



## Governing Body

316th Session, Geneva, 1–16 November 2012

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Institutional Section

INS

### FIFTH ITEM ON THE AGENDA

## Matters arising out of the work of the 101st Session (2012) of the International Labour Conference

## Follow-up to the decision adopted by the International Labour Conference on certain matters arising out of the report of the Committee on the Application of Standards

## Summary report concerning the informal tripartite consultations held on 19 September 2012

### Introduction

1. It will be recalled that at its 315<sup>th</sup> Session (June 2012) the Governing Body:

- (a) decided to include on the agenda of its 316th Session (November 2012) the decision taken by the Conference, reproduced below, to refer to the Governing Body certain matters arising out of the report of the Committee on the Application of Standards:
  - The Committee noted that different views were expressed on the functioning of the Committee in relation to the reports of the Committee of Experts which were submitted for its consideration as found in paragraphs 21, 54, 81–89, 99–103 and 133–224 of this report.
  - The Committee recommended that the Conference: (1) request the Director-General to communicate those views to the Governing Body; and (2) invite the Governing Body to take appropriate follow-up as a matter of urgency, including through informal tripartite consultations prior to its November 2012 session;

- (b) authorized the Chairperson of the Governing Body, assisted by the two Vice-Chairpersons, to undertake informal tripartite consultations with the Government, Employers' and Workers' groups for consideration by the Governing Body at its 316th Session.
2. The informal tripartite consultations on the follow-up to the discussions of the Conference Committee on the Application of Standards were held on Wednesday 19 September 2012. Mr. Gilles de Robien, Chairperson of the Governing Body, was in the Chair, while the Employer member, Mr. John Kloosterman, and the Worker Vice-Chairperson of the Governing Body, Mr. Luc Cortebeeck, spoke on behalf of the Employers' and the Workers' groups respectively.
  3. At the request of the Officers of the Governing Body, a factual and historical Information note on the ILO supervisory system was prepared by the Office to assist the constituents in the consultations. The Officers have further agreed that this written report on the informal consultations be submitted to the Governing Body.

## **I. Matters arising out of the report of the Committee on the Application of Standards addressed during the informal tripartite consultations**

4. Two main matters were discussed during the informal consultations on 19 September: (a) the submission of a list of individual cases on the application of ratified Conventions for adoption by the Committee on the Application of Standards at the 102nd Session (2013) of the International Labour Conference; and (b) the mandate of the Committee of Experts on the Application of Conventions and Recommendations.

### **A. Submission of a list of individual cases for adoption by the Committee on the Application of Standards at the 102nd Session (2013) of the International Labour Conference**

5. The Employer and Worker spokespersons expressed the joint commitment of their groups to agree on a list of cases with a view to its submission for adoption by the Committee on the Application of Standards at the 102nd Session (2013) of the Conference. While some details regarding the specific method and criteria for establishing the list remained to be decided, the two spokespersons confirmed that their groups were committed to reaching an agreement in a timely manner so as to enable early communication of the list.
6. At the request of several Government representatives, both the Employer and the Worker spokespersons gave a guarantee that there would be agreement on a list of cases, irrespective of the possible outcome of the discussions concerning the other matters arising out of the report of the Committee on the Application of Standards, including the issue of the mandate of the Committee of Experts on the Application of Conventions and Recommendations.
7. The Government representatives welcomed this joint commitment as they considered that the establishment of a list of cases to be discussed by the Committee on the Application of Standards was the priority issue. They expressed the hope that the agreement reached by the Employers' and the Workers' groups would provide the basis for a lasting solution beyond the 102nd Session (2013) of the International Labour Conference.

## **B. The mandate of the Committee of Experts on the Application of Conventions and Recommendations**

8. The Employer spokesperson emphasized that the real issue at stake was the mandate of the Committee of Experts on the Application of Conventions and Recommendations. He referred to the 1926 resolution of the International Labour Conference establishing the Committee on the Application of Standards and the Committee of Experts, noting that at the time it was underlined that the Committee of Experts was a technical body and not a judicial body. In the early years of the functioning of the Committee of Experts, the question of its mandate to interpret ILO Conventions had been discussed in the Governing Body, which in 1932 had unanimously rejected a proposal made by the Office to grant the Committee of Experts the mandate to interpret Conventions. He emphasized that the Committee of Experts had no mandate to interpret. Nevertheless, over the years, the Committee of Experts had developed a practice of interpreting Conventions. The Committee of Experts had given itself this mandate in the absence of any express reference in the ILO Constitution or the relevant Standing Orders. Since 1989, the Employers' group had repeatedly expressed its concern at this practice in the Committee on the Application of Standards. Accordingly, the Employers' group requested the Office to provide an answer as to whether the Governing Body had ever decided to amend the stated terms of reference of the Committee of Experts to expressly include the interpretation of international labour standards and, if it had not, whether the Governing Body intended to change those terms of reference.
  
