



Governing Body

317th Session, Geneva, 6–28 March 2013

GB.317/INS/4/1

Institutional Section

INS

Date: 7 March 2013

Original: English

FOURTH ITEM ON THE AGENDA

Matters arising out of the work 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 19–20 February 2013

Introduction

1. At its 316th Session (November 2012), the Governing Body was provided with a Summary report on the informal tripartite consultations held on 19 September 2012 pursuant to the decision on the follow-up to the discussions in the Committee on the Application of Standards (CAS) taken at the 101st Session (2012) of the International Labour Conference (ILC),¹ including the decision taken by the Governing Body at its 315th Session (June

¹ The Conference invited the Governing Body to take appropriate follow-up as a matter of urgency, including through informal tripartite consultations prior to its November 2012 session (*Provisional Record* No. 19, Part 1 (Rev.), International Labour Conference, 101st Session, Geneva, 2012, para. 208).

2012).² At the same time, the Employers' group read out a statement to clarify the Employers' position.³

2. The outcome of the discussion⁴ was as follows: "The Governing Body, noting the outcome of the informal tripartite consultations which had taken place on 19 September 2012 and the commitment to pursue discussions in a constructive manner, invited the Officers of the Governing Body to pursue informal tripartite consultations and to report to the Governing Body at its 317th Session (March 2013)".
3. Informal tripartite consultations were held on 19–20 February 2013. Upon the recommendation of the Director-General, the Officers of the Governing Body had invited the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to meet with constituents in the framework of the consultations. Six members had been designated to that end by the CEACR.⁵ Thus, the tripartite meeting began with an exchange of views between the constituents and the members of the CEACR, in the presence of the Director-General. A tripartite discussion then took place. The Chairperson of the Governing Body chaired the consultations, 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.
4. The Office had prepared an information paper on the history and development of the mandate of the Committee of Experts, in light of the outcome of the informal tripartite consultations in September 2012. The paper also set out possible ways forward. This paper, together with relevant excerpts from the General Report of the Committee of Experts adopted at its 83rd Session (November–December 2012),⁶ was circulated prior to the consultations to assist the constituents. During the consultations, the foreword of the General Survey of the CEACR on labour relations and collective bargaining in the public service, to be discussed at the 102nd Session (June 2013) of the ILC, was also distributed.⁷
5. In line with the indications provided by the constituents participating in the consultations, the Officers have agreed that this summary report on the informal consultations be submitted to the 317th Session of the Governing Body (March 2013).

² GB.316/INS/5/4; GB.315/INS/4; dec-GB.315/INS/4.

³ GB.316/PV/Draft, para. 98.

⁴ *ibid.*, paras 98–115.

⁵ The six experts who attended the consultations were: Judge Bentes Corrêa, Professor Brudney, Judge Koroma (incoming Chairperson), Judge Lyon-Caen, Professor Owens and Professor Yokota (outgoing Chairperson).

⁶ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 102nd Session, Geneva, 2013 (hereinafter "General Report"), paras 8–36.

⁷ *Collective bargaining in the public service: A way forward, General Survey concerning labour relations and collective bargaining in the public service*, Report III (Part 1B), International Labour Conference, 102nd Session, Geneva, 2013 (hereinafter "General Survey"). The General Survey is on the Labour Relations (Public Service) Convention, 1978 (No. 151), and Recommendation, 1978 (No. 159), and the Collective Bargaining Convention, 1981 (No. 154), and Recommendation, 1981 (No. 163).

