



**Fifth item on the agenda: The scope
of the employment relationship**
(general discussion)

**Report of the Committee on the
Employment Relationship**

1. At its first sitting on 3 June 2003, the International Labour Conference constituted the Committee on the Employment Relationship. The Committee held its first sitting on 4 June 2003. The Committee was originally composed of 220 members (96 Government members, 54 Employer members and 70 Worker members). To achieve equality of voting strength, each Government member entitled to vote was allotted 315 votes, each Employer member 560 votes and each Worker member 432 votes. The composition of the Committee was modified seven times during the session, and the number of votes allocated to each member was adjusted accordingly.¹
2. The Committee elected its Officers as follows:
 - Chairperson:* Ms. A. van Leur (Government member, the Netherlands) at its first sitting.
 - Vice-Chairpersons:* Mr. A.J. Finlay (Employer member, Canada) and Mr. E. Patel (Worker member, South Africa) at its first sitting.
 - Reporter:* Ms. I. Khazâl (Government member, Lebanon) at its seventh sitting.

¹ The modifications were as follows:

- (a) 5 June: 230 members (102 Government members with 84 votes each, 56 Employer members with 153 votes each and 72 Worker members with 119 votes each);
- (b) 6 June: 216 members (105 Government members with 3,068 votes each, 59 Employer members with 5,460 votes each and 52 Worker members with 6,195 votes each);
- (c) 7 June: 203 members (107 Government members with 2,183 votes each, 59 Employer members with 3,959 votes each and 37 Worker members with 6,313 votes each);
- (d) 12 June: 162 members (109 Government members with 592 votes each, 37 Employer members with 1,744 votes each and 16 Worker members with 4,033 votes each);
- (e) 13 June: 151 members (109 Government members with 60 votes each, 30 Employer members with 218 votes each and 12 Worker members with 545 votes each);
- (f) 13 June (evening): 141 members (109 Government members with 207 votes each, 23 Employer members with 981 votes each and 9 Worker members with 2,507 votes each);
- (g) 17 June: 141 members (109 Government members with 207 votes each, 23 Employer members with 981 votes each and 9 Worker members with 2,507 votes each).

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3. At its sixth and seventh sittings, the Committee appointed a Drafting Group to agree proposed conclusions, based on the plenary discussion, for consideration by the Committee. The Drafting Group was composed as follows:

Government members: Mr. A. Annakin (New Zealand), Mr. P. Benjamin (South Africa), Mr. N. Bruun (Finland), Mr. M. Levin (United States) and Mr. G. Maldonado (Guatemala);

Employer members: Mr. P. Anderson (Australia), Mr. A. Finlay (Canada), Mr. O. Magnussen (Norway), Mr. G. Ricci Muadi (Guatemala) and Mr. V. Van Vuuren (South Africa);

Worker members: Ms. A. Debrulle (Belgium), Mr. M. González (Spain), Ms. C. Passchier (the Netherlands), Mr. E. Patel (South Africa) and Mr. H. Sandrasekere (Sri Lanka).

4. The Committee held 14 sittings.
5. The Committee had before it Report V, entitled “The scope of the employment relationship”, prepared by the Office on the fifth item on the agenda of the Conference.

Introduction

6. In her opening address, the Chairperson emphasized the importance of the topic that had been entrusted to the Committee, and called for a frank and free exchange of views. She recalled that the Committee had been given the task of holding a general discussion, with the aim of agreeing conclusions to put before the Conference for consideration. The measure of success of the Committee’s work would lie ultimately in the realism and vision of those conclusions, which should provide a concise analysis of the problem, and serve as a blueprint for the future regarding the role of employers’ and workers’ organizations, governments and the ILO in this area. She enumerated five main challenges facing the Committee: (i) to build a shared understanding of the problems and challenges faced; (ii) to bring to light the different concerns and interests, and to try to understand the views of others; (iii) to assess honestly the progress made, to identify where improvements were still needed and any obstacles; (iv) to seek common ground on principles and values; and (v) to forge a consensus, not only on the perception of the issues linked to the employment relationship, but on what could and would be done by the tripartite partners under the mantle of the ILO to ensure that all workers enjoy conditions of dignity and decency at work.
7. The representative of the Secretary-General of the Conference introduced Report V. Outlining the evolution of the discussion at the ILO, she noted that while the International Labour Conference at its 86th Session in 1998 had failed to adopt a standard on “contract labour”, there was clear recognition of the importance of the issues raised and the need for the ILO to continue to address the question of workers in situations needing protection. The Conference in 1998, therefore, adopted a resolution inviting “the Governing Body of the ILO to place these issues on the agenda of a future session of the International Labour Conference”. As part of the follow-up to the resolution, the Office commissioned 39 national studies aimed at helping to identify and describe the principal situations in which workers lacked protection, as well as the problems caused by the lack of protection. The national authors were also to suggest measures to remedy such situations. As further mandated by the resolution, in May 2000 the Office convened a tripartite Meeting of Experts on Workers in Situations Needing Protection, culminating in the adoption of a common statement by the experts (Annex 2 of Report V).

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8. Having outlined the main sections of Report V, the representative of the Secretary-General emphasized that the report contained information on but did not evaluate: (i) different criteria for determining the existence of an employment relationship; (ii) the substantive content of the employment relationship. She also stressed that it did not deal with civil or commercial contracts related to the provision of labour or services. The flexible forms of work available both within and outside the framework of the employment relationship were also highlighted. Indefinite, fixed-term, fixed-purpose, part-time and telework, for example, could be used within the framework of the employment relationship, while civil or commercial contracts under which the services of self-employed workers were procured were available outside that framework. The reason for placing the scope of the employment relationship on the agenda of the Conference was to address the growing phenomenon of dependent workers lacking labour protection. The underlying causes for this phenomenon were one or a combination of the following: (i) the law was too narrow or was too narrowly interpreted; (ii) the law was poorly or ambiguously drafted; (iii) lack of compliance/enforcement; (iv) objectively ambiguous relationship; (v) disguised employment relationship; (vi) “triangular” employment relationship. Key questions arose regarding the disguised and objectively ambiguous relationships: did an employment relationship exist, who was an employee and who was an employer. With respect to “triangular” employment relationships, the main questions were who was the employer, what were the worker’s rights and who was responsible for fulfilling those rights. She drew attention to the variety of recent initiatives, legislative and beyond, detailed in the report, aimed at addressing these questions. In conclusion, the representative of the Secretary-General emphasized the prospects for national and international action, citing an extract from the common statement by the experts participating in the Meeting of Experts on Workers in Situations Needing Protection (May, 2000): “... the ILO can play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection”.

Opening statements

9. Placing the Committee’s work in a historical context, the Employer Vice-Chairperson raised a number of factors, conceptual, definitional and linguistic, that in the view of his group had resulted in the failure of the International Labour Conference in 1997 and 1998 to arrive at a consensus on the adoption of a standard on the subject of “contract labour”. He concluded that it was clear that contract labour was unsuitable as a subject for standard setting. He cautioned that another such failed debate could damage the credibility of the Conference and the International Labour Organization, stressing the particular risk for the Organization should it move in the direction of international labour standards in areas unsuitable for such an approach. Affirming that the Employers’ group wanted this general discussion to be a success, and would approach it in a very positive and realistic manner, he stressed that the starting point for a constructive discussion must be a full understanding of the nature of the problems at issue, their causes and their consequences. Regarding the nature of the problems, he expressed the view that there remained a lack of clarity and of concrete data. He called for the problems to be clarified before attempting to find solutions. He also stressed the need to assess the potential impact of any proposed solutions, noting in particular that poorly considered regulation would have cost implications and create barriers to employment generation. It must also not be overlooked that changing employment relationships were a factor in improving standards of living, empowering individuals, and were linked to improvement in skill levels and education. The debate was not about exploitation but rather should be about creating jobs and lifting people out of poverty, which would require a proactive approach to change rather than seeking solutions based on outdated models.

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- 10.** He pointed out that at the national level a variety of different policy responses had been adopted, indicating in the view of his group that the issues were national and were not amenable to a common international approach. Three main questions were proposed as the basis of the Committee's discussion: (i) what was the nature of the problems at issue, their causes and consequences; (ii) how could they best be addressed; and (iii) by whom and at what level. He then pointed to two broad areas where his group felt the Committee could make genuine progress: promoting clarity by national administrations, with an emphasis on the application and enforcement of existing laws; ensuring an entitlement to know one's employment status and to have recourse to well-defined procedures to establish this. Regarding the scope of international action in this area, he cautioned that the employment relationship, being very complex and reflecting differing national realities, was an area where international regulation could be disruptive in a manner unforeseen and unintended. It should rather be left to national administrations to determine the criteria for an employment relationship.
- 11.** Referring to the 1998 Conference discussion, he raised the concern of the possible establishment of a third category of worker, which could encroach on and confuse commercial activities, and limit freedom of choice in the relationship between enterprises and workers. The choice of workers who have entered into commercial relationships for their own needs should be respected. A worker is either an employee or he or she is not, and the Employers' group would not support fraudulent activity aimed at avoiding valid obligations. He stressed, however, that globalization had given rise to a need for businesses to restructure their affairs to focus on comparative advantage, including contracting out aspects of the production process, and his group was not willing to enter into discussions on the economic viability of, or the justification for, doing business in this way. He counselled caution in making policy recommendations that could endanger government action aimed at addressing unemployment, in particular through facilitating hiring of people and finding increased ways of allowing people to find work. Nor should policies endanger partnerships with developing country enterprises which would thus deny them access to global markets. Noting the situation in the informal economy, he queried whether having more laws that were not enforced or were unenforceable was the solution to improving the global economy. The appropriate policy response should rather be the effective implementation of existing laws, and the discussion should aim to assist national administrations to clarify the issue at national level, taking into account national and local specificities and difficulties. He concluded by emphasizing that the expansion of the scope of the employment relationship would be an obstacle to growth and opportunity.
- 12.** The Worker Vice-Chairperson noted that the topic before the Committee was at the very heart of the ILO's work. The employment relationship, and with it, the protections afforded by labour law, as distinct from normal commercial relationships, was necessary due to the inherent inequality between employers and employees. Without it, the law of the jungle would apply with the strong imposing their will on the weak. He stressed the universality of the concept of the employment relationship, which was the essential basis in every legal system for a distinct form of law (labour law or employment law), with tests and criteria to identify it drawn from a limited and consistent range of facts. His group did not seek to condemn legitimate contracting and subcontracting practices. The discussion should focus on who should be an employee and who that person's employer was. He then addressed six questions. First, was there a problem and, if so what was it? This was answered in the affirmative, and the nature of the problem was stated to be that many millions of dependent workers who should be protected by the rights flowing from the employment relationship were not receiving that protection in law or in fact. As a result, they may not be protected regarding minimum wages, hours of work, overtime pay, annual leave, social security, maternity or workers' compensation, and may be denied the right to join a union or bargain collectively. Pointing to the variety of causes underlying the

problem, he emphasized that there could also be many solutions, and called on the Committee to present conclusions as to how to rectify each of the underlying causes. Highlighting the long-recognized need to tackle ambiguous relationships, he recalled that in 1990 the International Labour Conference had adopted a resolution referring to “the nominal self-employed”, who in reality engage in dependent employment relations more akin to wage employment, and stressing the importance of assisting them to become genuinely self-employed or regular wage employees enjoying full benefits.

- 13.** The second question posed by the Worker Vice-Chairperson was whether the problem was widespread. He noted that concerns about workers not enjoying labour protection had been raised in ILO forums since the 1950s; the magnitude of the problem was also attested to by a number of Government members during the 1997 and 1998 Conference debate, as well as during the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000). Through a survey done by the Workers’ group, a wide range of occupations, sectors and branches of activity were identified where the problem had manifested itself, a number of which were also identified in the country studies or during the Meeting of Experts. He also cited a publication of the Organisation for Economic Cooperation and Development (OECD) acknowledging the weakened distinction between self-employment and wage employment, noting in particular the growing phenomenon of “false” self-employment. The third question raised was whether the problem was serious. The Worker Vice-Chairperson asserted that the problem had many serious and undesirable consequences, including exploitation of workers and widening inequalities, discrimination against women, health and safety problems, loss of tax and social security revenue to the State, systemic risk to the industrial relations system, and unfair competition suffered by scrupulous and compliant employers. He emphasized that while the problem may have diverse forms, the outcome was uniform, namely poor, vulnerable workers would suffer. The growth of non-protected dependent work was one reason for the backlash against globalization. He submitted further that the expansion of unprotected dependent work had important negative repercussions for social cohesion and inclusion, as well as for public safety, human resources development and productivity.
- 14.** The fourth question raised was whether the problem was common across countries, regions and legal systems, to which the Worker Vice-Chairperson responded in the affirmative. He pointed in particular to the range of countries, regions and legal systems covered by the 39 national studies commissioned by the Office, and the fact that all the countries experienced an aspect of the problem, with some experiencing the problem in all its dimensions. Moving on to the fifth question, namely was the issue capable of being tackled, he acknowledged that the issues were complex, but that this was true of the most important problems to be tackled in the world. He drew attention to the numerous examples from the national studies where the employment relationship had been refocused through legislative reforms or case law, In this regard, he cited the United Kingdom legislative provision on deeming certain individuals to be employees, the Chilean Labour Code presumption of employment for certain types of homeworkers, the South African example of joint and several liability between two companies when an enterprise is transferred and the example in the Philippines where the principal employer, rather than the subcontractor, can be regarded as the employer. He noted that the International Labour Organization had started to address aspects of the problem, in particular through standards on occupational health and safety as well as through the Private Employment Agencies Convention, 1997 (No. 181). Focusing on the final question of whether this issue could benefit from ILO action, he rejected the claim that the problem could safely be left to countries to resolve on a case-by-case basis, referring to comments made during the Meeting of Experts as to the importance of having an international instrument in this area. The Government experts had supported the elaboration of a common approach and the undertaking of international action, citing in particular the bearing on international

competitiveness. The Worker Vice-Chairperson stressed that the International Labour Organization had tackled and adopted international instruments on a wide range of complex but critical social issues, where national-level action had already been occurring, since international and national action had been viewed as desirable and mutually reinforcing. He called on the Committee to pursue the following outcomes: (i) reassert the importance and continued relevance of the employment relationship; (ii) acknowledge that the tests of either dependency or subordination define the employment relationship, give examples of factors that have been used, and set out a means to update the scope, definition and criteria; (iii) identify ways in which access to establishing an employment relationship could be facilitated; (iv) discourage attempts to disguise the employment relationship or bypass the obligations that flow from it; (v) promote national action by member States, employers' and workers' organizations; and (vi) set out a programme of focused work for the ILO, including the dissemination of information, promotion of good practices, technical cooperation, assistance and guidance, and the adoption of international labour standards. He noted that the regulatory problems faced in the labour market were not unique, and drew a parallel with tax policy where both tax evasion and tax avoidance by companies, and the responses of tax authorities to these, mirrored the problems the Committee had to address in respect of the scope of the employment relationship. He noted that labour law needed to confront both evasion and socially harmful avoidance of employment status. He concluded by pointing out that in the nineteenth century the industrial revolution had led to widespread labour exploitation. In the twentieth century most governments had established a legal and institutional framework to protect workers. The challenge of the twenty-first century was to ensure there was not a return to the labour exploitation, income disparities and economic and political insecurities that characterized the nineteenth century.

15. In the interest of clarifying some terminology, the Chairperson presented a common statement to the Committee on behalf of the Employers' and Workers' groups, explaining that for the purpose of the discussion the term "employee" referred to a person who was a party to a certain kind of recognized legal relationship, which was normally called "an employment relationship"; the term "worker" was a broader term that could be applied to any worker, regardless of whether or not he or she was an employee.
16. The majority of the Government members making opening statements highlighted the importance, relevance and timeliness of the topic before the Committee, including the Government members of Canada, Germany, Greece, India, Japan, Kenya, Norway, Papua New Guinea, South Africa, Trinidad and Tobago, Venezuela and Yemen. Some of these commented that the topic went to the very heart of the work of the ILO and was the foundation of labour relations. The Government member of Germany characterized the employment relationship as one of the most important topics in labour and social legislation. There was also general acceptance among the Government members of the existence and magnitude of the problem facing dependent workers lacking labour protection, with the particular national dimensions of Canada, India, New Zealand, Papua New Guinea, Trinidad and Tobago, and Venezuela being highlighted. The Government member of Australia, however, stated that the employment relationship remained predominant and durable, and advised the Committee not to overstate the problem. He emphasized that the choice in work relationships was key: workers choosing to be employees would have the full protection of the law, while those choosing a commercial relationship would get certain advantages of independence and flexibility. The Government member of Yemen expressed the view that it should not be assumed that the employee was the weaker party in the employment relationship.
17. Regarding the nature of the problem, the Government member of Mexico pointed to the lack of an appropriate framework to develop the employment relationship, which adversely

affected workers, employers and governments. The Government members of Denmark, the Dominican Republic, Kenya and South Africa pointed to weaknesses in labour law resulting in the exclusion of certain categories of workers in need of protection. The Government member of South Africa went on to stress that exclusion of dependent workers from labour protection, whether by decision or default, would lead to a race to the bottom. The particular impact on women was raised by the Government member of India. Specific issues with respect to the informal economy were raised by the Government members of the Dominican Republic and Papua New Guinea, as well as by the World Movement of Christian Workers, and the International Young Christian Workers. The problems arising due to disguised or ambiguous relationships were raised by a number of Government members (Australia, Denmark, Kenya, New Zealand, Venezuela and Yemen) as well as the different issues facing those in a triangular relationship (the Government members of Denmark, Greece, Kenya, New Zealand and Venezuela).

