://www.adb.org/Documents/Others/QPS/2006/2006-highlights.pdf> (accessed 31 May 2007).

<sup>33</sup> For example, the National Confederation of Trade Unions of Japan (ZENROREN) has indicated that as a part of the national policy, governmental agencies and public enterprises are increasingly outsourcing the work as well as services they should provide and, as a result, public contracts have spread to many trades and industries, and the number of workers to be covered by public contracts is growing. The Government of the United Kingdom has referred in its report to contracting out practices that transfer public employees to private sector contractors.

this connection, some public sector employment has been replaced by private sector activity done under conditions of public contract. These developments and their implications for promoting fair working conditions in line with Convention No. 94 and Recommendation No. 84 are discussed in detail in Chapter III. The Committee thus notes that the Convention is of special interest because it represents a certain view – “a long-accepted and prevailing view”<sup>34</sup> – of how to integrate social or labour concerns into public contracts and public procurement.

### Box 1

#### What is public procurement and how does it relate to public contracts?

There is no universally agreed or authoritative definition of “public procurement”. The expenditure of government funds for buying what it needs is the critical characteristic of public procurement while a public contract is, in principle, any contract for goods or services where one of the parties is a public entity or authority. The three definitions that follow help to understand the subject matter of this survey from different perspectives.

- “Public procurement refers to the government’s activity of purchasing the goods and services which it needs to carry out its functions – ranging from paper to missiles, from construction to street cleaning, from vehicle maintenance to information technology services.”<sup>1</sup>
- “Procurement refers to a wider process than simply a purchase decision. Procurement covers a cycle of actions and decisions including identification of need, drawing up specifications and tenders, evaluating tenders, drawing up contracts and contract performance conditions, monitoring and reviewing contract delivery.”<sup>2</sup>
- “Public procurement systems are the bridge between public requirements (e.g. roads, hospitals, defence needs, etc.) and private sector providers. Governments provide goods and services to meet a variety of citizen needs. These items are obtained from either internal government organizations (hospitals, public works departments, etc.) or from sources external to the government, in the private sector (domestic or international suppliers). In this sense, governments traditionally use their budget process to decide if they will ‘make’ something in house or ‘buy’ it from others through their procurement system, just as a private company makes similar decisions in their enterprise resource plan. However, unlike private sector procurement – public procurement is a business process within a political system – with distinct consideration of integrity, accountability, national interest and effectiveness.”<sup>3</sup>

<sup>1</sup> S. Arrowsmith: “National and international perspectives on the regulation of public procurement: harmony or conflict”, in S. Arrowsmith and A. Davies (eds): *Public procurement: global revolution* (London, Kluwer Law International, 1998), p. 3.

<sup>2</sup> S. Bell and A. Usher: *Labour standards in public procurement*, background paper for DFID Labour Standards and Poverty Reduction Forum, 23 May 2007, p. 6.

<sup>3</sup> W. Wittig: Building value through public procurement: A focus on Africa, Ninth International Anti-Corruption Conference, 10–15 October, 1999, Durban, South Africa, p. 3.

29. Indeed, the question of avoiding social, and, in particular, wage dumping in public procurement procedures has attracted considerable interest in recent years. Two examples may suffice here to illustrate this trend. First, in a very recent opinion, the Advocate General of the Court of Justice of the European Communities (hereinafter referred to as the “European Court of Justice”) held that the “Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and Article 49 EC must be

<sup>34</sup> K. Krüger, R. Nielsen, N. Bruun: *European public contracts in a labour law perspective* (Copenhagen: DJØF Publishing, 1998), p. 208.

interpreted as not precluding national legislation, such as the Landesvergabegesetz of Land Niedersachsen, on the award of public contracts which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, if the collective agreement to which the legislation in question refers is not declared to be generally applicable. It is for the court of reference to verify whether that legislation confers a genuine benefit on posted workers, which significantly augments their social protection, and whether, in the application of that legislation, the principle of transparency of the conditions for the performance of public contracts is respected”.<sup>35</sup>

30. The recent debate in Germany concerning the draft law on collectively agreed pay in public procurement is another case in point. Under the proposed “*Tariftrueugesetz*”, public contracts in the construction and local public transport could be awarded only to those companies which declare that they pay wages in line with those collective agreements which are applicable at local level.<sup>36</sup> In presenting the draft law, the federal Government explained that in recent years a massive use of low-paid workers in construction had distorted fair competition in the sector and threatened many jobs. The federal Government further argued that the State had to set a good example regarding working conditions and fair competition and therefore needed to link the award of public contracts to the observance of collective agreements on pay.<sup>37</sup>

31. ***These examples demonstrate that the basic motivation behind the adoption of the Convention in 1949 has not lost any of its relevance or persuasion. Today, more than ever before, fierce competition for public contracts constrains tenderers to lower costs and as part of this process to economize on labour costs including workers’ pay and other costs related to working conditions. The incessant quest for ways to maximize profit by minimizing production cost, exacerbated by the forces of globalization, finds in this Convention a most compelling check. By proposing statutory regulation of the social aspects of public procurement, the Convention aims at counteracting extensive price competition based on costs of working conditions, skilled jobs and quality services. It introduces a truly level playing field for public procurement in so far as labour standards are concerned and puts tenderers on notice that there can be simply no “comparative advantage” at the expense of workers’ employment and working conditions.***

32. The topicality of the issue of labour clauses is further stressed by the fact that public procurement systems themselves are undergoing a “global revolution”.<sup>38</sup> Reform efforts have their origins in both domestic and international factors. In some countries, new emphasis is being placed in domestic policy on value for money in public

<sup>35</sup> See Case C-346/06, *Rechtsanwalt Dr. Dirk Ruffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v. Land Niedersachsen*, Opinion of Advocate General Bot delivered on 20 Sep. 2007, para. 136.

<sup>36</sup> It should be noted, however, that this is a type of pre-qualification condition for bidders and not a standard contract clause like that required by the Convention.

<sup>37</sup> The draft law was adopted in April 2002 by the *Bundestag*, the first chamber of the national Parliament, but was later rejected by the *Bundesrat*, the second chamber of the national Parliament. See also paras 189 and 288 below.

<sup>38</sup> S. Arrowsmith and A. Davies (eds): *Public procurement: Global revolution* (London, Kluwer Law International, 1998).

purchasing; in others, on inclusion of social considerations in buying decisions. Internationally, development bankers and donors have insisted on greater transparency and accountability in the use of loaned and granted funds, as well as improved value for money. Bilateral and multilateral trade arrangements are also being negotiated and agreed with aims of opening procurement up to international competition, not to mention promoting increased competition and an increased market orientation to partners' economies. Attention should nevertheless be drawn to the fact that these grand objectives, and the reorientations they sometimes require, dwarf the requirements of Convention No. 94, while global review and revision of national procurement procedures would risk to wash out of existence the provisions requiring labour clauses in public contracts as well as the policies which underpin them.

## Section 5. Labour clauses in public contracts and the Working Party on Policy regarding the Revision of Standards

33. The Working Party on Policy regarding the Revision of Standards was set up by the Governing Body in March 1995 for the purpose of assessing current needs for the revision of standards, examining the criteria that could be applied to revision and analysing the difficulties and inadequacies of the standard-setting system with a view to proposing effective practical measures to remedy the situation.<sup>39</sup> The Working Party conducted a case-by-case examination of all ILO Conventions and Recommendations adopted prior to 1985 and formulated a significant number of proposals, which have been approved by the Governing Body by consensus.<sup>40</sup>

34. For the third meeting of the Working Party (November 1996), the Office prepared a document in which 28 Conventions, including Convention No. 94, were examined with a view to deciding on the possible need for their revision.<sup>41</sup> The Governing Body decided at that time that consultations should be carried out with constituents on their intentions regarding ratification of Convention No. 94, and on the possible obstacles and difficulties encountered, if any, that might prevent or delay ratification. Consultations were carried out in the course of 1997; 36 member States responded to the request for information. The Office presented the results of consultations to the Working Party at its sixth meeting (March 1998).<sup>42</sup> After an exchange of views, the Working Party decided to defer the examination of Convention No. 94 to its next, seventh meeting (November 1998).<sup>43</sup>

35. In the document prepared for the seventh meeting,<sup>44</sup> the Office drew attention to the fact that Convention No. 94 had been classified by the Ventejol Working Parties of

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<sup>39</sup> The decision was taken following the discussions on standard-setting policy at the 82nd Session of the ILC in 1994 on the occasion of the 75th anniversary of the ILO. The mandate of the Working Party can be found in the appendix to GB.267/LILS/WP/PRS/2.

<sup>40</sup> See GB.283/LILS/WP/PRS/1/2.

<sup>41</sup> See GB.267/LILS/WP/PRS/2, under III.5.

<sup>42</sup> See GB.271/LILS/WP/PRS/2, paras 60–67.

<sup>43</sup> See GB.271/LILS/5, paras 55–58.

<sup>44</sup> See GB.273/LILS/WP/PRS/2, paras 4–6.



1979 and 1987 as being among the instruments to be promoted on a priority basis.<sup>45</sup> It noted that changes in procurement standards for public agencies had raised concerns that the Convention might have lost part of its relevance, and that various opinions were expressed by a number of member States on this matter. The Office noted, however, that consultations revealed a significant trend in favour of its ratification in seven or more countries. It also noted that a resolution had been adopted at a tripartite meeting in March 1996 calling, *inter alia*, for the promotion of the ratification of Convention No. 94.<sup>46</sup> In conclusion, the Governing Body, upon the recommendation of the Working Party, decided to invite member States to contemplate ratifying Convention No. 94.<sup>47</sup> Thus, as an up to date instrument, the Governing Body considered that the ratification of the Convention should be encouraged because it continued to respond to current needs.<sup>48</sup>

## Section 6. Status of ratification

36. Convention No. 94 came into force on 20 September 1952. As at 7 December 2007, it has received 60 ratifications. The most recent instrument of ratification was registered on 18 May 2005 (*Armenia*), while two more ratifications (*Norway* and *Saint Vincent and the Grenadines*) were registered in the last ten years. The list of States which are currently bound by the terms of the Convention is given in Appendix I.

37. To date, the Convention has been denounced by one member State, the United Kingdom, on 20 September 1982. At the time of communicating its instrument of denunciation to the Director-General of the Office for registration, the Government of the United Kingdom stated that it believed that terms and conditions of employment as a general principle were best settled by voluntary agreement between the parties concerned, without state intervention. The Government of the United Kingdom felt that, in the light of developments in economic conditions and in the relationships between employers and employees since it had ratified the Convention in 1950, the provisions of the Convention had become inappropriate for the country.

## Section 7. Information available

38. For the present survey, the Committee had before it 146 reports communicated by 85 member States in conformity with article 19 of the ILO Constitution. Full indications on the reports due and received are contained in Appendix II. Moreover, according to its usual practice, the Committee has also made use of the information contained in reports submitted under articles 22 and 35 of the Constitution by those member States which have ratified the instrument under consideration. Finally, the Committee has duly taken into account the observations submitted by several employers' and workers'

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<sup>45</sup> See final report of the Working Party on International Labour Standards, in *Official Bulletin*, Special Issue, Series A, Vol. LXII, 1979, p. 16, and report of the Working Party on International Labour Standards, in *Official Bulletin*, Special Issue, Series A, Vol. LXX, 1987, p. 30.

<sup>46</sup> Resolution concerning public procurement for construction services and labour clauses, adopted at the Tripartite Meeting on Social and Labour Issues concerning Migrant Workers in the Construction Industry. See *Note on the proceedings*, TMMWCI/1996/13, p. 30, in GB.267/STM/3/1.

<sup>47</sup> See GB.273/LILS/4, para. 26, and GB.273/8/2, para. 7(a).

<sup>48</sup> See GB.283/LILS/WP/PRS/1/2, paras 17–18.

organizations.<sup>49</sup> The Committee recalls that regular and thorough reporting is an obligation inherent to membership of the Organization and which is also crucial to the functioning of the Organization's supervisory bodies. *The Committee regrets that no more than 29 national workers' and employers' organizations from only 17 member States took the opportunity offered by article 23 of the ILO Constitution to express their views on a subject which is being analysed in depth in a General Survey for the first time and which is of significant importance not only for the day-to-day lives of workers, but also as a basic element of public administration. The Committee cannot overemphasize the particular significance attributed to the comments of employers' and workers' organizations in respect of the difficulties and dilemmas that the application of ILO standards may entail in practice, and therefore strongly encourages these organizations to adopt a more responsive and participatory stance towards the Committee's work in sharing their valuable observations and insight with it.* Moreover, for the purposes of this Survey, the Committee has considered it important to refer to the policies, programmes and official publications of numerous intergovernmental organizations, international financial institutions and professional organizations which are particularly active in the area of public procurement, as shown in Chapter III below.

## Section 8. Outline of the survey

39. The General Survey is divided into four chapters. Chapter I contains a general introduction to the survey. In Chapter II, the Committee looks into national law and practice in respect of the requirements of the instruments under consideration. In Chapter III, the Committee reviews recent developments in public contracting and procurement as they affect the application of the Convention and Recommendation. Finally, in Chapter IV, the Committee assesses the overall difficulties encountered in the application and the prospects for further ratification of the Convention, as reflected in the reports received, and concludes with some remarks on the present-day relevance of the standards set out in the instruments and what can possibly be done to improve their effectiveness.

<sup>49</sup> Argentina: General Confederation of Labour; *Austria*: Federal Chamber of Labour (BAK); *Barbados*: Barbados Workers' Union; Canada: Canadian Labour Congress; China: China Enterprise Confederation, All-China Federation of Trade Unions; *Finland*: Central Organization of Finnish Trade Unions (SAK), Finnish Confederation of Salaried Employees (STTK), Confederation of Unions for Academic Professionals (AKAVA), Commission of Local Authority Employers (KT); Germany: German Confederation of Trade Unions (DGB); Japan: National Confederation of Trade Unions (ZENROREN), Japanese Trade Union Confederation (JTUC-RENGO), Joint Struggle Committee of Construction and Allied Industries of Metropolitan Area; Republic of Korea: Korean Confederation of Trade Unions (KCTU); Mozambique: Workers' Organization of Mozambique (OTM); New Zealand: Business New Zealand, New Zealand Council of Trade Unions (NZCTU); Pakistan: Pakistan Workers' Federation (PWF), Employers' Federation of Pakistan; Portugal: Confederation of Portuguese Industry (CIP), General Confederation of Portuguese Workers (CGTP-IN), General Union of Workers (UGT); Sweden: Swedish Trade Union Confederation (LO), Swedish Confederation of Professional Employees (TCO); Thailand: National Congress of Thai Labour (NCTL); The former Yugoslav Republic of Macedonia: Trade Union of Civil Engineering, Industry and Planning (SGIP); United Kingdom: Confederation of British Industry (CBI), Trades Union Congress (TUC). Comments have also been received from the Building and Wood Workers' International (BWI).

## Chapter II

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### Requirements of ILO standards on public procurement and review of national law and practice

#### Section 1. Introductory remarks on the applicability of national labour law to public contracts and the core requirements of the Convention

40. *The Committee wishes to note at the outset that the essential purpose of Convention No. 94 and Recommendation No. 84 is to ensure that the workers employed by a contractor and paid indirectly out of public funds enjoy wages and conditions of labour which are at least as satisfactory as the wages and conditions of labour normally established for the type of work concerned, whether they are established by collective agreement or otherwise, in the locality where the work is done. The Convention requires that this be done through the insertion of appropriate labour clauses in public contracts. This has the effect of setting as minimum conditions for the contract standards that are already established within the locality. Labour costs are thus removed from competition between bidders. The further aim is that local standards higher than those of general application should be applied, where they exist.*

41. *Therefore, clauses within public contracts that restate the applicability and binding nature of national laws, including those dealing with wages, hours of work and other conditions of employment, are not sufficient to meet the requirements of the Convention.* Such provisions are commonly found in contracts for construction works and the provision of goods and services, and have been invariably reported by governments of both ratifying and non-ratifying countries.<sup>1</sup> Nor is the general applicability of national labour law to work done in the execution of public contracts the focus of the instruments under review, although this view also has been extensively expressed in connection with their application.<sup>2</sup> Indeed, there would be very little meaning in adopting a Convention that would simply affirm that work for public contracts must comply with relevant labour legislation. Finally, for a few countries the

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<sup>1</sup> For instance, *Costa Rica, Egypt, Greece, Islamic Republic of Iran, Mali, Morocco, Netherlands (Aruba), Singapore, Switzerland and Tunisia.*

<sup>2</sup> For instance, *Algeria, Australia, Azerbaijan, Brazil, China, Comoros, Czech Republic, Estonia, Ethiopia, Fiji, Greece, Guatemala, Honduras, India, Indonesia, Islamic Republic of Iran, Kuwait, Latvia, Lebanon, Lithuania, Republic of Moldova, Myanmar, Netherlands, New Zealand, Nicaragua, Philippines, Poland, Rwanda, Senegal, Suriname, United Kingdom, Viet Nam and Zimbabwe.*

insertion of labour clauses in public contracts seems to be discretionary and not compulsory under the Convention.<sup>3</sup>

42. ***Such information provided in reports concerning the implementation of the Convention confirms a significant misunderstanding of its core requirement.*** In certain cases, “public contracts” are understood to be contracts for individual services, covered by general labour law or laws applicable to civil servants.<sup>4</sup> In other cases, the information provided details the actual conditions of labour applicable to persons executing work on public contracts even though the setting of any particular conditions is not the purpose of the instruments under review. In yet other cases, approaches are reported which in other ways attempt to deal with aspects of the problem of extreme competition in public contracting and the fundamental rights of workers.

43. The problem lies partly with the fact that the Convention is situated half way between labour law and procurement law. Procurement law is basically administrative law of a commercial nature whereas labour law is social contract law. The two areas of law necessarily interrelate even though they appear to continue to develop separately and without reference to each other which is regrettable. The provisions of the Convention reflect principles of labour protection but also address contract award and contract enforcement issues and therefore represent the point of intersection between labour legislation and procurement rules. In many cases, countries fail to realize this dimension and thus do not understand the need to take action that goes beyond what is purely labour or procurement law in order to implement the Convention. In some cases, even where countries do understand this dimension, they are unwilling to take necessary action to implement it.

44. The Committee therefore considers it important, before embarking on the review of national law and practice, to restate the basic purpose of the Convention and clarify what this Convention is about and what it is not. The Convention seeks to ensure that public contracts are executed under conditions of labour which are not less favourable than those established by collective agreement, arbitration award or national laws or regulations for work of the same character in the trade or industry concerned in the district where the work is carried out. This in practice means the most advantageous labour conditions for the workers concerned, as discussed further in paragraph 103 below. This obliges the contractor to apply the most favourable pay rates, including overtime pay, and other working conditions, such as work hour limits and holiday entitlement, established in the industrial sector and geographical region in question. The concrete terms of this obligation incumbent on the selected bidder and any subcontractors, are to be reflected in a standard contractual clause which has to be effectively enforced notably through a system of specific sanctions.

45. ***In this connection, the Committee recalls its general observation of 1956, where it noted that:***

***... the essential purpose of the Convention is to ensure that workers employed under public contracts shall enjoy the same conditions as workers whose conditions of employment are fixed not only by national legislation but also by collective agreements or arbitration awards, and that in many cases the provisions of the national legislation respecting wages, hours of***

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<sup>3</sup> The Government of *Denmark*, for instance, indicated that the central authorities may recommend, but cannot instruct, municipalities and counties to insert labour clauses. Similarly, the Government of *Sweden* reported that when such clauses are included, they refer to certain appropriate collective agreements or relevant conditions.

<sup>4</sup> This is the case, for instance, in *India* and *Mozambique*.

*work and other conditions of employment provide merely for minimum standards which may be exceeded by collective agreements. The Committee therefore feels that the mere fact of the national legislation being applicable to all workers does not release the States which have ratified the Convention from the obligation to take the necessary steps to ensure that public contracts contain the labour clauses specified in Article 2 of the Convention.*<sup>5</sup>

46. *The Committee considers that Convention No. 94 calls for the insertion of labour clauses of a very specific content. In addition, States may also include in public contracts clauses related to equal remuneration and equality, as expressly required by Convention No. 100, read with Recommendation No. 90, and Convention No. 111, read with Recommendation No. 111. Such clauses could include, for example, affirmative action measures such as measures to promote the employment of women or of vulnerable groups, or addressing systemic discrimination through a system of quotas. In addition, Convention No. 94 does not preclude the insertion of other labour clauses, such as those requiring compliance with other core labour standards, as reflected in the ILO's fundamental Conventions, including those aimed, for example, at preventing the use of child labour and anti-union practices. Such clauses play an important role in the protection of labour rights and enhance the application of the principles contained in Convention No. 94.* The Committee deals in paragraphs 278–279 below with the relationship between Convention No. 94 and the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

47. In an effort to fully reflect information available in the light of the diverse information reported by governments, the results of this survey as to each article of the Convention are presented first with respect to those countries that have labour clauses as defined by Article 2 of the Convention, and then with respect to those that make provision for some other types of labour clauses, if any.

## Section 2. Scope of application

48. Article 1 of the Convention defines the scope of its application. Article 1, paragraph 1, sets out the characteristics of public contracts that are covered by the substantive provisions of the Convention. Article 1, paragraphs 2–5, establish the flexibilities afforded to competent authorities nationally for broadening or narrowing the scope of application. These provisions are analysed in detail in this section.

<sup>5</sup> See Report of the Committee of Experts on the Application of Conventions and Recommendations (hereinafter RCE) 1956, 79. Raising the same point in more recent comments, the Committee has emphasized “that the insertion of labour clauses covering all the employment conditions of persons engaged in the execution of public contracts constitutes the basic requirement of the Convention and the best guarantee that such workers enjoy conditions as favourable as those which may have been collectively negotiated and obtained by workers employed in similar work in the same district. It should therefore be clear that where collective agreements grant additional benefits or provide for higher standards than those established under labour laws in general, or where collective agreements are not generally binding, a mere reference to the relevant provisions of the national legislation would be insufficient for the purpose of giving effect to the Convention”; see RCE 2002, 310 (*Brazil*). See also RCE 2007, 436 (*Algeria*); RCE 2007, 443 (*Costa Rica*); RCE 2006, 337 (*Ghana*); RCE 2004, 289 (*Democratic Republic of the Congo*); RCE 2004, 296 (*Netherlands–Aruba*). In the same vein, the Committee has explained that general labour legislation prescribes minimum standards, such as wage levels, and does not necessarily reflect the actual working conditions of workers whereas the Convention requires workers engaged in the execution of public contracts to be paid the wage that is generally paid in practice rather than the minimum wage provided for in the legislation; see RCE 2007, 447 (*Egypt*); RCE 2007, 450 (*Ghana*).

## Subsection A. Public contracts

49. Convention No. 94 applies to contracts that fulfil the four particular conditions laid down in paragraphs (a)–(d) of Article 1, paragraph 1. First, at least one of the parties to the contract must be a “public authority”. Second, execution of the contract must involve the expenditure of funds by a public authority and the employment of workers by the other party to the contract. Third, the contract must be a contract for “(i) the construction, alteration, repair or demolition of public works; (ii) the manufacture, assembly, handling or shipment of materials, supplies or equipment; or (iii) the performance or supply of services”. Fourth, the contract must be awarded by a “central authority of a Member of the International Labour Organisation for which the Convention is in force”. Accordingly, a labour clause of the type specified in Article 2 of the Convention must be included in all public contracts that fulfil cumulatively these conditions. The Convention clearly applies to a subset of all public contracts, where public contracts are defined as all contracts where public authorities are at least one party to the agreement. The parameters of that subset are set by these conditions and are analysed below.

50. In *Burundi*,<sup>6</sup> for instance, public procurement legislation follows to the letter the provisions of Convention No. 94 with respect to the scope of its requirement for a labour clause, covering public contracts for the construction, alteration, repair or demolition of public works; the manufacture, assembly, handling or shipment of materials, supplies or equipment; or the performance or supply of services. In Brunei Darussalam,<sup>7</sup> subsidiary legislation to the Labour Act requires labour clauses in all instances referred to in the Convention. In *Mauritania*,<sup>8</sup> the decree regulating public procurement applies to contracts for the execution of works, supply of equipment or provision of services. The term, “public contracts” is defined as written contracts which consist principally of the general administrative clauses, the common specifications and the labour clauses.

51. In the United States, labour clauses dealing with labour matters required to be included in public contracts of different types and values, are found in nine federal laws. Requirements for federal contracts for construction, services, and the manufacture or supply of materials are found in three separate laws.<sup>9</sup>

52. In other countries, the requirement for labour clauses is not included in public procurement laws; the clauses are simply placed in the general conditions of contract, and therefore are applicable only to the specific categories of public contracts covered by those conditions (i.e. contracts for construction works, performance of services, or supply of equipment). In the *Syrian Arab Republic*,<sup>10</sup> for instance, an express provision

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<sup>6</sup> (1), s. 1(c). In its preamble, the Presidential Decree fixing minimum conditions for workers employed in public contracts makes explicit reference to Convention No. 94. In addition, the Decree on General Conditions requires the contractor to take all measures as regards order and safety so as to avoid accidents involving either the personnel or third parties, and to make appropriate arrangements to ensure the hygiene at the worksite; see (3), s. 260. Moreover, with respect to construction works, the General Conditions provide that “the general base of remuneration and the general conditions of work established by the national legislation are applicable to the personnel employed by the contractor”; see (3), s. 269. There are, however, other problems in applying the Convention; see RCE 2006, 331 (*Burundi*).

<sup>7</sup> (2), s. 2.

<sup>8</sup> (1), ss 2, 9.

<sup>9</sup> (1), (2) and (3).

<sup>10</sup> (2), s. 29(B). Other provisions set out the rules concerning working hours and safety and health at work; see (2), ss 22, 23.

for working conditions in conformity with the requirements of the Labour Code and Convention No. 94 is to be found in the Decree setting out the general conditions for public contracts but applies only to contracts for construction works. Similarly, in the *Central African Republic*,<sup>11</sup> the administrative clauses applicable to contracts for construction works require compliance with social clauses, whereas the general administrative clauses concerning contracts for the supply of services and equipment do not contain a similar provision.

53. In the case of *Yemen*, there are no laws or regulations providing specifically for the insertion of labour clauses in public contracts, but a standard clause is reportedly included in all public contracts.<sup>12</sup>

54. In other countries which have ratified the Convention, the Convention has ceased to apply to any public contract. In the case of *France*, for example, the old Code on public procurement made provision for the insertion of labour clauses in the general administrative clauses concerning public contracts and was thus fully aligned with the letter of the Convention.<sup>13</sup> However, more recent legislation adopted for the purpose of transposing relevant EU law, now merely provides that “the contractor is subject to the obligations arising from the laws and regulations relating to the protection of labour and to working conditions”.<sup>14</sup> In *Singapore*, the Executive Council Resolution of 1952 providing for the inclusion of fair wages clauses in Government contracts, which previously gave effect to the requirements of the Convention, has been superseded by the Government Procurement Act of 1997 and the Public Sector Standard Conditions for Contract which merely require performance in accordance with current laws and regulations. Similarly, in *Algeria*, the Decree of 10 April 1937 revising the Decree of 10 August 1899 on the conditions of work under public contracts contained provisions making obligatory the application of the wages and conditions of work in force in the district or in the region where the work was to be carried out, and requiring that such conditions would not be less favourable than the general level observed by employers of the same trade or industry. This Decree, however, was repealed by Ordinance No. 73-29 of 5 July 1973. In *Suriname*,<sup>15</sup> the General Regulations for the execution and

<sup>11</sup> (2), s. 16; (3). See also the collective agreement of construction contractors and public works. Following comments made by the Committee of Experts on this point, the Government has since 1982 indicated its intention to take measures to ensure the application of the Convention in public contracts for supplies and services. In its last report, submitted in 2005, the Government reported that the new Labour Code would include provisions on labour clauses in public contracts.

<sup>12</sup> According to the Government’s reports, this clause reads as follows: “All labourers employed for the purpose of carrying out this contract shall be provided with wages and conditions of work not less favourable than the current wages and conditions of government-employed workmen.” In its last report submitted in September 2007, the Government transmitted the text of a new public procurement law which nevertheless does not provide for labour clauses.

<sup>13</sup> See Decree No. 64-729 of 17 July 1964 concerning codification of regulatory texts on public contracts, ss 117–121.

<sup>14</sup> (2), s. 9; (3), s. 5; (4), s. 9; (5), s. 8. The new Code on public procurement simply provides in section 46 that tenderers have to produce certified statements attesting that they fulfil all their tax and social obligations. In addition, under section 44-1, employers who have not met the obligation to offer employment to a certain number of disabled workers are not allowed to participate in public tendering. Lastly, the Code contains in section 14 a so-called “best social offer” clause (*mieux disant social*), which provides that the specifications for the execution of a public contract may aim especially at the promotion of employment for persons facing particular integration difficulties, or at the fight against unemployment.

<sup>15</sup> RCE 2002, 317. The Government is in the process of reviewing its public procurement system with support from the Inter-American Development Bank (IDB) and intends to draft new procurement regulatory framework and procedures.

maintenance of works that provided for labour clauses in line with the Convention are no longer in effect. The Committee has been suggesting to the Government for the last 35 years that the scope of the General Regulations be extended to contracts other than those for public works without ever receiving an indication of concrete progress made in this respect, while in recent reports the Government only refers to the Labour Act as governing employment matters under public contracts.

55. Finally, a certain number of States parties to the Convention, including *Guinea*,<sup>16</sup> *Panama*<sup>17</sup> and *Rwanda*,<sup>18</sup> have still to adopt specific measures to implement the Convention arguing that their general labour legislation applies to all workers without distinction, including those engaged under public contracts. The Committee has emphasized on numerous occasions that the mere application of the general labour legislation to public procurement contracts does not produce the same legal effects as the insertion of labour clauses expressly required under the terms of the Convention.

56. In *Cameroon*, the legislation requires that “tendering enterprises shall undertake in their bids to comply with all laws and regulations and all clauses of collective agreements relating, among other matters, to wages, conditions of work, safety, health and welfare of the workers concerned”.<sup>19</sup> In this connection, the Committee has pointed out that such a commitment at the pre-selection stage is not sufficient to ensure the application of the Convention, and that it is necessary to incorporate a clause to the same effect into the final contract awarded by the public authority.<sup>20</sup>

57. In *Morocco*, following the adoption of new public procurement legislation, two sets of general conditions have been issued with regard to public contracts for construction works and contracts for services related to studies and work management. However, these provisions fall short of guaranteeing the application of the Convention, since they merely require bidders to comply with the labour legislation.<sup>21</sup>

58. The Government of China indicated in its report that the concept of “public contract” is not used in current laws or regulations, but that the concept of “government procurement contract” bears some degree of resemblance since it denotes the act of the Government in disbursing public funds for procuring goods, projects and services.<sup>22</sup>

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<sup>16</sup> See RCE 2006, 337.

<sup>17</sup> See RCE 2002, 316. The Government has been reporting for the last 25 years that measures were under consideration, including draft legislation on two separate occasions, to give effect to the Convention. However, recently adopted public procurement legislation (Law No. 22 of 2006) continues to fail to comply with the basic requirement of the Convention.

<sup>18</sup> See RCE 1995, 221. The new Public Procurement Act, adopted in March 2007, gives no effect to the core requirements of the Convention.

<sup>19</sup> (2), s. 15(1).

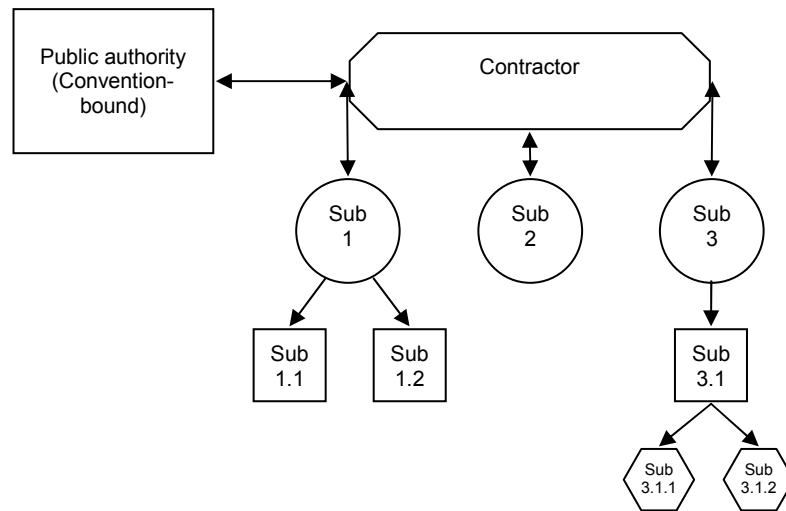
<sup>20</sup> See, for example, RCE 2002, 312 (*Cameroon*).

<sup>21</sup> (2), s. 22(1); (3), s. 19. At present, there do not exist general conditions applicable to other types of public contracts covered by Convention No. 94, such as contracts for supplies or for services other than those related to studies and work management.

<sup>22</sup> (1), s. 2.



Figure 1. Public contracting arrangement covered by Convention No. 94



#### A.1. At least one of the parties is a public authority

59. Convention No. 94 does not apply to contracts between two private parties; one at least of the parties to the contract must be a “public authority”. The Convention intentionally, however, leaves the term “public authority” undefined. During the preparatory work on the Convention, the Governments of Austria, *Belgium* and Hungary had suggested “that it would also be desirable to incorporate in the international regulations a definition of the term ‘public authority’ as to cover such bodies, for example, as public institutions or undertakings enjoying a public service concession”.<sup>23</sup> In relation to this point, the Office expressed the view that “an attempt to establish an international definition of the term ‘public authority’ would raise a number of difficulties, as, for example, those which, in view of varying national legal systems, would inevitably arise with regard to different types of public and semi-public corporations. It would appear more appropriate, as was originally contemplated by the Office in drawing up the questionnaire, to leave to national action the question of defining what is to be meant by the term ‘public authority’”. The Office concluded that “this solution appears to commend itself to the great majority of the governments, and to be in conformity with the considerable body of opinion that the proposed Convention should be so drafted as to provide for a certain margin of decisions to be made nationally”.<sup>24</sup> The matter was not raised again, nor further discussed in the first or second discussion of the Conference.

60. During the first Conference discussion, there were proposed amendments that would have narrowed the groups of workers to whom labour clauses in public contracts were to be made applicable. It was suggested, for instance, that labour clauses be applied to workers employed by “private” employer/contractors. The point in opposition to this was raised by the Australian and South African Government members who considered that the addition of the qualification “private” would unduly restrict the scope in that it might lead to the exclusion of semi-public or public bodies, including government

<sup>23</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 41.

<sup>24</sup> *ibid.*

corporations and local authorities, who might contract with other public authorities.<sup>25</sup> In the end, there was no narrowing of scope, and the proposition remained that “at least” one of the parties be a public authority and the other party could also be a public or semi-public entity.

61. Some countries have applied the term “public authority” very broadly. In the United States, for example, labour clauses to be included in public contracts involving the manufacturing or furnishing of materials or supplies, refer to “contract[s] made and entered into by any agency or instrumentality of the United States, or by any corporation all the stock of which is beneficially owned by the United States”.<sup>26</sup>

62. As discussed in Chapter III below, there can be some doubts about the involvement of “public authorities” per se, within the meaning of the Convention, in the context of public–private partnerships (PPPs). It is clear that at the time of the adoption of the Convention, a traditional public contract for construction work, manufacture of goods, or the provision of services made between a central public authority and a semi-public body should include a labour clause under the Convention. Governments are certainly permitted to insist that labour clauses be placed in contracts concluded between agencies or entities with which they may be involved as, for example, investor or regulator and private contractors. Yet, although there was talk of public investment in infrastructure when the Convention was adopted, there was no discussion about public authorities’ investment of public funds in private enterprises which in turn would invest in and construct infrastructure to serve the public.

#### *A.2. Contract involving expenditure of funds by a public authority and employment of workers*

63. Article 1, paragraph 1(b), of the Convention requires “that the execution of the contract involves (i) the expenditure of funds by a public authority; and (ii) the employment of workers by the other party to the contract”. In preparing for discussion of the subject of fair wages clauses in public contracts, the Office in 1948 specifically consulted with member States about the advisability of defining what is meant by “public contract” by asking if the term should be defined as a contract: (i) in which at least one of the parties is a public authority; and (ii) the execution of which involves the expenditure of public funds and the employment of workers.<sup>27</sup>

64. Not many replies made substantive comments on the two suggested requirements. One gave some insight by commenting on types of agreements made by public authorities that should not be considered public contracts to be covered by any future international regulation. The Government of Hungary replied that “these regulations should not ... apply to orders given by public undertakings and workplaces for the procurement of raw materials or semi-manufactured and unfinished products necessary for their functioning”. It went further to suggest that “the regulations concerned should apply to all public contracts awarded by the State, municipalities and communes, by the institutions, establishments, undertakings and workplaces owned or exploited by the State, municipalities and communes, or by foundations and funds directed by one of these public bodies, as well as to all public contracts relating to work for which a public

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<sup>25</sup> ILC, 31st Session, 1948, *Record of Proceedings*, Appendix IX: Wages, p. 447.

<sup>26</sup> (3), s. 35.

<sup>27</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 8.

body supplies the fund to the extent of 50 per cent”.<sup>28</sup> The Government of Switzerland considered, however, “that it would be desirable to define a ‘public contract’ as any contract to which one of the parties is a public authority and the execution of which involves the expenditure of public funds and the employment of workers. This definition conforms, in effect, to the award by a public authority of contracts for construction work, and the furnishing of supplies and services”.<sup>29</sup>

65. Article 1, paragraph 1(b), of the Convention sets up a symmetry between the expenditure of funds by a public authority on the one hand, and the employment of workers by the other party to the contract on the other. This arrangement was established in the conclusions of the Conference Committee on Wages but only after the first discussion at the 1948 Conference, where the original text suggested by the Office had two sub-clauses. The first required that at least one of the parties be a public authority and the second that the execution of the contract involve the expenditure of public funds and the employment of workers. During the first discussion, the focus of debate was finding wording to ensure that any labour clause in the public contract be applied to workers employed by the other party to the contract, i.e. not the public authority. This was not entirely clear in the suggested text. The text of article 1, paragraph 1(b), was formulated in the conclusions of the first discussion in 1948 and was adopted without discussion at the 1949 Conference. There was no further discussion with respect to this paragraph that would help clarify, for example, how close the nexus need be between the execution of the particular contract and the “employment of workers by the other party”. Similarly, there was no discussion about whether a financial investment by a public authority was to be seen differently from an “expenditure”, where both might today directly lead to creation of public infrastructure.

### A.3. *Contracts for construction, supply of goods, and performance of services*

66. Article 1, paragraph 1(c), of the Convention identifies the categories of contracts to be covered, provided the other conditions of Article 1 are met. Considering the broad scope of modern public procurement, it is important to note that the Convention applies to types of public contracts for three certain purposes: construction, alteration, repair or demolition of public works; the manufacture, assembly, handling or shipment of materials, supplies or equipment; or the performance or supply of services. The text as finally adopted is virtually identical to that originally suggested by the Office.

67. No information has been available to the Committee on the extent to which, if at all, member States have attempted to limit the application of obligations under the Convention to, for example, only groups of workers engaged in the execution of a public contract, or to certain suppliers of enterprises manufacturing products under public contract.

68. There were only a few comments made by member States concerning the language proposed by the Office that might help clarify how far along the manufacturing supply chain – much shorter than today – the obligation to pay fair wages and respect certain working conditions imposed on contractors via the public contract inheres. In connection with the possible problem of applying different sets of wages and working conditions within the same manufacturing enterprise, the Government of India noted in

<sup>28</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 16.

<sup>29</sup> *ibid.*, p. 20.

reply to the first law and practice questionnaire, that it would have difficulties with clauses identifying manufacturing and services because “in many cases government offtake may constitute only a small part of the output of the industrial undertaking. It is difficult to isolate the workers employed on government contracts. Where the unit also produces for stock, it may not be possible to say when the goods delivered to government are manufactured”. The Government went on to point out that construction contracts are “different from other contracts. These contracts are executed by distinct groups of workers, who are employed whole time on work covered by contracts. It is desirable that government should act as a good employer and take such measures as may be necessary to secure to the workers employed on such contracts fair wage rates, especially in the building industry, where workers are not organised or in a position to secure, by their own efforts, fair wage rates”.<sup>30</sup> The text suggested by the Office was adopted by the Committee on Wages in 1948 and again in 1949, without discussion.<sup>31</sup>

#### A.4. *Central and other public authorities*

69. Article 1, paragraph 2, of the Convention provides that its provisions apply to contracts awarded by a central authority and that it would be for the competent authority of a ratifying State to determine the extent to which and the manner in which the Convention could be applied to contracts awarded by authorities other than central authorities.

70. The Committee recalls that, in adopting the Convention, the Conference chose not to specifically define the term “public authority”. It decided instead to leave “a certain margin of decisions to be made nationally”.<sup>32</sup> Furthermore, in describing the law and practice in different countries, the preliminary Office report noted that “all the clauses relating to wages, hours of work, etc., mentioned in this report apply to work or services carried out in virtue of contracts concluded by the central authority” and that in cases involving a federal State, the central authority is either the federal authority or a central authority or a constituent unit. The report also noted that “in many countries, however, the clauses relating to social protection apply to work or services performed on behalf of local authorities. The term ‘local authority’ may mean the authority of a province, a department, a region, a municipality, a port, etc., according to the country concerned”.<sup>33</sup> The Office then asked governments, with a view to setting the basis for discussion at the Conference, whether international regulations should apply to contracts entered into: (i) by authorities of the central Government; and (ii) by local authorities.<sup>34</sup> On the basis of responses, the Office proposed that “the Convention should apply to contracts awarded by all central authorities ... and that it might be left to national decision to define the extent to which and the manner in which the Convention is to be applicable to contracts awarded by other authorities”.<sup>35</sup> Thus, the term “other authorities” was introduced in Article 1, paragraph 2, of the Convention with “local authorities” in mind. *The*

<sup>30</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2) (Supplement), pp. 15–17.