I. Opening statements

6. The informal tripartite consultations were opened by the Chairperson of the Governing Body, who welcomed the participation of the Director-General and the six members of the CEACR. He stressed the urgency of holding tripartite discussions on the ILO supervisory system, the gravity of that matter of critical importance for the ILO, and the constituents' responsibility to identify ways forward. The Director-General indicated that he shared the sense of urgency, gravity and responsibility noted by the Chairperson of the Governing Body. A supervisory system that lacked credibility, authority and the support of all of its parties would not equip the ILO to undertake its essential functions. The ongoing process of reform in the ILO would not have great effect or purpose unless the subject at hand was resolved successfully and without undue delay. Thus, the current tripartite discussions were important to the future of the Organization. At the same time, the Director-General emphasized the need to balance an appreciation of the current difficulties with an equal appreciation of the good work and global impact of the standards system, including the manner in which the supervisory system had concretely made a difference in member States and, in many cases, in peoples' lives. That should urge constituents forward in a spirit of openness and dialogue and in a direction of compromise.

II. Exchange of views with the members of the CEACR

7. In being invited by the Chairperson of the Governing Body to present brief introductory remarks, the Chairperson of the CEACR expressed, on behalf of the CEACR, his gratitude to the Officers of the Governing Body and the Director-General for the opportunity to participate in an exchange with the constituents. The CEACR and the CAS were the two pillars of the ILO's supervisory machinery and were part of the ILO standards system under the ILC and the Governing Body. Ever since their creation in 1926, the two committees had worked together in a spirit of mutual respect, cooperation and responsibility. The committees were complementary, with different mandates and compositions. These differences had led, at times, to different views. The CEACR had found very useful the practice and arrangements under which each committee would participate in the work of the other. Since 2002, the CEACR, through its subcommittee on working methods, had made a number of improvements, mainly in response to comments from the CAS. Another member of the CEACR referred to the excerpts from the General Report of the 83rd Session of the CEACR and summarized the views expressed therein by the CEACR on its mandate, the non-binding nature of its opinions and recommendations, and the proposal made by the Employers' group to add a caveat or disclaimer in the future reports of the CEACR.
8. The exchange of views consisted mainly of questions posed by the constituents to the six members of the CEACR. A representative of the Employers' group asked the experts, in light of the changes in the world over the past 40 years, how they saw their future role in the supervisory system. In response, the members of the CEACR provided the following elements. They recalled that the Governing Body had defined the terms of reference for the CEACR. Since its establishment in 1926, the role of the CEACR was a response to needs identified by the Governing Body and the ILC with regard to the ILO standards system, including its supervisory system. Over the years, the CEACR had been given additional responsibilities under articles 19 and 23 of the Constitution, not of its own volition but rather as a result of assignments decided by the constituents. In its current role, the CEACR was a body composed of independent members with a function to perform. In so doing, the CEACR sought to comply strictly with its terms of reference while being guided by the ILO Constitution. The definition of its future role fell under the responsibility of the constituents. Balancing the work of the CAS and the CEACR would provide great insight,

taking into account the need for possible changes and adaptations to address new issues in a globalized world.