- 18.** The Government members addressed what their Governments considered to be some of the underlying causes of the problems facing dependent workers. The rise in new forms of work and changes in production processes were cited by the Government members of Denmark, Germany, Greece, Kenya and Venezuela. The profound impact of globalization on the labour market and work organization was also raised by the Government members of Denmark, Germany, India, Kenya and Venezuela. Rising unemployment was also a factor, according to the Government members of Germany and Trinidad and Tobago, since it increased potential for exploitation of workers. Other factors raised by the Government member of Trinidad and Tobago were the lack of awareness of workers of their rights and the perception that many workers felt intimidated in the pursuit of their rights. Similar issues were raised by the representative of the World Movement of Christian Workers, and the International Young Christian Workers.
- 19.** Touching upon the question of how to address the issues related to the employment relationship, the diversity of national approaches was noted by the Government member of Mexico, while the Government member of Canada expressed the view that there were many common denominators. The Government member of Greece, speaking on behalf of the Government members of the Committee Member States of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom), and the Government members of India and Norway asserted that there was a need to promote a general understanding of the problem. The Government member of Canada stated that governments generally needed a better picture of the real situation facing employers and employees to be able to identify and address gaps, and suggested that emphasis be placed on protection of the most vulnerable workers. The Government member of Japan cautioned that a uniform approach to the issues would not be appropriate. Similarly, while the Government member of Denmark acknowledged the universality of the employment relationship, she cautioned that there was no easy universal solution to the various problems. She noted in particular that disguised and ambiguous relationships needed to be dealt with separately from triangular relationships since different issues arose.
- 20.** Various Government members stressed the need to balance various interests in seeking a solution to the problem. The Government member of Germany noted that the lack of labour protection was a worldwide problem and, to ensure humane conditions of work and fair competition, both employers' and workers' interests needed to be taken into account. The need to address the problems through social dialogue at the national level, which would provide for a balancing of various interests, was supported by a number of Government members (Mexico, Trinidad and Tobago, the United Kingdom and Yemen). International-level social dialogue led by the ILO was also advocated by the Government members of Canada, New Zealand and Papua New Guinea. The need for flexible responses

taking into consideration specific national circumstances was also widely supported (Government members of Denmark, Greece, Japan, Norway and Yemen). The Government member of Venezuela cautioned that the Committee should be careful not to accept the creation of a third category of worker, but should come up with common criteria to make it easier to determine who was and who was not an employee. The Government member of Norway recommended that the Committee not try to seek to adopt a common definition of the employment relationship, but rather focus on what protection was needed. The need to improve enforcement was also raised (Government members of Japan, Kenya and Trinidad and Tobago).

- 21.** Regarding the role of the ILO, some Government members called for further research into the subject of the employment relationship (Denmark and Yemen), some for ILO technical advice and assistance (Denmark, India, Kenya, Papua New Guinea and South Africa). On the issue of the appropriateness of an international labour standard in this area, the Government members of Denmark, the Dominican Republic, New Zealand and Venezuela supported the adoption of a Recommendation. The Government member of Greece, speaking on behalf of the Government members of the Committee Member States of the European Union, supported the establishment of guidelines for effective action to protect workers.
- 22.** In response to the opening statements, the Employer Vice-Chairperson remarked that the perspectives had evolved and were more sophisticated than in earlier debates. However, his group continued to challenge the assertion of the universality of the issues, noting the diversity evident from the statements of the various Government members. Any action in this area needed to be characterized by flexibility and diversity, recognizing national differences. He also contested the view expressed by the Worker Vice-Chairperson that there was significant loss of tax revenue because workers were outside of the employment relationship, stating that the loss of tax revenue likely arose due to a number of issues unrelated to the lack of clarity in the employment relationship. He asked for greater specificity on the protections concerned since some, like health and safety, were not even tied to the existence of an employment relationship. Although in some jurisdictions health insurance was linked to the employment relationship, the Employers' group was of the view that the appropriate response was not to enlarge the employment relationship, but rather to review and revise the health insurance scheme. Protection regarding hours of work was also unlikely to be a major issue with workers who chose a commercial relationship over an employment relationship. While conceding that there were indeed workers who were exploited, he urged the Committee to examine precisely the needs and how to respond. He noted that the issue of enforcement had been raised in the debate, and linked this to a lack of knowledge regarding the laws as well as a lack of capacity. Where lack of enforcement was due to a lack of political will, expanding the scope of the employment relationship would not help. He acknowledged that the ILO had a role to play in providing technical cooperation and assistance on capacity building. He also called on governments to commit adequate resources to enforcement.
- 23.** The Worker Vice-Chairperson pointed to the areas of convergence in many of the opening statements, which in the view of his group would help to take the discussion forward towards finding a solution or a package of solutions. He stated that the discussion had evidenced a broad recognition of the problem and the variety of approaches to addressing the problem. On the issue of taxation, he stressed that tax laws needed to be applied, and cited an official United States Government subcommittee referring to the magnitude of lost tax revenue due to "misclassification" of the employment status. Given the efficiency of the United States Internal Revenue Service, the problem could not stem from a lack of capacity. On the issue of occupational safety and health, he asserted that providing for joint and several liability or for allocation of responsibilities between two enterprises as found in

this area would be a useful approach more generally regarding triangular employment relationships. He clarified that the Workers' group was not asserting that all relationships falling outside the employment relationship were abusive, and acknowledged that many commercial contracts were covered by well-established rules and were characterized by equality of power. However, in the normal employer-employee relationship, there was an imbalance of power, and there was evidence of large-scale abuse of dependent workers, which was why laws and institutions linked to the employment relationship had been established for their protection. Regarding the impact of international labour standards on jobs, he noted that, while there had been a marked increase in labour market flexibility, there had also been a global increase in unemployment. He cited the example of the United States, where rising levels of unemployment had taken place in spite of high levels of labour market flexibility. He called for a balance between labour market protection and flexibility, and stated that there was in fact significant flexibility within the scope of the employment relationship.

Point 1. General causes and consequences of lack of protection

24. The first point for discussion dealt with the factors leading to lack of protection for workers who should be protected within the framework of an employment relationship, as well as with the consequences this lack of protection might have for governments, employers and workers. The Employer Vice-Chairperson opened his remarks by stating that worker protection was not solely linked to the presence of an employment relationship, but was also guaranteed by other types of law. Not all protections were linked to the employment relationship, as could be seen in the area of health and safety, which had as its premise occupiers' liability law. Workers' compensation law was based on civil liability models, and even collective bargaining had its origins outside the employment relationship with the evolution of trade unionism in the nineteenth century. He went on to state that attempts to define a typical or normal employment relationship appeared out of place in the modern business world. Thanks to recent labour market developments, individuals could now freely choose to disassociate themselves from traditional types of work contracts.
25. He added that employment relationships were nowadays so complex that no definition could ever claim to cover all possible constellations. Various tests and criteria existed at national level to ascertain who was and who was not an employee. It would be inappropriate, he asserted, to suggest that particular tests or criteria should be universally used. In the opinion of his group, the criterion of dependence was not appropriate for the purposes of determining employment status because dependency came in various forms and could be more or less significant depending on particular circumstances. Even if it was common in legal systems to focus on the facts of the relationship to determine employment status, he considered that this test failed to respect the intent of the parties. As a result, workers who wanted to be treated as independent workers often ended up being considered as employees.
26. With regard to the question of how widespread the phenomenon of lack of protection really was, the Employer Vice-Chairperson stated that the Office's report did not provide clear answers to the question and that the examples it provided suggested that national legal systems had adequate capacities to solve the problems they were faced with. It would be a mistake to assume, he added, that all those who lacked protection automatically wanted it. Some workers may have elected to provide their labour outside of the scope of the employment relationship for a variety of reasons, including minimization of tax liabilities, increased income opportunities, greater flexibility and greater personal freedom.

A better understanding of worker preferences was needed for meaningful discussion of these issues. As to the consequences of lack of protection, the Employer Vice-Chairperson felt that no proper analysis of social and economic consequences of regulation had been carried out by the Office. He feared that regulation might have unintended consequences, including reduced job opportunities and the creation of a third category of workers who neither had the flexibility of self-employed workers nor the legal protections of employees.

- 27.** The Worker Vice-Chairperson opened his remarks by saying that many factors were associated with lack of protection. Many of them were listed in the Office's report. Other factors could be added to the list provided by the Office. The important point that needed to be emphasized was that lack of protection was not a new phenomenon for the ILO, and that discussions on this issue went back to the 1950s. In discussing the consequences of lack of protection, the Worker Vice-Chairperson stated that lack of protection had negative consequences for employers, governments and workers alike. It had negative consequences for employers because it led to unfair competition. Companies were put in the position of being able to obtain cost advantages simply by manipulating the form of relationship they engaged in with workers. This kind of competition did not generate dynamic efficiency, that is, it did not create incentives to increase productivity, and was therefore associated with negative externalities for society as a whole.
- 28.** Reliance on unprotected forms of work also had negative consequences for governments, because it often led to occupational hazards and was associated with evasion of taxes and social security contributions. Also, it reduced companies' willingness to invest in human resources development. The resulting undersupply of skills was, again, a negative externality for society. Because those who shifted from employment relationships to self-employment were not necessarily better off, reliance on unprotected forms of employment often led to greater income inequality and, through this, to reduced social cohesion. The negative consequences for workers were clear enough: these workers were denied the protection which national labour law afforded them.
- 29.** The Worker Vice-Chairperson did not agree with the Employer Vice-Chairperson that a single definition of employment relationship was inappropriate or technically incapable of being framed. In the opinion of his group, a pool of common factors clearly emerged from the country studies referred to in Report V. These revolved around the concepts of subordination and dependence. On the issue of scale of abuse, he noted that in previous discussion the Government of India had noted that millions of workers in that country were denied the protections they were entitled to and he cited OECD figures referring to a significant percentage of people currently classified as self-employed who would normally meet the criteria for an employment relationship. He concluded by saying that the causes of the problem were multiple, but the problem itself – lack of protection – was fundamentally one problem and had an international dimension. This did not necessarily imply, however, that there should be only one solution to the problem. On the contrary, it was possible that more than a single ILO instrument was required to tackle effectively the problem.
- 30.** The Chairperson then gave the floor to several Government members to address the first point for discussion. The Government member of the United Republic of Tanzania stated that lack of protection of workers had dire consequences, particularly for poor countries, as it led to poverty and social exclusion. In her opinion, one of the major factors contributing to lack of protection was the failure of labour administrations to adapt to socio-economic change and to reflect changing labour market conditions. She expressed her preference for general instruments, which gave governments and the social partners the possibility to develop their own particular solutions to specific problems within the framework of general rules. Finally, she cautioned against the risk of applying a single model of

protection to countries at different levels of development or characterized by workforces with different skill levels. The Government member of Guatemala agreed that some countries lacked the capacity to enforce legislation. He added that such capacity would not be necessarily increased by a new international instrument. He also noted a growing tendency for dependent workers to be presented as if they were self-employed. It was important, he concluded, that governments developed clear criteria to distinguish between the two categories. The Government members of Lebanon and the Syrian Arab Republic also emphasized the importance of enforcement of existing laws. They argued that cost consideration often stood in the way of greater enforcement capacity. The Government member of the Syrian Arab Republic also stated that a Convention or Recommendation was needed to address the problem of lack of protection. Finally, the Government member of the Dominican Republic argued that growth in unemployment led workers to accept suboptimal, and often illegal, working conditions.

31. The Chairperson invited the Employer Vice-Chairperson to respond to comments. First, in response to a previous comment by the Worker Vice-Chairperson, he stated that expanding the scope of the employment relationship would not solve the problem but would only provide unscrupulous employers with an additional opportunity to avoid or evade the law. Second, he questioned whether it was really true that new forms of work, outside of an employment relationship, were associated with lower levels of training. He argued that not enough was known on these issues. Third, with reference to the example of India introduced by the Worker Vice-Chairperson, he expressed the view that this example illustrated that countries have ample capacity to develop their own criteria to distinguish between different types of relationships.
32. The Worker Vice-Chairperson also responded to comments. The discussion showed that the problem of lack of protection preceded globalization but that it was exacerbated by globalization; that deficiencies in labour administration were significant contributors to the problem; and that the last few years had seen a growth in disguised or objectively ambiguous forms of relationships. He concluded by stating that the Worker members' intention was not that of infringing on or restricting in any way legitimate, bona fide commercial relationships, but that of depriving unscrupulous employers of one source of unfair competitive advantage. He noted that the discussion pointed to the need for international action: where so many countries faced the same problem, and where the causes of these problems were so similar across national jurisdictions.

Point 2. Specific reasons why protection is lacking

33. The second point for discussion had to do with the extent to which employees failed to benefit from the protection they should enjoy in an employment relationship because of one or a combination of different factors: the law was unclear, too narrow in scope or otherwise inadequate; the employment relationship was ambiguous; the employment relationship was disguised; an employment relationship clearly existed but it was not clear who the employer was, what rights the worker had and who was responsible for them. The Chairperson gave the floor to the Worker Vice-Chairperson who focused his remarks on specific cases.
34. One of the cases he cited arose under the South African Labour Relations Act, 1995. This did not include independent contractors in the category of employees and, hence, excluded this group of workers from the protections associated with an employment relationship. Workers in various sectors, and especially in the clothing sector, were approached by their employers and asked to sign a detailed document, in which they declared themselves to be independent contractors. These workers were and continued to be employees. Yet, various

clauses in their contracts sought to disguise the presence of an employment relationship. One example was that such “contractors” had to pay of monthly “rent” of US\$0.10. The Worker Vice-Chairperson argued that this case clearly illustrated how the presence of loopholes in legal texts led some employers to circumvent the protections granted to employees and gain unfair cost advantages at the expense of their law-abiding competitors. He added that this was not just a South African peculiarity but resonated with similar experiences in other parts of the world. Turning to the case of ambiguous relationships, he asserted that the objective character of the relationship should prevail over the subjective choice of the parties in determining whether a worker was self-employed or an employee. He cited the example of a tin of baked beans that did not lose its characteristics simply through relabelling it as apple juice. In the same way, the essential characteristics or elements of an employment relationship were capable of objective expression, and could help to define the existence of an employment relationship.

- 35.** The Employer Vice-Chairperson stated that lack of application of existing laws, not lack of clarity, was the main cause of lack of protection. In this regard, he asserted that it was unlikely that an international labour standard could rectify the situation. As to ambiguity, he stated that a person either was an employee or was not. An employee, in turn, was such when there was an employment relationship recognized by law. This legal test was determined by national law and practice. He added that dependency was an inappropriate criterion as it increased ambiguity. Employees who supplied their services to a user enterprise should not be considered as employees of the user enterprise. Concerning disguised employment, he stated that employers did not support deliberate attempts at evading legal obligations, as this created a situation of unfair competition. While employers were open to discussing the notion of disguised employment, they cautioned against solutions that interfered with bona fide commercial relationships or frustrated the desire of individual workers to become more independent. With regard to the South African example of unclear law referred to by the Worker Vice-Chairperson, the Employer Vice-Chairperson stressed that this example illustrated that, even when the law was unclear, appropriate correction mechanisms existed at the national level.
- 36.** Several Government members, including the Government members of Bahrain, Côte d’Ivoire, the Dominican Republic, Guatemala, Lebanon and Namibia, as well as a representative of the Liberation Movement of Palestine, contributed to the debate by providing examples, based on the experience of their countries, of situations in which ambiguous, disguised or triangular relationships, as well as other circumstances, led to lack of protection for workers. Other Government members, including the Government members of Italy and the Netherlands, illustrated their own legislative approaches to improving protection for workers in ambiguous or triangular relationships. Some Government members, including the Government members of Australia, Mexico and the United States, provided overviews of the different criteria used by their national jurisdictions to determine the legal status of different categories of workers. The Government member of the Syrian Arab Republic described the procedures through which the Syrian legal system determined who was an employee. A variety of Government members, including the Government members of Cameroon, El Salvador, Namibia and Nigeria, underscored that inadequate implementation of existing laws lowered worker protection, and emphasized the urgency of strengthening enforcement capacities. The Government members of the Dominican Republic and Trinidad and Tobago expressed the view that, in many cases, workers were unable to benefit from the protection to which they were entitled because they refrained from seeking judicial redress. In this regard, the Government member of Venezuela emphasized that the capacity of the judiciary was an important factor to be taken into consideration. The Government members of Namibia and Yemen asserted that workers and employers, particularly those in the informal economy, were often not aware of their legal rights and obligations.