<sup>31</sup> ILC, 31st Session, 1948, *Record of Proceedings*, p. 447, and ILC, 32nd Session, 1949, *Record of Proceedings*, p. 483.

<sup>32</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 41.

<sup>33</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 10.

<sup>34</sup> *ibid.*, p. 38.

<sup>35</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 42.

***Committee notes, therefore, that Convention No. 94 principally addresses itself to contracts awarded by a central authority. It explicitly permits, however, application to other authorities as the competent national authorities may freely decide. Changes in patterns of decentralized public administration may indeed have had the effect in some cases of permitting the exclusion of a large number of persons working under public contracts made with non-central authorities who have not been obliged by the competent national authorities to include labour clauses in their contracts.***<sup>36</sup>

71. In a number of countries, for instance, *Central African Republic*<sup>37</sup> and *Morocco*,<sup>38</sup> the relevant legislation applies to public contracts concluded in the name of the State without further details.

72. In other countries, the scope of application of the legislation on labour clauses extends also to contracts concluded by authorities other than those of the central government. In *Burundi*,<sup>39</sup> for instance, the legislation covers municipalities and public law institutions, while in *Mauritania*,<sup>40</sup> labour clauses must be inserted in all administrative contracts concluded on behalf of the State, public agencies, public corporations and local authorities. In the *Syrian Arab Republic*,<sup>41</sup> by “public entity” is understood any of the ministries or public bodies, local administration units, municipalities or municipal authorities, Waqf departments, public establishments or companies and public institutions. In Latvia,<sup>42</sup> the term “contracting authority” is defined as a state institution or local government institution, local government and other bodies governed by public law or their organs, as well as a legal person governed by private law, which simultaneously complies with the following criteria: (i) it is established or functions for the purpose of meeting public needs which have no commercial or industrial character; (ii) it is subordinate or under decisive control of state or local government institutions or under decisive control of a legal person governed by private law (which manifests as a majority voting rights in the election of supervisory or executive bodies or appointment of management), or this legal person governed by private law is financed in amount exceeding 50 per cent by State, or local authority. In Nicaragua,<sup>43</sup> the law on public contracting applies, apart from central government agencies, also to municipal authorities, regional autonomous councils and governments, state-funded universities, state-owned commercial enterprises and all other institutions or enterprises receiving funds from the state budget. In Peru,<sup>44</sup> the scope of application of public procurement legislation extends to contracts awarded by regional or local

<sup>36</sup> The Committee recalls that the Office has given an informal opinion concerning the meaning of the term “central authority”, practically along the same lines, in 1990 to the Danish Centre for Human Rights, and in 1996 to the Government of Sweden.

<sup>37</sup> (1), s. 2.

<sup>38</sup> (1), s. 1.

<sup>39</sup> (1), s. 1(a).

<sup>40</sup> (2), s. 1. Similarly, in Portugal, public contracts are those concluded by the State, the autonomous regions, local authorities, public institutions and public associations, or legal persons, which independently of their public or private nature, are established to satisfy needs of general interest and either are mainly financed by those bodies or are subject to their control or management.

<sup>41</sup> (1), s. 1.

<sup>42</sup> (1), s. 1.

<sup>43</sup> (1), s. 2. See also El Salvador (1), s. 2.

<sup>44</sup> (1), s. 2(1).

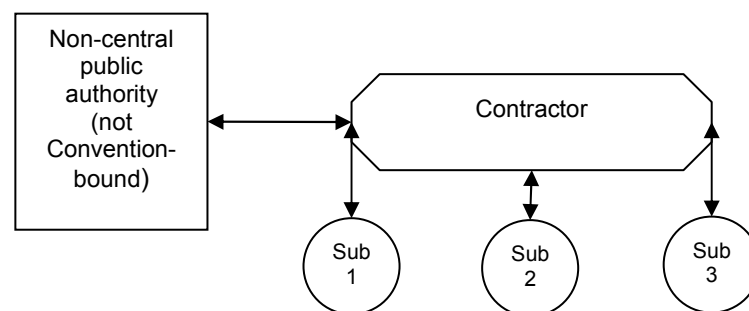
governments, autonomous constitutional institutions, public universities, the armed and police forces, state-owned and state-controlled enterprises, as well as programmes, projects and funds of decentralized public agencies. In Brunei Darussalam,<sup>45</sup> “government” as a contracting party, includes such public authorities, municipal boards or local authorities as the minister may from time to time specify.

73. In certain federal States, such as *Belgium*,<sup>46</sup> the legislation explicitly stipulates that it is applicable to federate entities.

74. In their comments, a number of Finnish workers’ organizations wondered whether the obligations set down in the instruments may depend on the administrative system of a member State. They noted, in this connection, that municipal authorities in their country are the largest public contractors and they expressed the view that the objectives of the instruments cannot be fulfilled as long as contracts concluded by municipal authorities are excluded from their scope.<sup>47</sup>

**Figure 2. Public contracting arrangement not covered by Convention No. 94**

(does not involve a central authority – the competent authority has chosen not to extend the coverage of the Convention to contracts awarded by non-central authorities)



**Subsection B. Application to subcontractors**

75. Labour clauses of the type required by the Convention must apply to work carried out by subcontractors or assignees of contracts. Article 1, paragraph 3, of the Convention requires that appropriate measures be taken by the competent authorities to ensure such application.

76. In surveying the global situation in preparation of the first Conference discussion, the Office observed in 1948 that clauses relating to fair wages, hours of work, etc., were applied in the majority of countries to both contractors and subcontractors. In some countries the clauses were made directly applicable. In other countries, the contractor

<sup>45</sup> (2), s. 2.

<sup>46</sup> (1), s. 4.

<sup>47</sup> The Central Organization of Finnish Trade Unions (SAK), the Finnish Confederation of Salaried Employees (STTK), and the Confederation of Unions for Academic Professionals in Finland (AKAVA). See also the direct request addressed to *Denmark* in 2006 where the Committee noted the Government’s information to the effect that the Ministry of Labour may recommend, but not instruct, municipalities and counties to insert labour clauses in contracts concerning building and construction work.

was held responsible for acts or omissions of subcontractors. In a few countries, contractors were held personally responsible for the observance of labour clauses by subcontractors, while in others the assignment of work to subcontractors was subject to permission being given by the contracting authority. Finally, in some countries the regulations only covered contractors.<sup>48</sup>

77. The object of applying labour clauses to subcontractors is, of course, to ensure implementation of the clauses in practice, by affecting the wages, hours and other conditions of persons working to execute the contract. Since construction work characteristically involves execution by specialty subcontractors, labour clauses would have little real meaning if they were not applied to subcontractors. The Office noted the risk of “evasion” from the protection envisaged in discussing the purpose of what was to become Article 1, paragraph 3. It observed also replies to its questionnaire from several countries which suggested that “application of the international regulations to subcontractors or assignees of contracts might create practical difficulties of application or of legal interpretation”. The Office acknowledged these replies saying that “it would obviously be most difficult, if not impossible, to draft international regulations in such a way that they would clearly apply to bona fide cases of subcontracting and at the same time would exclude such arrangements as, for example, a purchase contract for primary materials entered into by a public contractor”. In this respect, the Office cautiously concluded that the “intended effect of such a provision [requiring government to take all possible measures to ensure application of the Convention to subcontractors and assignees of contracts] would be to leave to national action the question of defining what is meant by the terms ‘subcontractors’ and ‘assignees of contracts’ and of the appropriate administrative measures to be taken to ensure application in such cases”.<sup>49</sup>

78. Today, general provisions for subcontracting are often found in public contracts, as well as laws and regulations governing public procurement.<sup>50</sup> Sometimes subcontracting is prohibited, sometimes permitted but with the permission of the contracting authority,<sup>51</sup> other times permitted but with the requirement that obligations binding on the contractor flow through to any and all subcontractors.

79. Although the intention was to leave the definition of subcontractor to competent national authorities, the Committee observes that the object of Convention No. 94 is to affect the wages and conditions of work arising from the employment of workers involved in the execution of a public contract. In the case, for example, where a public contract is for the shipment of supplies that are part of stock in trade, i.e. inventory of merchandise held for sale, the only persons employed as a result of the contract are those engaged in the delivery, and not the manufacture of the supplies. Similarly, where a supplier provides stock in trade to a public contractor that employs persons to finish the ordered manufactured goods, the supplier cannot be seen as a subcontractor. If, however, the supplier manufactures to specification an input to the final product ordered under a public contract, it ought to be considered a subcontractor.

<sup>48</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 8–9.

<sup>49</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), pp. 41–42.

<sup>50</sup> See, for example, India (1).

<sup>51</sup> See, for example, China (1), s. 48; Saudi Arabia (2), s. 71.

80. In certain countries where labour clauses required by the Convention are included in public contracts, such as *Cyprus*,<sup>52</sup> *Denmark*<sup>53</sup> and *Swaziland*,<sup>54</sup> clauses are directly applicable to subcontractors, and the principal contractor is held responsible for application. Similarly, according to the legislation of *Belgium*,<sup>55</sup> *Morocco*<sup>56</sup> and *Uruguay*<sup>57</sup> the prime contractor is responsible for ensuring compliance with labour clauses by any subcontractor. In Switzerland,<sup>58</sup> contractors are required to oblige their subcontractors by contract to apply the same provisions concerning workers' protection and the conditions of work as those applicable to them. In Canada,<sup>59</sup> federal legislation for construction works provides that there must be included in every contract a provision that in subcontracting any part of the work, the contractor will place conditions in the subcontract to secure observance by the subcontractor of the same conditions respecting fair wages, hours of work and other labour conditions with those applicable to him/her. In *Austria*,<sup>60</sup> subcontracting has only recently been permitted as a result of legislative changes so that labour clauses are now directly applicable to subcontractors. In Brunei Darussalam,<sup>61</sup> the subcontractor is also directly bound by labour clauses. In *Guyana*,<sup>62</sup> a contractor is prohibited from subcontracting without the approval of the Commissioner of Labour. In *Mauritania*,<sup>63</sup> the legislation sets out that the contractor cannot subcontract without prior authorization of the contracting authority and that in any case the contractor is solely responsible to the latter.

81. In some countries where other types of labour clauses are included in public contracts, the principal contractor is responsible for ensuring compliance with labour clauses by any subcontractor.<sup>64</sup> In other countries, subcontracting is subject to prior authorization of the project coordinator while full responsibility for the execution of the contract falls upon the contractor. This is the case in *Burundi*,<sup>65</sup> *Mali*<sup>66</sup> and the *Syrian*

<sup>52</sup> (1), s. 5(b).

<sup>53</sup> (1).

<sup>54</sup> (1), s. 138(1).

<sup>55</sup> (1), s. 12(1), (2), (3). In particular, the contractor is responsible for covering wages and social security benefits that the subcontractor may have failed to pay.

<sup>56</sup> (1), s. 79; (2), s. 22(2); (3), s. 19(4).

<sup>57</sup> (3), s. 1. The contractor bears joint liability for any failure of the subcontractor to meet his/her social security obligations such as the payment of work-injury insurance.

<sup>58</sup> (2), s. 6(1)(b).

<sup>59</sup> (2), s. 12.

<sup>60</sup> (2), s. 31(1).

<sup>61</sup> (2), s. 6.

<sup>62</sup> (1), s. 6(a).

<sup>63</sup> (1), s. 19. Moreover, the principal contractor is jointly responsible for the observation of labour clauses by its subcontractors; see (2), s. 6.

<sup>64</sup> See, for instance, *Central African Republic*, (2), s. 11(2)(i). In addition, it is explicitly provided that subcontractors must be certified by the contracting authority. As mentioned previously, the general conditions of contract for supplies and services do not contain labour clauses, yet they apply to subcontracting; see (3), s. 16(5)(a).

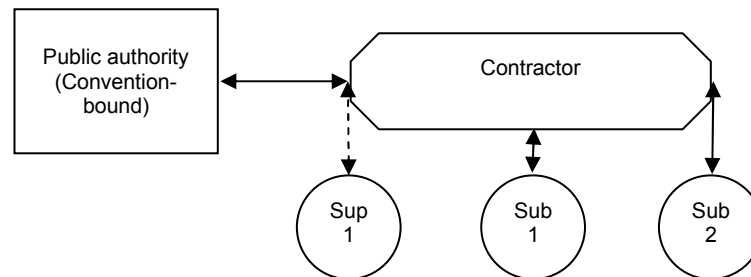
<sup>65</sup> (3), ss 142 and 143. In addition, the legislation provides that the successful bidder must ensure that its subcontractors discharge their obligations towards workers employed for the execution of contract; see (1), s. 5.

<sup>66</sup> (1), s. 58.



*Arab Republic*.<sup>67</sup> Similarly, in Senegal<sup>68</sup> and Tunisia,<sup>69</sup> in case of subcontracting, the contractor remains personally responsible for the observance of all the obligations resulting from the contract, both vis-à-vis the contracting authority and the workers of the subcontractor. In *Singapore*,<sup>70</sup> the contractor is obliged to make good any damage, loss or injury suffered by the contracting authority by reason of any breach of contract, repudiation, default or failure, whether total or partial, on the part of any subcontractor or supplier whether nominated or privately engaged by the contractor and to indemnify the contracting authority against all and any loss, expense, costs, damages, liability or claim arising therefrom. In Peru,<sup>71</sup> the contractor remains solely accountable to the contracting authority for the execution of the totality of the contract irrespective of any subcontracting.

**Figure 3. Public contracting arrangement covered by Convention No. 94**  
(illustrating a supplier of materials to the contractor who is not covered by the Convention, provided the competent national authorities do not deem the supplier to be a subcontractor)



### Subsection C. Exceptions

82. The Convention provides in Article 1, paragraphs 4 and 5, for two possible exceptions from its material and personal scope of application. First, the competent authorities may, after consultation with the organizations of employers and workers concerned, exempt low value contracts which do not exceed a fixed amount. Second, they may exclude persons occupying positions of management or of a technical, professional or scientific character, whose conditions of employment are not regulated

<sup>67</sup> (2), s. 30. Furthermore, the circular concerning the payment of wages to private workers engaged under a public contract provides that when the contractor concludes a contract with a subcontractor, such contract must reproduce the clauses related to the payment of wages provided for in the said circular; see (3), s. 3.

<sup>68</sup> (1), s. 39; (2), s. 48.

<sup>69</sup> (3), s. 2.4.8; (4), s. 3.28; (5), s. 2.39. The Government of Tunisia reported that with a view to ensuring entrepreneurs' respect for legislation relevant to conditions of work, safety and health, social security, occupational injury and illness, it envisages elaborating special conditions of contract applicable to those types of procurement where subcontracting is typically found. Similar issues are faced in procurement of security and cleaning services; special conditions of contract have been prepared and are soon to be approved for these types of contracts.

<sup>70</sup> (3), s. 4.3. The subcontractor is under the obligation to observe, perform and comply with all the provisions of the main contract to be observed, performed and complied with on the part of the contractor so far as they relate to subcontracted work, (5), s. 5.

<sup>71</sup> (2), s. 208.

by national laws or regulations, collective agreement or arbitration award and who do not ordinarily perform manual work.

*C.1. Contracts involving the expenditure of public funds of an amount not exceeding a specified limit*

83. In introducing the idea of making it possible to exempt low value contracts, the Office observed the practice in national legislation and asked member States if the possibility for such an exemption should be permitted by the international standard. The Office noted that views on this question were divided, including negative replies on grounds of principle, that is to say that the expenditure of public funds was the basis for including labour clauses in public contracts and therefore the value of such contracts should be of no consequence, and affirmative replies maintaining that the threshold value should not be set too high, in order not to exclude too many contracts. The Office concluded that the number of governments in favour of the proposed exemption indicated that in order to arrive at a widely ratifiable Convention, such an exemption should be made possible.

84. Consequently, the Conference discussions focused on the issue of possible abuse of this exemption possibility. Proposed amendments ranged from deleting the possibility for exemption to placing some condition on making use of an exemption related, for example, to the contract value, the number of persons employed, or the character of their employment. In the end, the Conference considered that the requirement of consultation with organizations of employers and workers concerned, where such existed, provided the most effective means of preventing abuse.<sup>72</sup>

85. In certain countries, such as *Cyprus*,<sup>73</sup> *Israel*,<sup>74</sup> *Italy*,<sup>75</sup> *Malaysia (Sabah)*,<sup>76</sup> *Mauritania*,<sup>77</sup> *Solomon Islands*<sup>78</sup> and the United States,<sup>79</sup> the legislation on public procurement, including any provisions on the insertion of labour clauses, applies only to

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<sup>72</sup> ILC, 32nd Session, 1949, *Record of Proceedings*, Appendix VIII: Labour clauses in public contracts, p. 484.

<sup>73</sup> (1), ss 3 and 12. Public expenditure must exceed £2,000. Moreover, if the contract involves the expenditure of an amount exceeding £5,000, the contractor is required to provide the contracting authority with a copy of the existing collective agreement or arbitration award applicable to the workers concerned.

<sup>74</sup> The obligation to include labour clauses in public contracts applies to contracts involving the expenditure exceeding 43,000 Israeli shekel (NIS) (US\$10,500).

<sup>75</sup> (5), s. 28.

<sup>76</sup> (1), s. 2(e). The threshold is fixed at US\$30,000.

<sup>77</sup> (1), s. 3. The amount is fixed at 1 million ouguiya (MRO). For contracts awarded by local authorities, the threshold is set at 250,000 MRO except for the authorities of Nouakchott and Nouadhibou (1 million MRO). As regards public enterprises of an industrial or commercial nature and national corporations, the threshold is fixed at 5 million MRO.

<sup>78</sup> (1), s. 2. The threshold is fixed at US\$5,000.

<sup>79</sup> (1), the threshold is fixed at US\$2,000; (2), the threshold is fixed at US\$2,500; (3), the threshold is fixed at US\$10,000.

contracts the value of which is equal to, or exceeds, a fixed limit. This is also the case in *Burundi*,<sup>80</sup> Brunei Darussalam,<sup>81</sup> El Salvador,<sup>82</sup> Latvia,<sup>83</sup> Mali,<sup>84</sup> Switzerland<sup>85</sup> and Ukraine.<sup>86</sup>

86. In other countries, such as *Central African Republic*<sup>87</sup> and *Morocco*,<sup>88</sup> the legislation on public contracts contains special rules in terms of opening up to international competition for contracts involving an expenditure lower than a specified amount, without permitting, however, any exemptions from the requirements concerning labour clauses.

87. In some countries, public works contracts are unbundled to create opportunities for small construction contractors using labour-based construction techniques. As a result, the value of contracts falls easily below thresholds established for the use of procurement processes that include the type of labour clauses that would be most useful for protecting workers in labour-based enterprises. In such circumstances, the consultation with workers' and employers' organizations required by Article 1, paragraph 4, of the Convention is all the more important for preventing overly broad exceptions.

### C.2. *Persons not performing manual work*

88. Article 1, paragraph 5, of the Convention permits the exclusion from the application of the Convention of persons occupying positions of management or of a technical, professional or scientific character, whose conditions of employment are not regulated by national laws or regulations, collective agreements or arbitration award and who do not ordinarily perform manual work.

89. When first surveying the subject in its law and practice report, the Office observed that national regulations then in force establishing fair wages clauses in public contracts fell into two categories: regulations governing all categories of workers engaged on government contracts, and regulations applying solely to manual workers. It was further observed that some countries' regulations applied to all employees in the plant or undertaking and not merely to those engaged in a government contract. Thus, the Office asked member States two questions: first, whether international regulations on the

<sup>80</sup> (1), s. 2. The threshold is fixed at 500,000 Burundi francs.

<sup>81</sup> (2), s. 2(e). Contracts for which labour clauses are required must involve the expenditure of government funds of an amount of not less than US\$10,000.

<sup>82</sup> (1), s. 40. Public tendering is only provided for contracts exceeding 635 times the amount of the minimum wage.

<sup>83</sup> (1), ss 5 and 10. The contract value threshold is fixed at 70,000 Latvian lat (LVL) for all types of public contracts and is revised at least once every two years by the Cabinet of Ministers.

<sup>84</sup> (1), s. 3(1). Contracts the value of which is less than CFA10 million are excluded from the scope of application of the public procurement legislation.

<sup>85</sup> (1), s. 6; (4), s. 1. The estimated value of the contract must exceed 248,950 Swiss francs for supplies and services and 9.5 million Swiss francs in the case of construction works. The Federal Ministry of Finance is empowered to periodically adapt these value thresholds.

<sup>86</sup> (1), s. 2(1). Public expenditure must exceed 20,000 gryvna (UAH), or 50,000 gryvna in the case of public construction work.

<sup>87</sup> (1), ss 5 and 8 (contracts for an estimated amount not exceeding 1 million and 100 million CFA francs, respectively).

<sup>88</sup> (1), s. 20(2) (contracts for an estimated amount not exceeding 1 million Moroccan dirham (MAD)).

subject of fair labour clauses should be limited to persons working directly in the execution of a contract or to all workers employed in an undertaking which is engaged in the execution of a contract, and second, whether international regulations should allow the exception of any particular classes of workers from labour clauses.<sup>89</sup>

90. The Office summarized the replies to the questionnaire, concluding that it would propose to the Conference a solution permitting national legislation to exclude from the application of the Convention those persons employed in a contracting establishment who are not directly engaged in contract work. With respect to the second question, the Office left it to the Conference to decide whether it would be permitted for ratifying States to exclude from the application of the Convention classes of workers having special responsibilities or standards of remuneration.<sup>90</sup> The argument put forward was that the type of protection afforded by labour clauses in public contracts was not needed by those classes of workers.

91. During the first Conference discussion, the subparagraph drafted by the Office to permit exclusion of workers not engaged in contract work was deleted on the proposal of the Government of the United Kingdom. Amendments were made to the proposed exemption of classes of persons with special responsibilities or standards of remuneration so that all the elements of current Article 1, paragraph 5 – authority vested in the competent authority, prior consultation with employers' and workers' organizations, listing of categories of workers to be excluded, distinction from manual workers – came into existence.<sup>91</sup>

92. In certain countries, such as *Morocco*,<sup>92</sup> the labour clauses in contracts for construction works are only applicable to manual workers. In the Canadian province of Yukon, only employees working on construction sites are required to be paid in accordance with established minimum rates.<sup>93</sup> In the United States, legislation requiring labour clauses in public contracts for construction, alteration or repair of public buildings or public works applies only to labourers and mechanics.<sup>94</sup>

### C.3. Other exceptions

93. In *Morocco*,<sup>95</sup> public contracts concluded under general law are excluded from the scope of public procurement legislation. The legislation also permits exceptions for contracts awarded in the framework of agreements concluded with international organizations or foreign States, if such agreements provide for the application of particular contracting conditions.<sup>96</sup>

94. The Government of the United Kingdom reported that its legislation exceptionally allows for the insertion of labour clauses, on the basis of whether there is a direct

<sup>89</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 13–14.

<sup>90</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), pp. 44–46.

<sup>91</sup> ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(1), pp. 9–11.

<sup>92</sup> (2), s. 20.

<sup>93</sup> (18), s. 105.

<sup>94</sup> (1), s. 5.2(m).

<sup>95</sup> (1), s. 2(1).

<sup>96</sup> (1), s. 2(2).

relevance of labour issues to the subject matter of the contract and not on the basis of a specific level of expenditure.

#### Subsection D. Private employers granted subsidies or licensed to operate a public utility

95. In its 1948 law and practice questionnaire, the Office raised the question of applying fair wages clauses to cases analogous to the granting of contracts. It recited examples of countries that made the granting of certain types of assistance such as subsidies, licences to operate, loans, approval of tariffs or prices, rebates, etc., subject to the inclusion of fair wages and other labour clauses in the relevant contracts. It accordingly asked member States whether international regulations should apply to arrangements analogous to public contracts whereby, as a measure of public policy, economic benefits are extended to private employers by such means as the granting of subsidies or of licences to operate a public utility, the approval of a tariff or table of rates, or the fixing of a minimum price schedule.<sup>97</sup> Most governments responded positively to the idea of international regulation in this area, with the justification that workers employed in enterprises benefiting from such arrangements should benefit from favourable conditions of labour. Most felt, however, that such a provision would be best placed in a Recommendation on account of the administrative complexity that would arise from the diversity of these types of arrangements within countries. The Government of the United States practically coined the phrase “public–private partnership” in responding that “the Recommendation should also assert the desirability of applying like standards to all public contracts involving the expenditure of public funds and the employment of workers, whenever one of the parties is an agency or instrumentality of the Government ... or other similar agent or instrument utilized by the Government for the effectuation of a public programme under a private–public or a private–semi-public arrangement”.<sup>98</sup> The proposed Office text underwent a single amendment proposed by the Employer members in the second Conference discussion; that text was finally adopted and became Paragraph 1 of Recommendation No. 84.

96. Thus, paragraph 1 of the Recommendation suggests that in cases where private employers are granted subsidies or are licensed to operate a public utility, provisions substantially similar to those of the labour clauses in public contracts foreseen by the Convention should be applied. This provision implies that the type of contracts to which it refers are not covered by Article 1, paragraph 1, of the Convention. As discussed in further detail in Chapter III below, practices involving PPPs have become more frequent, in some cases replacing public procurement as the means of acquiring and supplying public goods such as transport and energy infrastructure, accommodation and entertainment infrastructure, thus raising issues for the continued relevance of the instruments reviewed here.

97. Certain countries, such as *Morocco*,<sup>99</sup> explicitly exclude the contracts for concession of public services from the scope of application of their legislation on public contracts, and thus from requirements on labour clauses.

<sup>97</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 11–13.

<sup>98</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2) (Supplement), p. 22.

<sup>99</sup> (1), s. 2(1).

## Section 3. Insertion of labour clauses in public contracts

### Subsection A. Content and nature

98. Article 2, paragraph 1, of the Convention provides that public contracts must include clauses on wages, including allowances, hours of work and other conditions of labour which must be not less favourable than the conditions established by collective agreement, arbitration award, or by national laws or regulations for work of the same character in the trade or industry concerned in the district where the public work is carried out. Article 2, paragraph 2, further defines means for protection of employment conditions in public contracts by providing that collective agreements, arbitration awards, or national laws or regulations applicable to the nearest district, or the general level observed in the same trade or industry, must be used where there are no applicable instruments referred to in the preceding paragraph of the Convention.

99. Complementing Article 2, paragraphs 1 and 2, of the Convention, Recommendation No. 84 specifies in paragraph 2 substantive content of labour clauses in public contracts. Labour clauses in public contracts should prescribe, either directly or by reference to relevant provisions of laws or regulations, collective agreements, arbitration awards or other agreements –

- (a) the normal and overtime rate of wages (including allowances) to be paid to the various categories of workers concerned;
- (b) the manner in which hours of work are to be regulated, including wherever appropriate –
  - (i) the number of hours that may be worked in any day, week or other specified period in respect of which normal rates of wages are to be paid;
  - (ii) the average number of hours that may be worked by persons working in successive shifts on continuous processes; and
  - (iii) where hours of work are calculated as an average, the period of time over which this average may be calculated and the normal maximum number of hours that may be worked in any specified period;
- (c) holiday and sick leave provisions.

100. These provisions were included in the Recommendation rather than the Convention because from the early stages of preparation, member States indicated their preference for a Convention which would set out general principles, and a Recommendation that would include points of detail.<sup>100</sup>

101. *With regard to labour clauses incorporated into public contracts, the Committee can observe three patterns from the information available to it. The first is clauses that require the contractor's respect for the highest locally set standard. The second is clauses placed in public contracts that reiterate the contractor's obligation to respect the law of the land (sometimes specifically naming labour- and employment-related laws), and therefore remedies for breach of contract are made available in addition to remedies under labour law. The third is general clauses or conditions of contract or bidding procedures which, although not tailored to meet concerns related to working*

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<sup>100</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 39.

***conditions, could nevertheless be used to further those interests. Only the first of these three patterns meets the specific requirements of Convention No. 94.***

102. It is perhaps worth noting that in March 1974 the Office prepared an Explanatory Note concerning Convention No. 94 which was subsequently used for providing guidance to member States on the instrument's implementation. The Note includes model text illustrating how the Convention might be implemented in law and practice.

103. ***It may appear from the language of Article 2 of the Convention that conditions to be ensured by labour clauses in public contracts need not be the most favourable conditions among those fixed by collective agreements, arbitration awards, or national law. This is not the case in practice.*** In its 1948 law and practice report and questionnaire, the Office asked whether member States considered that “international regulations should ensure to workers concerned conditions of work not less favourable than the *most* favourable conditions fixed by collective agreements or arbitration awards, if such exist, for work of the same character in the district where the work is carried out” (emphasis added).<sup>101</sup> In the light of the replies received, the Office observed that “it is apparent that a large number of governments would prefer that the international regulations should refer to *prevailing* conditions of work rather than to most favourable conditions” (emphasis added).<sup>102</sup> The Office felt then that it would be necessary to give some indication as to the manner in which the phrase “prevailing conditions of work” should be interpreted. Relying on the large body of opinion expressed by respondent member States which agreed that labour standards in public contracts should be based on the conditions prescribed by collective agreements or arbitration awards, and that secondary emphasis be placed on conditions prescribed by legislation, a view on the meaning of conditions “not less favourable than those generally prevailing” took shape and was expressed in the text proposed for the first discussion in 1948. The approach was that “prevailing conditions” would be taken to mean those defined in, first, collective agreements or arbitration awards if they existed, and then national legislation if they did not. The Office observed that this sequence was understandable since in practice, “collective agreements and similar arrangements arrived at by negotiation generally establish more favourable conditions of work than those prescribed by legislation”.<sup>103</sup> ***Thus, the Committee is of the view that conditions not less favourable than the three alternatives offered by the Convention would in practice, in most instances, imply the best conditions of the three.***

104. The reference to “generally prevailing” conditions was amended during the first Conference discussion in 1948, but the order in which the three potential sources were referred to remained. ***It was recognized then that by requiring conditions “not less favourable” than those established by the three sources, the automatic result would be requiring the best conditions out of the three.***<sup>104</sup> One of the important arguments expressed at the time was that the State should be a model employer and could therefore

<sup>101</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 17.

<sup>102</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(2), p. 47.

<sup>103</sup> *ibid.*, p. 48.

<sup>104</sup> The Worker members had proposed during the first discussion to substitute the words “most favourable conditions” for the words “not less favourable than”. A number of Government and Employer members opposed the proposal. They considered that its effect would be to disturb the generally established labour conditions in an industry as fixed through negotiation, and that its application would be difficult. The proposed amendment was rejected; see ILC, 31st Session, 1948, *Record of Proceedings*, p. 450.

not sanction any labour conditions which fell below the highest conditions available. It is also important to note that the reference to collective agreements was qualified to include only those concluded between organizations of employers and workers “representative respectively of substantial proportions of the employers and workers in the trade or industry concerned”.<sup>105</sup>

**Box 2**

**What is practically required by Article 2 of the Convention?**

Not all countries have laws or regulations setting minimum wages, or provisions for sick or holiday leave. Not all districts have collective agreements establishing maximum weekly hours of work, or improving on minimum wages established by national law. Unless the wages and conditions of work applied in executing a public contract are very clearly more favourable than those possibly established by collective agreement, arbitration award or by national laws or regulations, some assessment needs to be made of what those wage levels and conditions are for any particular district and type of work so that the wage and conditions under the public contract are set to be at least as favourable. In practice this means that for wages, hours, overtime hours, overtime remuneration, weekly rest, holiday and sick leave, etc., a survey of the applicable public legislation/regulation must be made, followed by an assessment to see if those standards have been improved upon by any arbitration award or, finally, by any collective agreement covering a substantial proportion of employers and workers. Once an assessment of these tiers has been made, the standard conforming to the requirements of the Convention can be set. Such a survey and assessment should be carried out by the government in consultation with the organizations of employers and workers concerned, where such exist.

*A.1. Clauses conforming to the Convention*

105. In some countries, the national legislation requires labour clauses to be included in public contracts with regard to wages, including allowances, hours of work and other conditions of labour, which must not be less favourable than those established by collective agreement, arbitration award, or by national laws or regulations, for work of the same character in the trade or industry concerned and in the district where the public work is carried out. This is the case, for instance, in *Barbados*,<sup>106</sup> *Belize*,<sup>107</sup> *Brunei Darussalam*,<sup>108</sup> *Cyprus*,<sup>109</sup> *Denmark*,<sup>110</sup> *Grenada*,<sup>111</sup> *Guyana*,<sup>112</sup> *Israel*,<sup>113</sup>

<sup>105</sup> *ibid.* At the second Conference discussion, a proposal to replace the words “representative respectively of substantial proportions of employers and workers” by the words “sufficiently representative respectively of employers and workers” failed to be adopted but this only reaffirmed the understanding that collective agreements which are not generally applicable in a sector or a region but apply to only one enterprise or a limited group of enterprises fall outside the scope of Article 2(1) of the Convention; see ILC, 32nd Session, 1949, *Record of Proceedings*, p. 485.

<sup>106</sup> (1), s. 3, Schedule, para. 1. See also *Saint Lucia* (1), s. 3, Schedule, para. 1.

<sup>107</sup> (1), ss 136–138.

<sup>108</sup> (2), Schedule, para. 1.

<sup>109</sup> (1), para. 1.

<sup>110</sup> (1), Appendix, para. 1; (2), para. 2.

<sup>111</sup> (1), s. 31(1) and Schedule, para. 1.

<sup>112</sup> (1), s. 2(1).

<sup>113</sup> (1).



*Italy*,<sup>114</sup> *Kenya*,<sup>115</sup> *Mauritania*,<sup>116</sup> *Nigeria*,<sup>117</sup> *Spain*,<sup>118</sup> *Swaziland*,<sup>119</sup> *Turkey*<sup>120</sup> and *Uganda*.<sup>121</sup> In *Belgium*,<sup>122</sup> contractors have to apply all legal provisions relative to social security and general conditions of labour, as may be laid down either in laws or in collective agreements at the national, regional or local level. In *Finland*,<sup>123</sup> the new Public Procurement Act adopted in March 2007, provides that before the signature of a public contract, a clause has to be added requiring that the employment conditions be at least aligned with the minimum requirements prescribed by national laws and collective agreements. In *Austria*, public procurement legislation adopted in 2006 expressly refers to a certain number of ILO Conventions, including Convention No. 94, and requires the standards in these instruments to be respected in the bidding process.<sup>124</sup> Contractors are bound to comply with national labour and social legislation both in bidding for and in executing public contracts. Express reference to the Convention is also made in the public procurement legislation of the *Syrian Arab Republic*,<sup>125</sup> which stipulates that conditions for recruiting workers for the execution of the public contract must be in conformity with the provisions of the Labour Code and those of ILO Convention No. 94, and also that contractors must observe the requirements of the Labour Code, of Convention No. 94 and of the Social Insurance Act.

106. In several countries, the national legislation further provides that, where the conditions of labour are not regulated in the district where the work is to be carried out by one of the means provided for in the Convention, workers engaged in the execution of public contracts should enjoy wages and other conditions of work not less favourable than those established under collective agreement or other recognized machinery of negotiation, by arbitration, or by national laws or regulations in the nearest appropriate

<sup>114</sup> (2), s. 17; (3), s. 18(7); (4), s. 36.

<sup>115</sup> (1), para. (a).

<sup>116</sup> (2), s. 2.

<sup>117</sup> (1), para. 1.

<sup>118</sup> (1) s. 11. See also the most recently adopted Act No. 30/2007 of 30 October 2007 on public contracts.

<sup>119</sup> (1), s. 134.

<sup>120</sup> (3), s. 2(b).

<sup>121</sup> (3), paras 1 and 2.

<sup>122</sup> (1), s. 12 (1). Moreover, following recent amendments to public procurement legislation, a criterion based on social considerations has been added to the list of criteria for tender selection, while another provision authorizes the contracting authority to require conditions for the execution of the contract which would be in line with social and ethical objectives regarding the vocational training for the unemployed or young workers, or with the obligation to respect, in substance, the provisions of basic ILO Conventions, in case these Conventions would not already apply in the tenderer's country of origin, *ibid*, ss 16, 18bis.

<sup>123</sup> (1), s. 49(2). Under the Employment Contracts Act, the employer must observe at least the provisions of a national collective agreement considered representative in the sector in question with regard to the terms of employment and working conditions of his/her employees, (3), s. 7.

<sup>124</sup> (1), s. 84. The ILO Conventions in question are the following: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Protection of Wages Convention, 1949 (No. 95); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); and the Maternity Protection Convention, 2000 (No. 183).

<sup>125</sup> (2), s. 29(B).

district, or than the general level observed in the trade or industry in which the contractor is engaged. This is the case in *Bahamas*,<sup>126</sup> *Belize*,<sup>127</sup> *Brunei Darussalam*,<sup>128</sup> *Guyana*,<sup>129</sup> *Kenya*,<sup>130</sup> *Mauritania*,<sup>131</sup> *Nigeria*<sup>132</sup> and *Turkey*.<sup>133</sup> In Switzerland,<sup>134</sup> the contracting authority must clearly indicate in the contract that the contractor has to comply with the provisions concerning the protection of workers and the conditions of work. The term “conditions of work” is defined to mean the conditions of work established by collective agreement, or in the absence of collective agreement, those habitually applying to the region and profession concerned. In *Uganda*,<sup>135</sup> the national legislation giving effect to the Convention provides that wages, hours of work and conditions of employment shall be not less favourable than those established by “custom or practice”, as well as collective agreements or arbitration awards. In *Grenada*,<sup>136</sup> the relevant legislation refers to established rates and conditions in other districts, but does not specify that those rates have to be established by collective agreement or other recognized machinery of negotiation, by arbitration, or by national laws or regulations, as provided for in Article 2, paragraph 2, of the Convention.

107. In certain countries, the national legislation provides additional means to guarantee the appropriate level of employment conditions in the absence of rates and conditions as provided for in Article 2, paragraphs 1 and 2, of the Convention. In *Grenada*,<sup>137</sup> *Kenya*,<sup>138</sup> *Nigeria*<sup>139</sup> and *Swaziland*,<sup>140</sup> the Labour Commissioner, or the Ministry of Labour as the case may be, may prepare a schedule setting out fair and reasonable rates and conditions for the public contract after consulting with workers’ and employers’ representatives. In *Brunei Darussalam*,<sup>141</sup> in the absence of any established conditions in the district or other district, for similar work under similar conditions, the contractor must pay rates and observe conditions which are not less favourable than the general level of wages and conditions observed by other employers whose general circumstances in the trade or industry in which the contractor is engaged are similar. In *Cyprus*,<sup>142</sup>

<sup>126</sup> (3), para. 17.

<sup>127</sup> (1), s. 138.

<sup>128</sup> (2), Schedule, para. 2, citing “... conditions in other districts where the trade or industry is carried on under similar general circumstances”.

<sup>129</sup> (1), s. 2(2).

<sup>130</sup> (1), para. (b).

<sup>131</sup> (2), s. 3.

<sup>132</sup> (1), para. 1.

<sup>133</sup> (3), s. 2(b).

<sup>134</sup> (1), s. 8(1)(b); (2), ss 6(1)(a) and 7.

<sup>135</sup> (3), para. 1; (4), para. 36.

<sup>136</sup> (1), Schedule, para. 2. See also the direct request addressed to *Grenada* in 2006.

<sup>137</sup> (1), Schedule, para. 3. See also *Barbados* (1), s. 3, Schedule, para. 2; *Saint Lucia* (1), s. 3, Schedule, para. 2.

<sup>138</sup> (1), para. (c).

<sup>139</sup> (1), para. 2.

<sup>140</sup> (1), s. 135.

<sup>141</sup> (2), Schedule, para. 3.

<sup>142</sup> (1), s. 2. See also *Barbados* (1), Schedule, para. 3; *Saint Lucia*, Schedule, para. 3.

*Guyana*<sup>143</sup> and Brunei Darussalam,<sup>144</sup> in the event of any difference or dispute with regard to working conditions under public contracts, the issue may be referred to a tribunal for decision.

108. In a few countries, labour clauses are required in public contracts; however, the scope of their coverage and the standard for conditions differ from the requirements of the Convention. In Canada, for instance, federal legislation on construction works provides that every contract must contain conditions covering the payment of fair wages, hours of labour and other working conditions to ensure that the expenditure of public funds does not lead to the exploitation of labour. The wage component of the legislation is administered by attaching schedules of wage rates to the construction contracts signed by contractors.<sup>145</sup> Where the provincial or territorial rates are not considered current by industry representatives from employers' and workers' organizations, the wage rates are determined by wage surveys prepared by government officials.<sup>146</sup> In the United States, with respect to federal contracting for construction works, labour clauses require contractors, or their subcontractors, to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits as determined for different classes of workers and localities by the Secretary of Labor.<sup>147</sup> A similar requirement applies to service contracts and contracts for manufactured goods.<sup>148</sup> In these cases, "prevailing wages" as determined by the Secretary of Labor are not necessarily the most favourable where collective agreements exist alongside statutory minimum wages and observable market wages.<sup>149</sup> In Argentina,<sup>150</sup> specific

<sup>143</sup> (1), s. 2(4).

<sup>144</sup> (2), Schedule, para. 5.

<sup>145</sup> (1), ss 3(1), 5(2); (2), ss 4, 5, 7(1). The term "fair wages" is defined as wages that "are generally accepted as current for competent workmen in the district in which the work is being performed, but ... in all cases fair and reasonable and ... in no case less than the minimum hourly rate of pay prescribed by the Labour Code". In addition, a small number of jurisdictions (Manitoba, New Brunswick, Yukon) have special legislation applicable to public contracts; these laws are confined to the construction sector and govern a limited number of working conditions such as wages and hours of work.