9. The Worker spokesperson asked for clarification as to the views expressed by the CEACR in its General Report, paragraph 36(b), that the addition of a caveat or a disclaimer would interfere with its independence. In response, the members of the CEACR noted that the request for such an addition had come from one group of constituents and was being contested by another group. If the Governing Body were to indicate that the constituents had agreed on a particular statement to be included in the General Surveys and reports, then the CEACR was at the service of the Governing Body and would follow accordingly, since doing so would not compromise its independence.
10. A Government representative of Niger, speaking on behalf of the Africa group, asked whether the number of members of the CEACR should not be increased to reflect the increase in ILO Members and the number of Conventions adopted since 1926. In addition, she asked whether the experts had any suggestions to overcome the current situation in the supervisory system which had arisen since the 101st Session (June 2012) of the ILC. In response, the members of the CEACR provided the following elements. Regarding the number of CEACR members, it was recalled that, when the CEACR had been created, all of its members had been European, and since that time it had gradually diversified to include non-Europeans, and it had become more gender balanced. The Office and the Director-General were aware of further needs for gender, linguistic and geographic balance, and future appointments should give appropriate attention to those issues. At the same time, it was noted that the CEACR was not currently functioning at its full capacity. In order to accelerate the filling of vacancies in the CEACR, it was suggested to change the existing arrangements under which, for each vacant position, the Office had to propose to the Governing Body five names of qualified candidates. With respect to suggestions as to how the current situation might be resolved, it was recalled that the issues surrounding the mandate of the CEACR and the right to strike under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), had existed for decades and further constructive dialogue was necessary to reach consensus among the different constituents. Meanwhile, both the CEACR and the Committee on Freedom of Association were required to make statements on country-specific cases. While the views of the CEACR were non-binding, governments still needed expert answers to certain questions they raised. The CEACR carried out its task in a context of ongoing dialogue with governments and other constituents. It was also recalled that the CEACR was continuing to explore ways to improve its working methods in order to cope with its increasing workload. Lastly, it was pointed out that there were concrete institutional solutions to the current situation where constituents disagreed with the views expressed by the CEACR on the meaning of the provisions of Conventions. The ILC could always revise a particular Convention. Alternatively, one of the two mechanisms set forth in article 37 of the Constitution for the interpretation of ILO Conventions could be implemented. The use of those institutional solutions was the responsibility of the constituents.
11. A Government representative of Greece, speaking on behalf of the Western European countries, indicated that to his understanding there were ongoing discussions on the proposed caveat or disclaimer. He asked about the specific language of the most recent proposal. A representative of the Employers' group explained that since the 101st Session (June 2012) of the ILC, the group had been seeking clarification regarding the issue of the mandate of the CEACR and, more specifically, the legal status of its views and observations, which was not clearly set out in its reports. The possibility of introducing a caveat or disclaimer had arisen in that context. Thus, the Employers' group had requested the CEACR to consider the issue with a view to providing the necessary clarity in all of its future reports. In particular, during the special sitting of the 83rd Session of the CEACR with the Employer Vice-Chairperson and the Worker Vice-Chairperson of the CAS, the

group had proposed that a text should be inserted to indicate that the General Surveys and reports did not necessarily reflect the views of the ILO's tripartite constituents. The text would also indicate that the ILO Constitution did not permit the CEACR to give authoritative interpretation of ILO Conventions and Recommendations, and that the only body with authority to do so was the International Court of Justice (ICJ). Referring to paragraph 29 of the General Report of the 83rd Session of the CEACR concerning the legal nature and effect of its comments, he indicated that it was not for his group to start clarifying the paragraph, which reflected the views of the CEACR. The issue for the group remained the views expressed by the CEACR on the right to strike under Convention No. 87, and in particular those set out in paragraph 31 of the General Report. A representative of the Workers' group questioned the addition of a caveat or disclaimer in the reports of the CEACR from the standpoint of the legal certainty of the ILO standards system, noting that the whole system relied on those reports. The members of the CEACR also addressed the issue and the Employers' reference to the General Report. In particular, they drew attention to paragraph 6 of the foreword of the General Survey, concerning the non-binding nature of the opinions and recommendations of the CEACR. Further explanations were also provided on the issue of the right to strike and Convention No. 87.