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- 37.** Some Government members, including the Government members of Guatemala and Lebanon, expressed the need for a precise definition of the employment relationship and related concepts. The Government members of Canada and the United States declared their support for the preparation of ILO guidelines aimed at clarifying the employment status. The Government member of Canada underscored the importance of having accessible and transparent processes for the determination of workers' employment status. The Government member of New Zealand expressed his Government's support for an ILO instrument that ensured flexibility and local differentiation. The Government member of the Netherlands believed that an international approach to the problem of lack of protection was both necessary and possible, but had to take into account the need for flexibility.
- 38.** Several other Government members emphasized the importance of flexibility. The Government member of Namibia stated that flexibility was of fundamental importance. The Government member of New Zealand cautioned against erecting barriers that would limit choice. Legislation, he asserted, could be a very blunt instrument, which could lead to unintended consequences. The Government member of Venezuela stated that too strict and rigid legislation might be undesirable. The Government member of Austria spoke about the need to reconcile protection with flexibility and worker autonomy. The Government member of Poland expressed the view that, when discussing appropriate levels of protection, consideration should be given to maximizing opportunities for work.
- 39.** Reflecting on different criteria used to determine the employment status of workers, the Government member of South Africa asserted that, because tests based on single factors had been largely abandoned, the determination of employment status was now more ambiguous than in the past and often left to the employers' discretion. This situation had increased the vulnerability of workers. With reference to the desirability of reducing ambiguity through more precise legal definition, the Government member of Australia argued that attempts at eliminating ambiguity were doomed to failure. Ambiguity was a necessary feature of human relations, and was also a much-needed source of flexibility. The Government member of Switzerland related the experience of his country in seeking to produce a more precise definition of the employment relationship. This attempt was eventually abandoned because it was realized that legal precision could complicate matters and increase that same ambiguity it was supposed to reduce.
- 40.** The Employer Vice-Chairperson commented on the debate by stating that lack of predictability of the law was to no party's advantage, as the consequence of this lack of predictability, namely litigation, was undesirable. However, he believed that greater predictability was not necessarily achieved through legal clarity. In fact, clear bad laws created unnecessary rigidities. These often stood in the way of addressing the plight of those who wanted to work but were impeded from doing so by a paucity of job opportunities. He noted a convergence of views on the fact that disguised employment relationships were, for all purposes, employment relationships. The key issue in this regard, he continued, was that of enforcement of existing employment laws. The problem of enforcement was a national problem and was best addressed at the national level. Finally, he asked for clarification of the terms "guidelines" and "guidance", which had been used in the debate. He distinguished between the national and the international levels and between guidance and guidelines. Guidelines might involve a degree of prescription, which would not be appropriate. Guidance identified alternative methods and was preferable because it offered choice.
- 41.** The Worker Vice-Chairperson also noted remarkable convergence on several issues. There was wide acceptance that appropriate distinctions between dependent and independent workers should be introduced. Also, many people participating in the debate acknowledged that disguised employment relationships were associated with undesirable social

consequences. He agreed with the viewpoints of the Government members of Lebanon and Nigeria that the problems were not simply a matter of application but also a question of existing scope of the law. Echoing a comment made by the Government member of South Africa, he stated that a key task for the Committee was to decide whether the choice that workers exercised when they engaged in relationships other than the employment relationship was really free choice. He agreed with the Employer Vice-Chairperson that the distinction between employee and non-employee was a useful starting point, but added that the status of employee was defined by objective characteristics. He quoted a number of case studies that included Argentina, Australia, the Philippines and South Africa, to point to omissions in the law, ambiguities or negative social consequences for workers. Returning to a comment made by the Employer Vice-Chairperson about the labour market situation in South Africa, he noted that the Employer Vice-Chairperson had agreed that, in this case, the elimination of legal ambiguity required better drafting mechanisms. This, however, also implied a need to review existing legislation in light of new problems. Finally, with reference to a comment made by the Employer Vice-Chairperson concerning the plight of those who were not in work, he stated that the relationship between standards, or institutional protections in general, and employment growth was a complex one and the empirical evidence was far from establishing a positive correlation between labour market flexibility and employment creation. He noted that if, indeed, levels of labour protection and the scope of the employment relationship were so automatically linked to levels of employment as suggested by the Employers' group, then Germany and Sweden would not have as high a proportion of persons as employees, and Indonesia and Pakistan so low a proportion as indicated in Annex 2 to the report. He noted that prior to the introduction of minimum wage regulations in the United Kingdom, prophets of doom had contended massive job losses – in fact, employment had grown in the period subsequently.

Point 3. Development of labour administration systems

42. The Committee moved on to address the issue of how labour administration systems and their services should be developed so as to respond more effectively to the challenges posed by non-compliance and lack of enforcement. The Chairperson noted that the issue of enforcement had been highlighted a number of times during the discussion, along with the significant implications for labour administration systems and the role of labour inspection.
43. The Worker Vice-Chairperson noted that his group agreed that labour administrations should be substantially strengthened to improve compliance with and enforcement of labour legislation, but stressed that this was a necessary but not a sufficient condition. Action would also be required on a number of other fronts, including simultaneous legislative reform. His group also acknowledged the considerable difficulties facing labour inspectorates in carrying out their tasks, as described in Report V, and asserted that mechanisms for monitoring the implementation of labour legislation would need to be substantially upgraded in virtually all countries. The problem of scarce, and often declining, human and financial resources allocated to labour administrations, and in particular labour inspectorates, was noted. His group suggested a number of approaches to strengthening labour administration, in particular labour inspectorates: (i) developing international benchmarks regarding the level of resources that should be available for labour inspection, for example as a percentage of the labour budget or the overall budget, perhaps based on a country with a particularly good record with respect to labour inspection; (ii) political will and a genuine commitment by governments to devote sufficient priority to labour inspection; (iii) given that fiscal constraints, particularly for developing country governments, could restrict the ability to expand those services, he called on the international community to devote a greater proportion of development

assistance to assisting governments in establishing the institutions necessary to ensure compliance with labour legislation; (iv) increasing capacity through training, putting into place modern systems, and making better use of technology; (v) targeting inspection on industries and enterprises where problems were more likely to occur, such as construction and transport; (vi) improving coordination and sharing of information between various authorities, including those responsible for labour, tax and social security; and (vii) increasing coordination and joint action between the trade union movement and the labour inspectorate.

44. The Worker Vice-Chairperson highlighted various national innovations including the appointment of labour inspectors at the tripartite level, or by the trade unions. He noted that there was an important role for employers' organizations to campaign strongly for respect for the law and compliance with labour standards. The role of the ILO in establishing best practice guidelines on labour inspection and on identifying disguised, ambiguous and triangular relationships was also raised, as well as consideration by the ILO Governing Body of regular periodic reports on labour administration. At the national level, his group proposed a periodic tripartite review of the labour administration.
45. The primary importance of clarity in the law was stressed by the Employer Vice-Chairperson, as this would greatly reduce the need for judicial or administrative intervention. The law then needed to be effectively enforced. He urged governments to make sure national legislation was clear and to devise methods for making existing legislation clear and understood. More and better information as to what rights and entitlements applied to which category of worker might also be needed. Governments were encouraged to involve the social partners in an effort to ensure that laws and regulations were appropriate and relevant to the world of work. Training of the labour inspectorate and education of workers and employers would in the view of the Employers' group contribute to greater understanding and compliance. Labour administration officials should also be trained to provide them with basic knowledge of national laws and the ability to distinguish between employees and non-employees. The usefulness of information and guidance was stressed, which could be effected through written mechanisms, including interpretations by courts, prepared in consultation with the social partners. He noted that a number of Committee members had already raised issues concerning labour inspection, in particular regarding resources, effectiveness and training. He stressed that labour inspection was only one aspect of enforcement, and that a broader focus in this area was needed.
46. The Employer Vice-Chairperson suggested some approaches to the resolution of disputed cases of employment relationships: (i) consideration should be given to different solutions appropriate to different national situations, with regard for differences among sectors and in the intent behind various types of protection; (ii) mechanisms for resolution should be inexpensive and accessible, with sufficient controls to prevent abuse; (iii) governments should be encouraged to examine existing national legislation to ensure it is appropriate, predictable and effective; (iv) consideration should be given to providing more and better information as to what rights and entitlements apply to which category of persons; (v) the principle of the intention of the parties in entering a relationship needed to be respected; (vi) some solutions could focus on specific needs of specific workers; and (vii) national administrations should conduct a regular review of enforcement programmes and processes.
47. A number of Government members underscored the potential significance of the labour administration system in compliance and enforcement, with some stressing in particular the role of the labour inspectorate. The Government members of the Syrian Arab Republic and Yemen noted that labour inspectors could play a significant role in enforcement in all

establishments and in all sectors. The Government member of Norway stated, however, that in his country labour inspection applied only with respect to public administration law, whereas disputes in the private sector were left to the courts. The Government members of the Dominican Republic, New Zealand and South Africa endorsed a broader mandate to ensure effective labour inspection extending beyond inspecting and imposing sanctions, including promotional activities aimed at prevention and voluntary compliance. On the issue of sanctions, the Government member of South Africa posed the question of whether they should be criminal or civil, and also suggested that access to tenders should be denied where there was a violation of labour standards, a suggestion supported by the Government member of Trinidad and Tobago. The Government member of Trinidad and Tobago also supported the proposals put forth by the Workers' group regarding international benchmarking of labour inspection resources, targeting inspection to industries and enterprises where problems were more likely to occur, and involving trade unions in the inspection process. The relevance of and the need to apply the provisions of the Labour Inspection Convention, 1947 (No. 81), were raised by the Government member of the Dominican Republic.

- 48.** Some Government members, including those of the Dominican Republic, Finland, Germany and Greece, noted other facets of labour administration beyond labour inspection. The statistical aspects of labour administration were raised by the Government member of the Dominican Republic. The Government member of Germany stressed the variety of bodies and institutions forming part of the labour administration involved in promotion, monitoring, control and enforcement, and noted the significance of the Labour Administration Convention, 1978 (No. 150), pointing out that it referred specifically to self-employed workers and the informal sector. The Government member of Australia cautioned that an active labour administration system would not be able to remove all exploitation. Some Government members (Germany and Greece) also stressed that the issues of enforcement and protection were not limited to the labour administration, and recalled the important role of the State in general, and the judiciary in particular. The Government member of France noted the role of the State in bringing together different governmental agencies and actors in enforcement and preventive action. Certain Government members indicated that, before addressing issues of enforcement, there needed to be a clear definition of the employment relationship (Finland, Greece, New Zealand).
- 49.** The various problems facing labour administrations that needed to be addressed were raised by a number of Government members. The need for increased resources, human and financial, was highlighted by the Government members of the Dominican Republic, Germany, South Africa, Trinidad and Tobago, and Yemen. On the issue of financial resources, the Government member of Yemen, while acknowledging that there was a problem of lack of resources, indicated that in developing countries priority needed to be given to using the limited resources on education and infrastructure for agriculture and industry. The Government members of Australia and the United Kingdom challenged the implication that an increase in financial resources would result in an increase in compliance. The Government member of the United Kingdom emphasized instead the usefulness of non-regulatory promotional practices, while the Government member of Australia called for a focused and clever use of resources, the dissemination of information to the parties and education regarding their rights and obligations, and the use of new technologies to extend the reach of information and advice. The focus on information and education was endorsed by the Government member of Norway, along with strengthened social dialogue to encourage a more proactive approach by the social partners. Related to the issue of lack of resources was the issue of lack of capacity and a need for adequate training of those in the labour administration, which was raised by the Government members of the Dominican Republic, Germany and Trinidad and Tobago, as well as by a

representative of the Liberation Movement of Palestine. The particular problem of staff, once trained, leaving the labour administration to work in the private sector was noted by the Government members of Germany and Trinidad and Tobago.

- 50.** A key role for employers' and workers' organizations in compliance and enforcement or the promotion of best practices was acknowledged by a number of Government members, including those of Finland, Norway, the Syrian Arab Republic, Trinidad and Tobago, the United Kingdom, Venezuela and Yemen. Cooperation and collaboration among various government agencies was advocated by the Government members of France and New Zealand, based on their own national experiences. The International Labour Office was viewed by a number of Government members as having a role in supporting national labour administration systems, capacity building, establishing a sound methodology, and providing technical assistance (the Dominican Republic, Germany, South Africa and Venezuela).
- 51.** The Worker Vice-Chairperson remarked that many practical ideas had been highlighted by the Government members. He stressed that the discussion was about compliance with the law and not about the substance of the law. The law had to be obeyed and complied with. An effective and efficient labour administration was a crucial component of compliance, but needed to go hand in hand with other elements that addressed aspects of the scope of the employment relationship. The Employer Vice-Chairperson stated that the discussion had highlighted that the enforcement of existing laws was central to many of the issues before the Committee, therefore, clearly placing the topic within the national context. He pointed out the innovative and creative ways of dealing with compliance that had been raised by the Government members, such as cooperation, information and education, more effective use of resources and increased action by the social partners. He stressed that local solutions had to be found for unique needs, though his group recognized some common elements in dispute resolution: expediency, accessibility, neutrality, and the process should not be subject to abuse. His group rejected the view expressed by the Worker Vice-Chairperson that there was a role for trade unions in labour inspection, since labour inspectors should be independent, fair, flexible, neutral and seek to serve the broader interest of work.

Point 4. Solutions to the problems, including addressing the gender dimension

- 52.** The Committee then turned its attention to proposing solutions to the problems raised throughout the discussion, including how to address the gender dimension of these problems. The Employer Vice-Chairperson identified several areas where his group believed the Committee could make genuine progress. First, there was a need to encourage predictability and flexibility in the law. He distinguished predictability and flexibility from clarity, stating that this would not be helpful if it resulted in rigidities. The law needed to be responsive to local conditions and national characteristics, which could be undermined through taking action at the international level. Second, people should be entitled to know their employment status and be able to have recourse to well-defined, fair and expeditious procedures in this respect. The third area where it was felt progress could be made was regarding the need for effective application and enforcement of the law. Finally, appropriate education of workers, employers and the labour inspectorate, in addition to other relevant public bodies, would be needed. He urged the Committee to focus on enhancing a better understanding of the issues, opportunities and problems from various perspectives, including that of employers, which would assist each member State in deciding what policies and changes would be most appropriate. A key aspect was the examination of the application and enforcement of existing laws, and he asserted that

national legal solutions and approaches in this area had often proved to be sufficient to address many of the problems.

- 53.** The Employer Vice-Chairperson stressed that the more economic growth there was, the more secure people would feel, and income security depended on growing markets and marketable skills; therefore, tying income security to the employment relationship was not a sustainable strategy. He submitted that employment growth was at the heart of this debate, and solutions needed to make it easier for employers to hire people, and policies facilitating employment generation needed to be formulated. Overregulation, in the view of his group, could aggravate the unemployment situation, particularly in countries with large informal economies. In the light of globalization, businesses were restructuring to focus on their comparative advantage. As a result, a large number of jobs were created through contracting out, providing many developing country enterprises with access to global markets. He cautioned that this kind of business model must not be jeopardized. He stated that international labour standards would not be appropriate regarding the matters before the Committee since legal systems evolved over time, and it was the role of legislatures to review the extent to which any changes may be needed, which would be impeded by rigidities inherent in any universally applicable principles. In the view of his group, the extent and actual nature of the problem was national. Given the diversity of the issues, mechanisms developed at the national level to clarify ambiguities in the law had unique national characteristics, driven by factors such as national priorities and local economic conditions and existing institutions. He indicated that international labour standards could potentially deny independent workers access to commercial protection and could incite the development of new evasion mechanisms. International labour standards should, in the view of his group, be “high-impact” mechanisms seeking to address fundamental workplace issues, and the creation of instruments that could not or would not be ratified could only undermine the credibility of the International Labour Organization and its processes. With respect to the gender aspect of the issues under discussion, the Employer Vice-Chairperson stated that this was not fully understood and there had been insufficient analysis of the scope of the gender issues in Report V prepared by the Office. The adverse impact on women of disguised employment, or of the economic, social and gender implications arising from the lack of clarity in employment laws, was not clear. Thus, any discussion of gender aspects of the problem would be premature.
- 54.** The Worker Vice-Chairperson, based on the numerous successful innovations introduced at the national level and through ILO instruments, put forward a number of proposals for constructing solutions. First, the ILO should develop a guideline on what may usefully be applied at national level, to constitute a set of considerations used to determine whether a worker was indeed an employee, while recognizing genuine commercial relationships and genuine self-employment. In this context, he noted that the use of tests and criteria to determine the existence of an employment relationship was widespread, and that the tests and criteria used were remarkably consistent across legal systems and jurisdictions, and had been drawn from a limited and consistent range of facts surrounding the relationship. The two tests most commonly applied used criteria of subordination or economic dependency, or a combination of both, to determine the objective nature of the relationship. Each of these tests then contained a limited range of more precise criteria, with both tests requiring that the worker perform services for the employer in return for remuneration. He cited a number of examples from a wide range of countries using substantially similar tests and criteria, and stated that such a range of criteria was a very flexible and dynamic tool, since in many countries criteria had evolved to embrace the new realities of employment relationships. Regarding international labour standards addressing the issue of who was and who was not an employee, he pointed to the Home Work Convention, 1996 (No. 177), which provides that homeworkers should receive a range of employment protection. He recalled that the Convention set out two criteria that defined an

independent worker, namely autonomy and economic independence. The second proposal put forward by the Worker Vice-Chairperson was that national law could define the scope of the employment relationship based on recognition of the need to include dependent workers within its scope. This could take the form of either referring directly to specific, normally excluded categories, for example homeworkers, or to introducing generic tests on the basis of the employment relationship. He noted a number of national laws in this regard, as well as the Promotion of Cooperatives Recommendation, 2002 (No. 193), which provides that national policies should promote the ILO fundamental labour standards and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, for all workers in cooperatives without distinction whatsoever.