<sup>146</sup> Moreover, according to information provided by the Canadian Labour Congress (CLC), several municipalities have adopted in the last five years no-sweat ethical procurement strategies which provide for the insertion of labour clauses in public contracts and require compliance with minimum performance standards set out in supplier codes of conduct. For example, under the Ethical Purchasing Policy (EPP) adopted by the City of Vancouver in 2005, all suppliers to the City must meet at a minimum the performance standards outlined in the Supplier Code of Conduct (SCC) which include the ILO core labour Conventions. With regard to wages and benefits, the SCC provides that City suppliers and their subcontractors must "meet national and legal requirements, whichever is higher for wages and benefits within the country of manufacture [and] meet industry standard benchmarks for prevailing wages and benefits where such benchmarks are readily available". Similarly, the EPP of the City of Ottawa aims at ensuring that clothing, apparel, and certain fair trade products such as coffee and tea, purchased by the City, meet the highest possible ethical standards where practical by following the principles set out in ILO fundamental Conventions. At the time of bid submission, the supplier must confirm in an affidavit to the City that he/she will comply with ethical supply labour practices that meet or exceed the minimum labour standards in the policy and he/she will acquire goods and services from subcontractors who agree to comply with the same labour practices. Under the Responsible Manufacturers Policy of the City of Toronto, garment manufacturers must respect minimum labour rights that include, among others, fair wages and compensation, maximum hours of work and healthy and safe working environment. The policy does not purport to enforce labour standards or other employment laws but simply provides that the City, as a consumer, can make the business decision not to deal with suppliers and manufacturers that choose not to operate responsibly.

<sup>147</sup> (1), s. 3142.

<sup>148</sup> (2), s. 351(a)(1); (3), s. 35(a).

<sup>149</sup> See US Department of Labor, Office of the Inspector General: *Inaccurate data were frequently used in wage determinations made under the Davis-Bacon Act*, Final Report No. 04-97-013-04420 (Washington, DC, 1997).

<sup>150</sup> (2), s. 19.

legislation on the status of workers in the construction industry provides that the employer may under no circumstances pay wages at a rate lower than that established by the relevant collective agreement.

109. Certain countries, such as *Antigua and Barbuda, Brazil, Costa Rica, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Ghana, Guatemala, Jamaica, Norway, Philippines, Rwanda, Singapore, United Republic of Tanzania* and *Yemen*, while bound by the Convention, have still to adopt specific implementing measures.

*A.2. Clauses not conforming to the Convention, reiterating legal obligations*

110. Some countries assert that work executed under public contracts is subject to general labour legislation, and that this affords sufficient protection to the workers concerned, thus giving full effect to the Convention. Often a clause is placed in the public contract generally requiring conformity with national law. ***In this connection, the Committee has stressed on numerous occasions that such provisions alone do not ensure the application of the Convention; the essential element required for the application of the Convention is that a labour clause along the terms prescribed in Article 2, paragraphs 1 and 2, of the Convention be incorporated into the text of the public contract.***<sup>151</sup>

111. The Committee has had the opportunity to note previously that national labour legislation does not necessarily provide minimum terms and conditions of employment with respect to all matters of day-to-day importance to workers, including those referred to by the Convention. In these circumstances, reiteration of the applicability of national law is wholly illusory as a basis for worker protection in terms of meaningful minimum labour standards.

112. ***The Committee noted in its 1956 general observation that it –***

***... does not, of course, overlook the fact that in certain countries and as regards certain matters, the conditions (wages, etc.) which are laid down in the national legislation constitute both maximum and minimum standards which may not be exceeded by more favourable collective agreements or arbitration awards. In such cases it considers that a reference in the public contracts to the relevant provisions of the national legislation would be sufficient for the purpose of giving effect to the Convention.***<sup>152</sup>

113. ***But in the general observation of 1957, the Committee reiterated its basic position that it –***

***... finds itself unable to accept the view that, where legislation and collective agreements apply to all workers, a government is freed from the obligation to insert labour clauses in public contracts in accordance with the Convention. The insertion of such clauses constitutes the basic requirement of the Convention, and the Committee considers that exceptions cannot be permitted. Moreover, ... the insertion of labour clauses in public contracts may have positive advantages, particularly where legislation merely establishes minimum standards capable of being exceeded by collective or individual agreements or where collective agreements are not generally binding .... Even assuming that the Committee were entitled to determine in particular cases whether or not labour clauses were to be inserted in public contracts, it could do so only after elaborate and difficult investigations into conditions***

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<sup>151</sup> See, for instance, RCE 2007, 436 (*Algeria*); RCE 2002, 310 (*Brazil*); RCE 2007, 443 (*Costa Rica*); RCE 2007, 452 (*Guatemala*); RCE 2004, 294 (*Netherlands–Aruba*).

<sup>152</sup> See RCE 1956, 79.

*obtaining in the countries concerned. The Committee considers that this would be neither desirable nor feasible.*<sup>153</sup>

114. In the case of certain countries national legislation is in the process of being revised in order to give effect to the provisions of the Convention. In *Uruguay*,<sup>154</sup> for instance, the Government has still to amend legislation that required contractors to comply only with “legal and regulatory provisions in force in labour matters” thus limiting the scope of earlier legislation that was fully consonant with the Convention. The process of revision has been reported in the *Central African Republic* for more than 20 years.<sup>155</sup> In the case of *Burundi*, the Government has announced its intention to rectify the situation and undertake concrete action in the framework of the forthcoming examination of the new draft Code on Public Contracts.<sup>156</sup> Similarly, in *Djibouti*, the Government is planning to examine the necessary measures to implement the Convention in the context of a major labour law reform that it intends to launch as soon as conditions allow the organization of a national tripartite consultation.<sup>157</sup>

115. The Government of South Africa referred to four different sets of Conditions of Contract that the Construction Industry Development Board has set as standards for uniformity in public contracting.<sup>158</sup> No particular reference is made in these documents to labour conditions apart from clause 15.1.4 of JBCC 2000 which requires “an acceptable health and safety plan, in accordance with the terms of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), within 21 calendar days of commencement date” and clauses 9.1.2 of JBCC 2000 and 4.5 of GCC 2004 which provide that the contractor indemnifies and holds the contracting authority harmless against any loss in respect of all claims, proceedings, damages, costs and expenses arising from non-compliance by the contractor with any law, regulation or by-law of any local or other authority.

116. The Government of Trinidad and Tobago, reported that although it has no specific legislation or regulations to deal with workers’ protection in the context of competitive bidding for public contracts, it makes use of the standard International Federation of Consulting Engineers (FIDIC) model contract clause on rates of wages and conditions of labour. This clause does not specify how the wages which are required to be paid have been established for the trade or industry where the work is carried out. The Government noted, however, that a memorandum of the Acting Director of Contracts on a fair wages clause for use in contracts for government and statutory boards modified the standard FIDIC clause used in the tender documents of the Ministry of Works and Transport, Highways Division. It now requires “the contractor to pay rates of wages that are not less than the rates of wages established under any collective agreement between employer’s or employers’ association and workers’ organization representatives respectively of

<sup>153</sup> See RCE 1957, 89.

<sup>154</sup> See RCE 2006, 345 (*Uruguay*) and RCE 2003, 331 (*Uruguay*). Despite the adoption of new legislation in 2005 and 2007, the scope and content of labour clauses remains unclear.

<sup>155</sup> See RCE 2006, 331 (*Central African Republic*).

<sup>156</sup> See RCE 2007, 438 (*Burundi*).

<sup>157</sup> See RCE 2006, 335 (*Djibouti*).

<sup>158</sup> These are the Principal Building Agreement of the Joint Building Coordination Committee, edition 4.1 of March 2005 (also referred to as JBCC 2000); the General Conditions of Contract for Engineering Works, 2004 (also referred to as GCC 2004); the New Engineering Contract (generally known as NEC); and the standard conditions of contract of the International Federation of Consulting Engineers (FIDIC).

substantial proportions of employers and workers engaged in the trade or industry, whether or not the contractor is a party to such agreement, the rates of wages and conditions of labour established in the absence of or subsequent to any collective agreement, under any arbitration award for work of the same character in the trade or industry, whether or not such award is binding on the contractor; minimum rates of wages established by any law; and such rates of wages as are paid by government for work of the same character in the trade or industry, in the absence of any collective agreement, arbitration award or provision of law”.<sup>159</sup>

### A.3. Other clauses and bidding requirements

117. In some cases (e.g. *Mauritius*), standard tender documents contain clauses on recruitment, rates of wages and hours and conditions of work but no provision is made for the insertion of similar clauses in the final contract. ***In this respect, the Committee has observed that a labour clause has to constitute an integral part of the actual contract signed by the selected contractor and that the insertion of labour clauses in tender documents, such as the general conditions or specifications, even though required under the terms of Article 2, paragraph 4, of the Convention, does not suffice to give effect to the basic requirement of the Convention set out in Article 2, paragraph 1.***<sup>160</sup> In other cases (e.g. *Cameroon*), the national legislation provides that tenderers must undertake in their bids to comply with all laws and regulations and all clauses of collective agreements relating among other matters to wages, conditions of work, safety and health and welfare of the workers concerned. ***In this connection, the Committee has drawn attention to the fact that the Convention does not relate to some general eligibility criteria, or prequalification requirements, of individuals or enterprises bidding for public contracts but requires a labour clause to be expressly included in the actual contract that is finally signed by the public authority and the selected contractor.***<sup>161</sup>

118. In some countries, public procurement legislation requires individuals or firms to obtain labour clearance certificates before they are allowed to tender for public contracts.<sup>162</sup> ***The Committee has consistently taken the view that the insertion of labour clauses in public contracts under the Convention goes beyond the aims of simple certification, as its purpose is to eliminate the negative effects of competitive tendering on the workers' labour conditions.***<sup>163</sup> The Convention seeks to ensure the contractor's commitment to apply high standards of social responsibility in the execution of a public contract and therefore a mere indication that the contractor concerned has no record of labour law violation in previously completed works is not sufficient to meet its requirements. ***Certification offers some proof about tenderers' past performance and law-abiding conduct but carries no binding commitment with regard to prospective operations as labour clauses do.***

119. A point occasionally made is that it is not necessary to include labour clauses in public contracts as it is the established practice for contractors of public contracts to

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<sup>159</sup> (1).

<sup>160</sup> See RCE 2004, 293 (*Mauritius*).

<sup>161</sup> See RCE 2007, 439 (*Cameroon*).

<sup>162</sup> For instance, in Canada (Newfoundland and Labrador), an occupational safety and health certificate is a required bidding document and certification is administered by a construction industry safety association.

<sup>163</sup> See RCE 2007, 450 (*Ghana*).

offer the same terms and conditions of employment as those generally observed in the trade or industry concerned. *The Committee has observed, in this regard, that the Convention calls for specific measures, which may take the form of legislative provisions, administrative instructions or circulars, to ensure the inclusion of appropriate labour clauses in all the public contracts covered by the Convention, and that therefore the application of the Convention through practice or usage alone is not sufficient to give effect to its substantive requirements.*<sup>164</sup>

120. In some countries, working conditions for persons employed to execute public contracts are set in practice by market conditions. The Government of Azerbaijan reported that systems of territorial, branch and general collective agreements ensure that minimum standards are met in the execution of public contracts by private enterprises; the Labour Code requires that the forms and systems of payment of wages, wage and salary rates, supplements, bonuses and the amount of other incentive payments shall be prescribed in collective agreements, and where they do not exist by individual employment contracts.<sup>165</sup> Yet in practice, labour market forces have resulted in monthly wage levels usually applied to workers in the contracting sector being higher than the monthly minimum wages fixed for the Republic. In this way, the Government indicated that best wages and working conditions are given to persons engaged in the execution of public contracts.

121. In most of the countries which have not ratified the Convention, the law makes no specific provision for the insertion of labour clauses in public contracts since all employment contracts are covered by the same labour laws and regulations, regardless of who the contracting parties are. This is the case, for instance, in El Salvador, Honduras, Japan, Kuwait, Mexico, Republic of Moldova, New Zealand, Nicaragua, Papua New Guinea, Saudi Arabia and the Bolivarian Republic of Venezuela. In a few cases (e.g. Argentina,<sup>166</sup> Peru,<sup>167</sup> Portugal<sup>168</sup> and Tunisia<sup>169</sup>) the legislation on public contracting merely provides that the contractor is subject to the laws and regulations relating to the protection of workers and labour conditions, while in others (e.g. Czech Republic, Estonia, Latvia, Lithuania, Senegal) recently adopted public procurement laws, despite their degree of elaboration and technicality, remain completely silent on labour matters related to the performance of the public contract.

#### Subsection B. Prior consultation with employers' and workers' organizations on the terms of labour clauses

122. Article 2, paragraph 3, of the Convention provides that the terms of labour clauses in public contracts must be determined by the competent authority after consultation with employers' and workers' organizations "in the manner considered most appropriate to the national conditions". The part on the manner of consultation was added at the second Conference discussion wherein a clarification was sought by the Government

<sup>164</sup> See, for instance, the direct request addressed to *Antigua and Barbuda* in 2004.

<sup>165</sup> (1), s. 158.

<sup>166</sup> (1), s. 36.

<sup>167</sup> (2), s. 212.

<sup>168</sup> (1), ss 144(1) and 149(1).

<sup>169</sup> (3), s. 9(1); (4), s. 9; (5), s. 5(1). In addition, it is incumbent upon the contractor to inform any subcontractors that the same obligations apply also to them.

member of Ireland on a point that consultation with the organizations of employers and workers would not be required upon awarding every contract, and that different procedures followed in countries would be acceptable under the Convention.<sup>170</sup> The purpose of this provision as finally worded affirms the need for tripartite consultations while leaving it to ratifying countries to decide the procedural manner in which such consultations would be conducted.

123. In some cases, the necessary consultations seem to have taken place at the time labour clauses were drafted. In *Denmark*,<sup>171</sup> for instance, a circular letter containing a model labour clause for public contracts was prepared after consultation with the Danish Employers' Confederation and the Danish Confederation of Trade Unions.

124. As regards many other countries, however, among those parties to the Convention, no relevant information has been provided and it therefore remains unclear whether the social partners have been duly consulted in formulating the terms of the clauses to be included in public contracts. This is the case in *Antigua and Barbuda, Bahamas, Barbados, Belize, Brazil, Cyprus, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Finland, Ghana, Grenada, Guyana, Jamaica, Kenya, Mauritania, Mauritius, Morocco, Nigeria, Norway, Philippines, Singapore, Swaziland, Syrian Arab Republic, United Republic of Tanzania, Turkey and Uganda*.

### Subsection C. Ensuring sufficient publicity for tenderers

125. Article 2, paragraph 4, of the Convention provides that the competent authority must take appropriate measures, by advertising specifications or otherwise, to ensure that persons tendering for contracts are aware of the terms of the clauses. The purpose of this provision is certainly to ensure that the requirements of the labour clauses are respected as well as to ensure that the resulting costs are properly factored into the bid. The Committee on Wages adopted the text suggested by the Office without discussion at the 1948 Conference.<sup>172</sup> The text, as finally adopted, was substituted for the Office text on the proposal of the Government member of Ireland, explaining that the new text "would be more flexible than that proposed by the Office and would cover the different practices followed in respect of various types of contracts".<sup>173</sup> The choice of means to ensure sufficient publicity was therefore left to national authorities.

126. In *Denmark*,<sup>174</sup> the contracting authority must ensure that tenderers are aware of the labour clause by inserting in the conditions and specifications, or in the letter inviting tenders, a provision to the effect that the contract will be subject to the requirements of the Convention. Similarly, in *Bahamas*<sup>175</sup> and *Turkey*,<sup>176</sup> the national legislation

<sup>170</sup> See ILC, 32nd Session, 1949, *Record of Proceedings*, p. 486.

<sup>171</sup> (1).

<sup>172</sup> See ILC, 31st Session, 1948, *Record of Proceedings*, p. 451. Point 8 of the draft text, presented in the conclusions of the first discussion provided: "The provisions of the labour clauses in public contracts, in accordance with the provisions of points 6 and 7, to be – (i) determined where necessary by the competent authority, in consultation with the organisations of employers and workers concerned, where such exist; and (ii) included in the advertising specifications calling for contract bids." See also ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(1), p. 28, and ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(2), p.16.

<sup>173</sup> ILC, 32nd Session, 1949, *Record of Proceedings*, p. 486.

<sup>174</sup> (1), para. 4.

<sup>175</sup> (1), para. 4.

<sup>176</sup> (3), s. 6.



provides that the competent authority must ensure that tenderers are aware of the terms of labour clauses. In other countries, such as *Grenada*,<sup>177</sup> *Guyana*,<sup>178</sup> *Nigeria*,<sup>179</sup> *Swaziland*<sup>180</sup> and *Uganda*,<sup>181</sup> before being awarded public contracts contractors must certify in writing that the wages and hours and conditions of work of persons to be employed by them on the contract are not less favourable than the established rates and conditions, as defined by law, which of course implies that they have had advance knowledge of the relevant provisions. In Sweden, where labour clauses like those required by the Convention may only voluntarily be placed in the conditions for contracts, there is a legislative requirement that such special conditions be indicated in the contract notice.<sup>182</sup> In Switzerland,<sup>183</sup> the public procurement legislation requires that all invitations to tender and contract awards be published at the *Feuille officielle suisse du commerce* at least in the official language of the place where the construction site is located.

127. In contrast, the legislation in *Antigua and Barbuda*, *Barbados*, *Belize*, *Brazil*, *Democratic Republic of the Congo*, *Djibouti*, *Dominica*, *Egypt*, *Finland*, *Ghana*, *Jamaica*, *Kenya*, *Mauritania*, *Morocco*, *Norway*, *Philippines*, *Singapore* and *United Republic of Tanzania* is silent with regard to publicity for tenderers.

128. ***The Committee has had occasion to recall that the insertion of labour clauses in the specifications or general conditions of tender documents, even though it is a means of making persons tendering for contracts aware of the terms of such clauses in line with Article 2, paragraph 4, does not suffice to give effect to the basic requirement of the Convention set out in Article 2, paragraph 1, which requires that the labour clause be included as an integral part of the public contract actually signed by the selected contractor.***<sup>184</sup>

129. In line with relevant EU directives,<sup>185</sup> several European countries (e.g. *Cyprus*,<sup>186</sup> *Finland*,<sup>187</sup> *Portugal*,<sup>188</sup> *Romania*<sup>189</sup>) reported that public authorities are required to indicate to bidders where full information on national labour law obligations can be found. Moreover, in providing such information the contracting authority requests the tenderers to indicate that they have taken into account, in drawing up their tender, their obligations related to employment protection provisions and the working conditions in force at the place where the contract is to be executed. Similarly, in the Republic of

<sup>177</sup> (1), s. 31(1) and Schedule, para. 4.

<sup>178</sup> (1), s. 2(3).

<sup>179</sup> (1), s. 3.

<sup>180</sup> (1), s. 136.

<sup>181</sup> (3), s. 3.

<sup>182</sup> (1), s. 18(b).

<sup>183</sup> (1), s. 24.

<sup>184</sup> See RCE 2004, 293 (*Mauritius*).

<sup>185</sup> See Directive 2004/17/EC, article 39(1) and (2); Directive 2004/18/EC, article 27(1) and (2).

<sup>186</sup> (2), s. 29.

<sup>187</sup> (1), s. 50; (2), s. 46.

<sup>188</sup> (1), s. 28(1).

<sup>189</sup> (1), s. 34(2).

Moldova,<sup>190</sup> most recently adopted legislation on public procurement provides that the contracting authority may specify in the terms of reference the institutions from which the tenderers may obtain information on obligations relating to taxes, environmental protection, labour protection and working conditions, and also that it may request the tenderers to certify in submitting their offers that they took into account their obligations and provisions on labour protection and working conditions applicable at the place where the works will be executed or the services will be provided.

#### Subsection D. Provisions for occupational safety and health

130. Article 3 of the Convention requires adequate measures to ensure fair and reasonable conditions of health, safety and welfare for workers executing public contracts where appropriate provisions relating to the health, safety and welfare of workers engaged in the execution of contracts are not already applicable under national laws or regulations, collective agreements or arbitration awards. Article 3, unlike the obligations laid down in Article 2 of the Convention, requires the taking of adequate measures by the competent authorities only where appropriate provisions are not already applicable for workers engaged in the execution of public contracts.

131. During the preparatory work for the Convention, the Office had suggested that labour clauses should include conditions of health, safety and welfare alongside those of wages and hours of work, that is to say, subject to the “not less favourable” requirement. However, during the deliberations of the Conference Committee on Wages in 1948, it was noted that health, safety and welfare matters were questions ordinarily dealt with by general statutory provisions, and thus it would not be advisable to include in the international standard words to the effect that laws and regulations should be enforced. It was concluded that only in circumstances where national laws or regulations, collective agreements or arbitration awards did not make appropriate provision for health, safety and welfare matters, should the competent authorities take adequate measures to ensure that these conditions for workers engaged in carrying out the contract were fair and reasonable.<sup>191</sup>

132. Most of the countries that require labour clauses as envisaged by the Convention, including *Barbados, Belize, Cyprus, Denmark, Guyana, Israel and Kenya*, have reported that adequate measures are found in national legislation, and thus no additional measures are needed. Among countries where labour clauses are inserted into public contracts, none appears to have determined that additional measures in the area of safety and health need to be taken, except for special contract clauses dealing with worker safety and health which are commonly used in public works contracts.

133. In *Grenada*, where labour clauses are included in public contracts, the Committee had inquired for several years whether provisions of the Factories Ordinance covering health and safety on docks, wharves, quays, warehouses, and ships and to works of building and engineering construction had entered into force.<sup>192</sup> In 1995 the Committee was informed that the provisions had not been brought into force, but that they were used as a basis for encouraging compliance. The Committee subsequently asked what measures had been taken to ensure fair and reasonable health, safety and welfare

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<sup>190</sup> (1), s. 31.

<sup>191</sup> See ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(1), pp. 11–16 and 31.

<sup>192</sup> Direct requests addressed to *Grenada* in 1989, 1991 and 1992.

conditions for workers engaged in the execution of public contracts.<sup>193</sup> The Government replied that contractors are required to hold sufficient insurance so as to pay compensation to workers under the Workmen's Compensation Act, and that the National Insurance (Employment Injury Benefit) Regulations provide for benefits in case of injury. On this occasion the Committee noted that Article 3 of the Convention requires adequate measures to be taken by the competent authority to prevent accident or illness, and that insurance coverage alone is not sufficient to satisfy this requirement. Several non-ratifying countries (e.g. Japan, Republic of Korea) have reported that requirements for insurance coverage are seen as measures to ensure fair and reasonable conditions of health, safety and welfare for workers engaged under public contracts. ***The Committee wishes to emphasize that the action required under Article 3 of the Convention goes beyond the mere compensation after an occupational accident or injury has occurred.***

134. The Committee has had the occasion to follow up on comments from a workers' organization on the adequacy of established methods for ensuring the occupational safety and health of those involved in the execution of public contracts, asking the government concerned what measures had been taken in light of such comments.<sup>194</sup>

135. Most countries, whether or not they include labour clauses in public contracts, point out that the health and safety of workers engaged in the execution of public contracts is protected by health and safety legislation of general application.<sup>195</sup> In some countries, such as the Republic of Korea,<sup>196</sup> Portugal<sup>197</sup> and Tunisia,<sup>198</sup> contract clauses merely reiterate the binding nature of national legislation. In some other countries (e.g. Ecuador), certification of the contractor's conformity with the general occupational safety and health regulations is required as a precondition for bidding. In other cases, legislation makes sector-specific provision and is applicable to work undertaken in the execution of public contracts. In Trinidad and Tobago,<sup>199</sup> for example, the health, safety and welfare of workers involved in building operations and work of engineering construction arising from public or private contracts are covered by general occupational safety and health legislation, and, in addition, commencement of such work must be notified to the chief inspector. In *Italy*,<sup>200</sup> recently adopted legislation seeks to protect the safety and health of all construction workers whether or not engaged in the execution of public contracts.

136. Several countries, however, include specific clauses on workers' occupational safety and health, particularly in contracts for construction work. This reflects the situation in the industry,<sup>201</sup> and may be on account of the issues of financial liability involved where workers are injured on the job.

<sup>193</sup> Direct request addressed to *Grenada* in 2001.

<sup>194</sup> See RCE 2003, 331 (*Uruguay*).

<sup>195</sup> For instance, Bulgaria, Canada, Indonesia, Islamic Republic of Iran, Japan, Latvia, Myanmar, New Zealand, Nicaragua, Panama, Papua New Guinea, Poland, Qatar, Saudi Arabia, Senegal, South Africa and Sweden.

<sup>196</sup> (1), s. 4.

<sup>197</sup> (1), s. 149(1).

<sup>198</sup> (3), s. 31.4.

<sup>199</sup> (2), s. 63.

<sup>200</sup> (6).

<sup>201</sup> Internationally recognized standard form construction contracts developed by the International Federation of Consulting Engineers (FIDIC), the so-called Red Book for *Civil engineering works* and the Green Book *Short*

137. In this connection, the Committee recalls the provisions of the Safety and Health in Construction Convention, 1988 (No. 167), and notes that eight member States have so far ratified both Convention No. 94 and Convention No. 167.<sup>202</sup>

## Section 4. Enforcement measures

138. Article 4(a) of the Convention provides that the laws, regulations or other instruments giving effect to its requirements must: (i) be brought to the notice of all persons concerned; (ii) define the persons responsible for compliance therewith; and (iii) provide for the posting of notices informing the workers concerned of the conditions of their work. Under Article 4(b), on the condition that other mechanisms are not operating to ensure effective enforcement, two requirements are set for implementing the laws, regulations or other instruments: (i) the maintenance of adequate records of time worked and wages paid to workers, and (ii) a system of labour inspection adequate to ensure effective enforcement.

139. With regard to the draft text proposed by the Office in 1948, only two substantive amendments were made during the Conference discussions. The first was the separation of the five subparagraphs into two divisions, the first group being required in all circumstances, whereas the second only where other arrangements are not operating to ensure their effective enforcement. The Office had originally proposed that the five requirements be taken in all cases. The Government member of the United Kingdom proposed the amendment, expressing “the view that the Office text implied an obligation to enforce the fair wages clauses by means of an inspection system, which could not be accepted, because there were other effective methods for securing enforcement and such methods should not be disturbed”.<sup>203</sup> The second amendment was the substitution of the word “time” where “hours” had been used in Article 4(b)(i), proposed by the Worker members, to ensure that parts of hours of work be included in work records.<sup>204</sup>

### Subsection A. Publicity and supervision

#### A.1. *Implementing laws or regulations brought to the attention of all*

140. Article 4(a)(i) requires the laws, regulations or other instruments giving effect to the provisions of the Convention to be brought to the notice of all persons concerned. This requirement does not refer to the substantive terms of the labour clauses, i.e. the wages, hours of work and other conditions of labour since that obligation is found in Article 2, paragraph 4. This point is further borne out by the question initially posed by the Office in its preparatory questionnaire as to whether “the international regulations should provide that the laws and regulations concerning fair wages clauses in public contracts should be brought to the notice of all persons concerned”.<sup>205</sup>

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*form of contract*, as well as the *Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition)*, all offer elaborate general and particular conditions of contract relating to safety and health conditions.

<sup>202</sup> Algeria, Brazil, Denmark, Finland, Guatemala, Iraq, Italy and Norway.

<sup>203</sup> ILC, 31st Session, 1948, *Record of Proceedings*, Appendix IX: Wages, p. 451.

<sup>204</sup> *ibid.*

<sup>205</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 35. It is worth noting that identical wording was proposed during the discussions that led to the adoption of the Protection of Wages

## A.2. *Authorities responsible for compliance*

141. Article 4(a)(ii) requires the laws, regulations or other instruments giving effect to the provisions of the Convention to define the persons responsible for compliance therewith. There is nothing in the Convention or the preparatory reports giving any indication as to the definition of “persons”. Presumably, the intention was to leave it to the national authorities to decide when framing the relevant laws, regulations or other instruments.

## A.3. *Posting of notices*

142. Article 4(a)(iii) requires the laws, regulations or other instruments giving effect to the provisions of the Convention to provide for the posting of notices in conspicuous places at the establishments and workplaces concerned with a view to informing the workers of their conditions of work.

143. In many countries, contractors are obliged to keep displayed in conspicuous places readable notices containing the conditions of work applicable to the workers concerned. This is the case, for instance, in *Bahamas*,<sup>206</sup> *Barbados*,<sup>207</sup> *Belize*,<sup>208</sup> *Canada*,<sup>209</sup> *Dominica*,<sup>210</sup> *Grenada*,<sup>211</sup> *Guyana*,<sup>212</sup> *Kenya*,<sup>213</sup> *Malaysia (Sabah)*, *Malaysia (Sarawak)*<sup>214</sup> and *Swaziland*.<sup>215</sup>

144. In *Denmark*,<sup>216</sup> the contractor may, if necessary, be invited to arrange for information of the relevant rates of pay and other working conditions to be readily available (for instance, by posting of notices at the workplace) to the workers engaged on the project covered by the contract.

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Convention, 1949 (No. 95). However, the text was considered by some governments as imposing an unreasonable obligation on the competent authority, and at the second Conference discussion the expression “be brought to the notice of all persons concerned” was changed to “be made available for the information of persons concerned”; see ILC, 32nd Session, 1949, *Record of Proceedings*, p. 509. The intention is therefore not to require that the relevant legislation be brought to the notice of all persons concerned, but merely that the texts should be given sufficient publicity, for instance, through publication of the relevant provisions in an official gazette.

<sup>206</sup> (2), para. 1(a); (3), para. 17. See also *Saint Lucia* (1), Schedule, para. 6A.

<sup>207</sup> (1), s. 4(1).

<sup>208</sup> (1), s. 142(2).

<sup>209</sup> (2), s. 14.

<sup>210</sup> (1), para. 5(a).

<sup>211</sup> (1), Schedule, para. 7.

<sup>212</sup> (1), s. 2(10A).

<sup>213</sup> (1), para. (f).

<sup>214</sup> (1), para. 21(e).

<sup>215</sup> (1), s. 142.

<sup>216</sup> (1), para. 4.

145. In others countries, such as *Burundi*,<sup>217</sup> *Central African Republic*,<sup>218</sup> *Philippines*<sup>219</sup> and Portugal,<sup>220</sup> no provision is made for labour clauses in terms of the Convention, but the posting of notices concerning the working conditions is required. In some countries, such as *Mauritius*, standard tender documents for public works refer to the display of notices at the workplace and the maintenance of proper wage records but no provision is to be found in national laws or regulations.

146. In certain countries, such as *Bulgaria*,<sup>221</sup> the laws and regulations on public contracts do not require the posting of notices in conspicuous places at the workplace with a view to informing the workers of the labour conditions applicable to them. In other countries, the duty to notify workers of the content of the labour clauses applicable to them is set out in the public procurement legislation but not implemented in practice. For instance, in *Mauritania*,<sup>222</sup> the public contracts regulations provide that the manner in which the parties concerned will be notified of the requirements of labour clauses will be determined by ministerial order but no such order has so far been issued. In some other cases, the Committee has asked for information on steps taken to inform workers of labour clauses in public contracts.<sup>223</sup>

147. A number of countries reported that the general labour legislation makes it compulsory for enterprises to display the works rules in a prominent place so that they can be consulted at any time.<sup>224</sup>

148. The Government of *Nigeria* reported that the posting of notices seems to serve no useful purpose as the labour force concerned is mainly drawn from persons speaking various languages. Workers are therefore informed by other means, for instance, by their trade unions or by labour inspectors.

## Subsection B. Record keeping and inspection

149. Article 4(b) of the Convention obliges ratifying States to provide for the maintenance of certain mechanisms associated with the enforcement of labour standards set up under a contract's labour clause, but only where other arrangements are not operating to ensure effective enforcement. This point was specifically noted by the Office in response to a proposal made by the Government of South Africa prior to the second Conference discussion to add a paragraph "the object of which is to eliminate the need for special laws or regulations relating to the enforcement of the Convention if provision is already made by ordinary legislation along the line laid down in this Article". The Office responded saying that "the effect of Article 4 is not to require the enactment of special legislation in order to satisfy its requirements, and that as at present drafted it

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<sup>217</sup> (1), s. 4.

<sup>218</sup> (2), s. 16(3). No similar provision is to be found in the general specifications relating to public contracts for the supply of materials and services.

<sup>219</sup> (2), Addendum, para. A4.

<sup>220</sup> (1), s. 144(1).

<sup>221</sup> The only provision to be found in the general labour legislation (1), s. 58, requires employers to make the text of relevant collective agreements available to employees.

<sup>222</sup> (1), s. 9.

<sup>223</sup> See, for instance, the direct request addressed to *Belgium* in 2006.

<sup>224</sup> For instance, Canada, Ontario (14), Part II; *Egypt*, (3), s. 86; *Syrian Arab Republic*, (4), s. 68, limited to enterprises employing more than 15 persons; *Uruguay* (5), s. 5.

gives government discretion as to the methods considered most appropriate to apply the provisions of the Article. With particular reference to clause (b), it will be remembered that the Conference at the first discussion decided to insert the words ‘except where other arrangements are operating to ensure effective enforcement’ for the specific purpose of providing a necessary margin of flexibility”.<sup>225</sup> In the light of this preparatory work, the Committee has often sought clarification on the application of this Article of the Convention, especially in situations where there was information suggesting that other arrangements had not been adequate to ensure effective enforcement or in order to assess the adequacy of other arrangements.<sup>226</sup>

150. Thus, where other arrangements are not operating to ensure effective enforcement, Article 4(b)(i) requires that laws, regulations or other instruments must provide for the maintenance of adequate records of the time worked by, and the wages paid to, the workers concerned.

151. In some countries, public procurement laws and regulations require contractors to keep proper wages books and time sheets showing the wages paid to and time worked by the workers engaged in the execution of the public contract. Moreover, contractors are bound, whenever required, to produce those records as well as any further details and evidence to facilitate labour inspection. This is the case, for instance, in *Barbados*,<sup>227</sup> *Belize*,<sup>228</sup> *Canada*,<sup>229</sup> *Cyprus*,<sup>230</sup> *Dominica*,<sup>231</sup> *Grenada*,<sup>232</sup> *Guyana*,<sup>233</sup> *Kenya*,<sup>234</sup> *Malaysia (Sarawak)*,<sup>235</sup> *Nigeria*,<sup>236</sup> *Syrian Arab Republic*<sup>237</sup> and *Turkey*,<sup>238</sup> where labour clauses as required by the Convention are used; and in *Burundi*,<sup>239</sup> *Central African Republic*,<sup>240</sup> *Philippines*,<sup>241</sup> and *Trinidad and Tobago*,<sup>242</sup> where other types of labour clauses are in use in public contracts.

<sup>225</sup> ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(2), p. 17.

<sup>226</sup> See RCE 2003, 331 (*Uruguay*). See also the direct request addressed to *Saint Vincent and the Grenadines* in 2004.

<sup>227</sup> (1), Schedule, para. 5. See also *Saint Lucia* (1), Schedule, para. 5.

<sup>228</sup> (1), s. 142(1).

<sup>229</sup> (2), s. 14.

<sup>230</sup> (1), paras 4 and 9.

<sup>231</sup> (1), paras 5(b) and 9.

<sup>232</sup> (1), Schedule, paras 6 and 13.

<sup>233</sup> (1), s. 2(5), (9).

<sup>234</sup> (1), paras (e) and (j).

<sup>235</sup> (1), para. 21(g).

<sup>236</sup> (1), Appendix, para. 5.

<sup>237</sup> (3), para. 1.

<sup>238</sup> (4), s. 33.

<sup>239</sup> (1), s. 2.

<sup>240</sup> (2), s. 16(4).

<sup>241</sup> (2), Addendum, para. A4.

<sup>242</sup> (1).

152. In some countries, such as Canada, contractors are not entitled to payment under the contract until they have filed with the contracting authority in support of a claim for payment, a statement swearing that required books and records have been kept, that there are no wages in arrears in respect of the work performed under the contract, and that to the best of their knowledge the conditions of the contract required by the law on fair wages and hours in public contracts have been complied with.<sup>243</sup> In *Uruguay*,<sup>244</sup> public procurement legislation provides for a specific clause whereby the contracting authority may require, as a precondition to the disbursement of any sums due under the contract, that the contractor produces documents showing that wages and social security contributions in respect of the workers concerned have been fully paid.

153. In some countries, the obligation of every employer to keep appropriate records and registers, including wage records and other records related to the employment relationship, is set out in the general labour legislation. This is the case, for instance, in Poland,<sup>245</sup> *Swaziland*<sup>246</sup> and *Uruguay*.<sup>247</sup>

154. Finally, in certain countries, such as *Bulgaria* and *Mauritania*, the public procurement legislation contains no specific provisions on record keeping.

155. Where other arrangements are not operating to ensure effective enforcement, Article 4(b)(ii) of the Convention calls for the maintenance of a system of inspection adequate to ensure effective enforcement.

156. In most countries, effective enforcement is principally ensured through labour inspection which exercises overall control over the observance of labour legislation in all economic sectors and branches of activity. As a matter of general rule, the duties of inspectors include the power to require employers to provide information on the wages, hours of work or other conditions of the persons in their employment. This is the case, for instance, in *Bulgaria*,<sup>248</sup> *Nigeria*<sup>249</sup> and *Swaziland*.<sup>250</sup>

157. Among the countries that have labour clauses conforming to the Convention, several have reported labour inspection systems supplementing mechanisms of general application. For example, in *Turkey*,<sup>251</sup> public procurement legislation makes specific reference to appropriate inspection to ensure effective enforcement. In *Belize*,<sup>252</sup> the Contractor-General who is responsible for monitoring the award and implementation of public contracts, may among other things have access to any premises or location where work on a public contract has been, is being or is to be carried out, and also have access to all books, records, documents or other property used in connection with the grant, issue, suspension or revocation of any licence whether in the possession of any public

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<sup>243</sup> (2), s. 11(1).

<sup>244</sup> (1), s. 2; (2), s. 3.

<sup>245</sup> (1), s. 94(9a).

<sup>246</sup> (1), s. 151(1).

<sup>247</sup> (4), ss 9, 11. Records must be kept at the workplace so that the workers may consult them.

<sup>248</sup> (1), ss 399 and 404.

<sup>249</sup> (2), s. 78(1)(e), (i).

<sup>250</sup> (1), s. 9(2)(b).

<sup>251</sup> (3), s. 4.

<sup>252</sup> (2), ss 14(2) and 15.



officer or any other person. Similarly, in *Bahamas*,<sup>253</sup> the General Conditions of Government Contracts provide that the Director of Public Works may at all times have access to the worksite and the contractor is bound to afford every facility and assistance in this respect. In Switzerland,<sup>254</sup> the contracting authority may carry out controls in matters of conditions of work. It may also delegate such authority to the inspection services provided for in the labour legislation or to other competent bodies, such as joint supervisory organs established under collective agreements. In *Italy*,<sup>255</sup> recent legislation provides that labour inspection personnel may issue orders suspending work at construction sites where serious labour regulations violations are found, and that in such cases they shall immediately inform the competent authorities of the ministry responsible for infrastructure with a view to issuing instructions to prohibit the conclusion of public contracts to or the participation in public tenders of the offending contractor for an eventual period of not less than double the duration of the suspension, but not more than two years.

158. Among the countries that have labour clauses not conforming to the Convention, some have public procurement legislation that makes specific reference to inspection to ensure enforcement. This is the case, for instance, in the *Philippines*.<sup>256</sup> In *Burundi*,<sup>257</sup> the contractor is under the obligation to allow persons acting on behalf of the public contracting authority and labour inspectors to either witness the payment of workers whenever they deem it appropriate or have access to all wage records with a view to verifying whether the pay scales practised are in conformity with the contractual requirements. In Trinidad and Tobago there is a similar arrangement obliging records on pay and hours of work to be subject to inspection, established in public contracts for works, as a result of an administrative memorandum.<sup>258</sup>

### Subsection C. Sanctions and penalties for violations

159. Article 5 of the Convention, paragraphs (1) and (2), respectively, set standards for penalties and remedies in situations where first, there is failure to observe and apply provisions of labour clauses and second, where workers have not received wages to which they are entitled. The Office in drawing up its preliminary questionnaire on the matter noted that in addition to the possibility for sanctions, countries had adopted provisions making it possible to withhold payment under a contract to ensure that workers concerned received all wages to which they were entitled, and also to exclude from tendering persons or firms who had been found guilty of non-compliance with the labour conditions laid down in contracts.<sup>259</sup>

<sup>253</sup> (3), para. 19.

<sup>254</sup> (1), s. 8(2); (2), s. 6(3).

<sup>255</sup> (6), s. 36bis.

<sup>256</sup> (2), Addendum, para. A5.

<sup>257</sup> (1), s. 2(e).

<sup>258</sup> (1).

<sup>259</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 34–35.

### C.1. *Withholding of contracts for breach of labour clauses*

160. Article 5, paragraph 1, of the Convention calls for the application of sanctions, including the withholding of contracts or otherwise, where labour clauses in public contracts have not been observed or applied.

161. Laws and regulations on public contracts and procurement typically list conditions under which tenderers are precluded from consideration. These conditions may include failure to perform under previous contracts, or breach. In some cases, the conditions specifically address labour clauses. For example, in a number of countries such as *Barbados*,<sup>260</sup> *Belize*,<sup>261</sup> *Burundi*,<sup>262</sup> *Cyprus*,<sup>263</sup> *Denmark*,<sup>264</sup> *Dominica*,<sup>265</sup> *Grenada*,<sup>266</sup> *Guyana*,<sup>267</sup> *Kenya*,<sup>268</sup> *Nigeria*<sup>269</sup> and *Swaziland*,<sup>270</sup> any contractor or subcontractor who fails to comply with any of the rules regarding labour clauses ceases to be approved as a contractor or subcontractor for such period as the competent labour authorities may determine, or for as long as they do not honour their obligations towards the workers concerned. Similarly, in the *Philippines*,<sup>271</sup> the failure of contractors to comply with the requirements of the labour clauses is deemed to be valid ground for their disqualification from tendering for any public works contract. In *Spain*,<sup>272</sup> under the general administrative specifications for public contracts, persons who have been sanctioned for serious offences in labour matters are precluded from contracting with the public administration.