12. A representative of the Employers' group inquired how the CEACR could undertake its work in all independence during a session which lasted only three weeks, without relying heavily on the Office's support. In response, the members of the CEACR provided the following elements. It was highlighted that it was not possible to become a member of the CEACR without demonstrated independence. The support of the Office was admittedly very important. However, that support did not mean that the Committee's decisions and report were the work of the Office: it was the CEACR's work. By way of illustration, concrete and detailed explanations were provided on the working methods of processing article 22 files and the preparatory work for and during the CEACR sessions. Lastly, the fact that the CEACR adopted its decisions by consensus did not mean that its members always agreed; rather, they had thorough and long discussions. Nonetheless, they had to reach consensus.
13. Additional explanations were also provided by the members of the CEACR as to the need for its meetings to be held in private. The issues addressed by the CEACR in its comments were sometimes of a sensitive nature, based not only on government information but also on comments sent by organizations of workers and employers. In 2012, the CEACR had received more than 1,000 such comments. Based on that information, it engaged in a dialogue with governments. It would be premature to unveil that information or make it public before the dialogue process had been completed. Further, owing to the complementary nature of the work of the two committees, the observations made by the CEACR were discussed by the CAS, which held its sessions in public and therefore offered the opportunity to engage in public debate. Since the work of the CEACR was undertaken with a view to submission to the CAS session, as a matter of respect for due process of law, it was important for governments to have the opportunity to react to the comments from workers and employers before that information was made public.
14. To conclude the exchange of views with the members of the CEACR, the Worker spokesperson emphasized that the General Report of the 83rd Session of the CEACR provided valuable guidance to governments, employers and workers on the issues raised at the 101st Session (June 2012) of the ILC with regard to the mandate of the CEACR, including the logical need for the CEACR to interpret Conventions in order to fulfil its mandate, which should be seen in the light of the Constitution. Through the General Surveys, the CEACR had also provided clarification on the scope of certain provisions of Conventions. While definitive interpretations could only be given by the International Court of Justice or a tribunal appointed under article 37, paragraph 2, of the Constitution, the CEACR's interpretations had nonetheless taken on considerable importance, as

reflected, in particular, in the jurisprudence of national courts throughout the world, as well as that of regional human rights tribunals, which highlight their value and authority. Legal certainty was not only crucial to worker protection, but essential for both governments and employers. The CEACR's opinions, on which governments relied, were widely accepted, in particular because of the qualifications, experience and independence of its members.

- 15.** With regard to the Employers' proposal to insert some form of disclaimer in the CEACR's General Surveys and reports, the Worker spokesperson duly noted paragraph 36 of the General Report, reaffirming that a disclaimer was not necessary, and emphasized that the moral authority of the CEACR derived from the fact that, although it was appointed by the Governing Body – a tripartite body – it had remained independent and impartial for 85 years. The Workers noted paragraph 6 of the foreword to the General Survey to be discussed at the 102nd Session (June 2013) of the ILC, and considered that that paragraph met the concerns expressed by the Employers.
- 16.** Recalling the position expressed by the Worker Vice-Chairperson of the Committee on the Application of Standards at the special sitting of the 83rd Session of the CEACR, the Worker spokesperson reaffirmed that the mandate of the CEACR was the result of a dynamic process led by the Governing Body in the light of the constitutional objectives, that tripartite dialogue at the national level should feed into the work of the CEACR, that the latter's mandate should not be interpreted in different ways depending on the circumstances, and that the CEACR's comments could not be changed according to differences or variations of opinion. In examining that mandate, it should also be borne in mind that the supervisory system as a whole had also evolved over time, mainly as a result of decisions taken by two tripartite bodies: the ILC and the Governing Body. Even if the supervisory bodies had taken certain decisions with regard to their own working methods, those decisions had been accepted by the two tripartite bodies. Lastly, with regard to the composition of the CEACR, the Worker spokesperson pointed out that since 1979 the number of experts had stood at 20 and had not increased, despite the growth in the number of member States and Conventions.
- 17.** The Employer spokesperson acknowledged that the Office did a substantial amount of preparatory work for the members of the CEACR. That observation was not a criticism, but rather a statement of fact. The members of the CEACR worked hard as experts. In referring to preparatory work performed by the Office, his group was not questioning the independence of the CEACR. Regarding paragraphs 6–7 of the foreword of the General Survey, his group appreciated those paragraphs and thought that they were fair statements. On the other hand, paragraph 8 of the foreword was not accurate. That paragraph mentioned the CEACR's views on the legal effects of its comments, expressed in its report submitted to the 77th Session (1990) of the ILC. He recalled that those views had been subject to debate in the CAS at the time and that that debate had led the CEACR to reconsider its position, as reflected in its report to the 78th Session (1991) of the ILC. The fact that the 1990 statement had returned was troubling to the Employers' group. Moreover, he noted the General Report's review of the position of the Employers' group over the years in paragraph 27, and the implication that the group had historically accepted the CEACR's interpretive role. He understood that, as part of applying a Convention, the CEACR had to do a certain amount of interpretation. However, since 1990, his group had been voicing its disagreement with interpretation as part of the CEACR's mandate. To indicate that his group had historically accepted that interpretive role as part of the CEACR's mandate was not therefore an accurate statement.