55. The third proposal of the Workers' group was that disguised employment relationships could be addressed through the introduction of a presumption of employment in certain circumstances, and deterrent penalties or fines for companies found guilty of such action. He noted that legal processes could be used to frustrate workers' claims regarding employment status, and were a key deterrent to workers pursuing such claims. To address this problem, a number of countries had shifted the onus of proof from an employee having to prove his or her status, to an employer being required to prove the absence of employee status. A role for the International Labour Office in distilling the criteria constituting the basis on which courts would pierce a disguised employment relationship was suggested. He also cited the provision of the Promotion of Cooperatives Recommendation, 2002 (No. 193), stating that national policies should ensure that cooperatives were not set up or used for non-compliance with labour law or used to establish disguised employment relationships. On the issue of sanctions, he stressed that if the only penalty for a disguised employment relationship were that the original obligation must be applied, it would create an incentive to cheat; therefore, penalties needed to be of a magnitude to seriously discourage evasion and disguised relationships. The fourth proposal put forth was that national law could introduce a facility to deem a category of workers to be employees for the purpose of labour legislation, and could identify their employer. He noted that a number of countries had adopted this approach in order to address the problems of ambiguous or disguised relationships and to respond quickly to shifts in employment relationships. A further proposal of the Workers' group called for national legislative measures to be introduced with regard to triangular relationships to allocate responsibilities between more than one enterprise, in respect of a range of provisions of labour legislation. As a number of country examples illustrated, provisions could clarify who was the employer, and what were the terms of the contract, assign responsibilities to a user as opposed to a provider enterprise or hold a new and an old employer jointly and severally liable for certain obligations, require a user enterprise to ensure that the provider enterprise was legitimate and complied with its legal obligations, and provide for non-discrimination between the workers of the provider enterprise and those of the user enterprise regarding certain matters. He noted that a range of international labour standards had introduced some measure of joint and several liability, or of allocating responsibilities between two enterprises, including a number of health and safety standards, the Home Work Convention, 1996 (No. 177), and its accompanying Recommendation (No. 184), and the Private Employment Agencies Convention, 1997 (No. 181). The final proposal put forward by the Worker Vice-Chairperson was that access to courts could be facilitated in a number of ways, including through expeditious and simple procedures, combining systems of conciliation and arbitration, an expedited time frame within which dismissal cases would be heard, limited review instead of a full right of appeal, and circumscribed recourse to lawyers.

56. With respect to the gender dimension of the problems, the Workers' group acknowledged that a significant proportion of workers in disguised and ambiguous employment relationships were women, and accounted for a large percentage of the workforce in

sectors where abuses were particularly rife, including construction, textiles, department stores and home-based work. Women often received lower wages and faced particularly severe discrimination. He called on member States to consider categories of work dominated by women as areas for priority attention in extending the scope of the employment relationship at national level. In addition, criteria which did not restrict performance of work to employers' premises, or which would accommodate flexible working hours, would help to prevent dependent homeworkers, for example, from being determined to be self-employed. Regarding the appropriateness of an international labour standard where action was already being taken at the national level, the Worker Vice-Chairperson emphasized that each instrument adopted by the International Labour Conference had been preceded by member States grappling with the problem and finding national solutions, and then acknowledging the need for an internationally coordinated response based on emerging trends, a variety of experiences and best practices, resulting in an instrument providing guidelines. Guidelines, he concluded, in the form of international instruments, would provide predictability combined with flexibility.

- 57.** A variety of solutions to the problems surrounding the scope of the employment relationship were introduced or supported by a number of Government members. Some Government members called for responses that would respect national and regional variations, including the Government members of Bahrain, Italy, Japan and Sweden. The Government members of Guatemala, Japan, Portugal, Venezuela and the United Kingdom supported the view that it was useful to have a common and limited range of criteria to determine whether an employment relationship existed, and cited the criteria used in their own countries. On a related issue, the Government members of Belgium, Guatemala, Italy, Mexico, Namibia and Sweden underlined the need for clarity in the law. How clarity in the law had been approached in Namibia was outlined by the Government member of that country. She explained that this had included labour law reform with the participation of the social partners drafting the law in plain language, promoting education and information campaigns and widespread dissemination of the law. Translating key sections into local languages could also improve clarity. The important role of education and information regarding the law and rights related to the employment relationship was also raised by the Government members of Portugal and Venezuela.
- 58.** The Government member of Venezuela referred to the need to promote a culture of compliance, and the Government member of Guatemala supported the view that sanctions and penalties were needed to ensure compliance. The issue of ensuring effective enforcement was raised by the Government members of Italy, Namibia, Tunisia and Yemen. The Government member of Austria asserted the need to focus on improving labour administrations, including labour inspectorates, and raised the issue of inspectors themselves abetting in the disguising of relationships. The Government member of Guatemala referred to the need to protect workers who might be coerced into disguised relationships, by ensuring that such workers had access to the judicial system. The Government members of Namibia and Portugal raised the issue of the need to improve access to justice, with the Government member of Namibia supporting a role for conciliation and arbitration. The Workers' group's proposal for a reversal of the burden of proof or a legal presumption of the existence of an employment relationship was supported by the Government members of Guatemala and Venezuela, noting that this approach was widespread in their region. These Government members also supported the call for apportioning responsibility in triangular relationships or providing for joint and several liability. The Government member of Austria proposed that all workers should be entitled to receive a written statement setting out their rights and responsibilities, and stating who was the employer. The importance of applying the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), to all workers was stressed by the

Government member of Sweden, as this would assist in addressing a number of the issues raised.

- 59.** The usefulness of studying various national solutions was supported by the Government member of Guatemala. A number of Government members, including from Japan, South Africa, Sweden and the United Kingdom, emphasized the appropriateness of tailoring solutions to target particular sectors or groups of workers. In this context, the Government member of the United Kingdom noted the enormous diversity in the labour market of his country, stating that there were different needs and different trade-offs in different sectors and industries that needed to be considered, and stressed the value of all member States carefully investigating particular employment situations in their own countries. The Government member of Japan noted that a number of initiatives in this respect had already been taken in his country, including adopting guidelines with respect to telework, home work, and employment agencies. The Government member of South Africa referred to the use of sectoral regulations in his country to ensure labour protection, and noted that these were particularly important in sectors where there was little union representation, which were also often the female-dominated sectors. The crucial role of the social partners and social dialogue in finding appropriate solutions was emphasized by a number of Government members, including those of Austria, Italy, Mexico, Namibia, South Africa, Sweden and the United Kingdom. The employment status reviews undertaken in the United Kingdom were highlighted, which involved a wide range of stakeholders. The Government member of South Africa noted that the social dialogue body in his country was mandated to develop a code of good practice which would contain guidelines to determine employment status. The Government member of Sweden stressed that social dialogue was essential in order to address all the issues that had been raised, including enforcement, the triangular relationship and defining who was an employee or an independent contractor.
- 60.** A number of Government members supported a role for the International Labour Organization in responding to the problems of dependent workers lacking labour protection, with some calling for an international standard in this area. The Government member of Tunisia, supported by the Government member of Guatemala, stressed the need for an instrument that would provide clear indications of situations where workers lacked protection, and set out definitions of the parties to an employment relationship in order to assist member States to use and apply the concepts more effectively. The Government member of Venezuela also supported the adoption of an instrument, as did the Government member of New Zealand, subject to the proviso that it should not encroach on genuine civil contracts. The Government member of Germany called for an instrument that could combat unfair competition among companies and unfair competition among States. The Government member of Bahrain, however, opposed the adoption of an international labour standard, while the Government member of Namibia noted that her Government was not yet sure whether there was a need for such an instrument. The Government member of Canada supported the adoption of practical guidelines in this area, while the Government members of Italy and the United Kingdom referred to the need for a digest or guide of good practices.
- 61.** The gender dimension of the topic before the Committee was acknowledged by a number of Government members, including those of Greece, Namibia, Portugal, South Africa, Sweden, the United Kingdom and Venezuela. The Government member of Namibia considered that the gender dimension was not fully explored in Report V and affirmed that the majority of workers in disguised and ambiguous relationships were women, many of whom worked in the informal economy. The Government member of South Africa stressed the need to focus action on female-dominated sectors. The Government member of Portugal referred to the importance of laws on gender equality and non-discrimination, as

well as generally making laws more systematic and accessible, as a means of promoting gender equality.

- 62.** The Employer Vice-Chairperson rejected the view expressed by the Workers' group that there was remarkable consistency in approach, submitting that the discussion had rather brought to light the enormous diversity. He stated that rather than having a piecemeal approach to the various responses, the International Labour Office could over time do an analysis of the rationale for the differences in scope of application in different laws, which should take into consideration the employers' perspective. He stressed that the adoption of the Home Work Convention, 1996 (No. 177), had not been supported by the Employers' group in 1996, in particular because of the way relationships of independence had been characterized. Given the low ratification rate of the Convention, the Employer Vice-Chairperson submitted that his group had been proven correct in not supporting the Convention. Regarding reversing the burden of proof and deeming workers to be employees, he stated that this was contrary to natural justice and procedural fairness. He challenged the view that the International Labour Organization could somehow reflect "best practices" in this area, since there was a wide range of practices, the appropriateness of which could only be determined at the national level. He asserted that an international labour standard in this area would not be able to address issues of coercion that had been raised, nor the numerous other diverse issues that had been touched upon in the discussion, and any attempt to adopt such a standard would undermine the credibility of the Organization. While acknowledging that there were appropriate matters that could be the subject of international labour standards, he stated that the scope of the employment relationship was not one of those. His group would support, however, an ILO digest of practice in this area, with appropriate analysis of the context and the consequences. The Office also had a role in providing technical assistance, training, capacity building, education and information. He concluded by stressing that the Employers' group would not support any course of action that would lead to an international labour standard or any other prescriptive approach in this area.
- 63.** In response to the discussion on possible solutions, the Worker Vice-Chairperson remarked on the important contribution of the Government members, which brought to light a convergence of how the problems and the solutions were manifested, irrespective of the region, culture or legal tradition. There was also remarkable consistency with respect to the tests used to determine the existence of an employment relationship, as well as the use of presumptions. Peru, Portugal and South Africa, in different continents with different levels of economic development and different legal systems, all applied presumption of employment. There were not, as far as solutions were concerned, a thousand unique situations. Responding to the issue of the appropriateness and impact of international labour standards where national approaches had been adopted, he asserted that if an international instrument would have no impact at national level, there should be no reason to fear its adoption. If it would have an impact, the extent would vary depending on the type of instrument chosen, since there were different obligations under a Recommendation compared to a Convention. He also pointed out that obligations under a Convention only arose upon ratification. However, even unratified, Conventions had provided guidance to many countries on a range of topics. A Recommendation, he stated, would come closest to the guidelines or guidance referred to by some of the Government members. It would essentially be a summary of recommended practice. He pointed to the common statement of the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000), which referred to the possible adoption of instruments including the adoption of a Convention and/or supplementary Recommendation. In addition, the resolution adopted by the International Labour Conference in 1998 invited the Governing Body of the ILO to place these issues on the agenda of a future Conference "with a view to the possible adoption of a Convention supplemented by a Recommendation" if considered necessary by

that Conference. The Worker Vice-Chairperson expressed the concern that the views of the Employers' group on international labour standards were tantamount to a blanket argument against such instruments, and attempted to call into question instruments already adopted. He called for a process of dialogue to address the legitimate concerns of the Employers' group concerning the need to respect genuine self-employment and valid commercial relationships. He concluded by stressing that the remarkable consistency in this area as well as the emerging practices and innovative mechanisms to address access to an employment relationship could find expression in an appropriately worded instrument.

Point 5. The roles of governments and the social partners

- 64.** Discussion on point 5 centred on the roles that governments, employers, workers and representative organizations could play in the design and implementation of solutions to the problem of lack of protection and, in particular, on the role of social dialogue. The Worker Vice-Chairperson reminded the Committee that the ultimate purpose of the discussion the Committee was engaged in was the promotion of social justice. This was essential for the long-term sustainability of society. The principal actor must be government. In the informal economy, lack of legal recognition or status deprived workers of their fundamental rights. This was a governance issue. He was convinced that refocusing the scope of the employment relationship was a step in transforming work in the informal economy into decent work in the mainstream economy.
- 65.** He expressed the view that there was an intrinsic link in many countries between the legal recognition of the employment relationship and the enjoyment of fundamental rights such as freedom of association and collective bargaining. Although these fundamental rights were meant to apply to all workers without distinction, governments had a role in ensuring that these rights were respected and could be exercised. With respect to collective bargaining and social dialogue, the employment relationship was the most important framework by which the appropriate partners could be identified and their respective rights protected.
- 66.** The Worker Vice-Chairperson expressed the view that there was a close link between refocusing the employment relationship and strengthening social dialogue. He stated that capacities for social dialogue were likely to be greater in countries that had a greater share of employees as a proportion of the workforce (and where they were organized) than in countries where only a small proportion of the workforce enjoyed the protection of and employment relationship and where the scope of the employment relationship was most in need of refocusing or the law was less effectively applied. Employers had a role in promoting the rule of law and in preventing violation of legal obligations. He referred to the dark side of subcontracting where work was performed by workers without status in complex supply chains. He recalled that some of the best company codes of conduct called for their suppliers not to avoid their obligations as employers. As for trade unions, he asserted that they had a moral obligation to bring the benefits of organization to presently unorganized workers, but that governments must protect the right to organize and bargain.
- 67.** The Employer Vice-Chairperson stated that the role of governments in providing solutions to the problems at hand was of considerable importance. In particular, governments were called upon to create or strengthen institutions that were inexpensive and that allowed for speedy access by all relevant parties. They should provide effective legal mechanisms for the enforcement of contracts. They should design policies geared towards employment creation. They should ensure that taxation systems were fair and equitable and that they reflected changes in labour markets. They should promote research on the economic

consequences of introducing undue regulation of the employment relationship, and on the value of alternative forms of work organization. Also, national administrations should seek to increase their enforcement capacities and share information about practices with other States faced with similar problems. Finally, governments should consult and involve in the design and implementation of policies not just the social partners, but all parties having an interest in a particular matter.

- 68.** The Employer Vice-Chairperson identified a series of roles for employers' organizations, saying that they could provide data that could clarify situations at the national level. They could collaborate with the other social partners in establishing or reforming dispute resolution mechanisms. They could assist in the process of reviewing national legislation to ensure clarity, predictability and fairness. They could provide training and information to member enterprises, assisting them to apply statutes and relevant case law decisions. Finally, employers' organizations could participate with the other social partners in processes aimed at examining enforcement problems and at developing national strategies that could include guidelines or other means to provide guidance.
- 69.** Much of the discussion among Government members focused on social dialogue as a useful tool for addressing the problem of lack of protection. Numerous Government members, including the Government members of Belgium, Denmark, the Dominican Republic, India, the Republic of Korea, Malawi, New Zealand, Norway, the Syrian Arab Republic, Venezuela and Yemen, underlined the importance of social dialogue and provided illustrations of how social dialogue was being used in their countries to address the problems at hand. The Government member of the Republic of Korea, for example, illustrated the attempts of the Korean social partners at developing solutions for workers in non-standard work. The Government member of New Zealand stated that social dialogue contributed to strengthening compliance with legislation by bringing moral pressure to bear on economic actors. The Government member of the Syrian Arab Republic stated that, in his country, social dialogue enhanced productivity and contributed to reduce social conflict. The Government member of India expressed the view that social dialogue was a useful complement to legislation – which was often ineffective when it was not supported by the social partners.
- 70.** Some Government members, including the Government members of Denmark and Norway, referred specifically to the role of collective bargaining in clarifying the scope of the employment relationship. The Government member of Belgium stated that sectoral level agreements had contributed to addressing some of the problems of disguised employment in his country. The Belgian Government supported these agreements and enforced them through labour inspections. Speaking on behalf of the Government members of the Committee Member States of the European Union, the Government member of Greece explained that, within the framework of the European employment strategy, the social partners were invited to negotiate on the modernization of work, with a view to striking a balance between flexibility and competitiveness.
- 71.** According to the Government member of Namibia, government played an important role in the search for solutions to the problem of lack of protection. In particular, the role of government was that of identifying gaps in legislation and of encouraging social dialogue, which should also include workers and employers in the informal economy. According to the Government member of Australia, however, government was not the key actor. Employers, contractors, workers and unions were. The principal task of government was that of establishing a general framework and to provide enforcement capacities, rather than substantial regulation. In this regard, he remarked that regulation stood a greater chance to be effective if it encouraged voluntary compliance. For the Government member of

Bahrain, trade unions' role in the search for solutions was that of making workers aware of their rights.

72. The Worker Vice-Chairperson commented on the usefulness of sharing national experiences and noted that, despite different institutional configurations, cultural heritages and levels of economic development, the problems encountered by different countries appeared remarkably similar. He emphasized the experience of countries that had used social dialogue, and particularly collective bargaining, to identify criteria for determining the employment status of workers. He pointed out the “chicken-and-egg” dilemma: collective bargaining and social dialogue assumed the existence of an employment relationship in many countries. Thus, they were not sufficient as means to address the problem. The Employer Vice-Chairperson agreed on the importance of capturing and disseminating information on the various country experiences. However, he considered that cross-country examination did not reveal uniformity but, on the contrary, wide variation.