162. In countries that do not require labour clauses as defined by the Convention, sanctions for breach of contract, encompassing the breach of a contractual obligation to respect national laws, such as those setting wages and hours of work, or regulating safety and health conditions, can include termination of contract.<sup>273</sup> In El Salvador,<sup>274</sup> persons who may not be in conformity with their obligations towards tax authorities and social security institutions are not permitted to participate in public tendering. Similarly, in Mali<sup>275</sup> and Senegal,<sup>276</sup> contractors committing serious breaches of the laws and

<sup>260</sup> (1), Schedule, para. 11. See also *Saint Lucia* (1), Schedule, para. 11.

<sup>261</sup> (1), s. 148.

<sup>262</sup> (1), s. 3.

<sup>263</sup> (1), para. 11.

<sup>264</sup> (1), Appendix, para. 4.

<sup>265</sup> (1), para. 11.

<sup>266</sup> (1), Schedule, para. 15.

<sup>267</sup> (1), s. 2(11).

<sup>268</sup> (1), para. (h).

<sup>269</sup> (1), Appendix, para. 11.

<sup>270</sup> (1), s. 143.

<sup>271</sup> (2), Addendum, para. A2. Similarly, in *Israel*, according to the Government's report, public contracts are awarded only to contractors included in the list of approved government contractors and a contractor not securing labour standards as provided for by collective agreements would not be kept on the list.

<sup>272</sup> (2), ss 20(d), 22.

<sup>273</sup> See, for instance, *Argentina* (1), s. 36; *Egypt* (4), s. 82; *Portugal* (1), s. 149(2).

<sup>274</sup> (1), s. 25(d).

<sup>275</sup> (1), s. 90.

<sup>276</sup> (1), ss 185, 186; (2), s. 146(1).

regulations in force may be excluded temporarily or permanently from tendering procedures while the authority overseeing public contracts publishes on a quarterly basis the list of enterprises or suppliers so excluded.

163. The Committee has had occasion to note information of practical application provided by *Austria*, where a judgement by the Federal Contracts Award Office upheld the exclusion of a contract bid because of the bidder's failure to observe labour law regulations in the bid's calculation of overtime payment.<sup>277</sup> That sanction was imposed, however, for failure to observe general labour law and not labour clauses within the meaning of the Convention.<sup>278</sup>

## C.2. *Suspension of payment for recovery of workers' unpaid wages*

164. **Article 5, paragraph 2, of the Convention calls for appropriate measures, including the withholding of payments under the contract or otherwise, for the purpose of enabling workers engaged in the execution of a public contract to obtain wages to which they are entitled. This obligation is independent both from the obligation to place labour clauses in public contracts, and from any other remedy that may be available to workers who have not been paid their wages. The withholding of payments must be seen as constituting an additional safeguard for the workers concerned even when normal judicial proceedings are available for recovering wages due to them.**<sup>279</sup>

165. In many countries, the relevant laws and regulations provide for the suspension of payment of any money which would otherwise be payable under the terms of the contract in case wages in respect of the execution of that contract remain in arrears. This is the case in *Argentina*,<sup>280</sup> *Bahamas*,<sup>281</sup> *Barbados*,<sup>282</sup> *Belize*,<sup>283</sup> *Canada*,<sup>284</sup> *Cyprus*,<sup>285</sup> *Dominica*,<sup>286</sup> *Grenada*,<sup>287</sup> *Guyana*,<sup>288</sup> *Mauritius*,<sup>289</sup> *Nigeria*<sup>290</sup> and *Swaziland*.<sup>291</sup>

166. In certain cases, specific provision is made for the settlement of any unpaid wages out of the moneys payable under the public contract, and the amounts so paid are deemed a payment to the contractor. This is the case in *Barbados*,<sup>292</sup> *Belize*,<sup>293</sup> *Brunei*

<sup>277</sup> Administrative Decision No. 1/98 of 19 Jan. 1998.

<sup>278</sup> See the direct request addressed to *Austria* in 2002.

<sup>279</sup> See the direct request addressed to *Cameroon* in 2007.

<sup>280</sup> (1), s. 36.

<sup>281</sup> (3), para. 27.

<sup>282</sup> (1), Schedule, para. 8. See also *Saint Lucia* (1), Schedule, para. 8.

<sup>283</sup> (1), s. 145.

<sup>284</sup> (2), s. 11(2).

<sup>285</sup> (1), para. 8.

<sup>286</sup> (1), para. 8.

<sup>287</sup> (1), Schedule, para. 12.

<sup>288</sup> (1), s. 2(8).

<sup>289</sup> (1), s. 14(1)(b).

<sup>290</sup> (1), Appendix, para. 8.

<sup>291</sup> (1), s. 139.

<sup>292</sup> (1), Schedule, para. 10. See also *Saint Lucia* (1), Schedule, para. 10.

<sup>293</sup> (1), s. 147.

Darussalam,<sup>294</sup> *Burundi*,<sup>295</sup> *Cyprus*,<sup>296</sup> *Dominica*,<sup>297</sup> *Grenada*,<sup>298</sup> *Guyana*,<sup>299</sup> *Kenya*,<sup>300</sup> *Malaysia (Sarawak)*,<sup>301</sup> *Mauritius*,<sup>302</sup> *Nigeria*,<sup>303</sup> *Philippines*,<sup>304</sup> *Portugal*,<sup>305</sup> *Spain*,<sup>306</sup> *Swaziland*,<sup>307</sup> *Thailand*,<sup>308</sup> *Turkey*<sup>309</sup> and *Uruguay*.<sup>310</sup> In the *Central African Republic*,<sup>311</sup> the labour inspection services are empowered to compensate directly any workers who may not have been receiving their wages in full or on time and withhold the relevant sums, increased by five per cent, from the funds due to the contractor. Similarly, in the *Syrian Arab Republic*,<sup>312</sup> the public administration may deduct from the contractor's payment not only the sums owed to workers but also any expenses incurred in paying out these sums. In *Morocco*,<sup>313</sup> the contracting public authority may pay directly any wages due to underpaid workers or workers who have been regularly experiencing delays in the payment of their wages, and deduct the corresponding amount from the sums owed to the contractor.

167. In some countries, public procurement legislation further provides for penal or administrative sanctions following an appropriate investigation into the contractor's failure to observe and implement the working conditions of the workers concerned. This is the case, for instance, in *Turkey*.<sup>314</sup>

168. Finally, in some countries no express provision is made for the withholding of contracts or the withholding of payments for failure to observe labour clauses in public contracts. This is the case in *Bulgaria* and *Mali*. Similarly, in *Mauritania*,<sup>315</sup> no detailed provisions are to be found on sanctions or other enforcement measures with the exception of a general clause

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<sup>294</sup> (2), Schedule, para. 10.

<sup>295</sup> (1), s. 3.

<sup>296</sup> (1), para. 10.

<sup>297</sup> (1), para. 10.

<sup>298</sup> (1), Schedule, para. 14.

<sup>299</sup> (1), s. 2(10).

<sup>300</sup> (1), para. (i).

<sup>301</sup> (1), para. 21(h).

<sup>302</sup> (1), s. 14(12).

<sup>303</sup> (1), Appendix, para. 10.

<sup>304</sup> (2), Addendum, para. A3.

<sup>305</sup> (1), s. 144(2).

<sup>306</sup> (2), s. 99(7).

<sup>307</sup> (1), s. 141.

<sup>308</sup> (1), s. 12.

<sup>309</sup> (3), s. 3.

<sup>310</sup> (1), s. 3; (2), s. 4.

<sup>311</sup> (2), s. 16(5), (6) and (7).

<sup>312</sup> (3), s. 2.

<sup>313</sup> (2), s. 20(5) and (7). No similar provision is to be found in the general specifications relating to public contracts for the supply of services.

<sup>314</sup> (3), s. 5; (4), s. 33.

<sup>315</sup> (2), s. 5.

stipulating that any dispute concerning wages, hours of work, or other conditions of work, as may be provided for in labour clauses, is to be submitted to the competent administrative authority for decision after consultation with the labour inspectorate.

**169. *As already mentioned, several countries bound by the Convention have not as yet taken measures to give concrete effect to the main requirement of the Convention, i.e. the insertion of labour clauses in public contracts, considering that the mere fact that the general labour legislation applies without distinction to all workers suffices to absolve them from their obligation of incorporating appropriate labour clauses into public contracts as defined in the Convention. The Committee therefore urges those Members to fully implement the provisions of the Convention, including Articles 4 and 5 on enforcement measures.*** They include: *Algeria, Antigua and Barbuda,*<sup>316</sup> *Brazil, Cameroon,*<sup>317</sup> *Costa Rica,*<sup>318</sup> *Democratic Republic of the Congo,*<sup>319</sup> *Djibouti,*<sup>320</sup> *Egypt,*<sup>321</sup> *Ghana,*<sup>322</sup> *Guinea,*<sup>323</sup> *Guatemala,*<sup>324</sup> *Jamaica, Netherlands (Aruba), Panama,*<sup>325</sup> *Philippines,*<sup>326</sup> *Rwanda,*<sup>327</sup> *Singapore and Suriname.*

<sup>316</sup> It is not clear whether the General Conditions of Contract, which applied to Antigua before its independence, and paragraph 16 of which gave effect to most of the provisions of the Convention, are still applicable in a legally binding form.

<sup>317</sup> See RCE 2007, 439.

<sup>318</sup> Following an ILO direct contacts mission, a Decree was adopted in 1980 implementing the main requirements of the Convention. The Committee noted with satisfaction the adoption of that Decree and requested information on its practical application. The Government initially referred to the establishment of a committee responsible for formulating the terms of labour clauses in consultation with the social partners but subsequently ceased providing further information while lately made reference to an Executive Directive of 2002 that only establishes the obligation of contracting enterprises to comply with national labour and social security legislation.

<sup>319</sup> The Committee has been commenting on the application of the Convention for 40 years while in 1976 at the Government's request the International Labour Office prepared a draft of new provisions to be incorporated into the existing public procurement legislation in order to give effect to the Convention; see RCE 2004, 289.

<sup>320</sup> The Government has been announcing for nearly 30 years its intention to revise its laws and regulations on public contracting in order to bring them into conformity with the provisions of the Convention but no real progress has so far been achieved; see RCE 2006, 335.

<sup>321</sup> See RCE 2007, 447.

<sup>322</sup> See RCE 2007, 450.

<sup>323</sup> A direct contacts mission conducted in 1981 obtained no concrete results; see RCE 2006, 337. The Government had announced in 1973 its decision to denounce the Convention but no practical effect was given as the Government's decision was not received within the appropriate denunciation period.

<sup>324</sup> The Committee had noted with satisfaction in 1987 the adoption of the Ministerial Agreement of November 1985 approving a model labour clause to be included in all public contracts. The Government has since not taken any steps to implement this agreement while in recent reports it limits itself to indicating that it is for each body that is party to a public contract to choose whether to insert or not labour clauses but that under no circumstances is it possible to waive social rights, as provided for in the Constitution and the Labour Code.

<sup>325</sup> The Government has been indicating since 1982 that it is considering action to give effect to the Convention. The Government subsequently announced the establishment of a tripartite inter-ministerial committee to prepare regulations for the implementation of the Convention. Draft legislation was elaborated in 1987 and again in 1998 but was never formally adopted; see RCE 2002, 316.

<sup>326</sup> The Committee had noted with satisfaction in 1983 the adoption of a Ministerial Order giving effect to the Convention's requirements. It has since been drawing attention to the fact that the labour clauses which had actually been included in specimen public contracts only required contractors to comply with labour laws regarding minimum wages, hours of work and other conditions of labour, and therefore, had to be revised. The Government later reported that due to a shift in the priorities of the legislature no action could be taken to follow up on the Committee's comments, and that in any event the Labour Code fully covered workers employed by public contractors; see RCE 2002, 317.

<sup>327</sup> The Committee has been requesting the adoption of measures to regulate public contracts since 1964 while the Government has been referring to draft legislation under preparation since 1983; see RCE 1991, 236. The

170. In other cases, where member States are not bound by the Convention, and where labour clauses are not included in public contracts, sanctions are nevertheless applied to contractors who, for example, fail to observe labour protection laws.<sup>328</sup> In Colombia,<sup>329</sup> the contracting authority, before paying any sums to the contractor, must verify that all contributions to pension funds or other social security schemes have been paid, and in case of outstanding payments, it may withhold the amount in question and transfer it directly to the institution concerned.

171. The Committee notes that attempts to establish enhanced protection mechanisms for the benefit of workers executing work under public contract are a poor second best as compared to the labour clause protection required by the Convention. General labour legislation often does not completely cover the workers concerned, or does not cover them with respect to all types of labour law violations. In some countries, problems that plague the usual labour law enforcement, such as weak labour and occupational safety and health inspectorates and judicial mechanisms affect also workers executing public contracts. To the extent such workers are in vulnerable sectors such as construction, where work is often short term and dangerous, the difficulties are more pronounced.

## Section 5. Exemption and suspension

172. Article 7, paragraph 1, of the Convention permits a ratifying member State to exempt from application of the Convention areas of its territory where conditions are such that application would be impracticable to enforce on account of the sparseness of the population or the stage of development of the area. The competent authorities must consult with the organizations of employers and workers concerned, where such exist, before making such an exemption. A general exemption may be made, or “with such exceptions in respect of particular undertakings or occupations as it thinks fit”. Paragraph 2 requires each Member to indicate in its first report on application of the Convention “any areas in respect of which it proposes to have recourse to the [exemption] and [to] give the reasons for which it proposes to have recourse thereto; no Member [may], after the date of its first annual report, have recourse to the provisions of the present Article except in respect of areas so indicated”. Paragraph 3 requires reconsideration at intervals of not less than three years, in consultation with the organizations of employers and workers concerned, where such exist, the practicability of extending the application of the Convention to exempted areas. Finally, paragraph 4 obliges Members having recourse to this exemption possibility to indicate in subsequent reports “any areas in respect of which they renounce the right to have recourse to the provisions of this Article and any progress which may have been made with a view to

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only relevant provision to be found in the new Public Procurement Act, which was adopted in March 2007, refers to the contractor’s obligation to comply with laws and regulations in force.

<sup>328</sup> See, for instance, Hungary (2), s. 60(1)(g); (3), s. 15(7); Poland (2), s. 24.

<sup>329</sup> (2), s. 50; (3), s. 1.

the progressive application of the Convention in such areas”.<sup>330</sup> To the Committee’s knowledge, no use has been made so far of the flexibility given in Article 7.<sup>331</sup>

173. Article 8 of the Convention permits operation of its provisions to be “temporarily suspended by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, in cases of force majeure or in the event of emergency endangering the national welfare or safety”. The provision has never been relied upon as a justification for suspending operation of provisions of the Convention.<sup>332</sup>

## Section 6. Summing up

**174. *Based on the review of national law and practice, the Committee concludes that the idea of including labour clauses in public contracts is not widely accepted among member States. According to what appears to be the prevailing view among the member States that have not ratified the Convention, but also a certain number of ratifying countries, public procurement legislation is not meant to regulate labour matters while public contracts fall squarely within the ambit of general labour legislation in so far as the social conditions of their execution are concerned. Moreover, there seems to be little support for the idea that workers employed under public contracts would need special protection in order to avoid social dumping in the sensitive area of public procurement. The rationale of the Convention, i.e. the notion that the State should act as model employer and offer the most advantageous conditions to workers paid indirectly through public funds, does not seem to enjoy great popularity today, or at least does not find expression in the form envisaged in the Convention, that is to say the insertion of a standard clause in all public contracts obliging contractors to align the conditions of employment and working conditions offered to their employees with the most advantageous applicable in the industry and district concerned.***

**175. *Even among ratifying countries, the application of the Convention lacks in many cases uniformity or coherence. According to a rough estimate, no more than 15 member States, accounting for one fourth of the total number of ratifications received to date, are in full compliance with its requirements. Another 15 member States, often several decades after ratification, have still not adopted any implementing legislation. As regards the remaining countries, they apply the Convention partially, in particular as regards the nature and stringency of the obligations applicable to tenderers and***

<sup>330</sup> Article 7 of the Convention was suggested by the Office after the first Conference discussion with the explanation that it was based on article 19(3) of the ILO Constitution, and contained provisions which have been included in a number of Conventions; see ILC, 32nd Session, 1949, *Labour clauses in public contracts*, Report VI(1), p. 28. Amendments were adopted during the second Conference discussion in 1949 to include the requirement of prior consultation in paragraph 1 and to add paragraph 3.

<sup>331</sup> Article 17 of the Protection of Wages Convention, 1949 (No. 95), is identical to Article 7 of Convention No. 94. In the case of Convention No. 95, some countries have taken advantage of that flexibility (*Guyana, Norway and Somalia*).

<sup>332</sup> Article 8 was proposed by the Indian Government delegate at the second Conference discussion. It was argued that allowance should be made for special measures which might be necessary in times of national emergency. The Iranian and United States Government delegates supported the proposal, the former suggesting, however, that it should be modified to limit the suspension to a specified period of time and to cases of force majeure. After some further discussion, the amendment was adopted as it appears in Article 8; see ILC, 32nd Session, 1949, *Record of Proceedings*, Appendix VIII, *Labour clauses in public contracts*, p. 490.

*contractors. Applying labour-related eligibility criteria or other “filtering” mechanisms, such as certification, to tenderers at the pre-selection stage may be an important safeguard for socially responsible contracting but is not strictly relevant to the main obligation of the Convention and in any event insufficient per se to implement its provisions.*

176. *The Committee wishes to recall that the Convention has a very simple structure, all its provisions being articulated around and directly linked to the core requirement of Article 2(1), i.e. the insertion of labour clauses ensuring favourable wages and other working conditions to the workers concerned. As a result, in case the national legislation makes no provision for the specific type of labour clause and in the specific terms set out in Article 2(1) of the Convention, the application of the remaining Articles 3, 4 and 5 becomes without object and thus cannot be considered separately.* For the same reason, even in the case of countries whose legislation provides for some of the measures provided for in Articles 3, 4 and 5, this remains immaterial in terms of application of the Convention as the Articles in question do not apply in isolation but only with reference to labour clauses, if and where these exist. For instance, most public procurement laws provide for the type of sanctions referred to in Article 5 of the Convention (i.e. suspension of contracts or withholding of payment) without however linking these sanctions in any manner to compliance with labour clauses and therefore remain irrelevant for the purposes of this analysis. Similarly, practically all modern public procurement laws contain detailed provisions seeking to guarantee transparency and requiring sufficient publicity at all stages of the bidding process, yet these provisions cannot be examined from the point of view of Article 2(4) of the Convention, since this Article refers to publicity for tenderers in connection with the specific terms of the labour clause.

177. *As the record shows, misunderstandings surrounding the objectives and normative requirements of the Convention persist, and the Committee has been engaged, not always successfully, in clarifying and restating the scope and essence of its provisions. The Committee considers that the Convention proposes a clear, concrete and effective solution to the problem of how to ensure that workers’ rights remain protected. By aligning contract standards to the highest prevailing standards, by excluding the lowering of those standards through subcontracting, and by incorporating those principles into the standard clauses of each and every public contract falling within its scope, the Convention guarantees that public procurement is not a terrain for socially unhealthy competition and can never be associated with poor working and wage conditions.*

178. *In this sense, the Committee regrets signs of what might appear as diminishing currency of the Convention. It regrets, in particular, that a few countries that previously applied the Convention have recently amended their legislation and no longer give effect to its provisions. The Committee also notes with concern that “model” public procurement laws recommended to developing countries, mainly for the purpose of promoting international competition under transparent and corruption-free conditions in the context of a globalized economy, are systematically silent on the social aspects of public contracting or are limited to some innocuous provisions that fail to come anywhere close to the solid principles of the Convention.*

179. Lastly, the Committee notes that the reports submitted for the needs of this survey tended to provide a somewhat narrow picture of the national situation; not in the sense of focusing on the specific requirements of the standards involved here to the exclusion of all other legal arrangements for the protection of workers executing public contracts, but



in the sense of seeing the requirement of labour clauses in public contracts and public procurement in isolation from the revolution that has been sweeping the sector and to which the Committee now turns.

## Chapter III

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### Recent developments in the public procurement sector

180. *As noted in Chapter I, there have been substantial developments in the field of public contracting in recent years. These developments have had an impact on countries' ability and interest in pursuing the aims of these instruments through the use of labour clauses in public contracts. At the national level, the most striking development is the increasing use of new forms of procurement and the progressive flexibility of procurement rules. At the international level, a multitude of programmes and initiatives of different international institutions seek to harmonize their own procurement practices, as well as those of national partners. International financial institutions have moved to apply common performance standards.*

#### Section 1. National developments

##### Subsection A. Reform of public procurement legislation and shifting policy on labour clauses

181. As has been noted in this survey, public procurement during the past 20 years has undergone a “global revolution”. The backdrop for this has been the promulgation of an international trade-related agreement on government procurement (usually called the Government Procurement Agreement, or GPA) and a Model Law on Procurement (developed by the United Nations Commission on International Trade Law), along with changes in economic policies favouring privatization. National and international actors have promoted reform to conform with these instruments and policies. The emphasis has been on: (i) eliminating corruption; (ii) increasing efficiency and transparency in procurement processes; (iii) establishing equal treatment between firms of the same as well as of different countries (to satisfy different disciplinary regimes); and (iv) increasing competition nationally and internationally with a view to improving the value received for state monies spent in public procurement. Reform of public procurement law has been seen in some governments' reports as part of the process of globalization. *In terms of the instruments under review here, reform of procurement law and policy has tended to mean either a lost opportunity for bringing legislation and practice into conformity with the requirements of the Convention<sup>1</sup> or, via calls for*

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<sup>1</sup> The following States parties to the Convention are currently the subject of comments by the Committee concerning implementation, and have recently undergone reform of public procurement legislation: *Algeria* (Presidential Decree of 2002); *Bulgaria* (new law of 2004); *France* (new Public Procurement Code of 2006); *Ghana* (new Procurement Act of 2003); *Mauritius* (new law of 2006); and *Morocco* (new legislation adopted in 1998 and general conditions in 2000).

***still greater competition in bidding (impliedly in bidders' labour markets as well), shifting away from the principle underpinning the Convention, that is, insulating labour costs from competitive pressures.***

182. Thus, some countries have departed from once-held policies favouring the inclusion of labour clauses in public contracts. This has the effect of worsening or, in the worst case, labour standard-free, conditions of work for persons employed in the execution of public contracts.

183. For example, the Government of the United Kingdom denounced the Convention in 1982 and its procurement policy today is reported to be based on “value for money” and to aim at the optimum combination of whole life cost and quality to meet the user’s requirements. Although the Government explains that the policy is not to rely on lowest initial price, it further indicates that competitive procurement should be the norm to achieve value for money.<sup>2</sup>

184. In the case of other European countries, the process of transposition to national law of recent EU directives on procurement may wrongly result in moving away from the principles of the Convention.<sup>3</sup>

185. In 1981, the Committee had noted with satisfaction that following ILO technical assistance, *Costa Rica* had issued the year before a decree giving full effect to the requirements of the Convention. In 2003, however, the Committee was obliged to note a change whereby entities issuing public contracts are obliged to include a clause establishing the obligation of contracting enterprises to comply only with labour and social security obligations, thereby distancing itself from the provisions of the 1980 Decree.<sup>4</sup>

186. Prior to a legislative change in 1973, *Algeria* had given effect to the Convention since before the time of its ratification by that country in 1962. The Committee has since asked that steps be taken to return the country to a situation of compliance.<sup>5</sup>

187. In *Mauritius*, the Labour Clauses in Public Contracts Ordinance of 1964 gave full effect to the provisions of Convention No. 94 prior to its repeal in 1975.<sup>6</sup> The Committee has since been urging the Government to take the necessary measures to ensure conformity with the terms of the Convention.<sup>7</sup>

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<sup>2</sup> The Government of the United Kingdom has also taken policy action to prevent the effects of excessive competition as it concerns the public sector service contracts which involve the transfer of staff from the public sector organization to the service provider. It has reported the publication in March 2003 of the code of practice on workforce matters in local authority service contracts which “requires that where the service provider recruits new staff to work on a local authority contract alongside staff transferred from the public authority, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees”. The code permits flexibility in applying this rule, provided that the overall result is to avoid changes which would “undermine the integrated nature of the team or the quality of the workforce”. In 2005, the scope of application of the code was extended in a new code of practice on workforce matters in public sector service contracts. In its comments, the Trades Union Congress (TUC) refutes the effectiveness of the code.

<sup>3</sup> See RCE 2007, 448 (*France*). See also the direct request addressed to *Finland* in 2006.

<sup>4</sup> See the direct request addressed to *Costa Rica* in 2003.

<sup>5</sup> See RCE 2007, 436 (*Algeria*).

<sup>6</sup> (1) s. 58(d).

<sup>7</sup> See RCE 2004, 293 (*Mauritius*).

188. The Government of Fiji reported that there was a policy in place where the insertion of a “fair wages clause” in all public contracts was required but that in the last ten years such practice was discontinued as all contracts are required by statute to comply with the minimum provisions stipulated in labour law.

189. Unlike the countries mentioned above, Germany has not had a policy or practice of labour clauses in public contracts. Yet, it has a well-established tradition of centralized wage bargaining and the use of industry-wide extension of collectively bargained agreements.<sup>8</sup> This has had positive results for income equality in the country; Germany is ranked 22nd globally in terms of income equality among inhabitants.<sup>9</sup> Despite such a pattern of industrial relations, an arrangement that might be taken to strongly suggest a willingness to apply a similar arrangement in public contracting, the Government reported that an attempt in 2002 to adopt a law on collectively agreed pay in public procurement (*Tariftrüegesetz*) was defeated. The proposed law would have been limited in application only to the award of contracts in construction and ancillary industries and in the local public transport sector. The Government itself noted that in the absence of consensus on this restricted application of the principle of labour clauses in public contracts, a wider application of the idea could not be expected.<sup>10</sup>

### Subsection B. Labour-only contracting

190. Another development is the practice of manpower or labour-only contracting by public authorities. Unlike contracting for a specified product or service, where value is added to labour provided in the execution of the contract, some public authorities have taken to contracting directly with manpower contractors who provide workers on a task-specific basis for a fixed fee.<sup>11</sup> The Government of *Israel* has reported revoking the licences of manpower contractors who had been engaged by the State to provide labour services. In addition, the Government has adopted special regulations requiring certification at the time of bidding of no-conviction or fine arising from labour law violations where the contract is for guard, security and cleaning services.<sup>12</sup> The Government of India reported that separate legislation regulates manpower contractors

<sup>8</sup> The Federal Ministry of Labour can declare a collective agreement generally binding on an industry, provided it covers 50 per cent or more of the employees in the relevant industry and a collective bargaining committee with representatives of trade unions’ and employers’ associations consent. According to data published by the European Foundation for the Improvement of Living and Working Conditions, in 2004, 65 per cent of German employees were covered by an industry or company collective agreement. Between 1996 and 2004, however, the coverage rate of sectoral agreements dropped from 69 per cent to 62 per cent in what was previously known as West Germany and from 56 per cent to 43 per cent in what was previously known as East Germany. Company-level agreements increased slightly.

<sup>9</sup> As calculated in the Human Development Report for 2007–08, Germany has a Gini index of 28.3, placing it 22nd globally, where 0 is absolute income equality and 100 is absolute income inequality; see UNDP: *Human Development Report, 2007–08*, p. 281.

<sup>10</sup> However, in certain *Länder*, the law on public procurement provides for labour clauses similar to those envisaged in the Convention. On the question of the compatibility of such legislation with EU law on freedom to provide services, see box 4 below.

<sup>11</sup> Under such an arrangement, the workers hired by a manpower agency perform the same tasks as regular workers at the employer’s workplace without however enjoying permanent employment or job security. Even though the only function of the agency is to supply the labour to the employer, the employer can argue that the contractual workers are “technically” employees of the agency while the agency for its part can argue that they are just a recruiter and not an employer.

<sup>12</sup> (5), s. 3.1.

generally and is applicable also where public authorities are contracting with the contractors.

191. *The Committee notes that labour-only contracting by public authorities without the labour clauses of the type foreseen by the Convention might lead to situations of social dumping in the operation of public services.* Privatization of public sector activities with a view to enhancing efficiency and economy should be based on improved management and not on the downgrading of conditions of work. Manpower contractors differ from a regular contractor in that the contract with the third party is limited to the provision of personnel management services.<sup>13</sup> This form of contracting leaves authority for day-to-day supervision with the public authorities, placing the onus for achieving the hoped-for efficiency and cost benefits directly on workers via reduced cost labour-only contracting. In such circumstances, the rationale for protection required by the Convention is all the more persuasive.

### Subsection C. Tender and bidding processes

192. *The Committee expresses its concern over the impact of certain tender and bidding practices on the matters dealt with by the Convention and Recommendation.* One is the lessening diligence with which public officials use estimates of contract costs based on explicitly stated unit labour costs. One practice is the requirement for specification of an “all-around price” or “lump-sum price” that is not broken down to show unit labour cost and quantity estimates. In the context of contracts for works, the practice is based on broadening promotion and acceptance of the “value for money” principle that disallows contracts that provide for re-measurement – allowing reimbursement to the contractor – of documented inputs after contract execution. Policy advice from international organizations important in the area of procurement law-making may reinforce this tendency.<sup>14</sup> Noted in reports and comments,<sup>15</sup> the result of such a practice is to undermine even the implementation of ordinary labour law, since an estimate of its labour costs in the context of a particular tendered work has not been calculated, or is not used in judging bids, or enforcing contracts.

193. In 2006, the Confederation of International Contractors’ Associations (CICA) and the Building and Wood Workers’ International (BWI) issued a joint statement calling specifically for the end of such practices in future international standard contracts of construction, including those promulgated and used by international financial institutions.<sup>16</sup> *The Committee is concerned that an emphasis on contracting with low-*

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<sup>13</sup> See UN Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights – Initial reports submitted by States parties under articles 16 and 17 of the Covenant, Israel, E/1990/5/Add.39*, 20 Jan. 1998, para. 91.

<sup>14</sup> See, for example, World Bank, Republic of Azerbaijan Country Procurement Assessment Report (Report No. 26778-AZ, June 2003), p. 8: “Estimated prices: The PPL [Public Procurement Law] allows tenders to be cancelled where the prices are significantly above or below the procuring entity’s estimated prices. Whilst such estimates are appropriate for the purpose of calculating the budget, they have no place in comparison and/or evaluation of bids. This provision should be removed.”

<sup>15</sup> Comments by Japan’s National Confederation of Trade Unions (ZENROREN) and Trade Union Confederation (JTUC-RENGO).

<sup>16</sup> According to the Joint BWI–CICA statement on corporate social and environmental responsibility (CSER) adopted on 28 November 2006 in Dubai, “the Parties to this agreement: (1) recommend that the following elements be included in the technical specifications and bidding documents of future Contract of Construction: (a) full and complete details of the social requirements; (b) the inclusion, as far as possible, of such requirements as measurable and priced items of the bill of quantities; (c) the commitment that the Owner pays the Contractor, through monthly instalments, for the services actually carried out by the Contractor. This provision is made to

*price bidders, which this practice seems to encourage, could undermine the rule of law by countering compliance with labour law requirements.*

194. *Another questionable practice is the use of real wage surveys as the basis for cost estimates.* Coupled with the proliferation of multiple-level subcontracting where levels of labour standards decline with each subcontracting level, observed wages have declined year after year, giving justification to lower estimated specifications in contracts. The result is a mutually reinforcing downward spiral in wages and working conditions. Imposition of labour clauses establishing a floor of acceptable conditions based on arrangements not less favourable than those collectively bargained or otherwise regulated would prevent this problem.

195. A protection against this problem is in place in *Brazil*, where a tender can be accepted only if the overall or partial sums it contains are compatible with the prices of inputs and market wages, while a contract proposal must refer to the remuneration fixed for the occupational category by collective labour agreements, including wages and other advantages established in labour legislation.<sup>17</sup> The Government of the Republic of Korea reported that in accordance with regulations, premiums for four major insurances, welfare costs, industrial safety and health management costs, and contributions to mutual retirement benefit schemes for construction workers should be calculated and specifically included as itemized expenses. This is aimed at protecting daily workers by preventing suppliers from having difficulties in securing an adequate level of labour costs due to low bid prices and thus avoiding taking the insurances as a consequence.<sup>18</sup>

#### Subsection D. New and expanding forms of public procurement

196. New and important arrangements for the acquisition or exploitation of assets once typically acquired through public contracting have also appeared. “Public–private partnerships” (PPPs) are forms of cooperation between public authorities and businesses to meet needs in the general interest. They involve complex legal and financial arrangements to ensure the funding for and carrying out of infrastructure projects or providing services for the public. These partnerships are used worldwide, in particular in infrastructure projects, transport, energy, telecommunications, public health, education, public safety, waste management and water distribution. With the evolution over the past two decades of project finance provided by private and public financial institutions, and also strong trends favouring privatization and deregulation, the number and size of PPPs in large infrastructure projects has grown and appears to be set to grow in the years to come.<sup>19</sup>

197. To use the terms of Convention No. 94, PPPs may or may not involve “the expenditure of funds by a public authority” and “the employment of workers by the other party to the contract”, just as they may or may not be directly for the provision of construction or other types of traditional goods or services. Whether they fall within the

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make sure that the Owner monitors and the Contractor complies with the contractual requirements listed in the Contract as stipulated in (a) and (b) above; (d) the commitment that, in no case, shall these items be paid through ‘lump sums’ or deemed to be included in the overheads of the unit prices, which would make the implementation of these requirements impossible to check by the Owner and the Engineer”.

<sup>17</sup> (1), s. 44(3); (3).

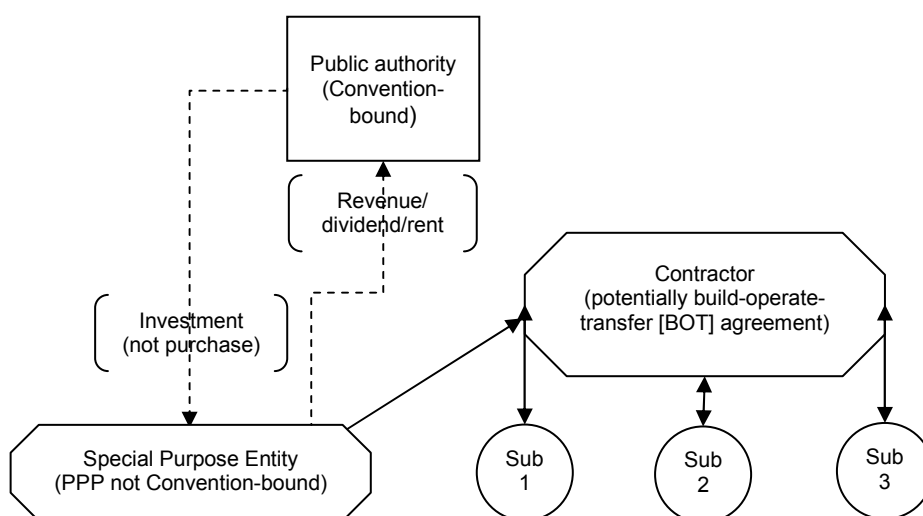
<sup>18</sup> (2), ss 11 and 19.

<sup>19</sup> See M. Sorge: “The nature of credit risk in project finance”, in *BIS Quarterly Review* (Basle, Bank for International Settlements, 2004), pp. 91–101.

scope of Convention No. 94 can thus be questioned, and would need to be considered on a case-by-case basis. For example, in some cases, where a private partner contracts to build infrastructure in return for the right to exploit it after construction (build-operate-transfer (BOT) type infrastructure project), the contract with the public authorities is in the nature of a concession agreement.<sup>20</sup> In others, public funds are used in combination with private investment to create an independent and private “special purpose entity” (SPE) which is in turn used to execute the PPP. In sum, policies favouring privatization and deregulation tend today to put in the hands of SPEs business forms and undertakings that were, when the Convention was adopted, imagined to be only within the scope of the public treasury, or viable only through the sale of public bonds. The Convention has wisely put these determinations in the hands of national competent authorities. Yet the growth of their use suggests that the issue be taken up in international standard setting.

**Figure 4. Public-private partnership (PPP) contracting for the building, operation and eventual transfer of a complex infrastructure (e.g. oil pipeline, hydroelectric dam)**

(public authority invests in a special purpose entity (SPE) which in turn contracts for the infrastructure project. The public authority ultimately benefits from revenues from the infrastructure or dividends or rents paid by the special purpose entity – the public receives the benefits of the infrastructure or the revenues generated through it, as a result of the exploitation of the natural (public) resource)



198. In adopting Paragraph 1 of Recommendation No. 84, the Conference considered in 1949 a number of situations where employers were perceived to be receiving government benefits, and thus, it was thought, ought to be applying fair labour standards to workers involved in the work concerned. Paragraph 1 suggests that labour clauses as foreseen by the Convention be used “where private employers are granted subsidies or are licensed to operate a public utility”. Some of the then-current situations, such as subsidies or minimum price schedules, are today seen as outdated. Others, such as concessions, have evolved into complex arrangements involving close collaboration

<sup>20</sup> The European Commission distinguishes between public works contracts and concession agreements not covered by the Public Works Directive on the basis of the right of exploitation; see Commission Interpretative Communication on Concessions under Community Law, 2000/C 121/02, pp. 7–8.

between workers in the private and public sectors as well as a merging of their interests. In this context, the standards set in the Convention and Recommendation examined here may need to be revisited.

## Section 2. International developments

199. Following the adoption by the United Nations Commission on International Trade Law (UNCITRAL) of its Model Law on Procurement in 1994 and the entry into force of the WTO's Agreement on Government Procurement (GPA) in 1996, there has been a proliferation of national procurement law reforms, many of which have aimed to dissociate procurement legislation from the protection of domestic interests and focus on fair competition, improved governance and transparency. International financial institutions (IFIs), global and regional intergovernmental organizations, and membership organizations, have been proactive in promoting and guiding legislative reforms at the national level so as to guarantee non-discriminatory procurement systems and processes, efficiently managed institutions, and a corruption-free procurement environment.<sup>21</sup> Thus international and regional organizations are having an impact on modern-day public contracting. They influence national decision-making through a variety of mechanisms, all in ways that impact directly or indirectly on the application of the Convention and Recommendation under consideration.<sup>22</sup>

### Subsection A. International financial institutions (IFIs)

200. The policies and practices of IFIs influence the implementation of the instruments considered here in three distinct ways: (i) by advising on reforms of national public procurement systems, (ii) by drafting and using standard contracting documents in the procurement of goods and services involving expenditure of granted funds, and (iii) by introducing labour and social standards in their operations. Each of these parameters is considered in this section in relation to the different institutions involved.

201. IFIs provide funding to governments which in turn enter into public contracts for the provision of goods and services. These institutions have long had an interest in ensuring that loaned sums are spent prudently, based on the use of accountable and transparent procurement procedures. In past years, each of these organizations has in its own way undertaken policies with programme elements aimed at promoting these objectives. These policies and programmes are influential nationally, first through activities to reform and modernize general public procurement laws and procedures, often undertaken with the economic and advisory support of these institutions. Secondly, they are influential through the promulgation, promotion and use of procedural standards and standard form contract documents in the procurement of goods and services. These policies and programmes to a certain extent run parallel to the policy concerns addressed

<sup>21</sup> By way of indication, SIGMA (Support for Improvement in Governance and Management in Central and Eastern European Countries), a joint initiative of the OECD and the European Union, has been offering since its establishment in 1992 expert advice to governments of transition countries in Central and Eastern Europe and the former Soviet Union on designing and implementing public procurement plans, drafting new legislation and institution building. As a result, in the period 1999–2004, 18 countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, The former Yugoslav Republic of Macedonia, Malta, Poland, Romania, Serbia and Montenegro, Slovakia, Slovenia and Turkey) have adopted new public procurement laws; for more, see [www.sigmaweb.org](http://www.sigmaweb.org)

<sup>22</sup> See discussion in Hilde Caroli Casavola: "Internationalizing public procurement law: Conflicting global standards for public procurement", in *Global Jurist Advances* (Berkeley, California, 2006), Vol. 6, Issue 3, Art. 7.



by Convention No. 94 and Recommendation No. 84; social issues as such do not explicitly feature within these institutions' activities in areas related to procurement. However, as discussed in detail below, these issues do arise in IFI-supported activities.

202. IFIs have more recently begun to appreciate ideas of sustainable development which incorporate the promotion of certain fundamental workers' rights in the context of funds' disbursement. Some IFIs have thus sought to have these additional ideas incorporated into policies that accompany financial resources. In this connection, the conclusions of the 1995 World Social Summit in Copenhagen, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, and the UN Global Compact launched in 1999, have likely been influential. These interests, and the policies and programmes they underpin are the third way IFIs influence, tangentially, the implementation of Convention No. 94 and Recommendation No. 84. These are discussed here to the extent they have had an influence on implementation of the instruments under consideration and their broader objectives.

203. Institutionally, several years of harmonization and rationalization efforts among the Multilateral Development Banks (MDBs)<sup>23</sup> culminated in 2005 in a specific effort to improve performance through the Common Performance Assessment System (COMPAS); yearly reports on the process have been prepared since.<sup>24</sup> This means in practice that some important processes, policies and procedures, which impact on the use of labour clauses in public contracts, and which were previously undertaken or used by banks individually, have today been harmonized or are done jointly. The MDB harmonized conditions of contract and the country procurement assessment reports (CPARs), both discussed below, are the most significant examples of this evolution.

204. A final related development has been in lending to the private and mixed sector in the context of PPPs. Private international financial institutions have followed the lead of the public multilateral banks in setting standards dealing with wages and working conditions, as well as the application of fundamental principles and rights at work, as a condition for project financing.