III. Tripartite discussion

18. The constituents acknowledged that the meeting with the members of the CEACR had provided a useful opportunity to exchange views. On the basis of the agenda proposed by the Chairperson of the Governing Body, the constituents turned to the information paper on the history and development of the mandate of the CEACR. They acknowledged that neither section A (The mandate of the CEACR: Historical background) nor section B (Interpretation of ILO Conventions: Role of the CEACR and the constitutional process of referral to the International Court of Justice) warranted discussion. Accordingly, the remainder of the discussion focused on section C (Main issues and possible ways forward) and other questions, including the 102nd Session (June 2013) of the ILC.
19. The Employer spokesperson indicated that there was consensus in his group that the ILO supervisory system was broken. It could alternatively be described as a system in crisis. The system had broken under its own weight and that had caused a crisis. Several reasons could be identified, including the following. First, the CAS and the CEACR were intended to represent the “twin pillars of the supervisory system”. However, as his group had been stating since 1990, the CEACR was overstepping its mandate. It had been given a clear mandate in 1926, namely that of a technical committee without judicial capacity. However, without amendment to the ILO Constitution or the Standing Orders of the Governing Body, the mandate had expanded over the years to a point where the CEACR was fulfilling what he described as “a sub-article 37, paragraph 2, tribunal role” concerning in particular Convention No. 87 but also other Conventions. Second, in a context of increasing workload, there was an important institutional sustainability issue. Third, the establishment of a list of cases with a view to its submission for adoption by the CAS had become increasingly difficult over recent years. The situation had reached a crisis point. Fourth, there was the impact of globalization, which had resulted in the use of ILO standards, and in particular the eight fundamental Conventions, by other instruments or schemes outside the ILO. In that respect, the speaker referred to a variety of corporate social responsibility initiatives such as the United Nations Global Compact or codes of conduct, but also international framework agreements, transnational company agreements and European framework agreements with global trade unions. Often, the mechanisms established at the international level set out globally recognized labour standards, some of which were filtering down into national legislation. In defining such global labour standards, policy-makers would look to the views of the CEACR, whose title conveyed a certain authority when determining terms such as the right to strike. In that context, he also noted that, under the ILO Declaration on Social Justice for a Fair Globalization, 2008, the ILO had been mandated to promote standards outside of the ILO. He also referred to certain training courses at the International Training Centre of the ILO (Turin Centre), which were aimed at promoting the use by national courts of standards and the work of the supervisory bodies.
20. The Employer spokesperson stated that, as the system had reached a “rupture point”, maintaining the status quo was not possible. His group was trying to make the system work and believed that it could be mended. To identify solutions, it was important for there to be a shared recognition among the constituents that the system was broken. With regard to the options set out in paragraphs 115–118 of the information paper, he observed that recourse to the ICJ was not easy, and the procedure was not well-known. There were many uncertainties surrounding the implementation of that option, in particular with regard to whether the result would be an advisory opinion, whether there would be a distinction between a “question” and a “dispute”, whether the social partners would be permitted to contribute, and who would be responsible for referring the issue to the ICJ. Regarding the appointment of a tribunal under article 37, paragraph 2, of the Constitution, his group was not sure that that was the best option and he recalled that the group had pulled out of the consultations thereon in 2010 for a variety of reasons. The option for a quasi-tribunal, in

other words a mechanism within the spirit of article 37, paragraph 2, referred to in paragraph 116 of the paper, could be worth exploring. In addition to the options presented in the paper, he referred to another proposal, contained in a forthcoming academic article, which was worthy of further examination. Finally, he noted that the Employers' group could distribute a paper setting out their proposed solutions.