Point 6. Priorities for ILO action

73. The sixth point for discussion focused on priorities for ILO policy, research, standard setting and technical assistance. The Employer Vice-Chairperson stated that, in his group's opinion, the main priorities for ILO action were in the field of technical cooperation and assistance, particularly with respect to training labour inspectorates and strengthening labour administration in general. He provided several examples of what the ILO could do: provide information on alternative national models; promote the search for national solutions through social dialogue; promote more research on the particular situation of specific countries. He repeated that the problems faced by different countries were uniquely national and therefore the solutions should be national. For this reason, the Employers' group would not support any ILO action leading to the adoption of an instrument. He emphasized that his group had clearly communicated their point of view over the years, including at the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000). He stated that the Employers' group intended to participate constructively in the Drafting Group; however, it would not participate in drafting language that moved towards the adoption of an ILO instrument.
74. The Employer Vice-Chairperson reiterated his group's view that regulation of the employment relationship increased labour market rigidities, discouraged investment and increased unemployment. He reminded the Committee that not all forms of protection had to be associated necessarily with the employment relationship. There were innovative ways of providing the same protections through alternative mechanisms to workers outside the framework of an employment relationship. These alternative mechanisms should be further explored. He expressed the view that the cost of protections tied to the employment relationship discouraged compliance. He noted that not every triangular relationship raised concerns about worker protection and that, as far as disguised and ambiguous employment relationships were concerned, inadequate enforcement capacities were the main source of problems. He added that an ILO standard, or even a guideline, would do nothing to increase countries' enforcement capacities. Instead, it would limit worker and employer freedom and reduce economic efficiency.
75. The Employer Vice-Chairperson also felt the need to respond to a point raised by the Worker Vice-Chairperson in the previous discussion, namely that the reservations expressed by the Employers' group about adopting an international labour standard – that it would have negative economic consequences; that national experience was too diverse and the issue too complex to justify a uniform approach; and that national authorities were

already adequately responding to the problem – were applicable to any ILO standard. The Employer Vice-Chairperson pointed out that Conventions were different from one another and that one could not generalize and say they were all undesirable. In fact, there were many Conventions that the Employers’ group had supported and continued to support.

- 76.** The Worker Vice-Chairperson stated that the discussions of the previous few days had identified the problem of dependent workers who should be protected by employment law but did not benefit from the protections to which they were entitled. This problem was serious and widespread and affected most countries, regardless of their legal regimes. He noted with satisfaction that the Employers’ group also recognized that the employment relationship was a universal concept and that every worker needed to be certain about his/her employment status. He concurred with the Employers’ group that genuine commercial relationships and genuine self-employment should not be undermined or limited.
- 77.** The Worker Vice-Chairperson laid out a series of priorities for future ILO activity. One set of activities had to do with research and outreach. The ILO should accumulate further information by commissioning additional country studies. It should carry out comparative analyses of the information already collected, to identify common trends. It should undertake studies focusing on particular regions and/or sectors. It should convene meetings, including at the regional and subregional levels, to favour the exchange of ideas and diffuse information. It should host meetings of experts to consider specific aspects of the topic, including national experiences in delineating the boundary between dependent work and independent self-employment. It should place the scope of the employment relationship as a subject matter for consideration by sectoral meetings. A second set of activities related to technical cooperation. The ILO should provide guidance to member States striving to clarify the scope of the employment relationship and contribute to developing the capacity of labour inspectorates. In this regard, the Governing Body should be requested to consider regular reviews of the performance of labour administrations of member States, with a view to identifying cases requiring assistance.
- 78.** The Worker Vice-Chairperson expressed his group’s support for an international labour standard covering the scope of the employment relationship. He added that his group did not necessarily suggest a “one-size-fits-all” approach. He suggested that an instrument that provided clear indications as to the essential elements of a solution without prescribing all the details was desirable. This approach also ensured sufficient flexibility to accommodate the particular economic, social or industrial relations environment of different countries. He rejected the view that international labour standards were straitjackets and that they brought about undue uniformity in labour practices. Much variation in labour practices was found even in countries that had ratified the same international labour standards. He also rejected the notion that international labour standards had negative economic consequences. He cited evidence from World Bank and OECD studies, as well as a recent publication by Werner Sengenberger, former Director of the ILO Employment Strategy Department, suggesting that international labour standards increased economic efficiency, including by providing incentives for firms to use their resources more effectively. Finally, he quoted Winston Churchill, who famously remarked in 1909 that “... the good employer is undercut by the bad, and the bad employer is undercut by the worst”.
- 79.** In addressing the question of what should be the priorities for ILO policy, research, standard setting and technical assistance, the Government members focused primarily on the issues of technical assistance and standard setting. A number of Government members situated their proposals specifically within the context of the ILO’s Decent Work Agenda (Côte d’Ivoire, Dominican Republic, Indonesia, Mexico, New Zealand, Nigeria, Venezuela, Yemen and Zimbabwe). The Government member of the Dominican Republic

stated that the existence of a clear employment relationship was an important element in achieving the goal of decent work. The Government member of Côte d'Ivoire suggested that an international labour standard on the employment relationship would promote decent work, and the Government member of Zimbabwe commented that it would be difficult to promote the Decent Work Agenda without adequately protecting workers in disguised, ambiguous and triangular relationships.

80. A large number of Government members spoke in support of the adoption of an international labour standard in this area (Argentina, Austria, Botswana, Côte d'Ivoire, Dominican Republic, France, Germany, Greece, Guatemala, Malawi, Namibia, Netherlands, New Zealand, Papua New Guinea, South Africa, United Republic of Tanzania, Trinidad and Tobago, Venezuela, Yemen and Zimbabwe), as well as the representative of the Liberation Movement of Palestine, with some referring specifically to a Recommendation (Argentina, Botswana, France, Greece, Malawi, Namibia, Papua New Guinea, South Africa and the United Republic of Tanzania), and others to a Convention (Germany, Guatemala and South Africa). The Government member of Germany noted that the adoption of a number of other Conventions had preceded successful attempts in his own country to improve the situation of workers, illustrating the potential positive impact of Conventions. He also noted the role of international labour standards in avoiding unfair competition, a sentiment echoed by the Government member of France. The Government member of Trinidad and Tobago remarked on the responsiveness and flexibility of international labour standards. The Government member of Namibia indicated that her Government might also support a Convention, but only if it were promotional in nature, while the Government member of France noted that a Convention could perhaps be proposed at a later date. The Government member of Sweden, speaking also on behalf of the Government members of Denmark, Finland, Iceland and Norway, stated that, due to widespread differences, there should be no binding international definition of the employment relationship, but indicated that in future a Recommendation might be possible. Also citing national diversity, the Government member of Austria commented that her Government could not support a binding instrument on the scope of the employment relationship. The Government member of the Syrian Arab Republic, noting that his Government was not in principle opposed to the adoption of a Recommendation, cautioned that it may not be an ideal solution in the light of rising unemployment. The Government member of Australia expressed his Government's opposition to the adoption of an international instrument on this topic, since it would restrict business growth and employment and create confusion, rather than dispelling it. Before any new standard could even be considered, the Government member of Australia asserted that there needed to be research and analysis of the potential labour market impact of such an instrument.

81. A variety of proposals were put forward concerning the possible content of an international labour standard. Some Government members referred to the need for an instrument to set out guidelines, a framework, general principles or a range of possible factors and criteria that could be taken into account in seeking to define the employment relationship and address the relevant issues (Botswana, France, Greece, Guatemala, Namibia, Papua New Guinea, South Africa, Syrian Arab Republic and the United Republic of Tanzania), and the representative of the Liberation Movement of Palestine. The Government member of Trinidad and Tobago emphasized the need to balance flexibility with protection, and to ensure protection in particular for the most vulnerable workers. The Government member of the Netherlands stated that an instrument could help employers keep on the road to social justice, which would be linked to a flexible labour market and economic growth. The Government member of Greece, speaking on behalf of the Government members of the Committee Member States of the European Union, with the exception of Denmark, Finland, Sweden and the United Kingdom, called for general principles aimed at proposing action for governments and workers' and employers' organizations. He stated further that

the instrument should provide a focus for areas of technical assistance, promote national policy on the protection of dependent workers in the light of recent developments in consultation with workers' and employers' organizations, and that it should be complemented by a code of practice. The usefulness of a code of practice was also raised by the Government member of Venezuela. The importance of referring in any instrument to the role of the social partners and to social dialogue was supported by the Government members of France and Venezuela. In addition, the Government member of South Africa suggested that consideration be given to the adoption of a Convention setting out the role of national social dialogue in evaluating the scope of the employment relationship.

- 82.** A number of Government members advocated that there should be specific reference in an instrument to ambiguous, disguised and triangular relationships in order to assist countries in better addressing these problems (Government members of Austria, France, Germany, Guatemala, South Africa and Zimbabwe, and the representative of the Liberation Movement of Palestine). With respect to disguised and ambiguous relationships, the Government member of South Africa suggested an instrument that would stress the need for national legislation to set out clear definitions, provide effective access to courts to clarify employment status, protect rights and provide appropriate penalties. He proposed that, regarding the triangular relationship, an instrument could stress the need to stipulate clearly the rights of employees and the respective obligations of users and providers. The Government member of Argentina and the representative of the Liberation Movement of Palestine submitted that there was a need to address the issue of social security. The inclusion of the role of labour administration, including the labour inspectorate, was endorsed by the Government members of Côte d'Ivoire, France and Germany. The Government member of France suggested that any standard also address the issues of access to justice, shifting of the burden of proof and the need for non-adversarial procedures to resolve disputes regarding the employment relationship.
- 83.** The next issue that attracted much discussion and a wide range of proposals was the role of ILO technical assistance in the context of the scope of the employment relationship (Government members of Argentina, Austria, Canada, Dominican Republic, Germany, Greece, Guatemala, India, Indonesia, Japan, Mexico, Namibia, New Zealand, Nigeria, Papua New Guinea, Saudi Arabia, Sweden, Syrian Arab Republic, United Republic of Tanzania, Trinidad and Tobago, Venezuela and Zimbabwe, and the representative of the Liberation Movement of Palestine). A number of Government members stressed the need for priority in technical assistance to be given to strengthening labour administration systems, including the labour inspectorate (Dominican Republic, Germany, Indonesia, Japan, New Zealand, Nigeria, Syrian Arab Republic and Trinidad and Tobago), as well as the representative of the Liberation Movement of Palestine. The Government member of Trinidad and Tobago supported the development of international benchmarks for labour administrations, regarding resources and training. The Government member of Argentina referred in particular to the need for assistance to ensure effective compliance, while the Government member of Sweden, speaking also on behalf of the Government members of Denmark, Finland, Iceland and Norway, referred to the need to focus on enforcement. The Government members of the Dominican Republic and Germany appealed to the Office to take a more coordinated and integrated approach to labour administration and inspection, which would entail placing them both within the same ILO technical unit. The key role of labour law review and reform in this area, with ILO assistance, was also raised by various Government members (Argentina, Canada, Japan, Namibia and Sweden).
- 84.** The Government member of Indonesia emphasized the need for ILO technical assistance to enable member States to develop action plans concerning the employment relationship, and to encourage tripartism, particularly through promoting the ratification and application of the Tripartite Consultation (International Labour Standards) Convention, 1976

(No. 144). The importance of promoting tripartism was also raised by the Government member of Greece, speaking on behalf of the Government members of the Committee Member States of the European Union, with the exception of Denmark, Finland, Sweden and the United Kingdom, in the context of ILO assistance in developing national policies regarding the scope of the employment relationship. The use of social dialogue to find solutions relating to dependent workers lacking labour protection was raised by a number of member States, with many referring to the mandate of the ILO to promote social dialogue nationally and internationally (Côte d'Ivoire, Greece, Namibia, Netherlands, Papua New Guinea, Sweden, Syrian Arab Republic, Trinidad and Tobago, and Yemen). Enabling member States to adopt appropriate national policies was also raised by the Government member of Mexico. The ILO's role in assisting with capacity building of governments and their agencies, workers' and employers' organizations was noted by the Government members of the Syrian Arab Republic, the United Republic of Tanzania, Trinidad and Tobago and Zimbabwe, as well as the representative of the Liberation Movement of Palestine. The Government member of Saudi Arabia called on the ILO to provide expertise to assist member States in identifying and addressing gaps in this area, and in the pursuit of solutions. ILO technical assistance should give priority to training and skills development particularly in the informal economy, according to the Government member of India. The Government member of Venezuela raised the relevance of ILO assistance in developing indicators to allow targeted assistance to the most affected sectors and groups of workers. The Government member of Yemen pointed to the need for particular assistance in female-dominated sectors, including the informal economy.

- 85.** A number of Government members also viewed the ILO as having an important role in undertaking further comparative research on the scope of the employment relationship and disseminating information (Argentina, Botswana, Canada, France, Greece, Guatemala, Japan, New Zealand, Saudi Arabia, United Republic of Tanzania and Venezuela). The Government member of Canada referred to the need to include statistical data in studies of national practice. The Government member of New Zealand called for studies on particular sectors, the gender dimension and issues related to workers with disabilities. The need for research and analysis of the gender dimension of the scope of the employment relationship was also stressed by the Government member of Namibia. The Government member of Venezuela recommended research on the ethical issues regarding the employment relationship. The need to update the classical methodology to define a dependent relationship was put forward by the Government member of Argentina. The usefulness of the role of the ILO in collecting, analysing and disseminating information on good practices was emphasized by the Government members of New Zealand and the United Republic of Tanzania. The role of regional integration in promoting respect for rights was raised by the Government member of Guatemala, suggesting a need for the ILO to link with other relevant organizations and institutions. Other Government members also called for the ILO to improve coordination and cooperation with other organizations and institutions, including international financial institutions, whose policies could impact on the employment relationship (Canada and Greece).
- 86.** In his concluding comments, the Worker Vice-Chairperson reminded the Committee that the issue it was considering, that of the scope of the employment relationship, went to the heart of the ILO's mission. He was heartened by what he perceived as broad convergence of Government members towards recognition of the necessity of an international instrument. He noted that 30 Government members had expressed support for either a Convention or some form of international labour instrument, while only one or two Government members had explicitly rejected a role for international labour standards. In conclusion, the Worker Vice-Chairperson observed that the Drafting Group had at its disposal a rich set of ideas and practical solutions on which to draw. He noted that the various national experiences that had been illustrated over the previous few days gave

useful indications of what was needed, and that there was political will to take the appropriate steps.

Consideration of the proposed conclusions on the employment relationship of the Drafting Group

- 87.** At its eighth sitting, the Committee considered the proposed conclusions that had emerged from the work of the Drafting Group. In introducing the proposed conclusions, the Chairperson observed that 73 proposals for amendment had been received, and reminded the Committee that they would be discussing the proposed amendments with a view to reaching agreement on conclusions that would be submitted to the plenary of the Conference. She thanked the members of the Drafting Group for their work, a sentiment that was subsequently echoed by the Government members of Norway, Sweden and the United Kingdom. She acknowledged that the debate in the Drafting Group had not been easy and that there remained a wide divergence of views and positions in some areas, though the discussion had been constructive and undertaken in a spirit of seeking consensus.
- 88.** The Worker Vice-Chairperson stated that the Drafting Group process had been helpful in surfacing various concerns, and in leading to a better understanding of the issues with which governments had been grappling. He commented that the draft text provided a workable basis for the Committee to proceed, since it incorporated balances, trade-offs and compromises. His group commended the members of the Drafting Group for having undertaken their work in the spirit of engagement and compromise. The Employer Vice-Chairperson also thanked the Drafting Group, noting in particular that the Government members had put forward particularly practical and well thought-out suggestions. While his group was of the view that there were shortcomings in the text as it had emerged from the Drafting Group, they acknowledged that some innovative improvements had been introduced.
- 89.** Following a request by all the Government members of the Committee, the Legal Adviser explained the distinction between “international instruments” and “international labour standards”, as understood in the practice of the International Labour Organization. The notion of “instrument” was descriptive: a document indicating the result of an action. The term “instrument” did not indicate the content or the legal scope of the document. “Instrument” included, but was not limited to, Conventions and Recommendations, encompassing also certain other texts adopted by the International Labour Conference or the Governing Body, such as Declarations, resolutions and codes of practice. International labour standards were, in contrast, specific instruments, namely Conventions and Recommendations, which had been elaborated according to the provisions of the ILO Constitution and the Standing Orders of the Conference. International labour standards were also required to be adopted by a two-thirds majority of the Conference, whereas other types of instruments, if submitted to the Conference, were adopted by a simple majority. Conventions were international agreements operating under international law, which, once ratified, gave rise to obligations on the part of member States, whereas Recommendations proposed acting in a particular way.

Paragraph 1

- 90.** The Government member of Côte d’Ivoire introduced an amendment, seconded by the Government member of Sweden, to change the word “heart” in the first sentence of paragraph 1 to “core”, so that it would read “[t]he protection of workers is at the core of the ILO’s mandate”. He stated that “heart” was a literary term, which was not appropriate

in a document dealing with legal matters. The Employer Vice-Chairperson indicated that the proposed amendment was not needed, a view that was reinforced by the Worker Vice-Chairperson, who noted that “core” and “heart” have the same effect. The Worker Vice-Chairperson also pointed out that paragraph 1 had been the subject of considerable discussion within the Drafting Group. His group also wanted to avoid any confusion with the specific use of “core” in the ILO to refer to a defined category of labour standards. The proposed amendment was withdrawn, though the Government member of Côte d’Ivoire cautioned that difficulties would still remain, particularly in the French version of the text.

91. The Government member of Sweden then introduced an amendment, also on behalf of the Government members of Austria, Denmark and Norway, to insert the words “For the purposes of this document the following applies.”, prior to the references to terminology set out in the paragraph. He stated that while paragraph 1 could be seen as laying down some elements of definitions, there remained a lack of clarity. While both the Employer and Worker Vice-Chairpersons acknowledged that the proposed amendment had merit, they expressed concern that it would upset the delicate balance struck by the Drafting Group. The Worker Vice-Chairperson asked that it be recorded that the intention of the Drafting Group had clearly been to have the terms apply only within the context of the document; however, the Employer Vice-Chairperson stated that the Employers’ group had a different view in this regard. In the light of the assurance given by the Worker Vice-Chairperson that the intention was to limit the application of the terms to the conclusions, the Government member of Sweden withdrew the proposed amendment on behalf of its sponsors. He noted, however, that they had some hesitations concerning the remarks of the Employers’ group. A final amendment to paragraph 1 was put forward by the Government member of Côte d’Ivoire to delete the last sentence referring to self-employment and independent work. The proposed amendment was not considered by the Committee as it was not seconded. Paragraph 1 was, therefore, adopted without amendment.