#### A.1. *World Bank*

205. Since its creation, the World Bank<sup>25</sup> has provided an estimated US\$250 billion in financing some 5,000 development projects. The average annual lending of the Bank is now US\$22 billion and approximately 30,000 contracts are awarded each year to borrowers of World Bank funds. In 1999, the World Bank formulated Guidelines for Procurement with a view to informing those carrying out a project that is financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD), or by a loan from the International Development Association (IDA), of the policies that govern the procurement of goods, works and services required

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<sup>23</sup> These included ongoing harmonization efforts of the heads of procurement of the public IFIs, including MDBs. See, for example, account of the High-Level Forum on Harmonization held in Rome, 2003, at <http://www.aidharmonization.org/secondary-pages/editable?key=106> (accessed 24 Aug. 2007).

<sup>24</sup> See AfDB, AsDB, EBRD, IADB, WB: 2006 COMPAS, *Multilateral development banks common performance assessment system – Steering for results*, 26 Jan. 2007.

<sup>25</sup> The World Bank Group consists of five closely associated institutions. The term "World Bank" refers specifically to two of them, the International Bank for Reconstruction and Development (IBRD), and the International Development Association (IDA). Of the other three institutions, i.e. the Multilateral Investment Guarantee Agency (MIGA), the International Centre for the Settlement of Investment Disputes (ICSID) and the International Finance Corporation (IFC), the last has played an important role, which is discussed in detail below.

for the project.<sup>26</sup> Four principal considerations generally guide the Bank's policies and procedures: (i) the need for economy and efficiency in the implementation of a project; (ii) the Bank's interest in giving all eligible bidders from developed and developing countries the same information and equal opportunity to compete; (iii) the Bank's interest in encouraging the development of domestic contracting and manufacturing industries in the borrowing country; and (iv) the importance of transparency in the procurement process.

206. The World Bank has also been active in helping borrower countries to improve their procurement systems. To this end, it relies on CPARs as a diagnostic tool that can be used by staff or consultants working with borrower countries to assess their current procurement system and to develop action plans for improving their procurement system. CPARs are periodically conducted for assessing the quality and performance of procurement processes used by World Bank clients, and recommendations for improvement are made. A review of CPARs over the years shows a clear focus on reform aiming at reducing corruption, improving transparency, non-discrimination and the competitive mechanisms in the procurement process. A CPAR has on one occasion included consideration of Convention No. 94, and the obligations of the country concerned. Noting the country's obligations under the Convention, recommendations were addressed to *Ghana* in 2003 that, among other things, "procuring entities must ensure that clauses on labour standards (fair wages, health and safety measures and social security) are incorporated in works contracts and enforced by contract managers".<sup>27</sup> The roads sector was the focus of discussion in the relevant portion of the CPAR, since a pilot project had been undertaken with international funding to improve the conditions of work on public financed roads projects using, among other things, detailed labour clauses in contract documentation. It included a number of other recommendations addressing social considerations of employment and small enterprise promotion.<sup>28</sup>

***207. In light of this one example of Bank activity clearly supporting the implementation of treaty obligations arising out of ILO Convention No. 94, the Committee hopes that the CPAR process, being extraordinarily well placed as it is to influence the content of national laws and regulations on procurement, might be used for this purpose in the future.***<sup>29</sup> In this connection, CPAR operational instructions may,

<sup>26</sup> The Guidelines may be accessed at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:50002392~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>. The Guidelines were last revised in 2006.

<sup>27</sup> World Bank: Ghana, CPAR – 2003, Main report, doc. No. 29055, Vol. 2, June 2003, p. 32.

<sup>28</sup> World Bank: Ghana, CPAR – 2003, Labour clauses in public contracts in Ghana: Recent experience in the roads sector, doc. No. 29055, Appendix 9, Vol. 5, June 2003.

<sup>29</sup> For the purpose of this survey, the Committee has reviewed CPAR reports involving Albania, *Algeria*, *Armenia*, Azerbaijan, Bangladesh, Bosnia and Herzegovina, *Brazil*, Cambodia, *Cameroon*, Chile, Colombia, Côte d'Ivoire, Croatia, *Dominica*, Dominican Republic, Ethiopia, Gambia, Georgia, *Ghana*, *Guinea*, *Guyana*, Honduras, India, Indonesia, *Jamaica*, Lao People's Democratic Republic, Malawi, Republic of Moldova, Mongolia, Nepal, *Nigeria*, Pakistan, Papua New Guinea, Paraguay, Peru, Poland, South Africa, Sri Lanka, *United Republic of Tanzania*, Timor-Leste, Tonga, *Uganda*, Uzbekistan and Viet Nam. None of the reports consulted makes any reference to the ILO instrument, its requirements or its possible influence on removing competitive pressures in the labour market faced by contractors.

for example, specifically call attention to the matter by asking if the country is a party (or planning to become one) to ILO Convention No. 94.<sup>30</sup>

**208. However, the Committee is concerned that international organizations working in the procurement area may use their technical guidelines and policy tools, which typically emphasize the aim of increasing the competition that takes place under procurement procedures in a transparent and corruption-free environment, as a justification for giving advice that may lead countries to disregard their ILO treaty obligations.**<sup>31</sup>

209. The World Bank requires that the MDB harmonized conditions of contract be used for the procurement of works financed in whole or in part by the Bank unless the Bank agrees to the use of other bidding documents acceptable to the Bank.<sup>32</sup> The Bank's policy favouring the use of national systems and institutions, once they have been approved as providing equivalent safeguards to Bank policy and interests, results in local procurement contracts being used instead of the MDB harmonized documentation.<sup>33</sup>

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<sup>30</sup> World Bank: Revised CPAR procedures, Apr. 2002, Appendix B – Questionnaire on public procurement system, section A, p. 25. A question of this nature is posed with respect to the Agreement on Government Procurement of the World Trade Organization (question 4).

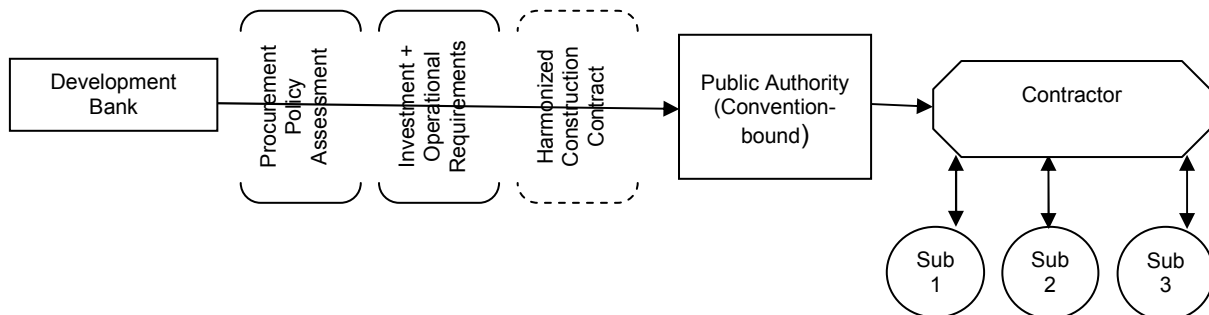
<sup>31</sup> In announcing the provision of US\$1.45 billion to support growth and social protection in *Dominica*, World Bank technical assistance is being planned there to make the public sector “more efficient and effective ... to operate in more transparency and efficiently manage public procurement”; World Bank press release No. 2007/256/LAC, 27 Feb. 2007. *Dominica* currently requires labour clauses in its public contracts. Application of guidelines found in *Good practice papers on strengthening procurement capacities in developing countries* may result in law and regulations that bring this country out of conformity with its obligations under the Convention. *Grenada* could be found in a similar situation, with the Public Sector Modernization Technical Assistance Project, concluded in 2005, supporting it to take the lead to jointly procure select goods and services with other Organization of Eastern Caribbean States (OECS) countries; World Bank news release No. 2006/209/LAC, 15 Dec. 2005.

<sup>32</sup> World Bank: *User's guide for the procurement of works* (Washington, DC, Mar. 2007), p. v.

<sup>33</sup> This policy is reflected, for example, in the Bank's piloting the use of borrower country systems to address environmental and social safeguard issues in Bank-supported projects. See World Bank Operational Policies OP and BP 4.00 (Mar. 2005). The objective of the World Bank's environmental and social safeguard policies is to prevent and mitigate undue harm to people and their environment in the development process. These policies provide guidelines for Bank and borrower staffs in the identification, preparation, and implementation of programmes and projects. Environmental and social safeguard policies and procedures deal with the environment, natural habitats, pest management, indigenous peoples, cultural property, involuntary resettlement and safety of dams. There is no safeguard policy concerning labour issues. For more, see <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html> (accessed 16 Aug. 2007).

**Figure 5. Public contracting arrangement under influence of development bank policy disciplines**

(public authority is bound in principle by the Convention but in practice banking disciplines may lead to alternative results)



*A.2. International Finance Corporation (IFC)*

210. The IFC is one of the five international institutions forming the World Bank Group. In April 2006, the IFC began to apply performance standards on social and environmental sustainability to manage social and environmental risks and impacts and to enhance development opportunities in private sector financing within its member countries. Together, the eight performance standards establish standards that the borrowing client is required to meet throughout the life of an investment by the IFC.<sup>34</sup>

211. The performance standards do not require labour clauses within the meaning of Convention No. 94 in contracts made with financed funding. An elaborate assessment and management system is required by performance standard 1. Performance standard 2 concerns labour and working conditions. It addresses issues of application to supply chains, and sets requirements in ten areas that are to be applied to “workers”, including employees of the client as well as certain “non-employee workers”.<sup>35</sup>

212. In the area of working conditions and terms of employment, it provides:

8. Where the client is a party to a collective bargaining agreement with a workers’ organization, such agreement will be respected. Where such agreements do not exist, or do not address working conditions and terms of employment (such as wages and benefits, hours of work, overtime arrangements and overtime compensation, and leave for illness, maternity, vacation or holiday) the client will provide reasonable working conditions and terms of employment that, at a minimum, comply with national law.

213. With respect to non-employee workers, the performance standards provide:

17. For purpose of this performance standard, the term “non-employee workers” refers to workers who are: (i) directly contracted by the client, or contracted through contractors or other intermediaries; and (ii) performing work directly related to core functions essential to the client’s products or services for a substantial duration. When the client contracts non-employee workers directly, the client will use commercially reasonable efforts to apply the requirements of this performance standard, except for paragraphs 6 [human resources policy], 12

<sup>34</sup> International Finance Corporation: *International Finance Corporation’s performance standards on social and environmental sustainability*, 30 Apr. 2006, p. i.

<sup>35</sup> These areas are: human resources policy; working relationships; working conditions and terms of employment; workers’ organizations; non-discrimination and equal opportunity; retrenchment; grievance mechanism; child labour; forced labour; and occupational health and safety.

[retrenchment], and 18 [supply chain]. With respect to contractors or other intermediaries procuring non-employee workers, the client will use commercially reasonable efforts to: (i) ascertain that these contractors or intermediaries are reputable and legitimate enterprises; and (ii) require that these contractors or intermediaries apply the requirements of this performance standard, except for paragraphs 6 [human resources policy], 12 [retrenchment], and 13 [grievance mechanism].

#### A.3. *Asian Development Bank (AsDB)*

214. The AsDB is committed to harmonizing and aligning procedures and practices of development partners.<sup>36</sup> In this vein, the Bank requires that the MDB harmonized conditions of contract be used for the procurement of works financed by the Bank.

215. The AsDB is also involved in supporting governance activities in priority areas such as public financial management and procurement reform in sectors and subsectors where AsDB is active.<sup>37</sup> It also participates in World Bank CPARs in its member countries.<sup>38</sup> ***Thus, AsDB activities offer opportunities similar to those of the World Bank for promoting implementation of Convention No. 94.***<sup>39</sup> ***The Committee hopes that the use of commonly agreed assessment indicators will enhance respect for obligations under ratified ILO Conventions.***<sup>40</sup>

#### A.4. *Inter-American Development Bank (IDB)*

216. The Inter-American Development Bank was established in 1959 as a multilateral development finance institution. It is a main source of multilateral financing for economic, social and institutional development in Latin America and the Caribbean. The IDB group is composed of the IDB, the Inter-American Investment Corporation (IIC) – two distinct public international organizations – and the Multilateral Investment Fund (MIF). The IIC focuses on support for small and medium-sized businesses, while the MIF, a fund administered by the Bank, promotes private sector growth through grants and investments.

217. The IDB requires that the MDB harmonized conditions of contract be used for the procurement of works financed by the Bank. It collaborates with the World Bank in CPARs involving countries in its region.

218. In August 2004, the IDB formed a Blue Ribbon Panel on Environment. The panel was asked to advise on draft environment and safeguards compliance policy. It was also asked to make recommendations on how the Bank could make a greater contribution to achieving sustainability in the region and to identify priority areas for the Bank to develop capacity and strengths to implement the policy. The panel made recommendations that specifically referred to the sustainable development standards of

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<sup>36</sup> Asian Development Bank: *Progress report on the Asian Development Bank's reform agenda* (Manila, Jan. 2005), para. 23, p. 4.

<sup>37</sup> Asian Development Bank: *Annual report 2006* (Manila, 2007) p. 26.

<sup>38</sup> Asian Development Bank: *Technical assistance report – Supporting the use of country procurement systems* (Manila, Apr., 2006), footnote 5, p. 3.

<sup>39</sup> The AsDB has also undertaken efforts to promote core labour standards in its operations. These efforts do not, however, include matters related to labour clauses in public contracts. See AsDB: *Core labour standards handbook* (Manila, 2006).

<sup>40</sup> *ibid.*, para. 13, pp. 3-4, and Appendix 5, incorporating assessment standards from DAC guidelines discussed below. See also AsDB: *Incorporation of social dimension into ADB operations, Operations Manual Bank Policies (B)*, OM Section C3/BP, issued 25 Apr. 2007.

the IFC and the Equator Principles examined below – both of which include standards on working conditions.<sup>41</sup> Bank management responded to this in May 2005 saying that it would identify other ways in which to address panel recommendations that fell outside the environmental dimension of the draft policy document, including labour standards. Management confirmed that it supported “the principles held up by the International Labour Organization” and that “the Private Sector Department of the IDB applies relevant standards of ILO Conventions to its operations”.<sup>42</sup> In January 2006, the Bank’s Board of Executive Directors adopted the new Environment and Safeguards Compliance Policy that consolidated environmental safeguards by bringing together a number of directives that aim to steer the Bank’s work toward mainstreaming environmental considerations across sectors, safeguarding the environmental quality of all IDB operations and making the Bank socially and environmentally responsible within its own facilities.<sup>43</sup> The policy applies to the IDB and the MIF, including financial and non-financial products, public sector and private sector operations, as well as environmental aspects of the Bank’s project procurement practices and management of its own facilities. Draft implementing guidelines have been drawn up.<sup>44</sup> The draft comprises seven policy directives to mainstream and upstream environmental considerations in the Bank, and 17 policy directives addressing standards for environmental safeguards. The last of these policy directives addresses procurement; labour matters as such are not mentioned.<sup>45</sup> Labour matters are generally referred to in relation to the environmental management system (EMS) that applies to downstream financial institutions involved in non-investment lending and flexible lending instruments. The objective of the EMS is to properly identify, assess, mitigate and monitor the potential environmental, social, occupational health and safety, or labour impacts and risks associated with each project and borrower, financed with IDB funds through the financial intermediaries.<sup>46</sup> There is no specific reference in any of these policies or implementing documents to Convention No. 94, or to labour clauses in public contracts.

219. In October 2006, the Private Sector Department (PRI) of the IDB published a document, the objective of which was to provide an overview, in terms of requirements and process, related to environment, social, health and safety, and labour aspects for private sector projects financed by the IDB via PRI. The document establishes that “a

<sup>41</sup> See Inter-American Development Bank: *Blue Ribbon Panel on the Environment – Final report of recommendations*, 23 Feb. 2005.

<sup>42</sup> Inter-American Development Bank: *Management response to the report of the Blue Ribbon Panel on Environment for the Inter-American Development Bank*, 16 May 2005, p. 5.

<sup>43</sup> See Inter-American Development Bank: *Environment and Safeguards Compliance Policy*, 19 Jan. 2006.

<sup>44</sup> See Inter-American Development Bank: *Draft implementing guidelines for the Environment and Safeguards Compliance Policy*, 10 Feb. 2006.

<sup>45</sup> The relevant text reads as follows: “Where agreed with the borrower, suitable safeguard provisions for procurement of goods and services in Bank-financed projects may be incorporated into project-specific loan agreements, operating regulations and bidding documents, as appropriate, to ensure environmentally responsible procurement. The Bank will foster approaches that help provide goods and services procured under Bank-financed operations that are produced in an environmentally and socially responsible manner, in terms of resource use, the work environment, and community relations. Bank procurement procedures will include a Bank-approved exclusion list of environmentally harmful products. The Bank should encourage borrowers and executing agencies to procure environmentally responsible works, goods and services, which in the Bank’s opinion are consistent with the principles of economy and efficiency. Environmentally responsible procurement experience and practices will be shared with borrowing member countries and other multilateral financial institutions, to promote harmonized approaches.”

<sup>46</sup> Policy directive B.13, *Non-investment lending and flexible lending instruments*.

fundamental requirement of all projects financed by the IDB via PRI is that each environmental party [i.e. project borrower, sponsor, construction contractor, operator, etc.] must comply with all environmental and social requirements”, which are defined as “all environmental, social, health and safety, and labour requirements required by any applicable in-country environmental law, any in-country governmental approval related to any environmental law, the IDB environmental and social policies and guidelines, any requirements established in project environmental reports/plans, and fundamental principles and rights at work”. It is also stated that “the IDB does not finance private sector projects or companies involved in the production, trade, or use of the products, substances or activities [under conditions of] ... (p) non-compliance with workers’ fundamental principles and rights at work”, defined as “(i) freedom of association and the effective recognition of the right to collective bargaining; (ii) prohibition of all forms of forced or compulsory labour; (iii) prohibition of child labour, including without limitation the prohibition of persons under 18 from working in hazardous conditions (which includes construction activities), persons under 18 from working at night, and those persons under 18 be found fit to work via medical examination; (iv) elimination of discrimination in respect of employment and occupation, where discrimination is defined as any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national extraction, or social origin”. However, no provision is made for the level of wages or other conditions of employment to be applied under contracts funded by the Bank.<sup>47</sup>

220. The Environmental and Social Unit (ESU) of the PRI has developed various types of guidelines<sup>48</sup> to assist in managing the environmental, social, health and safety, and labour aspects particularly related to private sector infrastructure and capital market investments in Latin America and the Caribbean.<sup>49</sup> The guidelines do not necessarily reflect specific requirements for financing by the Inter-American Development Bank nor

<sup>47</sup> Private Sector Department, Inter-American Development Bank: *Environmental and social aspects*, Oct. 2006, at [http://www.iadb.org/pri/PDFs/ENV\\_Requirements\\_E-Oct06.pdf](http://www.iadb.org/pri/PDFs/ENV_Requirements_E-Oct06.pdf) (accessed 30 June 2007). Compared with other documents of the IDB, for example, the Environment and Safeguards Compliance Policy of 19 Jan. 2006, it is unclear whether the PRI document is a formal policy of the IDB, or a “guideline” in the sense described in the following paragraph.

<sup>48</sup> These guidelines have been divided into four basic groups: (1) PRI staff environmental and social guidelines, which provide specific guidance in terms of content and process for the various stages of a PRI project; (2) PRI project borrower environmental and social guidelines, which provide specific guidance to potential PRI borrowers (sponsors) related to environmental, social, health and safety, and labour aspects; (3) PRI environmental and social unit guidelines, which provide specific detailed guidance and procedures to the PRI ESU related to environmental, social, health and safety, and labour aspects; and (4) PRI general environmental and social guidelines, which provide information related to various general environmental, social, health and safety, and labour aspects. For more, see <http://www.iadb.org/pri/guidelines.cfm> (accessed 30 June 2007).

<sup>49</sup> The PRI was created in 1995 to mobilize private financing for infrastructure. Working in partnership with commercial banks, institutional investors, and other co-lenders, PRI provides private companies with financing to meet the region’s growing demand for infrastructure and public utilities. PRI focuses on several sectors: energy (generation, transmission, and distribution); water supply and wastewater treatment; transportation (roads, railways, ports, and airports); and telecommunications. The principal financial products of PRI are project finance, corporate finance, guarantees, and capital markets. The PRI Environmental and Social Unit (ESU) is responsible for managing, controlling and providing leadership related to environmental, social, health and safety, and labour aspects. PRI is committed to ensuring that each PRI-supported project is fully assessed, approved, and monitored with respect to environmental, social, health, safety, and labour standards, and moreover, that each project is environmentally and socially sustainable. In addition, PRI/ESU is committed to promoting more broadly environmental and social sustainable private sector investment in infrastructure in Latin America and the Caribbean. In this context, ESU develops guidelines to assist in the management of environmental, social, health and safety, and labour aspects.

do they reflect the official position of the Bank.<sup>50</sup> In 2006, ESU published more than 100 pages of guidelines on managing labour issues in infrastructure projects. Based explicitly on the international labour standards of the ILO, the guidelines focus on and give an overview of “internationally recognized core labor rights”, standards on wages, termination of employment, personnel management, hours of work, night work, rest and leave, medical care and sickness benefits, children and young people, women, indigenous and tribal peoples, migrant workers, road transport and dockworkers. There is no mention, however, of the use of labour clauses of any sort in public contracts, nor of Convention No. 94.

221. Lastly, the MIF has produced environmental and social guidelines for MIF financial intermediary operations, which outline the procedures to be used in environmental review and management of financial intermediary operations of the MIF, which are targeted on reaching enterprises with less than 100 employees and less than US\$3–5 million in annual sales, i.e. small and medium enterprises. The general objective of these procedures is to ensure that financial intermediaries’ projects of the MIF include adequate provisions for actions necessary to prevent, control and mitigate adverse impacts on the environment, in accordance with identified MIF guidelines. Those guidelines, known as “MIF environmental and social requirements”, are the “substantive standards to be applied to individual subprojects and investments” and include “any pertinent local laws and regulations, including obligations of international treaties which the host country is a party to or signatory”.<sup>51</sup>

#### A.5. *European Bank for Reconstruction and Development (EBRD)*

222. The EBRD came into existence in 1991. It consists of 63 members including the European Community and the European Investment Bank (EIB). Section 1 of the Agreement Establishing the EBRD (hereinafter the “EBRD Agreement”) provides that the Bank’s purpose is to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in countries committed to democracy, pluralism and market economics. With this purpose in mind, the Bank’s operation covers at the moment 29 countries in Central and Eastern Europe and Central Asia, in business sectors such as agribusiness, energy efficiency, financial institutions, micro, small and medium businesses, municipal and environmental infrastructure, natural resources, power and energy, property and tourism, telecoms, informatics and media, and transport.

223. Section 13, paragraph (xii), of the EBRD Agreement requires the Bank to set no restriction upon the procurement of goods and services in all financing by the Bank and to undertake international bidding for all operations while paragraph (xiii) provides that the Bank must ensure any loan or equity investment by the Bank is used economically and efficiently only for the purposes of the loan or equity investment. The Bank’s procurement policies and rules, originally adopted by the Board of Directors in 1994, supplement these provisions of the EBRD Agreement.

<sup>50</sup> See Inter-American Development Bank: *Managing labor issues in infrastructure projects* (Washington, DC, IDB, 2006).

<sup>51</sup> Eleven of the 26 countries in the region covered by IDB activities have ratified Convention No. 94: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and the Bolivarian Republic of Venezuela.



224. Section 2, paragraph (vii), of the EBRD Agreement sets out that one of the functions of the Bank is “to promote in the full range of its activities environmentally sound and sustainable development”. The environmental policy (2003) builds on this provision and provides for principles, strategies, and institutional arrangements. The policy applies to the Bank’s financing and to its procurement activities, as the EBRD seeks to “ensure through its environmental appraisal process that the projects it finances are environmentally sound designed to operate in compliance with applicable regulatory requirements, and that their environmental performance is also monitored”.<sup>52</sup> Under the policy, the term “environment” is defined to include “occupational health and safety, harmful child labour, forced labour, and discriminatory practices”.<sup>53</sup> There is no reference to labour clauses, or to Convention No. 94 in that document.

225. The EBRD requires that the MDB harmonized conditions of contract be used for the procurement of works financed by the Bank. It collaborates with the World Bank in CPARs involving countries in its region.

## Subsection B. International organizations and agencies

### B.1. *United Nations Commission on International Trade Law (UNCITRAL)*

226. The Model Public Procurement Law was developed in 1994 after many years of discussion by the United Nations Commission on International Trade Law (UNCITRAL). The model law is a non-binding instrument, designed to serve as a guide for action in the area. It does not contain provisions relevant to the application of Convention No. 94 or Recommendation No. 84.

227. In view of the desirability of improvement and uniformity of the laws on procurement, the United Nations General Assembly recommended that all States give favourable consideration to the model law when they enact or revise their procurement laws. According to information published by UNCITRAL, the following countries have taken account of the model law in the enactment of national procurement law: Albania, Azerbaijan, Croatia, Estonia, Gambia, Kazakhstan, *Kenya*, Kyrgyzstan, Malawi, *Mauritius*, Republic of Moldova, Mongolia, Poland, Romania, Slovakia, *United Republic of Tanzania*, *Uganda* and Uzbekistan.<sup>54</sup>

228. A working party has been established to update the 1994 model law. A working party has also been established to revise the model law in connection with electronic means of tendering.<sup>55</sup>

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<sup>52</sup> European Bank for Reconstruction and Development: *Environmental policy* (London, EBRD, 2003), para. 4.

<sup>53</sup> *ibid.*, footnote 1. These issues, however, do not seem to have substantive impact in the Bank’s operation at the moment except for occupational health and safety, as can be understood in two aspects. First, substantive parts of the policy deal with environmental issues mostly as ecological ones. Secondly, the Bank’s performance is evaluated with indicators on environment, health and safety, pollution loads and energy efficiency, environmental management and public consultation and participation; see EBRD, Evaluation Department: *Annual evaluation overview report 2005* (London, EBRD, 2005), p. 8, footnote 13.

<sup>54</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/1994Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html).

<sup>55</sup> UNCITRAL has also been involved in the preparation of other model laws and guidelines, including: UNIDO guidelines for infrastructure development through build operate transfer (BOT) projects, 1996 (UNIDO BOT guidelines); OECD basic elements of a law on concession agreements, 1999–2000; UNCITRAL legislative guide on privately financed infrastructure projects, 2000 (UNCITRAL legislative guide); UNCITRAL model legislative provisions on privately financed infrastructure projects, 2003 (UNCITRAL model legislative provisions).

## B.2. *World Trade Organization (WTO)*

229. Government procurement has been omitted from the scope of the multilateral trade rules under the WTO. In fact, article III(8)(a) of the General Agreement on Tariffs and Trade (GATT), originally negotiated in 1947, specifically excludes laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes from the key national treatment obligation. There are, nevertheless, three areas of WTO work in the field of government procurement. The first is the Working Group on Transparency in Government Procurement Practices mandated to study transparency in members' government procurement practices, and to develop elements which could be included in a future agreement on transparency.<sup>56</sup> The second is a Working Party on General Agreement on Trade in Services (GATS) Rules tasked broadly to negotiate multilateral agreements, including one on government procurement of services. The third is a plurilateral agreement on government procurement (GPA). In the Tokyo round of negotiations, a first GPA was agreed in view of procurement policies impacting on trade. The original agreement was signed in 1979 and entered into force in 1981. Amendments made in 1987 entered into force in 1988. The scope and coverage of the agreement was later extended and the GPA 1994 was signed in Marrakesh in 1994 at the same time as the Agreement Establishing the WTO. The GPA is a plurilateral agreement within the WTO structure, meaning that not all WTO member States are bound by it, although all are free to ratify it.

230. The two basic principles governing the GPA are most-favoured-nation (MFN) and national treatment. The former prohibits discrimination among foreign products; the latter prohibits discrimination between foreign and domestic suppliers. Article III(1) of the GPA requires parties to provide the products, services and suppliers of any other party treatment no less favourable than that they give to their domestic products, services and suppliers. In addition, under article III(2), parties must ensure that their entities do not discriminate between locally established suppliers "on the basis of degree of foreign affiliation or ownership" or "on the basis of the country of production of the good or service being supplied".

231. Twelve countries and administrative regions out of 38 parties to the GPA have also ratified Convention No. 94.<sup>57</sup> These countries are under an obligation by virtue of Article 2 of the Convention to ensure that public contracts include clauses guaranteeing the workers concerned wages, working hours and other working conditions not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on by collective agreement, arbitration award or by national laws or regulations. By virtue of the GPA as described above, they must extend the same obligation to all suppliers regardless of their nationality, affiliation or ownership.<sup>58</sup>

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<sup>56</sup> The Group was set up by the 1996 Ministerial Conference in Singapore and all WTO members participate in its work.

<sup>57</sup> Currently, the parties to the agreement are the following: Canada, European Communities, including its 27 member States, Hong Kong Special Administrative Region, Iceland, *Israel*, Japan, Republic of Korea, Liechtenstein, *Netherlands (Aruba)*, *Norway*, *Singapore*, Switzerland and the United States.

<sup>58</sup> See C. McCrudden: "Social policy issues in public procurement: A legal overview", in S. Arrowsmith and A. Davies (eds): *Public procurement: Global revolution* (London, Kluwer Law International, 1998), pp. 233–238.

### B.3. Organisation for Economic Co-operation and Development (OECD)

232. The OECD has 30 country members. Its purpose is to promote policies designed to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist other countries' economic development, and contribute to growth in worldwide trade. In order to achieve its aims, the OECD has set up a number of specialized committees. One of these is the Development Assistance Committee (DAC), whose members have agreed to secure an expansion of aggregate volume of resources made available to developing countries and to improve their effectiveness.<sup>59</sup>

233. In 2005, DAC published *Good practice papers on strengthening procurement capacities in developing countries*. The publication includes a coordinated set of good practice papers and tools which were the result of a OECD/DAC–World Bank Procurement Round Table initiative carried out during 2003 and 2004. The papers are said to reflect the insights of procurement experts from developing countries and bilateral and multilateral donors.<sup>60</sup> A baseline indicator tool for assessment of national public procurement systems was drawn up as part of this process. Four key pillars were identified as a way of organizing the basic elements of a national public procurement system, each pillar being linked with relevant indicators. Pillar III is the area of procurement operations and market practices, and Indicator 7 – Functionality of the public procurement market – provides that the assessment of the public procurement market is based among other things on the following criterion: "... 3. There are no major constraints that inhibit competition (e.g. technical, labour and other standards)". Under the so-called Johannesburg Declaration,<sup>61</sup> countries and agencies participating in the Round Table process<sup>62</sup> committed to achieve these shared objectives by putting into widespread use the common strategies, approaches and tools developed under the Round Table process.

234. The Committee notes that the OECD's *Good practices papers* have since been adapted into a *Methodology for assessment of national procurement systems*.<sup>63</sup> Pillar III, Indicator 7 – Functionality of the public procurement market, sub-indicator 7(c), has

<sup>59</sup> OECD/World Bank: *DAC Guidelines and Reference Series, Harmonising donor practices for effective aid delivery, Volume 3: Strengthening procurement capacities in developing countries* (Paris, 2005), p. 2.

<sup>60</sup> *ibid.*, p. 6.

<sup>61</sup> When they adopted the "Johannesburg Declaration" on 2 December 2004, Round Table participants confirmed their commitment to implement the good practices developed by the Round Table, to mobilize the political and financial support needed to put them into practice and to widen the number of developing countries and donors participating in this initiative, *ibid.*, p. 1.

<sup>62</sup> Countries and agencies involved in the Round Table process included: Australia, *Austria, Belgium, Canada, Denmark, Dominican Republic, Ethiopia, France, Germany, Ghana, Iceland, Indonesia, Ireland, Italy, Japan, Madagascar, Morocco, Mozambique, Netherlands, Nicaragua, Norway, Philippines, Portugal, Senegal, South Africa, Spain, Sri Lanka, Sweden, Switzerland, United Republic of Tanzania, Uganda, United Kingdom, United States and Viet Nam*. Agencies involved in the Round Table process included: Crown Agents for Overseas Governments and Administrations Ltd, West African Economic and Monetary Union (UEMOA), World Bank, World Trade Organization, United Nations, United Nations Development Programme (UNDP), The Global Fund, UN Conference on Trade and Development (UNCTAD), UN World Food Programme (WFP), African Development Bank, European Bank for Reconstruction and Development, European Commission, Ideas Centre, International Development Law Institute (IDLI), International Monetary Fund (IMF), International Trade Centre (ITC), Nordic Development Fund, Sahel Club of West Africa; *ibid.*, p. 14.

<sup>63</sup> Version 4, dated 17 July 2006.

been amended and now refers to “major systemic constraints (e.g. inadequate access to credit, contracting practices, etc.) inhibiting the private sector’s capacity to access the procurement market”, while the reference to labour standards has been removed. Moreover, Pillar I – Legislative and regulatory framework, Indicator 2 – Existence of implementing regulations and documentation, sub-indicator 2(b) – Model tender documents for goods, works, and services, contains the following elaboration:

Model documents of good quality promote competition and increase confidence in the system. Potential contractors or suppliers are more willing to participate when they are familiar with the documents and their interpretation. Model documents should contain the basic required clauses that will be incorporated into contracts in order to enable the participants to value the cost and risk of mandatory clauses when performing a contract for the government. If model documents are not available, there should be, as a minimum, a set of standard and mandatory clauses and templates that will help in the formulation of the tender documents.<sup>64</sup>

### Subsection C. Regional organizations

235. Intergovernmental organizations of regional integration today play an important role in public procurement, either by establishing standards for procurement among their members, or by recommending to their members standard forms for public contracts. These mechanisms have the potential to influence the application of the principles of Convention No. 94 by ILO member States.

#### C.1. European Union (EU)

236. The Committee notes information provided by EU Member States stating their views on the compatibility of Convention No. 94 with European law. The Government of the United Kingdom reported that with respect to requirements in the selection or award criteria or contract conditions, the inclusion of non-relevant matters are likely to contravene the EU rules and that in including labour clauses the contracting authority runs the risk of contravening EU rules. The Government of Sweden reported that in 2004 a Public Procurement Committee was tasked to investigate how the EU directives on public procurement should be transposed into Swedish law. The Public Procurement Committee reached the conclusion that it was uncertain if the obligations under ILO Convention No. 94 were compatible with the procurement directives and other EU law. The Committee has had the occasion to note that in at least one European country developments in connection with the transposition of the relevant EU directives into national law appear to have had the effect of moving legislation away from including an obligation for labour clauses as required by the Convention.<sup>65</sup> Other European countries made no specific mention of EU law in their reports,<sup>66</sup> while others did make reference but raised no concerns about its relation to implementation of the Convention.<sup>67</sup>

237. With a view to opening up public procurement contracting to competition and ensuring more efficient operation, the EU has adopted directives that regulate the details of public contract bidding and award procedures. These consist of two principal directives, both adopted in 2004. The first, Directive 2004/17/EC, coordinates the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The second, Directive 2004/18/EC, governs procedures for the award of

<sup>64</sup> *ibid.*, p. 16.

<sup>65</sup> See the direct request addressed to *Finland* in 2006.

<sup>66</sup> *Cyprus*, Czech Republic, Estonia, Germany, Greece, Hungary, Lithuania, Poland and Romania.

<sup>67</sup> *Italy*, Latvia and Portugal.

public works, supply and service contracts in those sectors not covered by Directive 2004/17/EC. To implement these directives, the Commission of the European Communities adopted Commission Regulation (EC) No. 1564/2005 of 7 September 2005 to establish standard forms for the publication of notices. Both directives are based on European Court of Justice case law, in particular as regards award criteria, which clarified the possibilities for contracting entities to meet the needs of the public concerned, including in the area of environmental and social protection. Both directives include provisions concerning employment protection, working conditions and social issue considerations without however requiring or even mentioning labour clauses in public contracts as envisaged by the Convention.<sup>68</sup>

238. The EU had several other directives dealing with public procurement prior to the adoption of Directives 2004/17/EC and 2004/18/EC.<sup>69</sup> None contained specific provision on the pursuit of social policy goals within the framework of public procurement procedures. As a result, several cases involving the use of social policy considerations in procurement decisions were brought before the European Court of Justice under these earlier directives.<sup>70</sup> In this context, the European Commission issued a Green Paper in 1996<sup>71</sup> and an interpretative communication on the Community law applicable to public procurement and the possibility for integrating social considerations into public procurement in October 2001.<sup>72</sup> The interpretative communication observed, among other things, that in determining the working conditions applicable to work done in execution of a public contract, a distinction must be made between situations of a cross-border nature and other, purely national, situations. In the latter case, “the contracting authorities, tenderers and contractors must comply, as a minimum standard, with all obligations relating to employment protection conditions and working conditions,

<sup>68</sup> Coverage thresholds are set in these directives. In certain EU Member States, only approximately 10 per cent of procurement contracts is said to fall above these thresholds. EC: press release IP/06/1053, Public procurement: Commission issues guidance on how to award low-value contracts fairly, 24 July 2006. This lacuna is the result of European law principles that limit standard setting only to contract awards that have a sufficient connection with the functioning of the internal market. See Commission interpretative communication on the community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directive (2006/C 179/02), 1 August 2006, which advises on national obligations with respect to contracts not covered by the 2004 directives. This non-binding interpretative communication does not have sufficient connection with matters dealt with in this survey to warrant further consideration.

<sup>69</sup> Directive 93/36/EEC on public supply contract, Directive 93/37/EEC on public works contracts, Directive 92/50/EEC on service contracts, all as amended by Council Directive 97/52/EEC of 13 Oct. 1997; and Directive 93/38/EEC on procurement in the water, energy, transport and telecommunications sectors, as amended by Council Directive 98/4/EC of 16 February 1998. Remedies were dealt with by Directive 89/665/EEC (supply and works contracts) and Directive 92/13/EEC (water, energy, transport and telecommunications sectors). For a comparative analysis of ILO and European standards on procurement, see K. Krüger, R. Nielsen, N. Bruun: *European public contracts in a labour law perspective* (Copenhagen, DJØF Publishing, 1998), pp. 207–247.

<sup>70</sup> For detailed discussion of these cases, see C. McCrudden: “Social policy issues in public procurement: A legal overview”, in S. Arrowsmith and A. Davies (eds): *Public procurement: Global revolution* (London, Kluwer Law International, 1998), pp. 219–239.

<sup>71</sup> EC: Green Paper, *Public procurement in the European Union: Exploring the way forward*, 27 Nov. 1996. The Green Paper includes a section on “Procurement and social aspects” paragraph 5.39 of which contains one of the very rare direct references in EU documentation to the principle set out in Convention No. 94: “Contracting authorities and contracting entities may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators. As examples of the pursuit of social policy objectives, one can mention legal obligations relating to employment protection and working conditions binding in the locality where a works contract is being performed.”

<sup>72</sup> COM(2001) 566 final.

including those derived from collective and individual rights, that arise from applicable labour legislation, case law and/or collective agreements, provided that they are compatible with Community legislation and the rules and general principles of Community law, and in particular the principles of equal treatment and non-discrimination". In "cross-border" situations, requirements justified by "overriding reasons in the general interest that are in force in the host country ... must, among others, be complied with by service providers, in the respect of the principle of equal treatment". Importantly with respect to the requirements of Convention No. 94, the Commission also concluded that "in both situations, provisions more favourable to workers, may, however, also be applied (and must be complied with), provided that they are compatible with Community law".

239. As noted, both 2004 directives are based on case-law clarifications of the possibilities for contracting entities meeting needs of the public in social areas. This is done in several ways. First, both directives provide that "the laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during the performance of a contract, provided that such rules, and their application, comply with Community law".<sup>73</sup>

240. Both directives also contain provisions relating to taxes, environmental protection, employment protection provisions and working conditions. Under these provisions, States may oblige their contracting authorities to set out in contract documentation where tenderers may obtain information on obligations relating to "[employment] protection and to the working conditions which are in force in the ... State, region or locality in which the [works are to be carried out or] services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract".<sup>74</sup> If this requirement is imposed on contracting authorities, they "shall request the tenderers ... in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are in force in the place where the [works are to be carried out or the] service is to be provided".<sup>75</sup>

241. Furthermore, the directives provide that where tenders appear to be abnormally low, the contracting authority "shall, before rejecting those tenders, request details of the constituent elements of the tender which it considers relevant", and "those details may relate in particular to ... compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed".<sup>76</sup>

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<sup>73</sup> Directive 2004/17/EC, 45th recital of the preamble; and Directive 2004/18/EC, 34th recital of the preamble.

<sup>74</sup> Directive 2004/17/EC, art. 39(1) and Directive 2004/18/EC, art. 27(1).

<sup>75</sup> Directive 2004/17/EC, art. 39(2) and Directive 2004/18/EC, art. 27(2).

<sup>76</sup> Directive 2004/17/EC, art. 57(1)(d) and Directive 2004/18/EC, art. 55(1)(d).