- 21.** The Worker spokesperson reiterated that the supervisory system as a whole, and not just the CEACR, had evolved substantially over the years, mainly owing to decisions of the ILC and the Governing Body, and that the supervisory bodies had taken a number of decisions relating to their own methods of work and procedures, which had been generally accepted by the ILC and the Governing Body. His group considered that the CEACR was fulfilling its constitutional role. He did not agree with the Employers' suggestion that the CEACR was fulfilling the role of what had been referred to as a "sub-article 37, paragraph 2, tribunal role". His group could work with the present system. However, he acknowledged that, if one of the constituent groups was indicating that the present system was broken, there was a problem that required fixing. Concerning the possible ways forward set out in the information paper, he noted that consideration might be given to seeking an advisory opinion from the ICJ, under article 37, paragraph 1, of the Constitution, regarding the issue of the right to strike. Turning to the implementation of an article 37, paragraph 2, tribunal, he recalled that the proposal had been the subject of informal tripartite consultations in the recent past. Should there be a willingness to reopen the debate, his group would be open to new discussions. Regarding the proposal set out in paragraph 118 of the information paper, concerning strengthening existing practices and approaches by underlining mutual supervision, he sought clarifications and further information from the Office. He indicated that he had not read the academic article referred to by the Employers. More importantly, it was necessary to discuss possible ways forward, even if it was too early to provide a concrete answer.
- 22.** The Government representative of Botswana, speaking on behalf of the Government group, reiterated the full commitment of her group to the ILO supervisory system, including the analysis of individual cases by the CAS. Her group recognized the importance of the independence, objectivity and impartiality of the members of the CEACR. On behalf of the group, she expressed the hope that the current informal tripartite consultations would contribute to a successful outcome and underlined the importance of an inclusive, tripartite and constituent-led process for overcoming the challenges ahead.
- 23.** Speaking on behalf of the group of industrialized market economy countries (IMEC), the Government representative of Australia indicated that his group did not consider that there was a problem with the mandate of the CEACR. However, he recognized that different views had been expressed by other constituents on the matter. With regard to the use of the work of the CEACR by external courts, he emphasized that the CEACR was producing non-binding decisions and not judgments. If judges were looking to the views of the ILO, it was important for the counsel involved in those cases, or representatives of workers' and employers' organizations, to bring the relevant sources of information to the attention of the judges, including the different views voiced by constituents and the views expressed by the CEACR. With regard to possible ways forward, he emphasized that his group was prepared to enter into further discussions on all the options set out in the information paper in paragraphs 116–118. The Office should further examine those options. The social partners may also wish to put forward any additional options that they considered suitable.
- 24.** A Government representative of Colombia, speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC), regretted that despite the importance of the matter under discussion, the tripartite exchange was limited. She stressed that neither the CEACR nor any other supervisory body was mandated to interpret international labour Conventions. That competence rested with the International Court of Justice. The

overstepping of its mandate by the CEACR resulted in legal uncertainty and was a disincentive to the ratification of Conventions. GRULAC considered that the problem that had arisen during the previous meeting of the CAS did not relate to the right to strike in itself, but rather to the CEACR's interpretation of that right in the framework of Convention No. 87. The right to strike was a constitutional right in the GRULAC countries, and was fully developed in the national legislation of its members. Consequently, the exercise of that right did not depend on the interpretation of Convention No. 87.