Paragraph 2

92. An amendment, proposed by the Government member of the United Kingdom and seconded by the Government member of Norway, sought to replace in the final sentence the words “so that the scope of application” with “so that employment status can be more easily determined”. The Government member of the United Kingdom asserted that when referring to “the employment relationship”, what was really meant and more commonly understood was in fact “employment status”. While indicating that this amendment would indeed have further clarified the text, the Employer Vice-Chairperson, referring to the difficult discussions on this paragraph in the Drafting Group and the innovative proposals made by the Worker members in that context, stated that his group could not support the proposed amendment. The Worker Vice-Chairperson maintained that the formulation proposed by the Drafting Group was clearer than the proposed amendment and should be supported. The amendment was withdrawn. Proposing an amendment to the same sentence, which would replace the remainder of the text after “sufficiently clear” with “to determine who is in an employment relationship”, the Government member of Lebanon, supported by the Government member of the Syrian Arab Republic, explained that her Government was of the view that reference to the “scope of application” did not add anything to the text. The Employer and Worker Vice-Chairpersons, in rejecting the amendment, reiterated the importance of respecting the balance achieved by the Drafting Group. The Employer Vice-Chairperson, however, commended the Government member of Lebanon on the amendment, and expressed his group’s regret that they could not support it, since it would have avoided some difficult legal issues. The Workers’ group thanked the Government member of Lebanon for the amendment, but called for the retention of the text of the Drafting Group. The proposed amendment was withdrawn. An amendment put forward by the Government members of Canada, Finland, New Zealand,

South Africa and the United States was also withdrawn as it was no longer relevant, given a corrigendum to the proposed conclusions changing “national laws” to “various laws”. As there were no further amendments proposed to paragraph 2, the Chairperson declared it to be adopted without amendment.

Paragraph 3

93. As there were no amendments proposed to paragraph 3, it was adopted without amendment.

Paragraph 4

94. The Government members of Canada, New Zealand, South Africa and the United States, on the one hand, and the Employer members, on the other, proposed two competing amendments. The amendment submitted by the Government members of Canada, New Zealand, South Africa and the United States proposed to replace paragraph 4 of the Drafting Group’s text with the following text:

One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient application of law is the growing phenomenon of workers who are in fact employees but find themselves without the protection of an employment relationship. This form of false self-employment is more common in less formalized economies. However, many countries with well-structured labour markets also experience an increase in this phenomenon.

The amendment put forward by the Employer members proposed to replace the same paragraph with a different text:

One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient applications of law, is the growing phenomenon of workers who find themselves outside the framework of an employment relationship. Some of these developments are new, some have existed for many decades. There are different perspectives on the extent and nature of this phenomenon. This phenomenon occurs in both developed and developing countries. Workers nowadays freely choose to work or provide services as self-employed or independent workers, because of specific advantages they see in such arrangements. However, as job shortage is on the increase in many countries there are also some instances where workers have no choice in the type of work they undertake.

95. Speaking on behalf of the Government members that had proposed the amendment, the Government member of Canada explained that their amendment accurately reflected the intention of the text elaborated by the Drafting Group, but did so by using clearer terminology. This was an advantage. The Employer Vice-Chairperson stated that the amendment proposed by his group acknowledged that, in poor countries, job scarcity created an environment which limited workers’ choice. The consequence was, in the Employer members’ opinion, that promoting a regulatory environment that encouraged strong economic and employment growth would also contribute to workers’ choice. The Employer Vice-Chairperson also commented on the amendment proposed by the Government members of Canada, New Zealand, South Africa and the United States. This was certainly better than the Drafting Group’s original text, which had not been able to go beyond the Office’s suggested language due to lack of consensus among the Drafting Group members. The original text had several problems. First, it created the category of dependent worker. The Employers’ group deemed that this category was inappropriate – because it implicitly created other categories, for example that of the independent worker – and not especially clear. Second, the original text appeared to identify as unambiguously negative a series of factors (for example, globalization, foreign direct investment,

enterprise restructuring, increased workforce participation of women) that could have both positive and negative consequences.

96. In commenting on both these proposed amendments, the Worker Vice-Chairperson stated that they would bring significant change to the Drafting Group's original text. He disagreed with the Employer Vice-Chairperson that reference to the concept of dependent worker was inappropriate. On the contrary, he explained, this concept was widely used, reflected the reality of the labour market and incorporated language that had already been used by the ILO. Also, he disagreed that the Drafting Group's original paragraph treated factors like globalization or technological change as if they were purely negative phenomena. It simply acknowledged that these factors had both intended and unintended consequences and some of these were negative. The Workers' group rejected the amendment proposed by the Employer members because it simply repeated a series of views that had gained no consensus in the Drafting Group. Also, the Workers' group felt that parts of the original text of paragraph 4 were more in line with its views than the amendment proposed by the Government members of Canada, New Zealand, South Africa and the United States. Nonetheless, in a spirit of cooperation, the Workers' group accepted the amendment proposed by the abovementioned Government members, since it was clear, and it referred in addition to the phenomenon of false self-employment,
97. The two proposed amendments, that of the Government members of Canada, New Zealand, South Africa and the United States, and that of the Employer members, were voted against each other. After an indicative vote, the Employer Vice-Chairperson decided to withdraw the amendment put forward by his group and discussion continued on the other proposed amendment. The Worker Vice-Chairperson proposed subamending this amendment by adding the following sentence at the end of the paragraph: "Some of these developments are new, some have existed for many decades." He noted that this sentence appeared in the proposed amendment that the Employer members had just withdrawn and in an amendment submitted separately by the Workers' group. The Government members of Argentina, Canada and Finland supported this proposed subamendment. The Employer Vice-Chairperson proposed to further subamend the text by deleting the words "false self-" from the second sentence. This sentence would then read "This form of employment is more common in less formalized economies." The Worker Vice-Chairperson stated that this further subamendment would significantly weaken the text and fail to convey its intended meaning. This concept was widely used and the growth of false "self-employment had been highlighted by the OECD. For these reasons, the Workers' group did not support the subamendment. An indicative vote was taken on the Employer members' subamendment, after which the Employer Vice-Chairperson withdrew it. Paragraph 4 was adopted as amended.

Paragraph 5

98. The Employer members proposed an amendment to delete the words "too narrow in scope or otherwise inadequate" in the first bullet point in the proposed paragraph. As a result, the text would read as follows: "the law is unclear". The Employer Vice-Chairperson explained that this amendment would clarify the text. In fact, reference to the narrowness of scope raised a question as to what the proper scope of the law was. This question should be left to national authorities. Also, reference to "otherwise inadequate" was not sufficiently precise and seemed a residual category. This was not very helpful, and might even be dangerous, in a legal text that was likely to be consulted by national-level courts and tribunals for reference. In responding to these comments, the Worker Vice-Chairperson stated that deleting the words "too narrow in scope or otherwise inadequate" would not clarify the text. In his group's opinion, these words correctly captured one of the factors that currently undermined the fair governance of the labour market. Also, the words

appeared to reflect the experience of several countries – previously discussed in the Committee – that laws that were too narrow in scope were also unable to protect particular categories of workers (for example, homeworkers, teleworkers). As to the words “otherwise inadequate”, the Worker Vice-Chairperson stated that lack of clarity of the law and narrowness in scope were two instances of inadequacy, but there were others. The expression, therefore, completed the sentence.

- 99.** The Government member of Finland appreciated the Employer members’ search for greater clarity and proposed to subamend the text of the amendment as follows: “the law is unclear or does not cover adequately de facto employment relationships”. This subamendment was seconded by the Government member of the United Kingdom and supported by the Government members of Lebanon and the Syrian Arab Republic. However, the Government members of Argentina, Bahrain, Chile and South Africa opposed it. The Government member of South Africa stated that this subamendment did not convey adequately the concept of narrowness in scope and ended up generating opposite consequences to its intended goals, because it reduced, rather than increased, clarity. As a result of this discussion, the Government member of Finland withdrew his subamendment.
- 100.** After an indicative show of hands, the Employer Vice-Chairperson decided to withdraw the Employer members’ amendment. The discussion then shifted to another amendment proposed by the Employer members. This sought to delete the following words in the second bullet point: “under the form of a civil or a commercial arrangement”. As a result, the text would read “the employment relationship is disguised”. The Employer Vice-Chairperson explained that this amendment sought to dispel the impression that civil and commercial relationships were being regarded as unambiguously negative. The Worker Vice-Chairperson responded to these remarks by saying that the words the proposed amendment intended to delete were important because they indicated the precise forms in which the act of disguising was carried out. For these reasons, his group did not support the Employer members’ amendment. The Government member of Switzerland supported the Employer members’ amendment by stating that disguised employment relationships came in different forms, not just civil and employment arrangements. The Government member of New Zealand noted that, at least in his jurisdiction, the commonest way to disguise an employment relationship was through commercial and/or civil relationships. The Government member of Argentina stated that the Drafting Group’s proposed text was preferable to the Employer members’ amendment. Recognizing the need to acknowledge that civil and commercial relationships were not the only way through which an employment relationship could be disguised, the Government member of Venezuela proposed the following subamendment: “the employment relationship is disguised, generally under the form of a civil or commercial arrangement”. This subamendment received the support of the Government members of Bahrain, Chile, the Dominican Republic, El Salvador, Guatemala, Mexico, and of the Workers’ group. However, following a statement by the Employer Vice-Chairperson that the subamendment was in stark contrast with the spirit of the original amendment proposed by the Employers’ group, it was ruled invalid by the Chairperson. Another subamendment was proposed by the Government member of Lebanon: “the employment relationship is disguised in the form of different contracts”. This subamendment was not considered as it was not seconded. The focus then returned to the Employer members’ original amendment. Following an indicative vote, the Employer Vice-Chairperson chose to withdraw it.
- 101.** Discussion then moved to an amendment submitted by the Worker members, which would add two bullet points at the end of paragraph 5 of the proposed conclusions. This would now read as follows: “■ the employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for them; and ■ lack of

compliance and enforcement.” The Worker Vice-Chairperson explained that this addition introduced a reference to triangular relationships and to the problem of enforcement. This was important in the context of a paragraph that sought to identify the sources of the problem of lack of protection. The Employer Vice-Chairperson expressed his group’s support for adding the second portion of the proposed amendment – the one concerning lack of compliance and enforcement – but voiced his group’s reservations on the first portion about triangular employment relationships. He explained that in cases where there clearly was an employment relationship, there was no question as to who the employer was and what rights applied to the employee. In light of these considerations, he proposed to subamend the Worker members’ amendment by deleting the first bullet point. The Government member of New Zealand expressed his Government’s opposition to this subamendment. In his Government’s opinion, reference to triangular employment relationships contributed to a more complete list of factors responsible for unclear legal frameworks. The Workers’ group did not support the proposed subamendment. After an indicative vote, the Employer Vice-Chairperson withdrew the subamendment.

- 102.** The Government member of Germany stated that while his Government supported the thrust of the Worker members’ proposed amendment, it believed that the text was not clearly worded. In particular, the reference to responsibility for the rights of workers generated confusion. For example, there were rights of workers for which the State, not the employer, was responsible. The Worker Vice-Chairperson explained that the proposed amendment drew attention to lack of clarity as regards from whom the worker should seek redress. This was particularly difficult to determine in the case of triangular employment relationships. The amendment signalled that these arrangements contributed to reducing clarity of the legal framework. The Government members of Argentina, Bahrain (also speaking on behalf of the Syrian Arab Republic and the United Arab Emirates) and Yemen expressed their support for the amendment proposed by the Worker members. The Government member of France also supported the Worker members’ amendment, but urged the Committee to keep in mind that there were situations in which triangular employment relationships involved self-employed workers and not necessarily only workers in an employment relationship. The Government member of South Africa stated that, while his Government supported the first part of the Worker members’ amendment – that relating to triangular relationships – it felt that the text needed to be clarified. He proposed to subamend the amendment by substituting the expression “the employment relationship clearly exists” with the expression “the worker is clearly an employee”, and by substituting the words “who is responsible for them” with the words “against whom those rights can be enforced”. This subamendment was seconded by the Government member of New Zealand and supported by the Worker Vice-Chairperson, who stated that the subamendment was consistent with the intent of the original amendment. Compared with the original amendment, it also helped to identify against whom the worker should seek enforcement. The Government member of France, however, still felt that this subamendment did not address some of the most fraudulent kinds of relationships, those that combined self-employment and triangular relationships. In response to this comment, the Government member of South Africa proposed to rephrase his subamendment by substituting “clearly” with “in fact”. The first portion of the subamendment would read “the worker is in fact an employee”. The Government member of France stated that this new subamendment covered the range of possible situations and that his Government supported it. The Government members of Nigeria and Yemen, as well as the Workers’ group, also supported the subamendment proposed by the Government of South Africa. The Government member of Guatemala stated that it would provide guidelines for judges and courts interpreting legal texts, and help employers to draw up contracts that were in full compliance with the law. The Employer Vice-Chairperson stated that the subamendment in question contributed to clarity – which was commendable – but its intent was not supported by the Employer members. The language in which it was drafted created

a situation whereby an employee would be able to seek enforcement of rights against somebody who was not his or her employer. This kind of regulation created unnecessary constraints. After an indicative vote, the subamendment proposed by the Government member of South Africa was adopted. Paragraph 5 was adopted as amended.

Paragraph 6

103. Only one amendment to paragraph 6 had been submitted to the Committee, proposed by the Government member of Japan and seconded by the Government member of New Zealand. The amendment proposed adding a reference to the interpretation of laws, so that the relevant portion of the third sentence would read "... laws should be drafted and interpreted ..." and the fourth sentence would be changed to "Laws and their interpretation ...". The Government member of Japan explained the importance in some jurisdictions of governmental guidelines for implementing laws. The Employer Vice-Chairperson put forward a subamendment to delete the part of the amendment pertaining to the third sentence. The Workers' group supported the subamendment. The amendment was, therefore, adopted as subamended. Paragraph 6 was adopted as amended.

Paragraph 7

104. The discussion on paragraph 7 began with the consideration of an amendment proposed by the Employer members to delete all the text after the first sentence, so that the paragraph would read as follows: "Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status." The Employer Vice-Chairperson, in introducing the amendment, stated that the paragraph lacked clarity concerning a number of concepts. He pointed, first, to the reference to "the inappropriate use of civil or commercial arrangements", asserting that, while it was clear what was meant by "legal", this was not the case of the term "appropriate"; thus its inclusion would open the door to the development of a new set of criteria relating to civil and commercial contracts. He then turned to the phrase "[i]t is detrimental", querying to what "it" was intended to refer. Regarding the expression "pseudo-cooperatives" he commented that this was not a common term. Addressing the references to "false self-employment", "false provision of services" and "false company restructuring", he asserted that introducing the term "false" was fraught with difficulties, since it was not clear what standards would need to be met to show something was "true" rather than "false", or at what point such proof needed to be provided. He stressed that the difficulties that employers would encounter with respect to these terms would also be shared by governments in their capacity as employers. He expressed particular sympathy for legal drafters attempting to define "false" in legal terms at the national level. His group was also concerned that, should the conclusions lead to an international labour standard, it would be an attempt to standardize terms of falseness. The first sentence, however, according to the Employers' group, was simple and clear, introducing the notion of intent and mala fides.

105. The Worker Vice-Chairperson opposed the amendment since the portions proposed for deletion helped to clarify different aspects of disguised employment by setting out how it could be disguised and some of the effects, then calling for active steps to be taken when it occurred. He expressed surprise that the Employers' group had put forward the amendment, since the text of paragraph 7 had been agreed by the Drafting Group, based on a text proposed by the Employer members, which contained the very words the Employer Vice-Chairperson was criticizing. He emphasized that the paragraph did not represent the preferred position of the Worker members, but rather it was seen as an acceptable compromise proffered by the Employer members. Regarding the use of the word "false", he cited various dictionary definitions, and stated that the definition was clear. With

respect to “pseudo-cooperatives” he pointed out that this term had been used in the Promotion of Cooperatives Recommendation, 2002 (No. 193), and that the Employers’ group had unanimously supported the adoption of the Recommendation. He recalled the earlier comments of the Government member of France, to the effect that a large proportion of workers without employment protection were those suffering from a combination of disguised and triangular relationships. The Employer Vice-Chairperson, responding to the views of the Workers’ group, explained that it was clearly understood that any agreement reached by the Drafting Group would need to be considered by the Employer members who were not members of the Drafting Group; it was at that point that the group had been alerted to the inherent flaws in the paragraph. With respect to the reference to “pseudo-cooperatives” found in Recommendation No. 193, he commented that such odd wording may have been intentionally overlooked at that time in the spirit of compromise, since overall the issues raised in the Recommendation had been supported by the Employers’ group, unlike in the present conclusions.