**Box 3**

**General administrative specifications of a social nature in public contracts, adopted by the local government of Seville (Spain) on 24 May 2007**

On 24 May 2007, the city of Seville adopted general administrative specifications of a social nature applicable to public contracts for construction works and services of a value exceeding 150,000 euros and of an estimated duration exceeding nine months. A first draft had received a negative opinion of the Permanent Commission of the Andalusia Consultative Council (opinion No. 453/2006 of 3 October 2006) because it introduced, among the selection criteria, social criteria which were not related to the subject of the contract and might therefore be considered contrary to the applicable EU directives. The municipal authorities therefore modified the draft putting the emphasis on the introduction of social considerations as conditions for the *execution* of the contract (and no longer as conditions for the *selection* of the tender) as follows:

- *General obligations:* (i) compliance with labour standards set out in applicable collective agreements, either at the sector or enterprise level, the Labour Code (Workers' Statute) and the General Social Security Act; (ii) for enterprises employing more than 50 persons, at least 2 per cent should be workers with disabilities; (iii) subcontracting may not exceed 50 per cent of the total contract value and the public authorities need to be notified in advance; (iv) the prevention of labour accidents needs to be integrated at all levels.
- *Specific obligations:* (i) at least 10 per cent of workers should be persons experiencing difficulties in access to employment (e.g. women, young persons, persons over 45 years of age, the long-term unemployed, migrants, persons suffering from incapacity exceeding 33 per cent); (ii) every enterprise with fewer than 40 per cent of women workers on its payroll has to engage during the execution of the contract at least one woman employee or transform a temporary contract of at least one woman employee into a permanent contract; (iii) in the case of contracts for services, at least 30 per cent of the personnel involved in the provision of the service must be employed under permanent contracts; (iv) the need to undertake awareness-raising activities and training during working hours on the rights established in labour laws or collective agreements relating to the balance between work and the family responsibilities of workers.

242. Unlike ILO Convention No. 94, the directives do not specify a level of employment protection or working conditions required in the performance of a contract. More generally, article 38 of Directive 2004/17/EC and article 26 of Directive 2004/18/EC permit contracting authorities to lay down special conditions relating to the performance of a contract and these conditions may, in particular, concern social considerations. Any conditions governing the performance of a contract which concern social considerations are compatible with the directives provided that they are not directly or indirectly discriminatory and are indicated in the notice used to make the call for competition, or in the specifications. Moreover,

... they may in particular be intended to encourage on-site vocational training, the employment of people experiencing particular difficulty in integration, the fight against unemployment or the protection of the environment. For example, mention may be made of the requirements – applicable during the performance of the contract – to recruit long-term jobseekers or to implement training measures for the unemployed or for young persons, to comply in substance with the provisions of the basic International Labour Organization (ILO) Conventions, assuming that such provisions have not been implemented in national law, and to recruit more handicapped persons than are required under national legislation.<sup>77</sup>

<sup>77</sup> Directive 2004/17/EC, 44th recital of the preamble, and Directive 2004/18/EC, 33rd recital of the preamble. The Commission in its Interpretative Communication COM(2001) 566 final, p. 5, defined “social considerations” as covering “a very wide range of issues and fields. It can mean measures to ensure compliance with fundamental

243. Both directives further provide for special arrangements for workers with disabilities. More concretely, they allow EU Member States to reserve the right to participate in contract award procedures to sheltered workshops or provide for such contracts to be performed under sheltered employment programmes.<sup>78</sup>

244. Directive 2004/17/EC expressly refers to ILO fundamental Conventions. Article 59(4) requires EU Member States to inform the Commission of any difficulties due to the non-observance of the fundamental Conventions when their undertakings have tried to secure public contracts in third countries. Article 59(5) provides for a follow-up process in which the Commission may propose that the Council of the European Union suspend or restrict the award of service contracts to undertakings governed by the law of the third country concerned, undertakings affiliated to them, or undertakings which have services originating in the country concerned.

245. Directive 2004/18/EC, in its article 45(2), provides that a contractor may be rejected from the participation in a public contract if it does not fulfil its obligation concerning, among others, the payment of social security contributions.

246. Moreover, Appendix VIIA of Directive 2004/18/EC enumerates information to be included in public contract notices. Among the listed items, concerning obligations relating to working conditions information must be provided in a notice on prior information on a public contract. Directive 2004/17/EC does not contain any similar appendix. Commission Regulation (EC) No. 1564/2005 of 7 September 2005 establishes standard forms for publication of public procurement notices and renders their use obligatory.

247. The European Commission adopted a communication on PPPs and the Community Law on Public Procurement and Concessions dated 15 November 2005.<sup>79</sup> The communication presents policy options with a view to ensuring effective competition for PPPs without unduly limiting the flexibility needed to design innovative and often complex projects.

248. *The Committee considers that there is nothing in the provisions of the two directives which would prevent EU Member States from requiring contractors through national laws to ensure to workers engaged in the execution of contracts wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on by the methods set out in the Convention.*<sup>80</sup> In reaching this understanding, the Committee cannot ignore, of

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rights, with the principle of equality of treatment and non-discrimination (for example, between men and women), with national legislation on social affairs, and with Community directives applicable in the social field. The expression 'social considerations' also covers the concept of preferential clauses (for example, for the reintegration of disadvantaged persons or of unemployed persons, and positive actions or positive discrimination in particular with a view to combating unemployment and social exclusion)".

<sup>78</sup> Directive 2004/17/EC, art. 28, and Directive 2004/18/EC, art.19.

<sup>79</sup> COM/2005/569 final.

<sup>80</sup> In the words of some commentators, "there is no conflict or contradiction between the EU legal regime on public procurement and the ILO Convention No. 94. The Public Procurement Directives are built on the assumption that national labour law sets the standards for work performed within the framework of public contracts and ILO Convention No. 94 can be regarded as one way of creating this national standard"; see K. Krüger, R. Nielsen, N. Bruun, *European public contracts in a labour law perspective* (Copenhagen, DJØF Publishing, 1998) p. 246.



course, the conditions set in the directives, in particular that special contract performance conditions, where they exist, are not directly or indirectly discriminatory. *The Committee is therefore of the view that there is no contradiction between the requirements of ILO Convention No. 94 and the principles set out in the two EU public procurement directives.*<sup>81</sup>

## C.2. Common Market for Eastern and Southern Africa (COMESA)

249. The Common Market for Eastern and Southern Africa (COMESA) is a regional integration grouping of African States (*Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libyan Arab Jamahiriya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe*) which have agreed to promote regional integration through trade development and to develop their natural and human resources for the mutual benefit of all their peoples. COMESA was initially established in 1981 as the Preferential Trade Area for Eastern and Southern Africa (PTA), within the framework of the Organisation of African Unity's (OAU) Lagos Plan of Action and the Final Act of Lagos. The PTA was established to take advantage of a larger market size, to share the region's common heritage and destiny and to allow greater social and economic cooperation, with the ultimate objective being to create an economic community. The PTA was transformed into COMESA in 1994.

250. COMESA has acknowledged that public procurement is of major economic importance among its member States. It estimates that public procurement accounts for approximately 60 per cent of government expenditure in countries of the region. Due to the importance of this sector, COMESA established in 2001 the COMESA Public Procurement Reform Project with funding from the African Development Bank. The project aims at harmonizing public procurement rules and regulations, as well as building the capacity of national procurement systems in the region. The agenda of the project includes law and public administration reform and capacity building based on principles such as competition, fairness, transparency, non-discrimination, accountability, professionalism, appeal rights, economy and efficiency. The African Development Bank approved in July 2006 US\$8.37 million in further funding for a follow-up project.<sup>82</sup>

251. The Committee has not been able to discern from information available to it any explicit policy established on the matter of labour clauses in public contracts of the sort defined by the Convention, or any objective within the COMESA project activities that

<sup>81</sup> By comparison, for example, both Directive 2004/17/EC, 55th recital of the preamble, and Directive 2004/18/EC, 46th recital of the preamble, set out principles for establishing criteria for the awarding of contracts, respecting always the principles of objectivity, transparency and non-discrimination. Any criteria used to assess bids tendered for contracts that include "social requirements" as defined by the EU directives, which arguably by their nature run a risk of being vague and potentially subjective, must also respect these principles. The standard of the Convention is much clearer and applies to all bidders requiring "wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on" to be ensured to workers executing the contract.

<sup>82</sup> Enhancing procurement reforms and capacity project, announced in press release of 21 July 2006: *AFDB group supports reforms in procurements*, at [http://www.afdb.org/portal/page?\\_pageid=293,174339&\\_dad=portal&\\_schema=PORTAL&press\\_item=3456253&press\\_lang=us](http://www.afdb.org/portal/page?_pageid=293,174339&_dad=portal&_schema=PORTAL&press_item=3456253&press_lang=us) (accessed 2 July 2007). See also, V. Mosoti: "Reforming the laws on public procurement in the developing world: The example of Kenya", in *International and Comparative Law Quarterly* (London, British Institute of International and Comparative Law, 2005), Vol. 54, Part 3, pp. 621 and 646–648.

might improve implementation of the Convention in its member countries.<sup>83</sup> Although “social benefits” were identified in the appraisal of the new project, nothing in available documentation suggests that the concrete matter of labour clauses figures into project activities.<sup>84</sup>

### C.3. *West African Economic and Monetary Union (WAEMU)*

252. The West African Economic and Monetary Union (WAEMU) was created in 1994 by treaty between its seven founding members, i.e. Benin, Burkina Faso, Côte d’Ivoire, Mali, Niger, Senegal and Togo. Guinea-Bissau became the eighth member State in 1997.<sup>85</sup> The organization aims at increasing the economic and financial competitiveness of its member States in the context of an open, competitive market and a rationalized, coherent, judicial environment; ensuring the convergence of economic performance and policy across member States, with the institution of a multilateral control procedure; creating a common market for the member States based on the free flow of people, goods, services and capital, the freedom of establishment of persons exercising an independent or salaried activity within the area, a common external customs tariff and a common trade policy; setting up the coordination of national sectoral policies and implementation in the areas of agriculture, country planning, environment, transport and telecommunications, human resources, energy, industry, mining and crafts; and where necessary for the smooth operation of the common market, harmonizing legislation across member States, particularly the fiscal system.

253. With the financial support of the World Bank and the African Development Bank, WAEMU initiated a Regional Procurement Reform Programme. Phase I started in 2003 and included preparation of a regional procurement legal and institutional framework, which culminated in the adoption by the WAEMU Council of Ministers of two directives concerning procurement.<sup>86</sup> Neither directive contains provisions that directly impact on the implementation of the Convention. As compared to the EU public procurement directives, the WAEMU directives make fewer provisions for labour

<sup>83</sup> It should be noted that nine of 19 COMESA members have ratified Convention No. 94. *Djibouti* was reported in 2004 to be actively working on new legislation to bring its public procurement practices in line with COMESA standards. See <http://www.undp-pogar.org/countries/finances.asp?cid=4> (accessed 24 Aug. 2007).

<sup>84</sup> African Development Fund: *Enhancing procurement reforms and capacity project, Appraisal report*, Infrastructure Department, North, East and South Regions, Tunis, May 2006, p. 28. Project Component C – Upgrading the procurement information system, sub-component CI, does foresee a “revamped IT system will have the capability of compiling information on procurement activities from each Member State, including information on market prices for materials, labour, plant and equipment, advertisements, bid results and progress on procurement reforms”, *ibid.*, p. 4.

<sup>85</sup> All eight member States of the WAEMU are also members of the Economic Community of West African States (ECOWAS) which was established in 1975 by the ECOWAS Treaty. It is a regional group of 15 countries (Benin, Burkina Faso, Cape Verde, Côte d’Ivoire, Gambia, *Ghana*, *Guinea*, Guinea-Bissau, Liberia, Mali, Niger, *Nigeria*, Senegal, *Sierra Leone* and Togo). The institutions of ECOWAS are the Commission, the Community Parliament, the Community Court of Justice. The organization also comprises a financial institution, the ECOWAS Bank for Investment and Development (EBID). The mission of ECOWAS is to promote economic integration in all fields of economic activity, in particular industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions, social and cultural matters. The African Development Bank has announced its intention to support procurement reform projects for ECOWAS member States similar to those implemented by COMESA and the WAEMU. For more, see <http://www.ecowas.int>

<sup>86</sup> The directives are: (i) Directive No. 04/2005/CM/UEMOA establishing procedures for the award, implementation and payment of public contracts and public service delegations within WAEMU; and (ii) Directive No. 05/2005/CM/UEMOA establishing procedures for the control and regulation of public procurement and public service delegations within WAEMU.

protection and social issues.<sup>87</sup> The African Development Fund approved in 2006 a further US\$6.03 million for implementation of Phase II of the project.<sup>88</sup>

#### C.4. *Asia-Pacific Economic Cooperation (APEC)*

254. The Asia-Pacific Economic Cooperation (APEC) began as an informal dialogue group in 1989. Since then it has developed into a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. In 1993, an APEC secretariat was established to support the activities of the forum. Today, APEC has 21 member States, known as Member Economies, three of which have ratified Convention No. 94.<sup>89</sup>

255. In 1995, APEC established a Government Procurement Experts' Group (GPEG) to consider ways to achieve increased transparency and liberalization of government procurement markets in accordance with APEC objectives and principles.<sup>90</sup> In 1999, GPEG developed a set of non-binding principles (NBPs) on government procurement, which were endorsed by APEC leaders at their meeting in Auckland, New Zealand. The NBPs include: (1) value for money, (2) open and effective competition, (3) accountability and due process, (4) fair dealing, and (5) non-discrimination. The NBPs are complemented by recently adopted APEC transparency standards on government procurement.<sup>91</sup> The GPEG has elaborated documentation explaining and giving examples of implementation of the NBPs.<sup>92</sup>

256. The Committee has been unable to identify any APEC or GPEG involvement in promoting principles reflected in labour clauses in public contracts, either in the sense intended by Convention No. 94 or in a broader sense of promoting other social considerations.

#### C.5. *Southern Common Market (MERCOSUR)*

257. The Southern Common Market (MERCOSUR) is a regional trade agreement between Argentina, *Brazil*, Paraguay and *Uruguay* founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto. Bolivia, Chile, Colombia, Ecuador and Peru currently have associate member status while the Bolivarian Republic of Venezuela signed a membership agreement in June 2006. The purpose of MERCOSUR is to promote free trade and the fluid movement of goods, services, persons and currency.

258. In 2004, MERCOSUR member States adopted a Protocol on Public Contracts and its Regulations (Decision of the Common Market Council of Ministers No. 27/04) with a

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<sup>87</sup> For example, there is no reference to social considerations in public contracts, nor is there any express requirement that protective labour laws, regulations and collective agreements should apply to work done under the public contract.

<sup>88</sup> Support for public procurement reform in WAEMU, press release of 5 Dec. 2006.

<sup>89</sup> The APEC Member Economies are: Australia, Brunei Darussalam, Canada, Chile, China, Indonesia, Japan, Republic of Korea, *Malaysia*, Mexico, New Zealand, Papua New Guinea, Peru, *Philippines*, Russian Federation, *Singapore*, Chinese Taipei, Thailand, United States and Viet Nam.

<sup>90</sup> As stated in APEC's fundamental Bogor Declaration and Osaka Action Agenda.

<sup>91</sup> The original set of NBPs included transparency; this has now been subsumed into the area-specific APEC transparency standards on government procurement.

<sup>92</sup> APEC: Review of the APEC NBPs on government procurement, 2006/SOM3/GPEG/005, Government Procurement Experts' Group Meeting, 8–9 September 2006.

view to gradually extending non-discriminatory treatment and to ensuring transparency in public procurement.<sup>93</sup> The Protocol applies to procurement undertaken by any level of government (central and provincial) for goods, services and public works above the threshold amounts set by each party to the Protocol. The Protocol does not address social issues in public procurement in an express manner.<sup>94</sup>

259. In a related development, government procurement is also included in the ongoing negotiations between the EU and MERCOSUR for the conclusion of an association agreement.

### C.6. *North American Free Trade Agreement (NAFTA)*

260. The North American Free Trade Agreement (NAFTA) was signed in January 1994 between Canada, Mexico and the United States. Its main purposes are to establish a free trade area by eliminating barriers, such as tariffs, thus realizing cross-border movement of goods and services; promoting conditions of fair competition; increasing substantially investment opportunities and protecting intellectual property rights.<sup>95</sup>

261. Chapter 10 of the Agreement contains provisions on government procurement which, however, do not address any social issues. This chapter applies to procurement by federal, state or provincial government, or government enterprises, of goods, services or construction services where the value of the contract exceeds the specific amount set for each of these contracting authorities. It requires the principle of non-discrimination to be applied in terms of the treatment of goods, their suppliers and service providers of another party to the Agreement. The Agreement also provides for non-discriminatory, fair, open and impartial bidding and tendering procedures. It further provides for exchange of information and for technical cooperation in the field of government procurement.

262. Reference may also be made to the North American Agreement on Labor Cooperation (NAALC) which is a supplemental agreement to the NAFTA Agreement. The objectives of the NAALC are, among other things, to improve working conditions and living standards, to promote a set of guiding labour principles, and to encourage cooperation to promote innovation and rising levels of productivity and quality. The Agreement emphasizes cooperation through various means, such as exchanges of information, technical assistance and consultations, in order to achieve its objectives. It promotes compliance and effective enforcement by each Party of its labour law through oversight mechanisms.<sup>96</sup> Under article 2 of the Agreement, each Party is under the obligation to ensure that its laws and regulations provide for high labour standards consistent with high-quality and productivity workplaces. In this connection, articles 24 and 45 provide for cooperative arrangements with the ILO in matters related to the supervision of the application of the Agreement, especially with regard to the appointment of members of the Evaluation Committees of Experts.

<sup>93</sup> The text of the Protocol can be found at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm>

<sup>94</sup> In order to implement the Protocol, the Common Market Council adopted a separate decision (Decision No. 55/04) approving Regulations for the Protocol including regulations for the review of the thresholds amounts, publication of laws, regulations and procedures concerning public contracts, establishment of a glossary of terms, conditions for recognition of bidders and the format for statistical reports.

<sup>95</sup> The text of the Agreement can be consulted at <http://www.nafta-sec-alena.org>

<sup>96</sup> The text of the NAALC can be accessed at <http://www.naalc.org/index.cfm?page=149>

## Subsection D. Non-governmental organizations

### D.1. *Equator Principles Financial Institutions (EPFIs)*

263. The Equator Principles are a set of globally recognized, voluntary guidelines to assess and manage social and environmental project financing risk, especially in emerging markets.<sup>97</sup> They were introduced in 2003 under the aegis of the World Bank and the International Finance Corporation, and were revised in July 2006. Some 56 institutions – Equator Principles Financial Institutions (EPFIs) – representing some 85 per cent of global project financing, have subscribed to these principles to ensure that the financed projects are developed in a manner that is socially responsible and reflect sound environmental management practices.<sup>98</sup> By doing so, negative impacts on project-affected ecosystems and communities should be avoided where possible and, if these impacts are unavoidable, they should be reduced, mitigated and/or compensated for appropriately. EPFIs therefore recognize that their role as moneylenders affords them opportunities to promote responsible environmental stewardship and socially responsible development.

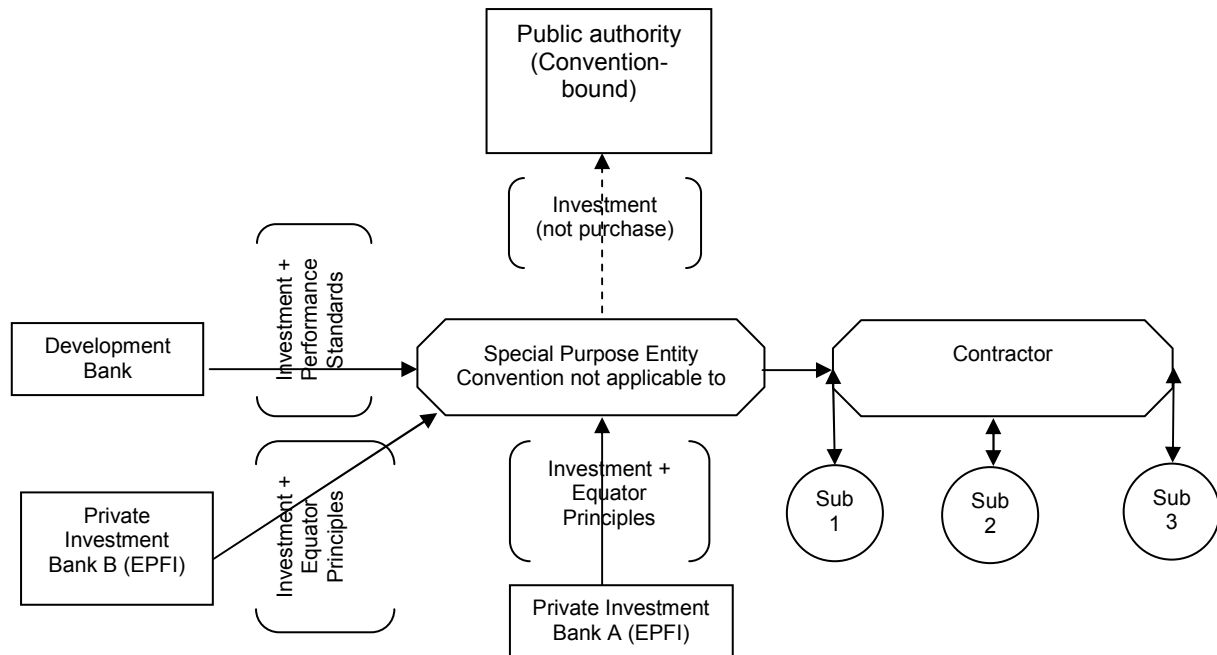
**264. *Developments with respect to the Equator Principles and IFC’s performance standards examined above are significant in that applied as intended they can have the effect of establishing through contract clauses standards for wages and terms and conditions of employment on projects that involve new forms of public procurement, such as public–private partnerships (PPPs), and that were once within the domain of public authorities’ contracting, and hence within the scope of Convention No. 94.*** Indeed, as described more fully elsewhere, the types of projects funded by the IFC and EPFIs continue to involve public authorities in the role not of a contracting employer, but of an investor in a PPP.<sup>99</sup>

<sup>97</sup> Project finance is a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants, mines, transportation infrastructure, environment, and telecommunications infrastructure. See Basel Committee on Banking Supervision, *International Convergence of Capital Measurement and Capital Standards (“Basel II”)*, Nov. 2005, para. 221.

<sup>98</sup> As of 25 October 2007: Argentina: Banco Galicia; Australia: Westpac Banking Corporation, ANZ, National Australia Bank; Belgium: Dexia Group, Fortis, KBC Bank NV; Brazil: Banco Bradesco, Banco do Brasil, Banco Itaú, Unibanco; Canada: BMO Financial Group, Canadian Imperial Bank of Commerce, Export Development Canada (EDC), Manulife, Royal Bank of Canada, Scotiabank, TD Bank Financial Group; Chile: CORPBANCA; Costa Rica: CIFI; Denmark: Eksport Kredit Fonden; France: Calyon Corporate and Investment Bank, Société Générale; Germany: Dresdner Bank, HypoVereinsbank, WestLB AG; Italy: Intesa Sanpaolo, MCC; Japan: Mizuho Corporate Bank Ltd, SMBC, The Bank of Tokyo–Mitsubishi UFJ Ltd; Netherlands: ABN AMRO Bank NV, FMO, ING Group, Rabobank Group; Oman: Bank Muscat; Portugal: Banco Espírito Santo Group, Millennium bcp; South Africa: Nedbank Group; Spain: BBVA SA, Caja Navarra, la Caixa; Sweden: Nordea, SEB; Switzerland: Credit Suisse Group; United Kingdom: Barclays plc, HBOS, HSBC Group, Standard Chartered Bank, The Royal Bank of Scotland; United States: Bank of America, Citigroup Inc., E+Co, JPMorgan Chase, Wachovia, Wells Fargo. For more, see [www.equator-principles.com](http://www.equator-principles.com)

<sup>99</sup> Denton, Wilde, Sapte: *A guide to project finance*, 2004.

**Figure 6. Public-private partnership (PPP) contracting for a public utility infrastructure project** (public authority is bound by the Convention, but is making an investment in a private entity which in turn enters into the contracting arrangement – the special purpose entity (SPE) is under the influence of banks' social policy disciplines)



#### D.2. *International Federation of Consulting Engineers (FIDIC)*

265. A number of Multilateral Development Banks (MDBs) have for many years adopted bidding and contracting documents of the International Federation of Consulting Engineers (FIDIC), as part of the standard bidding documents to be used by their banking clients when expending loans. FIDIC represents and promotes the business interests of the global consulting engineer industry and, as such, has promulgated standard form contracting documents that have over the years become a worldwide standard. In the late 1990s, a number of important MDBs resolved to harmonize contracting documents.<sup>100</sup> Working with FIDIC, a first version of the MDB harmonized construction contract was released in May 2005, and amended in 2006.<sup>101</sup>

<sup>100</sup> These banks include the World Bank (WB), African Development Bank (AfDB), Asian Development Bank (AsDB), Black Sea Trade and Development Bank (BSDB), Caribbean Development Bank (CDB), Council of Europe Development Bank (COEDB), European Bank for Reconstruction and Development (EBRD) and the Inter-American Development Bank (IDB).

<sup>101</sup> The procedures and practices presented in the standard bidding documents for works were developed through broad international experience and are based on the Master Bidding Document for Procurement of Works, prepared by MDBs and other public international financial institutions, and have the structure and provision of the master procurement document, except where the Bank's specific considerations have required a change; see World Bank, *Standard bidding documents, User's guide for procurement of works*, Washington, Mar., 2007, p v. All these documents are based on international construction industry standard documents of the International Federation of Consulting Engineers (FIDIC). See also: <http://www1.fidic.org/resources/mdb/> (accessed 10 July 2007).

266. The MDB harmonized conditions of contract contain general condition clauses<sup>102</sup> under the heading “Staff and labour”, including the requirement for “Rates of wages and conditions of labour” that reads as follows:

... the Contractor shall pay rates of wages, and observe conditions of labour, which are not lower than those established for the trade or industry where the work is carried out. If no established rates or conditions are applicable, the Contractor shall pay rates of wages and observe conditions which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Contractor.

267. In addition, the MDB harmonized conditions of contract include compulsory general condition clauses dealing with, among other labour-related subjects, the prohibition of forced or compulsory labour and the prohibition of harmful child labour.<sup>103</sup>

**268. *The Committee considers the establishment of these harmonized conditions of contract and MDB policies promoting their use to be an important development, directly relevant to the application of the Convention. It is bound to observe, however, that although the general clause on “Rates of wages and conditions of labour” resembles that required by Convention No. 94, it does not fully meet the international standard set in the Convention since it does not refer to local wages and conditions of labour being established by collective agreement, arbitration award, or national laws or regulations.<sup>104</sup> The provision does not otherwise fully capture the idea that it is the most advantageous level of wages and working conditions established locally that is required under the contract. Nor, in the absence of specific language to the contrary, does it appear that all the provisions apply to subcontractors.<sup>105</sup>***

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<sup>102</sup> “General conditions” of contract are understood in the industry to be required, and in the context of the MDB harmonized conditions of contract, to be used with their text unchanged, as contrasted with “particular conditions” which are terms that are specific to each individual contract (although standard clauses are offered by FIDIC as a basis for selection).

<sup>103</sup> World Bank: *Standard bidding documents, User’s guide for procurement of works*, Washington, Mar. 2007, Part 3 – Conditions of contract and contract forms, Section VII, General conditions (GC), clauses 6.20 and 6.21, p. 156.

<sup>104</sup> See also, for instance, the direct request addressed to the *United Republic of Tanzania* in 2006 concerning the FIDIC standard conditions of contract for works of civil engineering construction.

<sup>105</sup> For example, in sections concerning health and safety, reference is made to “contractor’s personnel” and “means the contractor’s representative and all personnel whom the contractor utilizes on site, who may include the staff, labour and other employees of the contractor and of each subcontractor; and any other personnel assisting the contractor in the execution of the works” (section 1.1.2.7). These references establish the personnel to be the beneficiary of obligations rather than the holder of them. Section 4.4 provides that “the Contractor shall be responsible for the acts or defaults of any subcontractor, his agents or employees, as if they were the acts or defaults of the contractor”, but the key obligations, including that to pay certain rates of wages, do not appear to flow beyond the contractor. “Contractor means the person(s) named as contractor in the Letter of Tender accepted by the employer and the legal successors in title to this person(s)” (section 1.1.2.3).

**Figure 7. Targeted and potential coverage of Convention No. 94**  
(public contracts for domestic public works, goods and services, potentially public contracts made by decentralized authorities, but not public contracts that involve the employment of workers extraterritorially or other forms of agreement with results analogous to public contracts, e.g. creation, maintenance, or operation of infrastructure and public utilities)

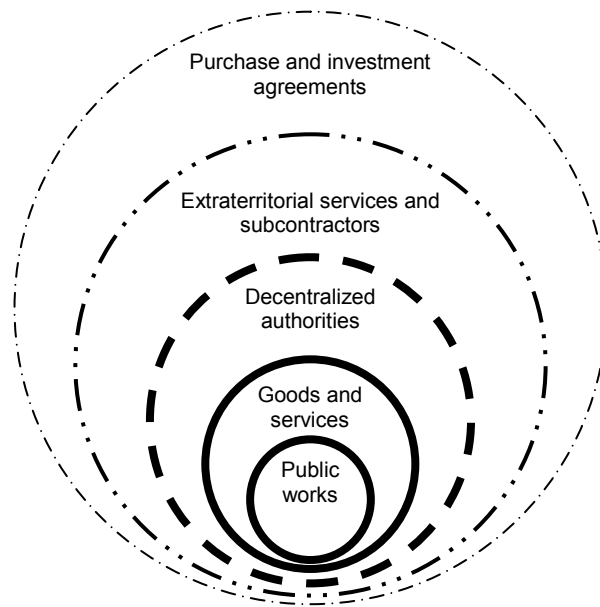




Table 2. Action and impact of international institutions on modern-day public contracting

		Institution			Action		
		Development finance institution/ public sector	Development finance institution/ private sector	Global/regional membership organization	Direct influence on labour clauses in public contracts	Operational guidance on national procurement systems	Obligations promulgated to clients/constituents influencing labour clauses
Global				UN		UNCITRAL Model Law	
		WB			MDBHC	Periodic CPARs	
				OECD		OECD/DAC Guidelines	
			IFC				Performance standards
			EPFI			Collaboration with WB CPAR	Equator principles
Regional	Africa	AfDB			MDBHC		
				COMESA		Public Procurement Reform Project	
				WAEMU		Regional Procurement Reform Programme	
				ECOWAS		Procurement reform projects	
	Asia	AsDB				Collaboration with WB CPAR "Social Dimension" incorporated into projects	
				APEC		Voluntary reporting	
	Europe	BSDB			MDBHC		
		CDB			MDBHC		
		COEDB			MDBHC		
			EBRD		MDBHC		
				EU		Via subordinate rules or other forms Member States' donor agencies collaborate with WB CPAR	Directives
	America	IDB			MDBHC	Collaboration with WB CPAR	Environmental and social requirements, particularly in investment via PRI

### Section 3. Globalization and international procurement

269. There are important developments in the world today related to the internationalization of public contracts and the increasing use of global sourcing which are relevant to this General Survey. The increasing frequency and speed with which goods, services, persons and capital are moved between countries may be credited for some of these developments. A few examples reflecting trends can be given: public contracts are being made for the supply of goods produced outside of the borders of the purchasing public authorities; construction work is being undertaken in the locality of the contracting public authorities by persons “imported” by the contractor from outside the country specifically to carry out the work; foreign capital is being loaned to governments or invested in PPPs for the development of works designed to yield public benefit as well as revenues.

270. The Committee notes certain observations made in relation to cross-border public contracting. The China Federation of Enterprises noted that Chinese export suppliers in bidding for foreign procurement or construction contracts must pay attention to the requirements of labour clauses in purchasing jurisdictions. The Government of Ethiopia reported that globalization has a negative side in that local personnel might be displaced by more competitive international labour forces.

271. Some governments in their report touched upon the types of dilemmas that gave rise to the Convention almost 60 years ago. The Government of Hungary, for example, noted that partially due to globalization, and in particular the general intent of employers to reduce labour costs, unreported or unregulated employment has developed and been on the rise. This labour law avoidance has resulted in a diminution of employees’ rights, and the need to explore new ways, including the giving of financial incentives, to promote compliance.

272. In Lithuania, the law on procurement calls upon contracting authorities and suppliers to inform the Ministry of Labour of any difficulties, in law or in fact, encountered by them when endeavouring to secure the award of service contracts in third countries which are due to the non-observance of any of the eight fundamental ILO Conventions. The Ministry is to submit any such information received to the Commission of the European Communities.<sup>106</sup>

273. The issue of equal treatment among bidders has been raised in reports by some governments (e.g. Sweden and the United Kingdom) as a reason for not having labour clauses of the type envisaged by the Convention in public contracts. The matter is couched in terms of consistency between the ILO instruments and the WTO General Procurement Agreement, EU directives on procurement,<sup>107</sup> UNCITRAL Model Procurement Law,<sup>108</sup> and general policy advice given by international institutions working in the procurement area, such as the development banks.

<sup>106</sup> (1), s. 83(2). This provision gives effect to the requirements of EU Directive 2004/17/EC, art. 59(4).

<sup>107</sup> For example, Directive 2004/17/EC on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, recitals of the preamble 44 and 55; Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, recitals of the preamble 33 and 46.

<sup>108</sup> Art. 6(5). Provisions of the model law take labour matters into consideration, for example art. 34(4)(c)(iii).

**Box 4**

**Striking a balance between the freedom to provide services and the overriding requirements of the protection of workers and the prevention of social dumping under EU law**

In *Rechtsanwalt Dr. Dirk Ruffert, as the liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen*, a German court asked the European Court of Justice for a preliminary ruling on whether national legislation requiring undertakings involved in the tendering procedure for public works contracts to give a commitment that they will comply with, and ensure compliance by their subcontractors with, the wage conditions prescribed by the collective agreement in force at the place where the services in question are to be provided is a restriction on the freedom to provide services under article 49 of the EC Treaty. According to the Law of Land Niedersachsen on the award of public contracts (“Landesvergabegesetz”), contracts for building services are awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement in force at the place where those services are performed. The dispute referred to a contract for structural work in the building of Göttingen-Rosdorf prison, awarded to a contractor who subsequently used a Polish firm as a subcontractor that employed Polish workers on the site at a wage below that stipulated in the applicable collective agreement. The Polish firm was accused of having paid the 53 employees engaged on the building site only 46.57 per cent of the applicable minimum wage. According to the Advocate General’s Opinion,

... In those circumstances, it appears to be established that compliance with the Landesvergabegesetz would have given these workers genuine additional protection by ensuring that they received a wage that was significantly higher than the wage they would normally be paid in the State in which their employer is established. This law therefore appears to me to ensure the protection of the posted workers. ... In my view it is crucial that, in the framework of the performance of the same public contract, local workers and posted workers be paid at the same rate. It is here, to my mind, that we must apply the yardstick that will enable us to detect possible discrimination in breach of Community law. ... Thirdly, while it is true that the aim of public procurement is above all to meet an identified administrative need for works, services or supplies, the award of public contracts also authorizes the attainment of other public interest requirements, such as environmental policy or, as in the present case, social objectives. ... The possibility of integrating social requirements into public procurement contracts has already been recognized by the Court and is now enshrined in Directive 2004/18. ... [Therefore] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and Article 49 EC must be interpreted as not precluding national legislation, such as the Landesvergabegesetz of Land Niedersachsen, on the award of public contracts which requires contractors and, indirectly, their subcontractors to pay workers posted in the framework of the performance of a public contract at least the remuneration prescribed by the collective agreement in force at the place where those services are performed, on pain of penalties that may go as far as the termination of the works contract, if the collective agreement to which the legislation in question refers is not declared to be generally applicable (Advocate General’s Opinion in Case C-346/06, 20 September 2007, paras 118, 131–133, 136).

As at 7 December 2007, no judgement had been given in this case.

274. The principle of non-discrimination in the conduct of public procurement requires that “as a general rule, suppliers and contractors are to be permitted to participate in procurement proceedings without regard to nationality and that foreign suppliers and contractors should not otherwise be subject to discrimination”.<sup>109</sup> By requiring that public contracts include labour clauses, Convention No. 94 requires wages and working conditions applied to work done in carrying out the contract being not less favourable

<sup>109</sup> UNCITRAL: “Guide to enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services” (A/CN.9/403), reprinted in Yearbook of the United Nations Commission on International Trade Law, 1994, Vol. XXV, (Vienna, 1995), p. 327.

than those established following the procedures laid out in Article 2 in the district where the work is being done, wherever that district is. The result is the same as that observed when the Convention was adopted – then in respect of the market for shoes within a federal State – that some bidders are given an advantage as compared to others by the labour clause authorizing the payment of lower wages merely because the work is done in a different locality.

275. As likewise observed when the Convention was adopted, there is little possibility for unequal treatment where work under the public contract must be done in a particular locality, as is the case in construction works.<sup>110</sup> Where the contract for such work contains a labour clause as contemplated by the Convention, all bidders would be required to offer the same conditions of labour. This would be the case no matter what the nationality or usual domicile of the workers concerned. Nor would the result differ if the origin of the contractor were foreign.<sup>111</sup> Steps in line with the requirements of the Convention can also be taken by the public authority to prevent discriminatory results where the work must be done domestically.<sup>112</sup>

276. The more difficult question arises where the public contract can be performed anywhere.<sup>113</sup> The Committee notes that the Convention covers contracts potentially performed anywhere for “shipping of materials, supplies or equipment” and for “the performance or supply of services”. Although the Office raised both the issue of different labour standards applied among geographically far-flung contractors, and the fact of cross-border procurement and international finance of procurement, the dominant focus at the time of adoption was clearly work inside a ratifying country. The Office’s law and practice report referred to the fact that a labour clauses policy can have useful policy influences, “depend[ing] upon the extent to which the Government enters into the economic processes of the country, either as a purchaser of supplies and equipment or as an investor in construction works”, or where, even “in well-regulated countries labour legislation may fall short of complete effectiveness in the maintenance of satisfactory conditions of work and employment, and labour standards in public contracts may therefore play a useful part in the attainment and maintenance of a high level of social protection”.<sup>114</sup> However, no evidence can be found of any intent to prohibit application

<sup>110</sup> Even in such works today, globalization, internationalization and technological improvement (transport and digitalization in particular) have become so important that significant amounts of work – from design of works to prefabrication of materials – can actually be done elsewhere than on the site concerned.

<sup>111</sup> In practice, a study published in Europe in 2004 concluded that direct cross-border procurement accounts for just 3 per cent of the total number of bids submitted by a group of sample firms. The more frequent practice involves foreign firms using local subsidiaries in bidding. European Commission: A report on the functioning of public procurement markets in the EU: Benefits from the application of EU directives and challenges for the future, 3 Feb. 2004, pp. 8–13, at [http://ec.europa.eu/internal\\_market/publicprocurement/docs/public-proc-market-final-report\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf) (accessed 27 June 2007).

<sup>112</sup> As in the example given in 1948, the government concerned can actually set the wage and working conditions for its entire territory.

<sup>113</sup> The problem raised by this issue is not the fact that the contracting public authority does not have control over the conditions of labour at the extraterritorial place where the work under a particular contract will be done; it is theoretically possible to use contractual mechanisms to enforce provisions and sanction breaches. The potential problem lies in the fact that possible bidders are able to perform a contract with workers in different places, and these places have different conditions of work. Thus the rule of the labour clause, that no less favourable conditions be given, uniformly applied, has a discriminatory result impacting on competition policy. On the other hand, the modern flexibilities that permit extraterritorial bidders in the first instance are limited only by the intrinsic nature of the contract in deciding where the work will be performed. And even some construction work today, with the advent of prefabrication technology, can be relocated to benefit from low input costs.

<sup>114</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), pp. 3–4.

of labour clauses in public contracts involving work performed outside the ratifying country.<sup>115</sup> Nor is there any record in the Conference discussions of an attempt to exclude such type of contract from the definition of public contracts in Article 1 of the Convention.<sup>116</sup>

277. The issue of wages and working conditions applied in modern, long and often transnational supply chains in the context of Convention No. 94 boils down to the understanding given by national authorities to the idea of subcontractors. As noted, the Convention was not intended to be applied, for example, to the production of construction materials, but was intended to cover work done in handling those materials. It would seem that given a supportive national interpretation, the Convention could be held to apply to suppliers of materials used to manufacture a product under contract, where the work to produce the material by the supplier was undertaken specifically to execute the contract, as opposed to supply of materials held as stock in trade. And should a member State desire to do so, contractual labour clause obligations could be applied across borders.

278. *The Committee is bound to note a further impact of globalization on application of the Convention. The International Labour Conference in 1998 adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. This historic instrument is part of the ILO's contribution to ensuring in the context of globalization that "economic and social policies are mutually reinforcing" and its adoption should be seen as nothing less than a universal agreement on an essential core of rights to which all workers are entitled. The significance of this achievement has not been overlooked by those actively engaged in the processes of globalization. As noted in this survey, these rights have been incorporated in various ways in policy instruments and legally binding texts of those actors engaged in public procurement-related activities. The international "rights-based" approach reflected in the 1998 ILO Declaration was just emerging when Convention No. 94 was adopted in 1949, just a year after the Universal Declaration of Human Rights was adopted.<sup>117</sup> Had it been more mature, the approach taken then to a recognized threat to working conditions might have been different than the contract-based approach used by Convention No. 94. In any case, the 1998 Declaration and its rights-based approach exist today and need to be fully taken into account in re-evaluating the relevance of the Convention or reflecting on its future use.*

<sup>115</sup> At least one commentator has taken the view that Convention No. 94 was not intended to apply to work done beyond the borders of the ratifying State, observing that "the assumption in public contracting is that the alignment to employment wages and conditions takes place when a non-resident contractor performs the contract within the State where these conditions apply. It would therefore be necessary to draw a distinction between contracts which necessitate the import of a workforce such as construction contracts on the one hand, as opposed to contracts where the workers are not moved from their resident State – such as typical supplies contracts – on the other. [footnote omitted]. In service contract situations one would have to apply the ILO requirements selectively on those of the contractor's staff which do the work in the contracting entity's State as distinguished from work done outside the State of the contracting entity"; see K. Krüger, R. Nielsen, N. Bruun, *European public contracts in a labour law perspective* (Copenhagen: DJØF Publishing, 1998), p. 226.