25. GRULAC considered paragraph 83 of the Office document to lack objectivity and be general, apparently indicating broad support for the CEACR interpretation. It highlighted and appreciated the clarity of paragraphs 107–110 and emphasized that both the Governing Body and the Conference could resort to the advisory jurisdiction of the International Court of Justice. With regard to paragraph 112, while recognizing that the CEACR and the CAS had complementary functions that could not be fulfilled by the other, GRULAC expressed its concerns regarding the phrase “nor is one body hierarchically superior to the other”. It considered the body whose considerations were the result of tripartite debate and strict compliance with its terms of reference to have greater legitimacy. With respect to paragraphs 115–116, relating to article 37, paragraph 2, of the ILO Constitution, she recalled that in 2010 no agreement had been reached regarding the relevance of instituting a tribunal for the expeditious determination of disputes relating to the interpretation of Conventions. GRULAC supported the option of going to the International Court of Justice. Concerning paragraph 117, GRULAC did not agree that the CEACR's interpretative views of Conventions should be understood as advisory. Paragraph 118 contained a new proposal that deserved further examination on the basis of a comprehensive and explanatory Office document. The constituents' views could not be considered to be a binding interpretation, even if the parties were to decide to accept it and not go to the International Court of Justice. Moreover, she asked what the solution would be if opinions to diverge in the tripartite sphere and whether tripartite consensus would be upheld or whether priority would be given to the majority position, without taking into account the fact that sometimes governments failed to reach a single opinion.
26. Speaking on behalf of the Western European countries, the Government representative of Greece asked whether the current consultations could rather focus on the issue of the inclusion of a caveat, or disclaimer, in the light of the foreword of the 2013 General Survey concerning labour relations and collective bargaining in the public service, which he considered to be a very promising development. The issue raised by the Employers with regard to the supervisory system appeared to be a longer-term issue. Speaking on behalf of the Africa group, the Government representatives of Botswana and Niger both expressed the group's full commitment to reforms aimed at strengthening the ILO supervisory system. The group took the view that a legal opinion should be sought on the possible ways forward set out in the Office's information paper, and in particular on the options set out in paragraph 117, which concerned placing emphasis on the role of the ICJ as the authoritative body for interpreting ILO Conventions and the Constitution, and in paragraph 118, which referred to “mutual supervision”. Further consultations should take place as soon as possible. Speaking on behalf of the Asia and Pacific group (ASPAG), the Government representative of the Islamic Republic of Iran indicated that the mandate of the CEACR needed to be discussed in the context of the ILO Constitution and historical developments in the ILO but also in the context of the mandate of other United Nations organizations. He reiterated his group's full support for tripartite consultations that were transparent and its hope that an amicable solution could be achieved as soon as possible.
27. The Government representative of the Russian Federation expressed surprise at the contention of the Employers' group that the system was broken, as his Government was quite satisfied with the ILO supervisory system. He suggested limiting the discussion to

possible ways forward in the spirit of tripartism. The Government representative of the United States expressed support for the supervisory system and cautioned against inadvertently weakening or undermining that system. She emphasized that there was a crisis but that did not mean that the system was broken. The CEACR clearly lacked the authority to make definitive interpretations, but it had neither sought nor assumed that authority. The proposed disclaimer was neither necessary nor appropriate. She further noted that the constituents could not accept the status quo. There were no obvious solutions, and it would be unrealistic for a solution to be agreed upon immediately as it would take time to find the right one, one that was agreeable to all the constituents. She emphasized that the constituents did, however, need to ensure that the CAS could work effectively during its next session, in June 2013. That statement was supported by the Government representative of Switzerland, who also underlined that it was important to rebuild trust between the parties, and in particular between the social partners, and that a constructive discussion should focus on the possible ways forward presented by the Office in paragraphs 116–118. She indicated that she did not object to examining the option set out in the academic article referred to by the Employers, but that an agreement among the constituents would be necessary in order to do so.