- 106.** The Government member of the United States also rejected the proposed amendment, stressing that it had been difficult to find wording that would give rise to a consensus on this paragraph in the Drafting Group. He noted that the same reasoning had been used by the Employers’ group to persuade Government members to withdraw amendments on paragraph 1. In response, the Employer Vice-Chairperson stated that the respect for the agreement reached in the Drafting Group referred to agreement after the text had been considered by the Employers’ group. The Government member of Germany expressed some support for the intention of the Employer members’ amendment, and suggested that the amendment could be subamended to reintroduce the fourth and fifth sentences, and the last half of the last sentence. The Chairperson ruled that this could not be considered a valid subamendment. The Government member of Lebanon, speaking also on behalf of the Government members of Bahrain and the Syrian Arab Republic, expressed support for the amendment, though proposed that part of the last sentence be reintroduced to read “governments, employers and workers should take active steps to guard against such practices anywhere they occur”. The Employer Vice-Chairperson expressed his group’s support for this proposal, as did the Government member of Germany. The Government member of Venezuela and the Government member of South Africa, speaking also on behalf of the Government members of New Zealand and the United States, expressed a preference for the original text of paragraph 7. The Government member of Lebanon withdrew the proposed subamendment.
- 107.** The Employer Vice-Chairperson cautioned that due to paragraph 5 as it had been adopted, and in the light of the likely rejection of the amendment, a set of conclusions was being constructed that reinforced the view of his group that the topic was not suitable for a standardized approach, and would render future efforts in this area extremely difficult, until the matters could be properly channelled and contained. At the request of the Employer Vice-Chairperson, the proposed amendment was put to a formal vote by show of hands, the results of which were as follows: 6,600 votes in favour, 9,240 votes against, with 120 abstentions (the quorum was 7,848). The proposed amendment to delete all the text after the first sentence was rejected.
- 108.** A further amendment to paragraph 7 was proposed by the Government members of Australia and the United Kingdom. In introducing the proposed amendment to delete the first sentence of the paragraph, and substitute “This” in the second sentence with “Disguised employment”, the Government member of the United Kingdom stated that in reality, disguised employment could be driven not only by employers but also by workers, and the first sentence was misleading in this regard. The Worker Vice-Chairperson, while agreeing that either an employer or a worker could initiate disguised employment, noted that his group could not support the proposed amendment as the text it sought to delete was

in fact silent on who initiates the disguised employment relationship, and hence the problem that the amendment sought to address, did not arise. The Employer Vice-Chairperson supported the reasoning motivating the proposed amendment and acknowledged that it addressed a clear problem with the text; however, his group was of the view that since the paragraph was fundamentally flawed, they could not support the paragraph, and therefore could not support the amendment. In the light of the discussion, the Government member of the United Kingdom withdrew the proposed amendment.

109. The Government member of Côte d'Ivoire proposed an amendment, which was seconded by the Government member of Guatemala, to replace the word "arrangements" with "practices" in the penultimate sentence, as his Government considered this a more appropriate term. The amendment also proposed adding to the end of the sentence the words "and social security contributions", since not only taxes but also social security contributions were often avoided through disguised relationships. The Employers' group abstained from the discussion of this proposed amendment due to their opposition to the paragraph as a whole. The Worker Vice-Chairperson expressed the view that the term "practices" was more precise than "arrangements", and the reference to social security contributions accurately reflected another common motivation for disguising employment relationships. After an indicative vote by show of hands evidencing strong support for the amendment by the Government members, the amendment was adopted.

110. The final amendment proposed to paragraph 7 was then considered, which was put forward by the Government members of Australia and the United Kingdom. The Government member of Australia introduced the proposed amendment to replace "is to deny" in the penultimate sentence with "can be to deny", emphasizing that the consequence of every case of disguised employment was not necessarily the avoidance of taxes or the denial of labour protection. The Employer Vice-Chairperson, while expressing appreciation for the logic and practical approach sought by some of the Government members, again noted that his group would abstain from the discussion of the amendments proposed to paragraph 7. The Workers' group supported the proposed amendment. The amendment was adopted following an indicative vote by show of hands. Consequently, paragraph 7 was adopted as amended.

Paragraph 8

111. Two amendments, one submitted by the Government member of Côte d'Ivoire, the other submitted by the Employer members, were voted against one another. The amendment submitted by the Government member of Côte d'Ivoire, seconded by the Government member of Guinea, proposed to replace paragraph 8 in the Drafting Group's proposed conclusions with the following text:

An ambiguous employment relationship exists whenever work is performed or services are provided under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship. In an increasing number of cases, it is very difficult to distinguish between dependent and independent employment, even when there is no intent to disguise the employment relationship. In this respect, it is acknowledged that in many areas the distinction between employees and independent workers has become blurred. To be sure, one of the chief characteristics of new forms of work is the autonomy or greater independence of employees.

The amendment of the Employer members proposed to substitute the same paragraph with the following text: "Where work is being performed or services are being provided in circumstances which raise a doubt about whether or not an employment relationship exists, it may be described as an ambiguous relationship." The Government member of Côte d'Ivoire explained that the purpose of the amendment proposed by his Government was clarity and consistency. As with paragraph 7, the text should begin with a definition and

then add further explanations. The Employer Vice-Chairperson stated that the amendment proposed by the Employer members aimed at clarifying the notion of ambiguous employment relationships. Commenting on the amendment proposed by the Government member of Côte d'Ivoire, he remarked that his group found the notions of dependent and independent employment – which appeared both in the proposed amendment and in the Drafting Group's text – to be fraught with problems. His group acknowledged that dependency was an important factor in determining employment status in some jurisdictions, but not in all. He stated that the issue of dependency was a key concern of the Employer members. In contrast to the text of the proposed amendment, his group believed that paragraphs 1 and 2 had dealt with the notions of employee and worker in a more balanced and constructive way. The Worker Vice-Chairperson expressed the view that beginning the paragraph with a definition contributed to greater clarity of the text. Consequently, the Workers' group supported the amendment proposed by the Government member of Côte d'Ivoire, while it opposed the amendment proposed by the Employer members.

- 112.** The two proposed amendments were voted against each other through a show of hands. Based on the results of the vote, the amendment proposed by the Government member of Côte d'Ivoire was discussed. The Government member of South Africa proposed a subamendment to substitute the word “employment” in the second sentence with the word “work”. The Worker Vice-Chairperson seconded the proposed subamendment and submitted another subamendment aimed at altering the wording in the last sentence as follows: “One of the characteristics of some new forms of work is the autonomy or greater independence of employees.” Not all new forms of work, he explained, were characterized by autonomy or greater independence. The Employer Vice-Chairperson repeated that his group had a fundamental problem with the proposed text of paragraph 8 and, for that reason, would abstain from voting on amendments associated with the paragraph. Indicative votes were taken on both the subamendment proposed by the Government member of South Africa and the subamendment proposed by the Worker members. Since there seemed to be broad support for both subamendments among the Government members, the Chairperson declared paragraph 8 to be adopted as amended.

Paragraph 9

- 113.** An amendment submitted by the Government member of Côte d'Ivoire proposed to substitute the first two sentences in the Drafting Group's text with the following language: “There is a triangular relationship where the services are provided to a third party (the user) by an employer (the principal employer). In such situations, the difficulty is to know who is the employer, what the rights of the worker are, who is responsible for them, and to what degree the relationship creates an absence of protection that is detrimental to the employee.” This amendment was not considered as it was not seconded. Discussion then moved to an amendment submitted by the Employer members, which proposed to delete the second sentence in the Drafting Group's text. This second sentence read as follows: “In such cases, the major issues at stake consist of determining who the employer is, what rights the worker has and who is responsible for them.” The Employer Vice-Chairperson stated that this amendment helped to eliminate some misunderstandings. In triangular employment relationships, it was clear who was the employer and what his or her responsibilities and obligations were. However, in light of the text of paragraph 5 which had been previously adopted, this attempt at clarification appeared almost a waste of time and energy. In fact, language in paragraph 5 had created a situation in which workers could seek redress of their rights against someone who was not their employer. He asserted that this issue was a key factor for the Employers' group. The Worker Vice-Chairperson stated that his group did not support the Employers' group's amendment. In fact, paragraph 9 had a similar structure to the previous paragraphs 7 and 8. These began by laying out a

particular category – disguised employment and ambiguous relationships, respectively – and then discussed the particular problems posed by each category. To accept the proposed amendment would create a meaningless paragraph. He also made it clear that the paragraph did not deal with subcontracting per se. An indicative vote was taken on the Employer members’ proposed amendment, after which the Chairperson ruled that the amendment was not adopted.

114. An amendment submitted by the Worker members was discussed next. This proposed to add the following text after the second sentence: “Therefore mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities amongst them.” The Worker Vice-Chairperson explained that the purpose of the amendment was to complement the first two sentences, which set out a definition and a statement of the problem, with a reference to ways to address the problem – specifically mechanisms to identify relationships and assign responsibilities. He also announced that the Workers’ group was prepared to withdraw another amendment, which proposed that the relevant substantive provisions of the Private Employment Agencies Convention, 1997 (No. 181), be considered for all triangular relationships, if the amendment under discussion was adopted. The Employer Vice-Chairperson commented that the amendment proposed by the Worker members implied that any civil or commercial relationship could give rise to some liability or responsibility with respect to another person’s employee. He stated that this would create an environment in which it would be very difficult for business to operate as it was not possible to know one’s obligations, risks and liabilities. He added that the potential widening of employers’ responsibilities towards non-employees was, together with the notion of dependency and the possible adoption of an instrument, a fundamental issue for the Employer members. For these reasons, the Employers’ group would not vote for any amendment of this type.

115. The Government member of Australia stated that the amendment proposed by the Worker members would create confusion in the regulation of triangular relationships. He recalled that paragraph 1 stated that civil or commercial relationships were beyond the scope of the employment relationship. The proposed amendment now suggested that all civil and commercial relationships would have to be reviewed to clarify the relationship between the various parties. This was outside the scope of the Committee’s work. Also, the proposed amendment threatened to have a negative impact on triangular employment relationships. The Government member of the United States commented that, while paragraphs 7, 8 and 9 described problems that arose in discerning the identity of the employee, the proposed amendment went further in suggesting mechanisms that could be used to allocate responsibilities. He observed that this reference to mechanisms was not appropriately placed within paragraph 9. He was further concerned with the word “allocate”. This appeared to imply that responsibility was being assigned to more than one party and this could not always be appropriate. The Government member of Guatemala said he disagreed with the Government members of Australia and the United States. Where a triangular employment relationship existed, responsibilities had to be determined, and a mechanism was needed to determine them. For this reason, his Government supported the proposed amendment. The Government member of New Zealand also supported the proposed amendment. Since there was a need to clarify rights and responsibilities, mechanisms were necessary. The Government member of Canada agreed with the proposed amendment but, echoing the concerns expressed by the Government member of the United States, suggested that the correct place for language included in the proposed amendment was in paragraph 14. The Government member of Finland also agreed with the proposed amendment based on the observation that it helped to deal with questions of responsibility. The Government member of Bahrain, speaking also on behalf of Lebanon and the Syrian Arab Republic, also supported the amendment, noting that it did not cast doubt on the good faith of employers. The Government member of South Africa asked the Chairperson

whether it was possible to submit a subamendment to reconsider placement of the proposed amendment. The Government members of Argentina, Bahrain and Guatemala expressed the view that they preferred the original location. Following an indicative vote, and after consulting the Worker Vice-Chairperson on the Worker members' willingness to consider an alternative placement, the Chairperson ruled that the amendment was adopted, with the proviso that the Office could consider an alternative placement for it. The Employer Vice-Chairperson reiterated the Employer members' firm opposition to the amendment.

- 116.** Discussion then moved to consider an amendment proposed by the Employer members. This proposed to add the following words at the end of the last sentence in the paragraph: "and such relationships are not the subject of these conclusions". The sentence would then read "It should be noted in this respect that a particular form of triangular employment relationship relating to the provision of work or services through temporary work agencies has already been addressed by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188), and such relationships are not the subject of these conclusions." The Employer Vice-Chairperson explained that the purpose of the proposed amendment was to clarify the reference to the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188), included in the Drafting Group's proposed text. From the proposed text it was not clear why this reference was made. The amendment would emphasize that the provisions of the present document did not apply to relationships covered by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188). This clarification was needed in light of the importance for private employment agencies to operate in a stable regulatory framework. The Worker Vice-Chairperson expressed his group's opposition to the proposed amendment. This would have the effect of exempting the private employment agency industry from any consideration of the scope of the employment relationship, which was a general concern applying to all industries. At the same time, he clarified that there was no intention or desire on the part of the Workers' group to rewrite a Convention that they had supported. The Employer Vice-Chairperson responded that his group detected an attempt at reviewing all situations in which work was provided for somebody other than the worker's employer, including situations covered by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188). He stated that the proposed amendment was not just about the scope of the employment relationship, as asserted by the Worker Vice-Chairperson, but also had implications for subcontracting, outsourcing, the use of vendors, the structuring of businesses, the standardization of definitions around the employment relationship and the extension of the employment relationship to self-employment. The proposed amendment was about standards and instruments replacing considered and logical initiatives, the setting-up of unnecessary constraints to job creation and flexible economies, and also about private employment agencies and other agencies that delivered the provision of services. Following an indicative vote, the Employer Vice-Chairperson called for a record vote. The results of the vote were as follows: 6,600 votes in favour, 9,540 votes against and 120 abstentions (the quorum was 7,848 votes). The amendment proposed by the Employer members was rejected.² Paragraph 9 was adopted as amended by the Worker members.

² The Employer members requested that the details of the record vote with respect to the Government members be included in the report. The results were as follows:

For: Australia.

Against: Algeria, Argentina, Austria, Bahrain, Bangladesh, Belgium, Botswana, Bulgaria, Canada, Chile, Côte d'Ivoire, Cyprus, Czech Republic, Dominican Republic, El Salvador, Finland, France,

Paragraph 10

117. On behalf of the Government members of Canada, New Zealand, the United Kingdom and the United States, the Government member of the United Kingdom introduced an amendment to replace the end of the first sentence of paragraph 10 (deleting the words “enforce the law”) and all of the second sentence with the following: “to ensure compliance with the law, supporting all mechanisms that facilitate this. Cooperation should be promoted among different government agencies.” He explained that the proposed amendment sought, first, to reflect the fact that ensuring compliance was not limited to government enforcement and, second, to make the sentence more concise, while acknowledging the variety of government agencies. The Worker and Employer Vice-Chairpersons, while expressing some appreciation for the amendment, were not able to support it. The Government member of Denmark proposed a subamendment, which would return the second sentence to its original form and modify the end of the first sentence to read as follows: “ensure compliance with the law, supporting all mechanisms that facilitate this, also involving the social partners where appropriate”. The subamendment was seconded by the Government member of Bahrain and supported by the Employer and Worker Vice-Chairpersons and the Government members of Germany and Namibia. The amendment, as subamended, was adopted. As a consequence, three other proposed amendments to the same sentences were not considered.

118. The Committee then examined the final proposed amendment to paragraph 10, which had been put forward by the Government member of Côte d’Ivoire and seconded by the Government member of South Africa, which sought to replace “promoting voluntary compliance” with “monitoring the application of the law” and to add “, ambiguous and triangular” after the word “disguised” in the last sentence of the paragraph. The Government member of Côte d’Ivoire asserted that the proposed changes would be more technically and legally accurate, and would remove the emphasis on voluntary compliance, since such compliance was virtually impossible in some countries. While the Employer Vice-Chairperson stressed that most employers were committed to complying voluntarily with the law, he noted that both the Employer and the Worker members had agreed to support the first part of the proposed amendment, but not the second part referring to “ambiguous and triangular”. The Employers’ group, therefore, submitted a subamendment to that effect. The Worker Vice-Chairperson affirmed his group’s support for the subamendment, remarking that the reference to triangular relationships would be misplaced in the sentence, since those relationships could include legitimate ones. The subamendment was also supported by the Government members of Norway and the United Arab Emirates. The amendment as subamended was adopted by consensus. Paragraph 10 was then adopted as amended.

Germany, Greece, Guatemala, Hungary, Italy, Japan, Kenya, Republic of Korea, Lebanon, Lesotho, Luxembourg, Malawi, Mali, Mexico, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Norway, Papua New Guinea, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, South Africa, Switzerland, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United States.

Abstentions: Denmark, United Kingdom.

Absent: Albania, Angola, Barbados, Belarus, Benin, Brazil, Burkina Faso, Cameroon, Congo, Costa Rica, Ecuador, Egypt, Eritrea, Fiji, Gabon, Ghana, Guinea, Honduras, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Jamaica, Jordan, Kiribati, Kuwait, Latvia, Libyan Arab Jamahiriya, Madagascar, Malaysia, Malta, Mauritania, Myanmar, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Philippines, Poland, Russian Federation, Slovenia, , Spain, Sri Lanka, Sudan, Sweden, Tanzania (United Republic of), Uganda, Uruguay, Venezuela, Zambia, Zimbabwe.

Paragraph 11

119. Two amendments were proposed to paragraph 11, one of which was withdrawn without discussion. The second, submitted by the Government members of New Zealand and the United Kingdom, proposed replacing “Poor enforcement of the law is a significant contributory factor which explains ...”, by “Poor enforcement and lack of compliance with the law can be significant factors which explain”The Employer and Worker Vice-Chairpersons expressed support for the proposed amendment. The amendment was adopted by consensus. Paragraph 11 was then adopted as amended.

Paragraph 12

120. The proposed amendment to paragraph 12, submitted by the Government member of the United Kingdom and seconded by the Government member of South Africa, added the term “where applicable” after “the labour inspectorate” in the first sentence, and in the last sentence added “the labour administrations and” before, and “where applicable” after, the words “labour inspectorates”. The Workers’ and Employers’ groups supported the amendment. The amendment was adopted by consensus, and consequently paragraph 12 was adopted as amended.

Paragraph 13

121. As no amendments had been proposed to paragraph 13, it was adopted without amendment.

Paragraph 14

122. The Government member of Japan submitted an amendment aimed at inserting the following at the beginning of the first sentence: “Where reliable enforcement mechanisms of labour administration are not sufficient,”. The Employers’ and Workers’ groups were unable to support the proposed amendment. The Worker Vice-Chairperson commented that, even with the existence of reliable enforcement mechanisms, disputes would still arise and hence the original text was more appropriate. The proposed amendment was rejected. Paragraph 14 was adopted without amendment.