<sup>116</sup> An explanation might be found in the fact that GATT was barely six months old at the time of the ILO's first discussion of the subject of labour clauses in public contracts in June 1948. The possibility for conflict between the fundamental principles of non-discrimination which underpin international trade regimes and the terms of a new international agreement on labour conditions of those executing public contracts might have been reflected in Convention No. 94 had this potential market for international trade not been excluded from the GATT.

<sup>117</sup> UN General Assembly Resolution 217 A III, 10 Dec. 1948.

**Box 5****The Declaration on Fundamental Principles and Rights at Work and its Follow-up and labour clauses in public contracts – What relationship?**

- With respect to the Declaration on Fundamental Principles and Rights at Work and its Follow-up, in his Global Reports in 2003<sup>1</sup> and 2007<sup>2</sup> on the subject of equality, the ILO Director-General observed that public procurement policies have been adapted to promote equality in employment, in some cases through the inclusion of provisions in public contracts.<sup>3</sup> What are the implications for the application of the instruments under consideration of reference to the fundamental or core labour standards – either to their principles or to the instruments themselves – in procurement procedures or policies related thereto?
- The Pakistan Workers' Federation noted in their comments that workers in the construction industry face hardships and exploitation due to lack of the right to form trade unions. In such a context, obliging an international contractor executing a public contract in Pakistan to apply the most favourable local wages and working conditions has a far different effect than obliging him to respect workers' fundamental right to freedom of association.
- Yet, the 1998 ILO Declaration and Convention No. 94 proceed on parallel directions and certainly share common objectives. Otherwise, what would be the point of pressing for the application of collectively agreed wages under Convention No. 94 if collective negotiation is not recognized? What would be the value of claiming higher standards for overtime pay and paid holidays for public contract workers if forced labour or child labour are not first eradicated? This underscores the complementarity of the two sets of principles and the importance of Convention No. 94 as a possible mechanism for promoting core labour standards.

<sup>1</sup> ILO: *Time for equality at work*, Report of the Director-General, ILC, 91st Session, Geneva, 2003, p. 61.

<sup>2</sup> ILO: *Equality at work: Tackling the challenges*, Report of the Director-General, ILC, 96th Session, Geneva, 2007, pp. 64–67.

<sup>3</sup> The Director-General reported that "since 2001 a Danish municipality requires contractors to design an equal treatment policy for people with different ethnic backgrounds, setting measurable goals for the period of the contract. Non-compliance with these conditions is deemed equivalent to non-fulfilment of the contract". This was characterized a "contract conditions model" where the focus is on the post-contract award stage, by requiring compliance with certain conditions in implementing the contract, *ibid.*, p. 66. In the same vein, the Government of the United Kingdom has recently reported that the Ethnic Minority Employment Task Force is leading an initiative for the use of public procurement contracts as a means to promote employment for ethnic minorities in the public sector; see the direct request addressed to the United Kingdom in 2007 concerning Convention No. 111.

**Section 4. Summing up**

*279. The approach taken in the instruments under consideration, to require in government procurement contracts provisions to ensure the best local labour terms and conditions, was appropriate when they were adopted in 1949. Soon afterwards, the role of public procurement as a key means of ensuring application of the principles of equal remuneration for men and women for work of equal value and equality in employment and occupation (Recommendations Nos 90 and 111 respectively) was internationally acknowledged. The risks posed to workers' labour conditions by competition for public contracts in 1949 are still present today; some would argue these risks have even increased multifold. The globalization of public contracting, in tandem with procurement reform, privatization, deregulation and consolidation of opinion within the international community concerning workers' rights – expressed in many forums and also in the ILO's Declaration on Fundamental Principles and Rights at Work – raise the question of whether the approach to the standard of wages and working conditions set in Convention No. 94 and Recommendation No. 84 could now be improved.*

*280. The Committee considers that the increased activity, both nationally and internationally, in the public procurement sector provides a window of opportunity for addressing workers' needs and social concerns. The Committee notes that in many countries the general public is not sufficiently aware of ILO standards. There is, however, increasing public awareness of the importance of issues such as child labour, non-discrimination and occupational safety and health. The ILO should therefore take advantage of this situation by bringing into the spotlight existing ILO Conventions which address these concerns. As noted in the concluding chapter of the survey, the Office should seek ways and means to influence the current process of public procurement law reform being undertaken in countries around the world and engage in more visible dialogue with influential actors in this field.*

## Chapter IV

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### Final observations

#### Section 1. Difficulties of application

281. Few member States that have ratified the Convention fully apply it. It appears to the Committee that a misunderstanding of the instrument's obligations is at the heart of the problem. Few of the Committee's comments addressed to ratifying member States have provoked responses that engage the Committee on the policy substance of the Convention; most of the governments concerned insist that application of national labour law to workers engaged in the execution of public contracts is sufficient to implement the Convention. It is true that the Convention reveals its full potential where collective bargaining processes are used by the parties to establish better conditions for workers than those found in national laws. On the contrary, where collective bargaining is weak, no alternative to general labour law standards is available, thus there is no incentive for the parties involved to pursue either the inclusion or the enforcement of labour clauses in public contracts as foreseen by the Convention. *This overall situation points to the need for awareness raising – at least in those countries where collective agreements more favourable than the national legislation exist – to strengthen the governments' ability to understand what the Convention requires so that they can take the necessary steps to fully implement its provisions.*

#### Section 2. Prospects for further ratification

282. Fifty-eight years after its adoption, Convention No. 94 has received 60 ratifications. During the decades since its adoption, Convention No. 94 has always been binding on roughly one-third of ILO member States. In recent years, however, countries that have not ratified the Convention have not shown much interest in becoming parties to it. Only three ratifications have been received in the past ten years (*Norway* in 1996, *Saint Vincent and the Grenadines* in 1998, and *Armenia* in 2005) while 61 per cent of the ratifications registered to date (36 out of 60) were received in the first 15 years after the adoption of the Convention.

283. *Based on the information contained in the reports received, the Committee notes that no government has announced its intention to denounce the Convention at the next possible opportunity but neither has any government announced the imminent or forthcoming ratification of the Convention. As explained in greater detail in the concluding remarks below, a major promotional effort would therefore be needed in order to attract new ratifications in the foreseeable future.*



### Subsection A. Governments' views

284. The Government of Canada identified two main difficulties: first, legislation enacted by some jurisdictions, which to an extent is consistent with the Convention, is typically restricted to the construction sector and does not cover the spectrum of public procurement envisaged by the Convention. Secondly, it is not clear how the insertion of labour clauses and the establishment of comparative working conditions would operate and impact on the award of public contracts. Moreover, Canadian jurisdictions favoured the application of laws of general application instead of special legislation for public contracting and therefore did not intend at this juncture to adopt legislative provisions to give effect to the Convention or Recommendation.<sup>1</sup>

285. The Government of the United Kingdom stated that the inclusion of labour clauses could add cost and bureaucracy to contracts without any clear indication of benefits while the contracting authority would run the risk of contravening EU rules, and that bearing this in mind, it had no intention to ratify the Convention at present. The Government of Australia considered that the mandatory insertion of labour clauses into public contracts represented an approach to labour regulation which is out of step with modern practice and therefore it was not the intention of the Australian Government to pursue ratification of this Convention.

286. For its part, the Government of Sweden reported that the discussions regarding whether or not Convention No. 94 should be ratified to a large extent concerned the question of the compatibility of the Convention with EU law, especially EU rules on the free movement of services. This question was analysed by the Public Procurement Committee which was set up in 2004 and which reached the conclusion that at present it was uncertain if the obligations in Convention No. 94 were compatible with the EU procurement directives and other EU law. Commenting on the conclusions of the Public Procurement Committee, the tripartite Swedish ILO Committee took the view that since no specific legal obstacles were identified, Convention No. 94 should be ratified. Moreover, in March 2006, the Swedish Parliament decided in favour of a proposal from the Parliamentary Committee on the Labour Market in which it was stated that it was important to ratify ILO Convention No. 94 but the Government had not yet responded to this initiative.<sup>2</sup>

287. The Government of China referred to diverse adjustments that the implementation of the Convention might entail and indicated that no plans for the ratification of the Convention had so far been made.

288. The Government of Germany reported that the possibility of ratifying the Convention had been considered on a number of occasions, most recently in connection with a proposed law on compliance with collective agreements which failed to be adopted by Parliament in 2002. The law in question, however, would not have fulfilled all the requirements of the Convention since it referred only to certain public contracts (i.e. construction industry and local public transport sector) and would have concerned only wages and not other conditions of employment. Given that it was not even possible

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<sup>1</sup> The Province of British Columbia repealed several years ago "fair wage" legislation that required non-union contractors on large construction projects to pay the prevailing union rate.

<sup>2</sup> The Government noted also in its report that the high coverage by collective agreements in the Swedish labour market (thus already providing working conditions that were higher than minimums set in national law) was the main reason why the Swedish Parliament in 1950 decided against ratifying Convention No. 94.

to reach a consensus on the proposed law, the German Government considered that the conditions for ratification of the Convention were currently not met.

289. A number of countries (e.g. Colombia, Dominican Republic, El Salvador, Indonesia, Latvia, Mali, Myanmar, Nicaragua, Saudi Arabia, Senegal and Suriname) reported that the ratification of the Convention was not envisaged at present without giving any specific reasons or additional explanations.

290. Certain countries made known that the question of the formal acceptance of the Convention was currently being studied by a competent body. The Government of Bahrain reported that it was in the process of examining the possibility of ratifying the Convention in the context of the broader labour law reform undertaken in consultation with the social partners. The Government of Greece referred to the forthcoming meeting of the Higher Labour Council and indicated that the question of the possible ratification of the Convention would be brought to the attention of the political leadership given that the requirements of the Convention were already sufficiently reflected in national law and practice. The Government of Lebanon reported that any modification of laws with a view to harmonizing them with the instruments under consideration would require deliberate and lengthy consideration that took into account all economic and financial conditions of the country. The Government of Tunisia indicated that it would undertake an in-depth analysis of the content of the Convention with a view to envisaging possible ratification. The Government of Kazakhstan reported that the Ministry of Labour had examined the Convention and intended to submit it for decision to the competent authorities once the results of the application of those provisions of the new Labour Code of 2007 that were linked to the implementation of the Convention were known.

291. In some countries, the question of the formal acceptance of the Convention has not yet been submitted to a competent advisory body for tripartite consultations. This is the case, for instance, in the Islamic Republic of Iran, Latvia and Poland. The Government of Switzerland indicated that the possible ratification of the Convention has not so far been examined on a tripartite basis but that full consultations with the most representative employers' and workers' organizations would be held in the framework of the major reform of the federal legislation on public procurement which was now under way. The Government of Bosnia and Herzegovina reported that no decision on ratification had been taken so far but that in tripartite consultations held earlier this year the social partners pronounced themselves in favour of ratification. The Government of Fiji stated that the Convention might be considered by the Labour Advisory Board next year once the nine Conventions currently pending before this tripartite forum had been decided. The Government of Viet Nam announced that the advantages and disadvantages of ratifying the Convention would be thoroughly analysed in consultation with the social partners in the context of the time-bound plan for ratification of ILO Conventions between 2007 and 2010.

292. Some member States expressed the view that there was no need to ratify the Convention. For instance, the Government of Hungary indicated that the national legal system excluded from the range of potential contracting parties those employers who violated the law to the detriment of their employees as early as in the pre-selection stage and accordingly the protection of employees' interests was fully ensured even though not in the form identified in the ILO instrument. The Government of New Zealand explained that its approach was to require conditions for the employment of labour for performance of any works and supply contracts (public and private) to comply with generally applicable employment-related legislation and therefore ratification was not considered necessary. The Government of Japan reported that there was no intention to ratify the

Convention considering that regardless of whether work was performed in the execution of public contracts, wages and other working conditions in the private sector were agreed upon autonomously between the parties concerned, i.e. workers and employers, and that it would be inappropriate for the government to intervene except in case of violation of the statutory conditions of work prescribed in the Labour Standards Law. The Government of Mexico stated that despite the recent enactment of new public procurement legislation, no provision was made for labour clauses such as those provided for in the Convention, it being understood that workers' rights were sufficiently and uniformly protected by the general labour legislation. The Government of Papua New Guinea indicated that it was not in a position to commit itself to any further ratification because of the burden each ratification represented in terms of implementation and reporting obligations, and that any new ratification would occur after all the fundamental Conventions were adequately taken care of in national law and practice. The Government of Comoros stated that it was not opposed to the ratification of the Convention but that priority was given to the ratification of fundamental Conventions and also that it considered labour legislation to be adequately protective of workers engaged under public contracts.

293. In the same vein, the Government of Zimbabwe reported that existing provisions of the Labour Act and sector-specific collective agreements sufficiently addressed the issue of workers involved in public contracts and therefore the ratification of the Convention was not contemplated. Similarly, the Government of Estonia indicated that it did not intend to ratify the Convention since the situation of workers engaged in the execution of public contracts posed no special difficulty and therefore ratification was neither relevant nor a priority issue today. The Government of Portugal indicated that there were no plans to ratify the Convention since all workers including those recruited under public contracts enjoyed the legal guarantees of a minimum monthly remuneration, a maximum limit on the duration of working hours and were covered by legislation relating to occupational safety and health. The Government of South Africa expressed the view that the legislation in place provided adequate protection to all workers and therefore singling out workers engaged in the execution of public contracts would be inappropriate and possibly discriminatory for every other category of workers. The Government of the Republic of Korea reported that there was no intention to pursue the ratification of the Convention as labour laws and regulations applied in a uniform manner and no need was felt for specific labour legislation with respect to public contracts.

294. Finally, a certain number of countries, including Argentina, Croatia, Czech Republic, Ecuador, Ethiopia, Honduras, India, Kuwait, Lithuania, Moldova, Peru, Romania, Thailand and the Bolivarian Republic of Venezuela, did not provide any indication in their reports as to whether they intended to consider the possibility of becoming parties to this Convention.

#### **Subsection B. Employer organizations' views**

295. Views expressed in observations received from employers' and workers' organizations are divergent. Business New Zealand stated that ratification would be unnecessary since the relevant employment legislation applied to all employees. The Confederation of British Industry (CBI) indicated that the current regulatory framework provided appropriate levels of employee protection and supported the decision of the Government of the United Kingdom not to ratify the Convention at this time. For the Confederation of Portuguese Industry (CIP), the contents of both Convention No. 94 and

Recommendation No. 84 were out of date and ratification of the Convention was thus unnecessary and inappropriate.

### Subsection C. Worker organizations' views

296. In contrast, the New Zealand Council of Trade Unions supported the formal acceptance of the Convention, and, in the meantime, called for the introduction of a Responsible Contractor Policy for publicly funded services. The German Confederation of Trade Unions (DGB) said that in light of recent developments in the labour market it was necessary to ratify Convention No. 94 as a matter of urgency. Denouncing phenomena of wage dumping on a massive scale as a result of labour market pressures and growing outsourcing and cross-border working arrangements, the German Confederation indicated that trade unions in certain sectors were no longer able to prevent unfair competition at the expense of workers when public contracts were awarded.

297. Moreover, the General Confederation of Portuguese Workers (CGTP-IN) considered that ratification of the Convention would constitute a very positive step since it would contribute to ensuring that workers enjoyed greater protection; it would render the process of public contracting more transparent and it would also induce the State and other public bodies to set an example with regard to the implementation of and compliance with labour standards. For its part, the General Union of Workers of Portugal (UGT) drew attention to the subcontracting relationships which were frequently linked to situations of exploitation and expressed the view that the ratification of Convention No. 94 would constitute an important signal revitalizing and rendering more effective certain labour protective measures. The General Confederation of Labour of Argentina considered that by formally accepting the Convention, which put an emphasis on the obligation to consult with the social partners, the Government would have the occasion to promote consensus-based policies that would facilitate compliance with labour standards and reduce job insecurity.

298. The two Japanese trade union centres, the Japanese Trade Union Confederation – (JTUC–RENGO) and the National Confederation of Trade Unions (ZENROREN), both pointed to structural reasons as justification for urging ratification. According to JTUC–RENGO, prefectural and large city governments have outsourced all operations for government building cleaning, 85 per cent or more of garbage collection, all home-help services and 95 per cent or more of school catering to private contractors, and mentioned that outsourced services now included additionally waste disposal, maintenance of roads, sewage systems and parks, and management of public facilities; 40 per cent of all completed work in the construction sector stemmed from orders placed by government. ZENROREN stated that increasing outsourcing of work as well as services by government agencies and public enterprises had caused public contracts to touch many trades and industries, and the number of persons doing work in the execution of public contracts was growing. Subcontracting practices, methods used for tendering and bidding, and emphasis placed on low-cost bidding were all cited as justification by these centres for ratification and implementation of Convention No. 94 as a matter of urgency.

299. In making the case in favour of the ratification of the Convention, Japan's Joint Struggle Committee of Construction and Allied Industries of Metropolitan Area<sup>3</sup> pointed out that multi-layer subcontracting was predominate in the national construction industry. Those working for very small, subcontractors were often deprived of rights on account of their being outside the scope of narrowly drawn Japanese labour laws. Since public works made up some 40 per cent of construction investment, the Struggle Committee suggested that appropriate condition-improving regulation of this sector would spill over to non-public works. The Struggle Committee further emphasized that the lack of a minimum pricing system for employer estimation of contract bids had caused wage compression pressures leading to "social dumping" in the public works sector; they argued that ratification would help remedy this. Along the same lines, the Korean Confederation of Trade Unions (KCTU) drew attention to the worsening situation of workers in an irregular situation and those workers employed through outsourcing in public contracts and felt it was urgently necessary for the Government of the Republic of Korea to ratify the Convention. It referred, in particular, to the construction industry which was dominated by subcontracts and short-term employment and denounced the fact that labour costs in contract prices were not calculated on the basis of the actual number of workers but as a certain ratio of the overall construction cost, thus leaving workers exposed to low and even sub-minimum pay.

300. In the case of *Finland*, three workers' organizations, i.e. the Central Organization of Finnish Trade Unions (SAK), the Finnish Confederation of Salaried Employees (STTK) and the Confederation of Unions for Academic Professionals (AKAVA), drew attention to the fact that contracts awarded by municipal authorities, who happened to be the biggest employers since they were responsible for sectors such as education, health and social care, and infrastructure (energy, traffic, construction), were excluded from the scope of the Convention which rendered the application of the Convention substantially ineffective. The Trade Union of Civil Engineering, Industry and Planning (SGIP) of The former Yugoslav Republic of Macedonia referred to the working conditions prevailing in the public works sector (undeclared day labourers without health or pension coverage and unlimited work hours), denounced the fact that new draft public procurement legislation currently under discussion did not provide for social or labour clauses, and also denounced the fact that the Economic and Social Council did not address the question of the possible ratification of Convention No. 94 since there was no interest on the employers' side. The Swedish Trade Union Confederation (LO) and the Swedish Confederation of Professional Employees (TCO) referred to the ongoing debate as to whether a possible ratification by Sweden would be compatible with EU Directives on public procurement. They recalled that a favourable opinion had already been given by an independent expert in the context of the Public Procurement Inquiry of 2005, and expressed concern about the fact that the EU trade rules on competition were being used as an excuse not to ratify the Convention.

301. In its comments, the Building and Wood Workers International (BWI) considered that Convention No. 94 was an important and under-appreciated instrument and that its

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<sup>3</sup> The main affiliated unions of the committee are: Kanto Headquarters of Public Workers' Union of the Ministry of Land, Infrastructure and Transport; Workers' Union of the Japan Water Agency; Workers' Union of Urban Renaissance Agency; National Federation of Construction Engineering Workers' Unions for Japan; Kanto District Council of All Japan Construction Transport and General Workers' Union; Yokohama City Labour Union; Port Branch of Tokyo Metropolitan Government Labour Union; Kanagawa Prefecture Construction Labour Union Federation; Tokyo General Construction Workers' Union; Chiba General Construction Workers' Union; and Saitama General Construction Workers' Union.

ratification should be promoted as a matter of priority. BWI suggested that promotional activities should include discussion of public procurement and labour clauses in public contracts at national and regional level. It further proposed that consideration should be given to the possibility of introducing additional labour clauses into the Convention, possibly in the form of a protocol, that would enhance its impact in achieving decent work objectives. Such additional labour clauses would relate to the fundamental ILO Conventions and to key international labour standards on occupational safety and health and social security.

302. By way of conclusion, the Committee observes that apart from some unspecified references to future tripartite consultations and a few standardized statements indicating that due consideration will be given to the possible formal acceptance of the Convention, the majority of member States non-parties to the Convention do not seem disposed to adopt specific legislation regulating labour matters in the execution of public contracts and to incorporate the provisions of Convention No. 94 into their domestic legal systems. This has caused concern to certain workers' organizations for what they consider to be a failure to deal with the structural challenge posed to labour conditions by the combination of increased competition for public contracts and the shortfall of modern labour regimes to ensure the maintenance of satisfactory conditions of work and employment.

### Section 3. Concluding remarks

303. The Committee welcomes the opportunity to examine thoroughly for the first time the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), and Recommendation (No. 84), with a view to contributing to a better understanding of their requirements and shedding some light on their essential purpose. Although the Convention has achieved a reasonable level of ratification, and although its rationale remains meaningful and relevant and the Governing Body has formally identified it as an up to date instrument, its application and scope continue to stir debate.

#### The continuing relevance of the Convention

304. In judging the currency of these instruments, it is useful to note that they were adopted with a view to ensuring that substantial public investment in public works and the purchase of goods and services did not have the effect of depressing working conditions elsewhere in the economy. As was noted in 1948,

the influence of [labour] clauses depends upon the extent to which the Government enters into the economic processes of the country, either as a purchaser of supplies and equipment or as an investor in construction works. In wartime, or in a period of intensive preparation for defence, the volume of government purchases reaches such high levels, and the number of industries in which such purchases represent a significant proportion of total output increases so considerably, that the effects of stipulations in public contracts concerning conditions of work may be felt to a marked degree in the entire economy.<sup>4</sup>

Today, public investment via public contracts represents a high proportion of formal economic activity in both developed and developing countries. The risk remains essentially the same, namely that the winning tender may well be the one which pays the lowest wages, fails to provide safety equipment or coverage for accidents, and which has the largest proportion of informal workers, for whom no tax or social security is paid,

<sup>4</sup> ILC, 31st Session, 1948, *Fair wages clauses in public contracts*, Report VI(b)(1), p. 3.

and who are not covered in practice by any legal or social protection. There is a concern that international competition, especially in the presence of multinational companies with large and efficient infrastructures, pushes bidding enterprises to compress labour costs which most often results in reduced wages, longer hours, and poorer conditions such as inadequate sanitation, accommodation and eating facilities. *Indeed, the observations made 60 years ago are even more valid today, taking also into account modern public authorities' outsourcing of public and support services via contract, and financial investment in public-private partnerships which provide today the types of public goods and services provided in the past through public contracting.*

305. ILO Conventions classically require ratifying States to use the mechanisms of law and enforcement to improve conditions at private workplaces. *The International Labour Conference in 1949 decided that state power in the marketplace, exercised via the labour clauses placed in public contracts, would also be an appropriate mechanism for preventing the downward pressure on labour rights. Equally compelling was the proposition that public funds should be used in socially responsible ways, including in the support of favourable conditions of work achieved through the exercise of the fundamental right to freedom of association and to collective bargaining, or as a result of government intervention on behalf of workers in inherently vulnerable labour market conditions.*

#### The debate in a nutshell

306. The Committee has observed in this survey significant developments bearing on these basic propositions. Although all agree that government contractors must comply with legislation that is applicable to them, there are many who oppose the idea that the modern public procurement system should pursue social policy goals and who favour instead policies which seek best value for money in an environment of fair competition.<sup>5</sup> Those who hold this view consider that contracting methods that today implement globally private corporate social responsibility should not be used to promote social responsibility on the part of contracting public authorities. On this view, public law and enforcement should be the only means available to governments in an increasingly competitive world where public resources are scarce.

307. In the field of workers' rights and conditions of labour, the current trend at both regional and national levels is for labour laws to establish enabling legal frameworks and to avoid setting specific minimum levels of wages and working conditions. However, enabling legal frameworks alone do not necessarily result in living wages and good working conditions as the empirical evidence of increasing income disparity and social inequality demonstrates. Another factor is the relative weakening of workers' organizations in negotiating favourable conditions. *In this environment, the Committee considers that labour clauses that actually set as minimum standards the most advantageous conditions where the work is being done, consistent with the notion of the State as a model employer, continue to be a valid means of ensuring fair wages and conditions of work.*

308. *In the light of the greater impact of globalization on an increasing number of member States and the related heightening of competitive pressures, the Committee*

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<sup>5</sup> See Union of Industrial and Employers' Confederations of Europe (UNICE): *Achieving world-class public procurement across Europe*, 2004. In 2007, the organization changed its name into BUSINESSEUROPE.

***further considers the objectives of the Convention to be even more valid today than they were 60 years ago and to strengthen the ILO's call for fair globalization.***

309. As this survey has shown, other organizations and institutions are currently very active in the field of public procurement and are adopting different approaches. At the same time, certain initiatives include a social dimension referring in general to the ILO fundamental principles and rights at work rather than to Convention No. 94. There are few mandatory rules and where they exist they are vaguely worded, mostly tied to existing laws, and the mechanisms for enforcement are weak. Optional clauses and guidelines are dependent on an employer's willingness to observe fair labour practices. The ILO standards reviewed here may seem to have lost some of their visibility in this debate.

### Bringing the Convention back into focus

310. The response of the Committee to this debate is to note, first, that the International Labour Conference, in adopting the report of its Committee on Sustainable Enterprises in 2007, specifically concluded that Convention No. 94 continues to be valid and up to date, and called upon the Office to promote its ratification and application.<sup>6</sup> The Conference also requested the Office to “work with international, multilateral and bilateral institutions in order to ensure sustainable procurement and lending practices that demonstrate an understanding and application of the principles contained in international labour standards”.<sup>7</sup> Moreover, the Governing Body in 1996 endorsed similar conclusions and resolutions from a Tripartite Meeting on Social and Labour Issues concerning Migrant Workers in the Construction Industry, including even a request to the ILO Director-General “to call on the international and intergovernmental development banks and agencies to take the provisions of Convention No. 94 into consideration when issuing tender specifications for public construction projects”.<sup>8</sup>

***311. Based on the above, the Committee considers that through appropriate engagement at national level much can be done in this vibrant sector to improve the implementation of Convention No. 94 among those countries that have ratified it. Consideration should be given to a programme of promotion and dissemination, involving technical assistance from the Office that reaches beyond ministries***

<sup>6</sup> ILC, report of the Committee on Sustainable Enterprises, resolution concerning the promotion of sustainable enterprises, 96th Session, 2007, *Record of Proceedings*, para. 19, p. 15/103.

<sup>7</sup> *ibid.*, para. 25, p. 15/106. Concerning the role of governments, the Conference invited them to “promote social and environmental standards in public procurement and investment programmes and in lending policies ... [and to] strengthen and reinforce a culture of respect for workers' rights by setting a strong example”, *ibid.*, para. 16(4), p. 15/101.

<sup>8</sup> ILO: *Note on the proceedings*, Tripartite Meeting on Social and Labour Issues concerning Migrant Workers in the Construction Industry, Geneva, 4–8 March 1996, TMMWCI/1996/13. Report of the Committee on Sectoral and Technical Meetings and Related Issues, GB.267/11, conclusions in para. 55, adopted by the Governing Body. GB.267/PV, p. IV/5. Another Tripartite Meeting on the Construction Industry in the Twenty-First Century, held in 2001, addressed the question of procurement and concluded: “Governments and international financing agencies should encourage socially responsible business practices that promote and protect workers' rights in accordance with the ILO Declaration on Fundamental Principles and Rights at Work. The ILO can help to bring this about by providing a platform for social dialogue and for discussions with financial institutions such as the World Bank. In this connection, consideration should be given to the Labour Clauses (Public Contracts) Convention, 1949 (No. 94)”; see *Note on the proceedings*, Tripartite Meeting on the Construction Industry in the Twenty-First Century: Its Image, Employment Prospects and Skill Requirements, Geneva, 10–14 December 2001, TMCIT/2001/12, para. 18, p. 27.



*responsible for labour and into the procurement and public contracting sector itself.<sup>9</sup> Collaboration should be sought with relevant employers' and workers' organizations, national and international industrial organizations and associations, as well as other institutions and organizations that are having a current and ongoing impact on this sector, as can be so vividly seen in this survey. In this respect, the ILO Training Centre in Turin with its expertise in public procurement training could play a more active role in enhancing the visibility of the Convention and familiarizing state and non-state actors with its requirements.*

312. *The Committee also considers that the Office could engage in a dialogue with both the international financial institutions, most notably the development banks and, through appropriate and coordinated procedures, with the international organizations that are having such a profound effect on public procurement with the object of cooperating on national action consistent with obligations under Convention No. 94 where it is ratified. The Committee stresses that Convention No. 94, an instrument binding under international law, adopted through a representative process, supervised transparently and objectively, should be recognized as having continued relevance to the world of work. In this respect, the Committee agrees with the view of the International Labour Conference that cooperation with IFIs and other interested actors is essential and emphasizes that this process should focus on improving synergy and coherence with these institutions and actors.*

## The way forward

313. *The Committee considers that in light of its continued relevance and importance, the Convention should be actively promoted with a view to amplifying its ratification record. At the same time, it notes that on account of major developments that have occurred since its adoption, the Convention does not adequately reflect current procurement patterns. The Committee also considers that the Convention may need to be revisited to address these issues and to enable the ILO to provide an appropriate response to current challenges such as: the increasing role of public-private partnerships; the emergence of new actors, including professional bodies; the absence of specific binding national legal provisions concerning labour conditions in the execution of public contracts and the lack of effective enforcement measures. Were the International Labour Organization to decide upon the partial revision of Convention No. 94, this would provide it with an opportunity to address some of the current limitations of the instrument including the non-coverage of public cross-border contracting and the wide discretion in excluding contracts awarded by non-central authorities. This would also allow the Organization to bring the instrument up to date, taking into account the major developments in the area of public procurement and the increasing role of international actors and institutions, both intergovernmental and non-governmental, and to synchronize its provisions with the*

<sup>9</sup> For example, the Office has had from 2003 a technical Construction Action Programme (CAP) operating in five countries, *Brazil, Egypt, Ghana, India and the United Republic of Tanzania*. The CAP focuses on improving employment practices, occupational safety and health, industry training and employment. The Committee has addressed comments for many years to three of the four ratifying countries involved in the CAP asking that measures be taken to apply the Convention. Recent article 22 reports from these countries give no indication of CAP activities supporting or promoting such measures. The Committee has been unable to otherwise observe such CAP support of this kind; ILO: Evaluation Report – Construction Action Programme (CAP), unpublished document. The Committee would be pleased to see action supporting improved application of the Convention within such a technical cooperation project.

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*principles underlying the eight fundamental ILO Conventions referred to in the 1998 Declaration on Fundamental Principles and Rights at Work thus making it a vital component of the ILO's Decent Work Agenda.*

314. *Even without partial revision,<sup>10</sup> the Committee's view is that the purpose and object of the Convention remain intrinsically sound. In this sense, the Committee considers Convention No. 94 to be an underused instrument. At a time when the ILO core labour standards and the 1998 ILO Declaration are gaining prominence in the field of international human rights law and international trade law, Convention No. 94 offers a unique opportunity and a normative platform on which the ILO could build a comprehensive standard for the promotion of decent labour conditions in public contracts.*

315. *The Committee therefore considers that there is real potential in infusing new life into the Convention and making it the focus for socially responsible public procurement operations. The current proliferation of private voluntary initiatives and other international and regional efforts reviewed in Chapter III above confirms the urgent need for harmonization and standard setting at the international level. In view of these developments, the Committee is of the view that there is a need for the ILO to act even more promptly with a view to marking the Convention's presence and formulating coherent proposals for integrating social criteria into public contracting.*

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<sup>10</sup> It is noted, in this connection, that the Building and Wood Workers' International (BWI) made express reference in its comments to the possibility of partially revising the Convention by means of a Protocol which would broaden the scope of labour clauses to incorporate the principles underlying the ILO fundamental Conventions and other key international labour standards on occupational safety and health and social security.

# Appendix I

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## List of ratifications

Adopted at the 32nd Session of the ILC

Date of entry into force: 20 September 1952  
60 ratifications

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Algeria	19.10.1962	Jamaica	26.12.1962
Antigua and Barbuda	2.2.1983	Kenya	13.1.1964
Armenia	18.5.2005	Malaysia	
Austria	10.11.1951	Sabah	3.3.1964
Bahamas	25.5.1976	Sarawak	3.3.1964
Barbados	8.5.1967	Mauritania	8.11.1963
Belgium	13.10.1952	Mauritius	2.12.1969
Belize	15.12.1983	Morocco	20.9.1956
Brazil	18.6.1965	Netherlands	20.5.1952
Bulgaria	7.11.1955	Nigeria	17.10.1960
Burundi	11.3.1963	Norway	12.2.1996
Cameroon	3.9.1962	Panama	4.6.1971
Central African Republic	9.6.1964	Philippines	29.12.1953
Costa Rica	2.6.1960	Rwanda	18.9.1962
Cuba	29.4.1952	Saint Lucia	14.5.1980
Cyprus	23.9.1960	Saint Vincent and the Grenadines	21.10.1998
Democratic Republic of the Congo	20.9.1960	Sierra Leone	15.6.1961
Denmark	15.8.1955	Singapore	25.10.1965
Djibouti	3.8.1978	Solomon Islands	6.8.1985
Dominica	28.2.1983	Somalia	18.11.1960
Egypt	26.7.1960	Spain	5.5.1971
Finland	22.12.1951	Suriname	15.6.1976
France	20.9.1951	Swaziland	5.6.1981
Ghana	4.4.1961	Syrian Arab Republic	7.6.1957
Grenada	9.7.1979	Tanzania, United Republic of	30.1.1962
Guatemala	13.2.1952	Turkey	29.3.1961
Guinea	12.12.1966	Uganda	4.6.1963
Guyana	8.6.1966	United Kingdom	30.6.1950
Iraq	25.4.1986	denounced 20.9.1982	
Israel	30.3.1953	Uruguay	18.3.1954
Italy	22.10.1952	Yemen	14.4.1969

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## Appendix II

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### Table of reports due and received on Convention No. 94 and Recommendation No. 84 under article 19 of the ILO Constitution (as at 7 December 2007)

Article 19 of the Constitution of the International Labour Organization provides that Members shall “report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body” on the position of their law and practice in regard to the matters dealt with in unratified Conventions and Recommendations. The obligations of Members as regards Conventions are laid down in paragraph 5(e) of the abovementioned article. Paragraph 6(d) deals with Recommendations, and paragraph 7(a) and (b) deals with the particular obligations of federal States. Article 23 of the Constitution provides that the Director-General shall lay before the next meeting of the Conference a summary of the reports communicated to him by Members in pursuance of article 19, and that each Member shall communicate copies of these reports to the representative organizations of employers and workers.

At its 218th Session (November 1981), the Governing Body decided to discontinue the publication of summaries of reports on unratified Conventions and on Recommendations and to publish only a list of reports received, on the understanding that the Director-General would make available for consultation at the Conference the originals of all reports received and that copies of reports would be available to members of delegations on request.

At its 267th Session (November 1996), the Governing Body approved new measures for rationalization and simplification.

From now on, reports received under article 19 of the Constitution appear in simplified form in a table annexed to Report III (Part 1B) of the Committee of Experts on the Application of Conventions and Recommendations.

Requests for consultation or copies of reports may be addressed to the secretariat of the Committee on the Application of Standards.

The reports, which are listed below, refer to the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), and the Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84).

<b>Member States</b>	<b>Convention No. 94</b>	<b>Recommendation No. 84</b>
Afghanistan	–	–
Albania	Received	Received
Algeria	<i>Ratified, 19.10.1962</i>	Received
Angola	–	–
Antigua and Barbuda	<i>Ratified, 2.02.1983</i>	–
Argentina	Received	Received
Armenia	<i>Ratified, 18.05.2005</i>	–

<b>Member States</b>	<b>Convention No. 94</b>	<b>Recommendation No. 84</b>
Australia	Received	Received
Austria	<i>Ratified, 10.11.1951</i>	Received
Azerbaijan	Received	Received
Bahamas	<i>Ratified, 25.05.1976</i>	–
Bahrain	Received	Received
Bangladesh	–	–
Barbados	<i>Ratified, 8.05.1967</i>	–
Belarus	Received	Received
Belgium	<i>Ratified, 13.10.1952</i>	–
Belize	<i>Ratified, 15.12.1983</i>	–
Benin	–	–
Bolivia	–	–
Bosnia and Herzegovina	Received	Received
Botswana	–	–
Brazil	<i>Ratified, 18.06.1965</i>	Received
Brunei Darussalam	–	–
Bulgaria	<i>Ratified, 7.11.1955</i>	Received
Burkina Faso	–	–
Burundi	<i>Ratified, 11.03.1963</i>	–
Cambodia	–	–
Cameroon	<i>Ratified, 3.09.1962</i>	Received
Canada	Received	Received
Cape Verde	–	–
Central African Republic	<i>Ratified, 9.06.1964</i>	–
Chad	–	–
Chile	–	–
China	Received	Received
Colombia	Received	Received
Comoros	Received	Received
Congo	–	–
Costa Rica	<i>Ratified, 2.06.1960</i>	Received
Côte d'Ivoire	–	–
Croatia	Received	Received
Cuba	<i>Ratified, 29.04.1952</i>	Received
Cyprus	<i>Ratified, 23.09.1960</i>	Received
Czech Republic	Received	Received
Democratic Republic of the Congo	<i>Ratified, 20.09.1960</i>	–
Denmark	<i>Ratified, 15.08.1955</i>	Received
Djibouti	<i>Ratified, 3.08.1978</i>	–

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<b>Member States</b>	<b>Convention No. 94</b>	<b>Recommendation No. 84</b>
Dominica	<i>Ratified, 28.02.1983</i>	–
Dominican Republic	Received	Received
Ecuador	Received	Received
Egypt	<i>Ratified, 26.07.1960</i>	Received
El Salvador	Received	Received
Equatorial Guinea	–	–
Eritrea	–	–
Estonia	Received	Received
Ethiopia	Received	Received
Fiji	Received	Received
Finland	<i>Ratified, 22.12.1951</i>	Received
France	<i>Ratified, 20.09.1951</i>	Received
Gabon	–	–
Gambia	–	–
Georgia	–	–
Germany	Received	Received
Ghana	<i>Ratified, 4.04.1961</i>	–
Greece	Received	Received
Grenada	<i>Ratified, 9.07.1979</i>	Received
Guatemala	<i>Ratified, 13.02.1952</i>	Received
Guinea	<i>Ratified, 12.12.1966</i>	–
Guinea-Bissau	–	–
Guyana	<i>Ratified, 8.06.1966</i>	Received
Haiti	–	–
Honduras	Received	Received
Hungary	Received	Received
Iceland	–	–
India	Received	Received
Indonesia	Received	Received
Islamic Republic of Iran	Received	Received
Iraq	<i>Ratified, 25.04.1986</i>	–
Ireland	–	–
Israel	<i>Ratified, 30.03.1953</i>	Received
Italy	<i>Ratified, 22.10.1952</i>	Received
Jamaica	<i>Ratified, 26.12.1962</i>	–
Japan	Received	Received
Jordan	–	–
Kazakhstan	Received	Received
Kenya	<i>Ratified, 13.01.1964</i>	–

Member States	Convention No. 94	Recommendation No. 84
Kiribati	–	–
Republic of Korea	Received	Received
Kuwait	Received	Received
Kyrgyzstan	–	–
Lao People's Democratic Republic	–	–
Latvia	Received	Received
Lebanon	Received	Received
Lesotho	–	–
Liberia	–	–
Libyan Arab Jamahiriya	–	–
Lithuania	Received	Received
Luxembourg	–	–
Madagascar	–	–
Malawi	–	–
Malaysia		
Sabah	<i>Ratified, 3.03.1964</i>	–
Sarawak	<i>Ratified, 3.03.1964</i>	Received
Mali	Received	Received
Malta	–	–
Mauritania	<i>Ratified, 8.11.1963</i>	–
Mauritius	<i>Ratified, 2.12.1969</i>	Received
Mexico	Received	Received
Republic of Moldova	Received	Received
Mongolia	–	–
Montenegro	–	–
Morocco	<i>Ratified, 20.09.1956</i>	Received
Mozambique	Received	Received
Myanmar	Received	Received
Namibia	–	–
Nepal	–	–
Netherlands	<i>Ratified, 20.05.1952</i>	–
New Zealand	Received	Received
Nicaragua	Received	Received
Niger	–	–
Nigeria	<i>Ratified, 17.10.1960</i>	–
Norway	<i>Ratified, 12.02.1996</i>	Received
Oman	Received	Received
Pakistan	–	–
Panama	<i>Ratified, 4.06.1971</i>	Received

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<b>Member States</b>	<b>Convention No. 94</b>	<b>Recommendation No. 84</b>
Papua New Guinea	Received	Received
Paraguay	–	–
Peru	Received	Received
Philippines	<i>Ratified, 29.12.1953</i>	–
Poland	Received	Received
Portugal	Received	Received
Qatar	Received	Received
Romania	Received	Received
Russian Federation	–	–
Rwanda	<i>Ratified, 18.09.1962</i>	–
Saint Kitts and Nevis	–	–
Saint Lucia	<i>Ratified, 14.05.1980</i>	–
Saint Vincent and the Grenadines	<i>Ratified, 21.10.1998</i>	–
Samoa	–	–
San Marino	–	–
Sao Tome and Principe	–	–
Saudi Arabia	Received	Received
Senegal	Received	Received
Serbia	–	–
Seychelles	–	–
Sierra Leone	<i>Ratified, 15.06.1961</i>	–
Singapore	<i>Ratified, 25.10.1965</i>	Received
Slovakia	–	–
Slovenia	–	–
Solomon Islands	<i>Ratified, 6.08.1985</i>	–
Somalia	<i>Ratified, 18.11.1960</i>	–
South Africa	Received	Received
Spain	<i>Ratified, 5.05.1971</i>	–
Sri Lanka	–	–
Sudan	–	–
Suriname	<i>Ratified, 15.06.1976</i>	Received
Swaziland	<i>Ratified, 5.06.1981</i>	–
Sweden	Received	Received
Switzerland	Received	Received
Syrian Arab Republic	<i>Ratified, 7.06.1957</i>	–
Tajikistan	–	–
United Republic of Tanzania	<i>Ratified, 30.01.1962</i>	–
Thailand	Received	Received
The former Yugoslav Republic of Macedonia	–	–



<b>Member States</b>	<b>Convention No. 94</b>	<b>Recommendation No. 84</b>
Timor-Leste	–	–
Togo	–	–
Trinidad and Tobago	Received	Received
Tunisia	Received	Received
Turkey	<i>Ratified, 29.03.1961</i>	–
Turkmenistan	–	–
Uganda	<i>Ratified, 4.06.1963</i>	–
Ukraine	Received	Received
United Arab Emirates	–	–
United Kingdom	Received	Received
United States	Received	Received
Uruguay	<i>Ratified, 18.03.1954</i>	Received
Uzbekistan	–	–
Venezuela	Received	Received
Viet Nam	Received	Received
Yemen	<i>Ratified, 14.04.1969</i>	–
Zambia	–	–
Zimbabwe	Received	Received

## Appendix III

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### Legislative texts on labour clauses in public contracts by country <sup>1</sup>

#### *Algeria*

1. Presidential Decree No. 02-250 of 24 July 2002 on public procurement regulations.
2. Order of 21 November 1964 establishing the general administrative clauses applicable to public works.