9. While recalling the comments made by the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association as regards the right to strike under Convention No. 87, the Worker spokesperson noted that the focus of the discussions was the mandate of the Committee of Experts. While the starting point of any analysis of its functions was the 1926 resolution of the International Labour Conference and the 1947 decision of the Governing Body to amend its terms of reference, it was important to take into account the fact that the scope of its mandate had evolved over the years at the request of the Conference or with its consent. In particular, the interpretative function of the Committee of Experts had increased in view of the fact that, in recent decades, a number of Conventions had been drafted in general terms. Quoting the views expressed by the Committee of Experts on its role regarding the question of interpretation, he observed that the interpretative function of the Committee of Experts derived logically from its mandate, as it was not possible to supervise the application of a provision of a Convention without determining its contents and scope. When the views expressed by the Committee of Experts generated questions, article 37 of the ILO Constitution provided for judicial mechanisms that should be used in order to obtain a definitive interpretation. If a country rejected the views expressed by the Committee of Experts, while refraining at the same time from using those constitutional means, such a situation would undermine the legal certainty that was crucial for the protection of workers and was indispensable for both governments and employers. Ultimately, this situation would prevent the ILO from discharging its constitutional functions.
  
10. The Government representative of Colombia, speaking on behalf of GRULAC, agreed that the issue at stake was the mandate of the Committee of Experts on the Application of Conventions and Recommendations and emphasized that no ILO supervisory body, including the Committee of Experts, had the mandate to interpret ILO Conventions. Under article 37 of the ILO Constitution, the mandate to interpret Conventions was vested solely with the International Court of Justice. The Government representative of Austria noted that the views expressed by the Committee of Experts on the meaning and scope of ILO Conventions and Recommendations were accepted as valid as long as they were not

contradicted by the International Court of Justice. This was a long-standing and consolidated practice of the ILO, which was recognized by other international bodies. This could only be changed through tripartite decision. Several Government representatives expressed the view that the question of the mandate of the Committee of Experts had to be addressed and settled in conjunction with that of the interpretation of ILO Conventions. The question of the interpretation of ILO Conventions had regularly resurfaced throughout the ILO's history and the time had come to resolve it in a comprehensive and definitive manner.

11. Replying to the question requested by the Employers, the Deputy Legal Adviser stated that, without prejudice to the scope and timing of the further Office paper needed, the Governing Body was a constitutional organ that operated within the constitutional order, including in respect of relevant decisions of the Conference and of article 37 of the Constitution referenced in the discussion and in the papers available to the meeting. Any decision of the Governing Body or the Conference concerning the Committee of Experts mandate would be understood consistently with that constitutional order.

## II. Next steps

12. Referring to the mandate given to the Governing Body by the Conference and, in particular, the urgency of the follow-up, the Employer spokesperson requested the Office to provide an answer at the 316th Session (November 2012) of the Governing Body to the question raised by his group. The Worker spokesperson requested a comprehensive document addressing all of the issues relating to the mandate of the Committee of Experts. The quality of the document should be ensured as a priority. The Government representatives requested a document that was solid enough to contribute to a comprehensive, sustainable and lasting solution. They added that adequate tripartite guidance should be provided to the Office for the preparation of the document.
13. Based on the discussions, the outcome of the informal tripartite consultations was as follows:
  - The Employers' and Workers' groups expressed their firm commitment to agree on a list of cases in a manner that would enable its timely communication with a view to its adoption by the Committee on the Application of Standards at the 102nd Session (2013) of the International Labour Conference, as well as a process to prevent a recurrence of the issues that arose at the 101st Session (2012) of the International Labour Conference.
  - An information document on the mandate of the Committee of Experts on the Application of Conventions and Recommendations would be prepared by the Office for the 317th Session (March 2013) of the Governing Body, based on further tripartite guidance.
  - Informal tripartite consultations would be held during the 316th Session (November 2012) of the Governing Body to provide the necessary guidance to the Office on the outline of the document on the mandate of the Committee of Experts.

## Draft decision

14. *The Governing Body is invited to provide further guidance to the Officers of the Governing Body on the follow-up to the discussions of the Committee on the Application of Standards.*