- 28.** A representative of the Workers' group emphasized that the role of the CEACR was very clear: it was to monitor the application of standards. Every possible interpretation was put forward in a specific case and served to clarify the situation. In support of that statement, he asked several specific questions concerning the right to strike and the arrangements for exercising that right, to demonstrate the need for the CEACR to interpret the provisions of the Conventions in order to give specific answers to questions. The current experts and their predecessors had built a social legacy, and prohibiting them from interpreting standards to give them practical meaning and content would be tantamount to prohibiting the functioning of the supervisory system. It should be noted that the experts examined situations on a case-by-case basis, as in a "common law" system, and their possible interpretations were never definitive. If definitive interpretations were wanted, then another institution should be approached. Another representative of the Workers' group said that the ILO should take up the evolving issue of multinational enterprises, building in particular on the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. With regard to the content of Convention No. 87, it should be noted that the Convention fell under the competence of the Committee on Freedom of Association, a tripartite body whose conclusions were adopted by the Governing Body and which, since 1952, had built up a body of case-law which was adapted on a case-by-case basis to each complaint that was examined. He stated that the right to strike had for a long time been among the rights of workers, and stressed that it was important for it to be within the ILO, and not elsewhere, that workers, employers and governments could together say what was meant by Convention No. 87.
- 29.** The tripartite discussion also addressed the issue of the submission of a list of individual cases on the application of ratified Conventions for adoption by the CAS at the 102nd Session (June 2013) of the ILC. In that regard, the Government representative of Australia, speaking on behalf of IMEC, recalled the commitment made previously to such a list and the guarantees made by the social partners to governments in September and November of last year. He emphasized that governments attached importance to that commitment. In the event that agreement could not be reached on the matter, there should nonetheless be an alternative mechanism in place to ensure a list of country cases for consideration by the CAS that year. That statement was supported by the Government representative of Greece, speaking on behalf of the Western European countries. The Government representative of Botswana, speaking on behalf of the Africa group, recalled her group's position regarding the criteria that should be adopted concerning the list, and indicated that the group attached great importance to the transparency of the process, in the sense that the governments concerned should be given early notifications of the nature of

the cases. Her group also favoured a balanced selection of countries and Conventions in that regard. A Government representative of Colombia, speaking on behalf of GRULAC, expressed concern that the issue of the list was being addressed, as her group had not prepared that item and consequently could not provide its views.

IV. Outcome of the consultations

30. Regarding the short term, and more specifically the question of the list of individual cases on the application of ratified Conventions, the Worker spokesperson reiterated that the Employers' group and the Workers' group were committed to agree on a list for the 102nd Session (June 2013) of the ILC, but they still needed time to agree on the modalities for preparing such a list. Regarding the long term, he said that the problems had been analysed and that the path to be taken towards a solution still had to be considered. The assistance of the Office would be needed in that regard. However, there would be no specific solution by the 317th Session (March 2013) of the Governing Body. At the current time, the only option was to present to the Governing Body a summary report of the discussions that had taken place during the consultations. The Employer spokesperson agreed with that statement.
31. A representative of the Director-General (the Director of the International Labour Standards Department) indicated that it was of the utmost importance for the Office to assist the tripartite constituents. To do so, the Office needed clear directions from the constituents. To that end, she invited concrete proposals from all the constituents for further examination. She recalled that the Office had set out three proposals in the information paper that could be further examined, if so requested. Constituents needed to indicate clearly which proposals, whether already set out or from alternative sources, needed further exploration. She observed that each of the proposals set out in the paper could be contained in separate documents, as they invoked complex issues. Any further document would not be available in time for discussion at the 317th Session (March 2013) of the Governing Body or the 102nd Session (June 2013) of the ILC. Moreover, it was important that clear priorities be identified by the constituents in terms of the documents to be prepared for the 319th Session (October 2013) of the Governing Body.
32. The Chairperson of the Governing Body closed the informal tripartite consultations by suggesting that the Office should analyse the options set out in paragraphs 116, 117 and 118 of the information paper, as well as other options. Further discussions could take place once that analysis had been completed. A workplan for the next steps would be established during the 317th Session (March 2013) of the Governing Body.

Draft decision

33. *In the light of the decision taken at the 101st Session (2012) of the Conference, the Governing Body is invited to provide further guidance on the follow-up to the discussions of the Committee on the Application of Standards, taking into account paragraph 32 of the present document.*