#### *Antigua and Barbuda*

1. Tenders Board Act Cap. 424A Vol. 9 (1992).

#### *Argentina*

1. Act No. 13.064 of 6 October 1947 on Public Works.  
[http://www.anses.gov.ar/p-contrataciones/normas/ley\\_13064.htm](http://www.anses.gov.ar/p-contrataciones/normas/ley_13064.htm)
2. Act No. 22.250 of 11 July 1980 on the status of workers in the construction industry.  
<http://www.construsur.com.ar/index.php?name=News&file=article&sid=87>
3. Rules on contracts concluded by the national administration, approved by Decree No. 1023/2001 of 13 August 2001.  
<http://www.enre.gov.ar/web/bibliotd.nsf/042563ae0068864b04256385005ad0be/9e8f9f23ec30382703256aaa0046ff6a?OpenDocument>
4. Rules governing the acquisition, alienation and hiring of goods and services of the State, approved by Decree No. 436/00 of 30 May 2000.  
<http://www.mecon.gov.ar/digesto/decretos/2000/decreto436.htm>

#### *Austria*

1. Federal Law on Public Procurement (BGB1 I No. 17/2006) (Bundesvergabeengesetz 2006).
2. Federal Act on the Award of Contracts (BGB1 I No. 56, as amended in BGB1. I. No. 120/1999).

#### *Azerbaijan*

1. Labour Code of 1 February 1999.
2. Law on Public Procurements of 27 December 2001.
3. Decree 668 of 29 January 2002 on application of the Law on Public Procurement.

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<sup>1</sup> Ratifying States are indicated in italics.

4. Decision No. 34 of 28 February 2003 of the Cabinet of Ministers On approval of sample of procurement contract for goods, works and services.

*Bahamas*

1. Circular No. 2 of 26 October 1965.
2. Circular No. 1/1966 of 19 January 1966.
3. General Conditions of Government Contracts.

*Barbados*

1. Labour Clauses (Public Contracts) Act (Cap. 349) as amended.  
[http://www.caricomlaw.org/docs/Labour%20Clauses%20\(Public%20Contracts\).pdf](http://www.caricomlaw.org/docs/Labour%20Clauses%20(Public%20Contracts).pdf)

*Belarus*

1. Act No. 2588-XII of 24 November 1993, as amended by Act No. 162-3 of 20 July 2006.
2. Civil Code, No. 218-3 of 7 December 1998, as amended up to 29 December 2006.
3. Labour Code of 26 July 1999 (Text No. 432).

*Belgium*

1. Law of 24 December 1993 on public procurement.

*Belize*

1. Labour Act, Chapter 297 of the Laws of Belize, Revised Edition 2000.  
<http://www.belize-law.org/lawadmin/index2.html>
2. Contractor-General Act, Chapter 6 of the Laws of Belize, Revised Edition 2000.  
<http://www.belize-law.org/lawadmin/index2.html>

*Benin*

1. Act No. 98-004 of 27 January 1998 establishing the Labour Code.

*Bolivia*

1. Supreme Decree of 26 May 1939 to issue the Labour Code, as amended.
2. Regulatory Decree No. 244 of 23 August 1943 regulating the General Labour Act, as amended.

*Brazil*

1. Law No. 8666/93 of 21 June 1993 on public procurement, as amended.
2. Decree No. 2271/97 on public contracting of services.
3. Normative Instructions of the Secretariat of the Federal Administration No. 8/SAF of 26 August 1994.
4. Normative Instruction IN/MARE No. 18/97 relating to procedures preparatory to tendering and subcontracted services.

*Brunei Darussalam*

1. Labour Act (Chapter 93), 11 of 1954, as amended (revised edition 2002, 15 April 2002).  
<http://www.commonlii.org/bn/legis/193127/>

2. Labour (Public Contracts) Rules, S 80/71.  
<http://www.commonlii.org/bn/legis/la931cr442/>

#### *Bulgaria*

1. Labour Code (State Gazette Nos 26–27/1986), as amended to 2004.  
<http://www.mlsp.government.bg/en/docs/labour/Labour%20code%20consolidated%20en.pdf>
2. Public Procurement Law (State Gazette No. 28/06.04.2004, as subsequently amended).
3. Rules for the implementation of the Public Procurement Law (State Gazette No. 84/27.09.2004).  
[http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/rules\\_pplaw.pdf](http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/rules_pplaw.pdf)
4. Ordinance for the award of small public procurement contracts (State Gazette No. 84/27.09.2004).  
[http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/small\\_contracts.pdf](http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/small_contracts.pdf)
5. Ordinance for the terms and conditions for the award of special public procurement contracts (State Gazette No. 80/14.09.2004).  
[http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/ordinace\\_special.pdf](http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/ordinace_special.pdf)
6. Status of the Public Procurement Agency (State Gazette No. 24/23.03.2004), as amended in 2005 (State Gazette No. 78/30.10.2005).  
<http://www.aop.bg/fckedit2/user/File/en/Normativna%20baza/uspr.pdf>

#### *Burundi*

1. Presidential Decree No. 100/49 of 11 July 1986 on specific measures to guarantee minimum conditions to workers employed by a public contractor.
2. Decree-Law No. 1/015 of 19 May 1990 on public procurement.
3. Decree No. 100/120 of 18 August 1990 on general conditions of contract.
4. Decree-Law No. 1/037 of 7 July 1993 on amendment of the Labour Code.  
<http://droit.francophonie.org/doc/html/bi/loi/fr/1993/1993dfbilgfr3.html>
5. National Inter-professional Collective Agreement of 3 April 1980.

#### *Cameroon*

1. Decree No. 95/101 of 9 June 1995 on public procurement regulations.
2. Decree No. 95/102 of 9 June 1995 on the mandate, organization and operation of the committees on public contracts.
3. Decree No. 2000/156 of 30 June 2000 amending certain provisions of Decree No. 95/102 of 9 June 1995.

#### *Canada*

##### *Federal jurisdiction*

1. Fair Wages and Hours of Labour Act.  
<http://laws.justice.gc.ca/en/ShowFullDoc/cs/L-4///en>
2. Fair Wages and Hours of Labour Regulations.  
<http://laws.justice.gc.ca/en/ShowFullDoc/cr/C.R.C.-c.1015///en>

3. Public Works and Government Services Canada (PWGSC) Supply Manual.  
<http://www.pwgsc.gc.ca/acquisitions/text/sm/toc-e.html>
4. Public Works and Government Services Canada (PWGSC) Standard Acquisition Clauses and Conditions (SACC) Manual.  
<http://sacc.pwgsc.gc.ca/sacc/download-e.jsp>

### *Provinces and territories*

#### Alberta

5. Employment Standards Code, Chapter E-9.  
<http://www.qp.gov.ab.ca/documents/acts/E09.cfm>.
6. Employment Standards Regulation (AR 14/97).  
[http://www.qp.gov.ab.ca/documents/regs/1997\\_014.cfm](http://www.qp.gov.ab.ca/documents/regs/1997_014.cfm)
7. Occupational Health and Safety Act.  
<http://employment.alberta.ca/cps/rde/xchg/hre/hs.xsl/295.html>

#### British Columbia

8. Employment Standards Act, Chapter 113.  
[http://www.qp.gov.bc.ca/statreg/stat/E/96113\\_01.htm](http://www.qp.gov.bc.ca/statreg/stat/E/96113_01.htm)

#### Manitoba

9. The Government Purchases Act.  
<http://web2.gov.mb.ca/laws/statutes/ccsm/g090e.php>

#### New Brunswick

10. Employment Standards Act, Chapter E-7.2, Parts 3, 4 and 5.  
<http://www.gnb.ca/acts/acts/e-07-2.htm>
11. New Brunswick Regulation 90-149 under the Employment Standards Act (O.C. 90-028).

#### Newfoundland and Labrador

12. Labour Standards Act, Chapter L-2.  
<http://www.hoa.gov.nl.ca/hoa/statutes/102.htm>
13. Occupational Health and Safety Act.
14. Public Tender Act.  
<http://www.hoa.gov.nl.ca/hoa/statutes/p45.htm>

#### Ontario

15. Employment Standards Act, Chapter 41.  
[http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/00e41\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/00e41_e.htm)
16. Occupational Health and Safety Act.

#### Quebec

17. Labour Standards Act, RSQ, Chapter N-1.1.  
<http://publicationsduquebec.gouv.qc.ca/en/frame/index.html>

## Yukon

18. Yukon Employment Standards Act.  
<http://www.community.gov.yk.ca/labour/esa.html>
19. Order Amending the Fair Wage Schedule (2005) (O.I.C. 2005/193).
20. Occupational Health and Safety Act.

### *Central African Republic*

1. Decree No. 61/135 of 19 August 1961 on administrative provisions applicable to all contracts for supplies, services and works awarded in the name of the Central African Republic.
2. Decree No. 61/136 of 19 August 1961 on general administrative clauses applicable to the execution of contracts for public works.
3. Decree No. 61/137 of 19 August 1961 on general administrative clauses applicable to the execution of contracts for supplies and services.
4. Labour collective agreement of enterprises of construction and public works.

### China

1. Government Procurement Law.

### Colombia

1. Law No. 80 of 28 October 1993 on the General Public Administration Contracting Statute.  
[http://www.ramajudicial.gov.co/csj\\_portal/Min/10801993.htm](http://www.ramajudicial.gov.co/csj_portal/Min/10801993.htm)
2. Law No. 789 of 27 December 2002 on labour and social protection.  
<http://www.consultoriotributario.com/normatividad/2002/leyes/L789-02/1L789-02.htm>
3. Law No. 828 of 10 July 2003 on control of fraud against the social security system.  
<http://www.secretariasenado.gov.co/leyes/L0828003.htm>

### *Cyprus*

1. Notification of 21 September 1977 on Model Rules in connection with labour clauses in Government and such other public contracts as may be entered into with assistance from Government by way of grant, loan, subsidy, licence, guarantee or other similar form of assistance.
2. Law for the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts and Related Matters No. 12(I)2006.

### Czech Republic

1. Public Procurement Act No. 40/2004 Coll.

### *Denmark*

1. Circular Letter No. 114 of the Ministry of Labour of 18 May 1966 respecting the application of the Convention No. 94 concerning Labour Clauses in Public Contracts adopted by the International Labour Conference.
2. Circular Letter No. 115 of the Ministry of Labour of 27 June 1990.

3. Act No. 933 of 15 December 1999 on posting of workers implementing the Directive of the European Parliament and of the Council of the European Union Directive 96/71/EC of 16 December 1996.
4. Consolidated Competition Act No. 539 of 28 June 2002.  
<http://www.ks.dk/english/competition/legislation/comp-act539-02/>
5. Act on the Complaints Board for Public Procurement of 31 May 2000, as amended by Act No. 431 of 6 June 2005.  
<http://www.ks.dk/english/procurement/legislation/act/>

*Dominica*

1. Fair Wages Rules, 1954, as amended.

Ecuador

1. Public Procurement Act 1990.

*Egypt*

1. Public Tenders Law No. 89/1998.
2. Tenders and Auctions Law No. 9/1983.
3. Labour Law No. 12 of 2003.
4. Executive Regulations of the Tenders and Auctions Law.

El Salvador

1. Law of Acquisitions and Contracts for Public Administration Institutions (Legislative Decree No. 868 of 5 April 2000).

Estonia

1. Public Procurement Act of 19 October 2000.

*Finland*

1. Public Procurement Act (348/2007).
2. Law on procurement by units operating in the water and energy management, traffic and postal services (349/2007).
3. Employment Contracts Act (55/2001), as amended.

*France*

1. Code on public contracts, adopted by Decree No. 2006-975 of 1 August 2006.  
<http://www.achatpublic.com/dmp/cmp/cmp2006>
2. General administrative clauses applicable to contracts for public works, Decree No. 76-87 of 21 January 1976.  
[http://www.minefi.gouv.fr/fonds\\_documentaire/daj/marches\\_publics/ccag/ccag\\_tx.htm](http://www.minefi.gouv.fr/fonds_documentaire/daj/marches_publics/ccag/ccag_tx.htm)
3. General administrative clauses applicable to public contracts for supplies and services, Decree No. 77-699 of 27 May 1977.  
[http://www.minefi.gouv.fr/fonds\\_documentaire/daj/marches\\_publics/ccag/ccag\\_fcs.htm](http://www.minefi.gouv.fr/fonds_documentaire/daj/marches_publics/ccag/ccag_fcs.htm)
4. General administrative clauses applicable to public contracts for intellectual services, Decree No. 78-1306 of 26 December 1978.

[http://www.minefi.gouv.fr/fonds\\_documentaire/daj/marches\\_publics/ccag/ccag\\_pi.htm](http://www.minefi.gouv.fr/fonds_documentaire/daj/marches_publics/ccag/ccag_pi.htm)

5. General administrative clauses applicable to industrial contracts, Decree No. 80-809 of 14 October 1980.

[http://www.minefi.gouv.fr/fonds\\_documentaire/daj/marches\\_publics/ccag/ccag\\_mi.htm](http://www.minefi.gouv.fr/fonds_documentaire/daj/marches_publics/ccag/ccag_mi.htm)

#### *Ghana*

1. Labour Act, 2003 (Act 651).

[http://www.ilo.org/dyn/natlex/natlex\\_browse.details?p\\_lang=en&p\\_country=GHA&p\\_classification=01.02&p\\_origin=COUNTRY&p\\_sortby=SORTBY\\_COUNTRY](http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=GHA&p_classification=01.02&p_origin=COUNTRY&p_sortby=SORTBY_COUNTRY)

2. Public Procurement Act, 2003 (Act 663).

<http://www.ghana.gov.gh/pbcopin/Public%20Procurement%20Act%202003%20Act%20663.pdf>

3. Standard Tender Evaluation Format – Procurement of Goods or Works, Public Procurement Board.

[http://www.ghana.gov.gh/dexadd/procurement/EVALUATION\\_FORMAT.pdf](http://www.ghana.gov.gh/dexadd/procurement/EVALUATION_FORMAT.pdf)

4. Procurement of Goods – National Competitive Tender, Public Procurement Board.

[http://www.ghana.gov.gh/dexadd/procurement/NCT\\_GOODS.pdf](http://www.ghana.gov.gh/dexadd/procurement/NCT_GOODS.pdf)

#### *Grenada*

1. Employment Act, 1999 (Act No. 14 of 1999).

#### *Guyana*

1. Fair Wages Rules, 1946, as amended.

#### *Honduras*

1. Decree No. 74-2001 of 1 June 2001 issuing the Public Procurement Act.

#### *Hungary*

1. Labour Code, Act XXII of 1992.
2. Act CXXIX of 2003 on Public Procurement.
3. Act XXXVIII of 1992 on Public Finances.

#### *India*

1. Contract Labour (Regulation and Abolition) Act, 1970.

#### *Israel*

1. Treasury Order No. 109/62 of 20 August 1962.
2. Mandatory Tenders Law, 5752-1992.
3. Mandatory Tenders Regulations (Preference for Israel Products and Mandatory Business Cooperation) 5755-1995.
4. Employment of Employees by Manpower Contractors Law.
5. Temporary Economic Provision regarding Protection of Rights of Employees Hired by Service Contractors.



*Italy*

1. Civil Code.
2. Presidential Decree No. 1063 of 16 July 1962.
3. Act No. 55 of 9 March 1990.
4. Act No. 300 of 20 May 1970.
5. Legislative Decree No. 163/2006 of 12 April 2006.
6. Legislative Decree No. 223 of 4 July 2006, transposed with modifications into Act No. 248 of 4 August 2006 issuing urgent measures to combat clandestine work and to promote safety at the workplace.

*Jamaica*

1. The Government Procurement Procedure Handbook (May 2001), as amended in September 2005.  
<http://www.ocg.gov.jm/gpphandbook.php>
2. The Contractor-General Act, 7 October 1983, as amended in 1999.
3. The Contractors Levy Act of 23 December 1985.
4. Financial Administration and Audit Act of 15 June 1959.

*Japan*

1. Law No. 127 of 2000 concerning the improvement of bidding and contracting for public works.
2. Labour Standards Law (Law No. 49 of 1947), as amended.

*Kenya*

1. Ministry of Education, Labour and Lands Circular No. 4/55 of 14 September 1955 on fair wages clauses in government contracts.
2. Ministry of Works, Contract Agreement – 1970 Edition.

*Republic of Korea*

1. Special Conditions of General Service Contracts.
2. Criteria for the Calculation of Prospective Prices.

*Kuwait*

1. Private Sector Labour Code (Act No. 38 of 1964).
2. Oil Sector Labour Code (Act No. 28 of 1969).

*Latvia*

1. Public Procurement Law of 6 April 2006.
2. Labour Law of 20 June 2001.

*Lebanon*

1. Labour Code, Act of 23 September 1946, as amended up to 24 July 1996.

#### Lithuania

1. Law On Public Procurement of 13 August 1996, No. I-1491, as amended by Law of 22 December 2005, No. X-471.

#### *Malaysia (Sabah)*

1. Labour (Public Contracts) Rules, 1951.

#### *Malaysia (Sarawak)*

1. General Conditions of Contract issued by the Public Works Department Sarawak.

#### Mali

1. Decree No. 95-401 PRM of 10 November 1995 establishing the Code on Public Procurement.
2. Act No. 92-020 of 23 September 1992 establishing the Labour Code.
3. Act No. 99-041 of 12 August 1999 establishing the Social Security Code.

#### *Mauritania*

1. Decree No. 93-011 of 10 January 1993 on public procurement regulations.
2. Order No. 035 of 3 June 1992 on the insertion of labour clauses into all administrative contracts awarded in the name and on behalf of the State, local authorities and public institutions.

#### *Mauritius*

1. Labour Act No. 50 of 30 December 1975, as amended to 2004.  
Link to the Amendment of 2004:  
<http://www.gov.mu/portal/site/laboursite/menuitem.a6a9af165cce6fbb93347524e2b521ca/>
2. Central Tender Board Act, 2000.  
<http://www.gov.mu/portal/site/ctb/menuitem.4760f930457fbff4bbb2761079b521ca/>
3. Public Procurement Act, No. 334 of 27 December 2006.

#### Mexico

1. Law of 4 January 2000 on Procurement, Leases and Services of the Public Sector, as amended.  
<http://leyco.org/mex/fed/14.html>
2. Law of 4 January 2000 on Public Works and Related Services, as amended.  
<http://www.funcionpublica.gob.mx/unaopspf/dgaop/lopt1cu.htm>

#### Republic of Moldova

1. Law No. 96-XVI of 13 April 2007 on public procurement.
2. Regulations on public procurement of works, Government decision No. 1123 of 26 September 2003.
3. Regulations on procurement of services, Government decision No. 44 of 13 January 2006.
4. Regulations on single-source public procurement No. 951 of 4 August 2003.

5. Regulations on procurement of goods and services by request for quotations No. 832 of 13 August 2001.

*Morocco*

1. Decree No. 2-98-482 of 30 December 1998 on the conditions and forms of public procurement.  
<http://www.maroc-business.com/reglement/decret/DECRET%20N%202-98-482.htm>
2. General administrative clauses applicable to contracts for public works, Decree No. 2-99-1087 of 4 May 2000.  
<http://www.maroc-business.com/reglement/decret/CCAG-T.htm>
3. General administrative clauses applicable to contracts for services of study and project management, Decree No. 2-01-2332 of 4 June 2002.  
<http://www.maroc-business.com/reglement/decret/CCADAG-EMO.htm>

*Netherlands*

1. Decree of 16 July 2005 regulating public procurement procedures for works, supplies and services.

*New Zealand*

1. Public Bodies Contracts Act 1959.
2. Employment Relations Act 2000 (No. 24).  
<http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/024.html>

*Nicaragua*

1. Act No. 323 of 2000 on Public Contracts.

*Niger*

1. Ordinance No. 96-039 of 29 June 1996 establishing the Labour Code.

*Nigeria*

1. Administrative circular No. 57/1946 of 30 August 1946, as amended.
2. Labour Act (Decree No. 21 of 1974), Laws of the Federation of Nigeria, 1990 (Cap. 198).  
<http://www.nigeria-law.org/>

*Norway*

1. Act (No. 62 of 2005) respecting working environment, working hours and employment protection, etc. (Working Environment Act).  
<http://www.arbeidstilsynet.no/regelverk/lover/pdf/7529.pdf>
2. Public Procurement Act, 1999.  
<http://odin.dep.no/fad/norsk/tema/offentlig/p10002770/024081-990048/dok-bn.html>

*Panama*

1. Law No. 22 of 27 June 2006 on Public Contracts.
2. Executive Decree No. 366 of 28 December 2006 on regulations concerning Law No. 22 on Public Contracts.

#### Papua New Guinea

1. Public Finance Management Act 1995.  
<http://www.finance.gov.pg/fmm/pfma.html>
2. Goods Procurement Manual.

#### Peru

1. Law on Public Contracts and Procurement No. 083-2004-PCM of 26 November 2004.
2. Regulations on Public Contracts and Procurement No. 084-2004-PCM of 26 November 2004.

#### *Philippines*

1. Government Procurement Reform Act (Republic Act 9184) of 10 January 2003.  
[http://www.gppb.gov.ph/laws\\_rules/laws/RA\\_9184.pdf](http://www.gppb.gov.ph/laws_rules/laws/RA_9184.pdf)
2. Implementing Rules and Regulations of Republic Act 9184 of 18 September 2003.  
[http://www.gppb.gov.ph/laws\\_rules/laws/IRR-A-amended.pdf](http://www.gppb.gov.ph/laws_rules/laws/IRR-A-amended.pdf)

#### Poland

1. Labour Code, Act of 26 June 1974, as amended up to 1996.
2. Public Procurement Law, Act of 29 January 2004, as amended by Act of 7 April 2006.

#### Portugal

1. Legislative Decree No. 59/99 of 2 March 1999 concerning public works contracts.
2. Legislative Decree No. 197/99 of 8 June 1999 concerning procurement of goods and services.
3. Legislative Decree No. 223/2001 of 9 August 2001 concerning procurement contracts relating to water, energy, transport and telecommunications sectors.

#### Qatar

1. Labour Act No. 14 of 2004.  
[http://www.qatarembassy.net/Qatar\\_Labour\\_Law.asp](http://www.qatarembassy.net/Qatar_Labour_Law.asp)

#### Romania

1. Emergency Regulation No. 34 of 19 April 2006 on the award of the public procurement contracts, public works concession contracts and services concession contracts.
2. Act No. 337 of 17 April 2007 approving Emergency Regulation No 34 of 19 April 2006 (with amendments).

#### *Rwanda*

1. Law No. 12/2007 of 27 March 2007 on Public Procurement.  
[http://www.ntb.gov.rw/en/public\\_law.pdf](http://www.ntb.gov.rw/en/public_law.pdf)

#### *Saint Lucia*

1. Labour Clauses (Public Contracts) Ordinance, 1959, as amended.

### Saudi Arabia

1. Royal Decree No. M/51 of 19 September 2006 promulgating the Labour Code.
2. Saudi Government System of Purchasing and Competition promulgated by Royal Decree No. M/58 of 27 September 2006.

### Senegal

1. Public Procurement Act, Act No. 2002-550 of 30 May 2002.
2. Decree No. 2007-545 of 25 April 2007 Act establishing the Code on Public Contracts.  
<http://www.gouv.sn/textes/marches.pdf>
3. Act No. 97-17 of 1 December 1997 establishing the Labour Code.

### Singapore

Relevant legislation can be accessed at: <http://statutes.agc.gov.sg/>

1. Employment Act (Ch. 91), as amended to 30 April 1996.
2. Government Procurement Act (Chapter 120) of 1997, as amended in 2004.
3. Public Sector Standard Conditions of Contract (PSSCOC) for Construction Works (fourth edition, March 2005) and Supplement (fourth edition, March 2005).  
[http://www.bca.gov.sg/PSSCOC/psscoc\\_construction\\_works.html](http://www.bca.gov.sg/PSSCOC/psscoc_construction_works.html)
4. Public Sector Standard Conditions of Contract (PSSCOC) for Design and Build (third edition, March 2005) and Supplement (third edition, March 2005).  
[http://www.bca.gov.sg/PSSCOC/psscoc\\_design\\_build.html](http://www.bca.gov.sg/PSSCOC/psscoc_design_build.html)
5. Public Sector Standard Conditions of Contract for Nominated Subcontract (fourth edition, March 2005) and Supplement (fourth edition, March 2005).  
[http://www.bca.gov.sg/PSSCOC/psscoc\\_nsc.html](http://www.bca.gov.sg/PSSCOC/psscoc_nsc.html)
6. Building and Construction Industry Security of Payment Act 2004 (Chapter 30B), as amended in 2006.

### Solomon Islands

1. The Labour (Fair Wages Clauses in Public Contracts) Rules, Legal Notice No. 112 of 1968.

### South Africa

1. Construction Industry Development Board Act (Act No. 38 of 2000).

### Spain

1. Decree No. 3854/1970 of 31 December 1970 on general administrative clauses for public works contracts.
2. Royal Legislative Decree No. 2/2000 of 16 June 2000 approving the consolidated text of Law on Public Administration Contracts.  
<http://vlex.com/vid/172318>
3. Royal Decree No. 1098/2001 of 12 October 2001 approving the General Regulations on the Law on Public Administration Contracts.  
<http://vlex.com/vid/174080>

*Suriname*

1. Labour Act, Decree No. 163 of 1963.

*Swaziland*

1. Employment Act, 1980.

*Sweden*

1. Public Procurement Act (SFS 1992:1528), as amended.
2. Posting of workers Act (SFS 1999:678).

*Switzerland*

1. Federal Procurement Law of 16 December 1994.
2. Public Procurement Rules (OMP) of 11 December 1995.
3. DETEC Rules on the exemption from the Public Procurement Law, of 18 July 2002.
4. DFE Rules modifying value thresholds for 2007 of 30 November 2006.
5. Rules on the organization of Confederation public procurement (Org-OMP) of 22 November 2006.
6. Federal Decree of 30 April 1997 approving extension of the area of application of the WTO agreement on public procurement.
7. Federal Labour Act of 13 March 1964, as amended.  
[http://www.admin.ch/ch/f/rs/c822\\_11.html](http://www.admin.ch/ch/f/rs/c822_11.html)

*Syrian Arab Republic*

1. Act No. 51 of 9 December 2004 approving the Uniform System of Contracts for Public Entities.  
<http://www.cfssyria.org/formtender/916e.pdf>
2. Decree No. 450 of 9 December 2004 issuing the Book of General Conditions for the Uniform System of Contracts for Public Entities.  
<http://www.cfssyria.org/formtender/918e.pdf>
3. Circular No. 70/B/2174/15 of 22 July 1969 concerning the payment of wages due to workers engaged under public contracts.
4. Act No. 91 of 5 April 1959 establishing the Labour Code, as amended.

*United Republic of Tanzania*

1. Public Procurement Act, 2004.
2. Public Procurement (Goods, Works, Non-Consultant Services and Disposal of Public Assets by Tender) Regulations, 2005, Government Notice No. 97.
3. Public Procurement (Selection and Employment of Consultants) Regulations, 2005, Government Notice No. 98.

*Thailand*

1. Regulation of the Office of the Prime Minister on Procurement 1992, as amended to No. 6, 2002.
2. Labour Protection Act BE 2541 (1998).

### Trinidad and Tobago

1. Memorandum by the Acting Director of Contracts (undated) on “Fair Wages” Clauses for use, in Contracts for Government and Statutory Boards.
2. Occupational Safety and Health Act, No. 1 f 2004, as amended by the Occupational Safety and Health (Amendment) Act, 2006.

### Tunisia

1. Labour Code, Act No. 66-27 of 30 April 1966, as last amended by Act No. 94-29 of 21 February 1994 and Act No. 96-62 of 15 July 1996.
2. Public Procurement Rules, Decree No. 2002-3158 of 17 December 2002, as last amended by Decree No. 2006-2167 of 10 August 2006.
3. General Conditions of Contract applicable to public works, by order of the Prime Minister of 12 October 1990.
4. General Conditions of Contract applicable to studies by order of the Prime Minister of 11 October 1994.
5. General Conditions of Contract applicable to supplies, goods and services.
6. Prime Minister’s Circular No. 35 of 30 July 1999 and No. 22 of 28 August 2003 concerning subcontracting in public administration and enterprises.

### Turkey

1. Public Procurement Law No. 4734 of 4 January 2002, as amended.
2. Public Procurement Contracts Law No. 4735 of 5 January 2002, as amended.
3. Decree No. 88/13168 of 18 July 1988 on general principles concerning conditions of employment on contracted out public works.
4. General Specifications for Public Works.

### Uganda

1. Employment Decree (No. 4 of 1975).
2. Employment Regulations (No. 41 of 1977).
3. General Notice No. 9 of 1963 on fair wages clause in government contracts.
4. Contract Agreement and Schedules of Conditions for Building Works.
5. Public Procurement and Disposal of Public Assets Act, 2003.
6. Public Procurement and Disposal of Public Assets Regulations, 2003.
7. Local Governments (Amendment) Act, 2006.

### Ukraine

1. Act on procurement of goods, works and services for public funds.

### United Kingdom

1. Transfer of Undertakings (Protection of Employment) Regulations 2006.
2. Local Government Act 1999.
3. Code of Practice on Workforce Matters in Local Authority Service Contracts.
4. Code of Practice on Workforce Matters in Public Sector Service Contracts.

## United States

### *Federal legislation*

1. Davis-Bacon Act, as amended (40 U.S.C. 3141, et seq.).
2. McNamara-O'Hara Service Contract Act (41 U.S.C. 351, et seq.).
3. Walsh-Healey Public Contracts Act (41 U.S.C. 35, et seq.).

### *Uruguay*

1. Decree No. 475/005 of 14 November 2005.
2. Law No. 18.098 of 12 January 2007.
3. Law No. 18.099 of 24 January 2007.
4. Decree No. 108/007 of 22 March 2007.
5. Decree No. 186/004 of 8 June 2004.

### *Bolivarian Republic of Venezuela*

1. Law on Public Contracts of 13 November 2001.  
<http://www.mintra.gov.ve/legal/leyesordinarias/lleydereformaparcialdeleydelicitaciones.html>

### *Viet Nam*

1. Act of 23 June 1994 establishing the Labour Code.  
[http://www.ivietnam.com/eng/business/LAWS/labourcode/printable/English/labor\\_law/laborcode.htm](http://www.ivietnam.com/eng/business/LAWS/labourcode/printable/English/labor_law/laborcode.htm)
2. Law on Bidding of 29 November 2005.

### *Yemen*

1. Bids, Tenders and Government Warehouses Act No. 3 of 1997.
2. Civil Code No. 19 of 1992.

### *Zimbabwe*

1. Labour Act (Chapter 28:01).



## Appendix IV

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### **Text of Convention No. 94 and Recommendation No. 84 concerning labour clauses in public contracts**

#### CONVENTION NO. 94

The General Conference of the International Labour Organisation,  
Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and  
Having decided upon the adoption of certain proposals concerning labour clauses in public contracts, which is the sixth item on the agenda of the session, and  
Having determined that these proposals shall take the form of an international Convention, adopts this twenty-ninth day of June of the year one thousand nine hundred and forty-nine the following Convention, which may be cited as the Labour Clauses (Public Contracts) Convention, 1949:

##### *Article 1*

1. This Convention applies to contracts which fulfil the following conditions:
  - (a) that one at least of the parties to the contract is a public authority;
  - (b) that the execution of the contract involves:
    - (i) the expenditure of funds by a public authority; and
    - (ii) the employment of workers by the other party to the contract;
  - (c) that the contract is a contract for:
    - (i) the construction, alteration, repair or demolition of public works;
    - (ii) the manufacture, assembly, handling or shipment of materials, supplies or equipment; or
    - (iii) the performance or supply of services; and
  - (d) that the contract is awarded by a central authority of a Member of the International Labour Organisation for which the Convention is in force.
2. The competent authority shall determine the extent to which and the manner in which the Convention shall be applied to contracts awarded by authorities other than central authorities.
3. This Convention applies to work carried out by subcontractors or assignees of contracts; appropriate measures shall be taken by the competent authority to ensure such application.

4. Contracts involving the expenditure of public funds of an amount not exceeding a limit fixed by the competent authority after consultation with the organisations of employers and workers concerned, where such exist, may be exempted from the application of this Convention.

5. The competent authority may, after consultation with the organisations of employers and workers concerned, where such exist, exclude from the application of this Convention persons occupying positions of management or of a technical, professional or scientific character, whose conditions of employment are not regulated by national laws or regulations, collective agreement or arbitration award and who do not ordinarily perform manual work.

#### *Article 2*

1. Contracts to which this Convention applies shall include clauses ensuring to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than those established for work of the same character in the trade or industry concerned in the district where the work is carried on:

- (a) by collective agreement or other recognised machinery of negotiation between organisations of employers and workers representative respectively of substantial proportions of the employers and workers in the trade or industry concerned; or
- (b) by arbitration award; or
- (c) by national laws or regulations.

2. Where the conditions of labour referred to in the preceding paragraph are not regulated in a manner referred to therein in the district where the work is carried on, the clauses to be included in contracts shall ensure to the workers concerned wages (including allowances), hours of work and other conditions of labour which are not less favourable than:

- (a) those established by collective agreement or other recognised machinery of negotiation, by arbitration, or by national laws or regulations, for work of the same character in the trade or industry concerned in the nearest appropriate district; or
- (b) the general level observed in the trade or industry in which the contractor is engaged by employers whose general circumstances are similar.

3. The terms of the clauses to be included in contracts and any variations thereof shall be determined by the competent authority, in the manner considered most appropriate to the national conditions, after consultation with the organisations of employers and workers concerned, where such exist.

4. Appropriate measures shall be taken by the competent authority, by advertising specifications or otherwise, to ensure that persons tendering for contracts are aware of the terms of the clauses.

#### *Article 3*

Where appropriate provisions relating to the health, safety and welfare of workers engaged in the execution of contracts are not already applicable in virtue of national laws or regulations, collective agreement or arbitration award, the competent authority shall take adequate measures to ensure fair and reasonable conditions of health, safety and welfare for the workers concerned.

#### *Article 4*

The laws, regulations or other instrument giving effect to the provisions of this Convention:

- (a) shall:
  - (i) be brought to the notice of all persons concerned;
  - (ii) define the persons responsible for compliance therewith; and
  - (iii) require the posting of notices in conspicuous places at the establishments and workplaces concerned with a view to informing the workers of their conditions of work; and

- (b) shall, except where other arrangements are operating to ensure effective enforcement, provide for the maintenance of:
- (i) adequate records of the time worked by, and the wages paid to, the workers concerned; and
  - (ii) a system of inspection adequate to ensure effective enforcement.

*Article 5*

1. Adequate sanctions shall be applied, by the withholding of contracts or otherwise, for failure to observe and apply the provisions of labour clauses in public contracts.

2. Appropriate measures shall be taken, by the withholding of payments under the contract or otherwise, for the purpose of enabling the workers concerned to obtain the wages to which they are entitled.

*Article 6*

There shall be included in the annual reports to be submitted under article 22 of the Constitution of the International Labour Organisation full information concerning the measures by which effect is given to the provisions of this Convention.

*Article 7*

1. In the case of a Member the territory of which includes large areas where, by reason of the sparseness of the population or the stage of development of the area, the competent authority considers it impracticable to enforce the provisions of this Convention, the authority may, after consultation with the organisations of employers and workers concerned, where such exist, exempt such areas from the application of this Convention either generally or with such exceptions in respect of particular undertakings or occupations as it thinks fit.

2. Each Member shall indicate in its first annual report upon the application of this Convention submitted under article 22 of the Constitution of the International Labour Organisation any areas in respect of which it proposes to have recourse to the provisions of the present Article and shall give the reasons for which it proposes to have recourse thereto; no Member shall, after the date of its first annual report, have recourse to the provisions of the present Article except in respect of areas so indicated.

3. Each Member having recourse to the provisions of this Article shall, at intervals not exceeding three years, reconsider in consultation with the organisations of employers and workers concerned, where such exist, the practicability of extending the application of the Convention to areas exempted in virtue of paragraph 1.

4. Each Member having recourse to the provisions of this Article shall indicate in subsequent annual reports any areas in respect of which it renounces the right to have recourse to the provisions of this Article and any progress which may have been made with a view to the progressive application of the Convention in such areas.

*Article 8*

The operation of the provisions of this Convention may be temporarily suspended by the competent authority, after consultation with the organisations of employers and workers concerned, where such exist, in cases of *force majeure* or in the event of emergency endangering the national welfare or safety.

*Article 9*

1. This Convention does not apply to contracts entered into before the coming into force of the Convention for the Member concerned.

2. The denunciation of this Convention shall not affect the application thereof in respect of contracts entered into while the Convention was in force.

*Article 10*

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

*Article 11*

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

*Article 12*

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 2 of article 35 of the Constitution of the International Labour Organisation shall indicate –

- (a) the territories in respect of which the Member concerned undertakes that the provisions of the Convention shall be applied without modification;
- (b) the territories in respect of which it undertakes that the provisions of the Convention shall be applied subject to modifications, together with details of the said modifications;
- (c) the territories in respect of which the Convention is inapplicable and in such cases the grounds on which it is inapplicable;
- (d) the territories in respect of which it reserves its decision pending further consideration of the position.

2. The undertakings referred to in subparagraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

3. Any Member may at any time by a subsequent declaration cancel in whole or in part any reservation made in its original declaration in virtue of subparagraph (b), (c) or (d) of paragraph 1 of this Article.

4. Any Member may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 14, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of such territories as it may specify.

*Article 13*

1. Declarations communicated to the Director-General of the International Labour Office in accordance with paragraph 4 or 5 of article 35 of the Constitution of the International Labour Organisation shall indicate whether the provisions of the Convention will be applied in the territory concerned without modification or subject to modifications; when the declaration indicates that the provisions of the Convention will be applied subject to modifications, it shall give details of the said modifications.

2. The Member, Members or international authority concerned may at any time by a subsequent declaration renounce in whole or in part the right to have recourse to any modification indicated in any former declaration.

3. The Member, Members or international authority concerned may, at any time at which the Convention is subject to denunciation in accordance with the provisions of Article 14, communicate to the Director-General a declaration modifying in any other respect the terms of any former declaration and stating the present position in respect of the application of the Convention.

*Article 14*

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

*Article 15*

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications, declarations and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

*Article 16*

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications, declarations and acts of denunciation registered by him in accordance with the provisions of the preceding articles.

*Article 17*

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

*Article 18*

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides –

- (a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 14 above, if and when the new revising Convention shall have come into force;
- (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

*Article 19*

The English and French versions of the text of this Convention are equally authoritative.

## RECOMMENDATION NO. 84

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Thirty-second Session on 8 June 1949, and

Having decided upon the adoption of certain proposals concerning labour clauses in public contracts, which is the sixth item on the agenda of the session, and

Having decided that these proposals shall take the form of a Recommendation supplementing the Labour Clauses (Public Contracts) Convention, 1949,

adopts this twenty-ninth day of June of the year one thousand nine hundred and forty-nine, the following Recommendation, which may be cited as the Labour Clauses (Public Contracts) Recommendation, 1949:

The Conference recommends that each Member should apply the following provisions as rapidly as national conditions allow and report to the International Labour Office as requested by the Governing Body concerning the measures taken to give effect thereto:

1. In cases where private employers are granted subsidies or are licensed to operate a public utility, provisions substantially similar to those of the labour clauses in public contracts should be applied.

2. Labour clauses in public contracts should prescribe, either directly or by reference to appropriate provisions contained in laws or regulations, collective agreements, arbitration awards or other recognised arrangements –

- (a) the normal and overtime rate of wages (including allowances) to be paid to the various categories of workers concerned;
- (b) the manner in which hours of work are to be regulated, including wherever appropriate –
  - (i) the number of hours that may be worked in any day, week or other specified period in respect of which normal rates of wages are to be paid;
  - (ii) the average number of hours that may be worked by persons working in successive shifts on continuous processes; and
  - (iii) where hours of work are calculated as an average, the period of time over which this average may be calculated and the normal maximum number of hours that may be worked in any specified period;
- (c) holiday and sick leave provisions.