Paragraph 15

123. Three amendments were proposed to paragraph 15, one of which was not considered since it was not seconded, and one which was withdrawn without discussion. A proposed amendment to delete paragraph 15 in its entirety was considered by the Committee. In introducing the amendment, the Employer Vice-Chairperson expressed his group’s regret that the gender dimension had not been adequately examined or recognized in Report V or during the discussion of the Committee. He stated that there was no evidence or data available demonstrating that lack of labour protection exacerbated gender inequalities. He also submitted that there were no ambiguous and disguised relationships in the informal economy, since there are no formal relationships. His group was also particularly concerned that certain occupations and sectors had been singled out, as well as export processing zones, suggesting that they were inherently inappropriately run. The Worker Vice-Chairperson voiced his group’s opposition to the proposed amendment, stating that the gender dimension was an important issue that had in fact been addressed by the Committee and in Report V. Regarding the informal economy, he stated that while there was divergence at the national level, it was possible for those working in the informal

economy to be party to an employment relationship. Concerning the reference to specific occupations and sectors, in the view of his group, the text in no way suggested that the entire sector was behaving improperly. The Government members of Bahrain, Lebanon, the Syrian Arab Republic and the United Arab Emirates expressed support for the proposed amendment, while the Government members of Canada, Chile, Côte d'Ivoire, Finland, Germany, Guatemala, Mexico, Namibia, New Zealand, Papua New Guinea and the United Kingdom spoke against the amendment. While preferring the initial text of the Drafting Group to no text at all on this topic, the Government members of Finland and Mexico expressed reservations about the original text. The Government member of Finland raised a particular concern regarding the predominance of disguised employment relationships in certain occupations or sectors. The Government members of New Zealand and the United Kingdom also noted that more work regarding the gender dimension was needed, including collecting relevant data and gathering evidence. The Employer members withdrew their amendment; however, the Employer Vice-Chairperson expressed the view that his group, along with many Government members, had acknowledged that further attention and research on the gender dimension was merited, and that inadequate work had been done on the topic to date. He also emphasized that his group did not find it acceptable to name specific occupational groups in this text, and were not alone in their concern. Paragraph 15 was adopted without amendment.

Paragraph 16

- 124.** The Government member of the Netherlands, speaking on behalf of the Government members of the Committee Member States of the European Union, introduced a proposed amendment that sought to incorporate a specific reference to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), noting that this was a particularly important Convention addressing discrimination specifically. The Employer Vice-Chairperson noted that his group had some reservations concerning the Conventions already enumerated in the paragraph, since it was not clear for what purpose they had been mentioned, and reference to them could be potentially limiting. They were, therefore, not able to support an amendment that added a reference to another Convention. The Worker Vice-Chairperson expressed support for the proposed amendment, as did the Government members of the Republic of Korea, Papua New Guinea and Tunisia. Following an indicative vote by show of hands, the amendment was declared adopted.
- 125.** The Worker Vice-Chairperson then introduced a further proposed amendment, adding references to three additional Conventions: the Workers with Family Responsibilities Convention, 1981 (No. 156); the Part-Time Work Convention, 1994 (No. 175); and the Home Work Convention, 1996 (No. 177), noting that these Conventions addressed matters that had been discussed by the Committee. The Government members of Guatemala, Namibia and the Syrian Arab Republic indicated support for the proposed amendment; however, as no clear consensus emerged among the Government members through an indicative vote by show of hands, the Worker members withdrew their proposed amendment. The Chairperson then declared paragraph 16 adopted as amended.

Paragraph 17

- 126.** The discussion of paragraph 17 opened with the Employer Vice-Chairperson withdrawing his group's proposed amendment to delete the entire paragraph, while noting that the quotation from the common statement of the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000) expressed sentiments that were not fully shared today by the Employers' group. An amendment proposed by the Government member of the Syrian Arab Republic, and seconded by the Government member of Guatemala, was

aimed at adding a reference to the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144). The Government member of the Syrian Arab Republic stressed the importance of this Convention in the context of the only international tripartite organization, and stated that its inclusion in the conclusions would promote social dialogue. While supporting the sentiment motivating the proposed amendment, the Worker Vice-Chairperson expressed concern that it could imply that only member States that had ratified the Convention would undertake such consultation. His group therefore submitted a subamendment to refer to “the principles set out in” the Convention. The Employer Vice-Chairperson queried whether the Convention addressed consultation on the scope of the employment relationship. The Worker Vice-Chairperson acknowledged that the Convention did not deal specifically with the employment relationship; however, the principles set out in the Convention regarding consultation with the most representative organizations of employers and workers, and the fact that they were to be represented on an equal footing were applicable in the present context. The Government member of South Africa indicated that the reference to Convention No. 144 was misplaced and could result in an overly narrow interpretation, since the Convention specifically referred to consultation on matters relating to each stage of the ILO’s standards-related activities. The Government members of Finland and Namibia agreed with the views expressed by the Government member of South Africa. The Government members of the Republic of Korea and the Syrian Arab Republic indicated their support for the subamendment. The Government member of the Syrian Arab Republic then withdrew the initial proposed amendment. Paragraph 17 was, therefore, adopted without amendment.

Paragraph 18

127. An amendment was submitted by the Government members of New Zealand and the United Kingdom to add the following text at the end of the last sentence in the paragraph: “and should take regard of other aspects of diversity”. The text would then read “All data collected should be disaggregated according to sex, and the national and sectoral level research and reviews should explicitly incorporate the gender dimension of this question and should take regard of other aspects of diversity.” The Government member of the United Kingdom explained that the proposed amendment reflected the need to consider, in addition to gender, other aspects of diversity, such as age. Both the Employer and Worker Vice-Chairpersons supported it. The amendment was adopted and paragraph 18 was adopted as amended.

Paragraph 19

128. As there were no amendments proposed to paragraph 19, it was adopted without amendment.

Paragraph 20

129. The Chairperson ruled that discussion of paragraph 20 was deferred to a later stage of the proceedings, as suggested by both the Worker and Employer Vice-Chairpersons. One amendment to the Drafting Group’s text had been submitted by the Employer members. This proposed to replace the paragraph with the following text:

Governments, and the social partners, can act now to address the issues arising from situations in which employees are not receiving protections associated with their employment relationship due to difficulties described in these conclusions by:

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- (a) Developing a national policy framework which can include, among other practical things, a general strategy for assessing the challenges within the country, assessing potential remedies, with consideration of the need for protections, the interests of the workers, and any cultural, social, economic and legal nuances peculiar to the national situation.
 - (b) Reviewing laws and public policy to improve clarity and predictability, while ensuring that there is flexibility to protect workers while encouraging positive economic activity.
 - (c) Ensuring access for employees and employers to dispute resolution procedures that are inexpensive, accessible, fair and not subject to abuse by any party.
 - (d) Developing effective, inexpensive, expeditious, and fair mechanisms and administrative procedures for resolving disputes about employment status, designed with due regard for the importance of the protection of rights and entitlements associated with the employment relationship.
 - (e) Reviewing enforcement and administration structures to ensure effectiveness, making the best use of technology and existing national structures.
 - (f) Promoting research and data collection that will enhance understanding of labour protection issues facing employees that appear to fall outside the employment relationship, including making effective use of ILO and other international information on the variety of responses and strategies being used by other countries, with due regard to their unique needs and contexts.
 - (g) Providing information to workers and employers about their rights and entitlements at the workplace.
 - (h) Encouraging social dialogue to ensure that concerns about the employment relationship are adequately explored at the national level, with due attention to unique regional and sectoral needs, and by ensuring that such research reflects all perspectives including that of employers, workers and their organizations.
 - (i) With due consideration for the need to balance priorities of the ILO, requesting the Governing Body to invite the Director-General to:
 - (i) commission country studies on the topic of the employment relationship;
 - (ii) conduct a comparative analysis of the existing and new studies on issues associated with the employment relationship for the purpose of providing a meaningful digest of practices, adaptable as a basis for national action to address the country's needs, and to provide guidance to governments, employers' and workers' organizations;
 - (iii) undertake studies on regional, sectoral and gender dimensions of the issue;
 - (iv) host meetings at the regional, sectoral and subregional levels when member States so request and where appropriate;
 - (v) convene meetings of experts to consider specific aspects of the subject, where appropriate, and where the social partners identify value;
 - (vi) provide capacity-building support to countries in need of assistance in ensuring the protection of workers in an employment relationship;
 - (vii) provide technical assistance to countries which request such assistance, especially with respect to enforcement and the development of labour administration;

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- (viii) provide support to countries which request such assistance for the training and education of those responsible for enforcement of worker protections.
 - (j) Promoting policies that encourage the creation of jobs, with a view to providing people with the opportunity to work in forms and in relationships that suit their needs, and that are rewarding and productive.

In the context of discussions about paragraph 25, the Employer Vice-Chairperson announced that the Employer members chose to withdraw this amendment in the interests of reaching a conclusion. However, he noted that the intent of their amendment was to give governments an opportunity to act immediately on the issues raised, by setting out some immediate actions that could be taken with the full endorsement and support of the social partners and achieve immediate results. Paragraph 20 was then adopted without amendment.

Paragraph 21

- 130.** The Government member of the United Kingdom proposed an amendment to insert “where applicable” after “labour inspection” in the second sentence of the Drafting Group’s proposed text. The sentence would read as follows: “It [the Office] should review its internal organizational arrangements in relation to labour administration and labour inspection, where applicable, in order to ensure that the Office provides a more coherent and efficient service to constituents in this area.” The Government member of the United Kingdom explained that the proposed amendment was consistent with previously accepted amendments. This proposed amendment was seconded by the Employer Vice-Chairperson and supported by the Worker Vice-Chairperson. The amendment was adopted and paragraph 21 was adopted as amended.

Paragraph 22

- 131.** An amendment, which was submitted by the Government members of Canada, Finland, New Zealand, South Africa and the United States, proposed to replace the word “mediators” with “adjudicators” in the second sentence, and the words “with the designated officials and judges” with “with judges, adjudicators and designated officials” in the last sentence. With some regret, because his Government believed that the Drafting Group’s proposed text was inadequate, possibly due to problems of translation, the Government member of New Zealand withdrew the amendment in the interest of saving time for other discussion items. Paragraph 22 was adopted without amendment.

Paragraph 23

- 132.** The Government members of Canada, Finland, New Zealand, South Africa, the United Kingdom and the United States proposed an amendment to replace “by” with “with” in the third bullet point. This bullet point would read “criteria for identifying the employment relationship are set out in law, case law or a code of practice developed with the social partners”. The Government member of South Africa explained that governments are not social partners and that it was more appropriate to refer to development of criteria “with” rather than “by” the social partners. The Worker Vice-Chairperson suggested a subamendment to use the words “by or with.” He stated that, in some cases, criteria for identifying the employment relationship were developed by the social partners through bilateral agreements. This subamendment met with the support of the Government member of South Africa and the Employer Vice-Chairperson. The amendment was adopted as subamended.

133. The Government member of Japan submitted an amendment, seconded by the Government member of New Zealand, to insert “, interpretation of the law” in the third bullet point before “case law.” The bullet point in question would read as follows: “criteria for identifying the employment relationship are set out in law, case law, interpretation of the law or a code of practice developed by or with the social partners”. He stated that the text of paragraph 6 referred to both laws and their interpretation. The purpose of the proposed amendment was to suggest that interpretation of the law could also produce criteria for the identification of an employment relationship. Both the Employer and Worker Vice-Chairpersons stated that they preferred the Drafting Group’s proposed text. As a result, the Government member of Japan withdrew his amendment. Paragraph 23 was adopted as amended.

Paragraph 24

134. Since there were no proposed amendments, paragraph 24 was adopted without amendment.

Paragraphs 25 and 26

135. The Chairperson advised the Committee that an agreement had been reached between several Government members and the Workers’ and Employers’ groups, to merge paragraphs 25 and 26, and to put before the Committee a new text for paragraph 25. She requested those members that had submitted amendments to paragraphs 25 and 26 to withdraw their amendments in the interest of achieving a consensus. In the course of the discussion on the new proposed paragraph 25, a number of Government members expressly withdrew their proposed amendments. The Government member of Finland introduced the proposed new paragraph 25 to the Committee, which read as follows:

25. The ILO should envisage the adoption of an international response on this topic. A Recommendation is considered by the Committee as an appropriate response. This Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. Such a Recommendation should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine commercial and independent contracting arrangements. It should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and should take into account recent developments in employment relationships, and these conclusions. The Governing Body of the ILO is therefore requested to place this item on the agenda of a future session of the International Labour Conference. The issue of triangular employment relationships was not resolved.

136. The Employer Vice-Chairperson emphasized that over the course of the Committee’s discussions, a number of perspectives, interests and concerns had been brought to light. In the view of his group, it was indeed a tribute to the process of social dialogue that, despite the many fundamental differences, the Committee was able to find an area of consensus. His group considered that, although the new proposed paragraph 25 would raise concerns for each of the groups as it did not capture the depth and breadth of concerns expressed during the discussion, it provided an opportunity to move forward constructively and positively to achieve real progress. He stressed that the proposed new paragraph could not be considered in isolation, otherwise the divergent views and issues would not be appropriately acknowledged. The conclusions in their entirety, read alongside the report would, however, capture the issues in a meaningful way. He affirmed his group’s intention

to take part in constructive social dialogue on the issues identified to move forward in this area.

- 137.** The Worker Vice-Chairperson recalled that in 1998 the Committee on Contract Labour of the International Labour Conference was not able to reach an agreement on the substance of their discussion. In contrast, due to the work of all the groups, this Committee had before it a consensus text that had been elaborated by drawing on the diverse points of view and rich discussion, which specifically supported a Recommendation. He stressed that the conclusions would lay a solid foundation for future ILO action. It was significant, in the view of his group, to have agreed conclusions that acknowledged the legitimate concerns of all parties; hence, all parties would be implicated in the future steps taken, and the Governing Body would need to bear this in mind in allocating the required resources.
- 138.** The Government member of Guatemala expressed his Government's feeling of frustration for the way in which the process had been managed. His Government felt that the views of certain governments had not been properly taken into consideration. He asserted that if the new proposed paragraph 25 were adopted by the Committee, workers' hopes for social justice would be shattered. The Chairperson responded to these remarks by acknowledging that the process through which the new paragraph had been arrived at was less than ideal. However, the process had allowed the Committee to move forward – which was not a negligible accomplishment given the complexity of the issue and the initial difference of the parties' positions. The Government member of New Zealand expressed the view that the solution proposed in the new paragraph 25 had some limitations. Nonetheless, his Government valued the consensus that had been achieved within the Committee and, therefore, supported the new paragraph. The Government members of Austria, Germany, Greece, Kenya, Republic of Korea, Namibia, Norway, the Syrian Arab Republic, Turkey and the United Kingdom expressed support for the new paragraph. Many of these Government members also observed that the proposed new paragraph reflected the spirit of tripartism, which was at the heart of the ILO. The Government member of Argentina asked whether the proposed new paragraph 25 foreclosed future discussion within the ILO of triangular employment relationships. The Chairperson explained that the conclusion expressed no decision with respect to triangular employment. The Government member of Chile, while supporting the new proposed text, stated that his Government was not entirely pleased with the new paragraph, particularly as far as triangular relationships were concerned. He asserted that his Government considered the current conclusion provisional and encouraged further ILO discussion on triangular employment relationships. The Government member of Turkey regretted that there was no reference to ambiguous employment relationships in the proposed paragraph. The Government member of Kenya asked whether there was a conflict with the text of paragraph 9. The representative of the Secretary-General clarified that paragraph 9 defined the problem of triangular employment relationships and stated the need for mechanisms, but did not call for ILO action. Because the new paragraph 25 focused on ILO action, no conflict arose.
- 139.** In the light of all the comments, the Chairperson noted that consensus had been achieved, and declared the new proposed paragraph 25 adopted. As a consequence, all outstanding amendments proposed to paragraphs 25 and 26 were deemed to have been withdrawn. The Chairperson emphasized that the conclusions reflected the rich debate and the issues and concerns raised by all, while achieving a consensus that would provide a strong basis for future action both within and beyond the ILO.
- 140.** The Worker Vice-Chairperson acknowledged the frustration of those who felt excluded by the process of drafting a consensus text on paragraph 25, a view felt at times by the Workers' group too. He stressed, however, that it was the work done within the Committee that had opened the door to standard setting, as this was a critical issue for many

Government members. With respect to the issue of triangular relationships, his group was of the view that the new paragraph 25 in no way closed the door on that issue. He pointed to the fact that triangular relationships were addressed in paragraphs 5 and 9, as adopted, and stressed that the ILO could not abandon this important issue. Given the unanimous support evidenced in the Committee for a Recommendation, he expressed the hope that the Governing Body would take appropriate and expeditious action to move this forward. He concluded by asserting that paragraph 25, as adopted, would offer hope to millions of workers lacking labour protection. In response, the Employer Vice-Chairperson noted that many valuable points had been raised by the Worker Vice-Chairperson; however, the Employers' group still had concerns about the viability of standard setting in this area.

Consideration and adoption of the report

- 141.** The Committee considered its draft report at its fourteenth sitting. In presenting the report, the Reporter stressed the richness of the debate reflected therein, which had led to significant conclusions that would guide future work of the ILO and future action within the member States. The Committee unanimously adopted the report, subject to minor amendments requested by some members, and requests for additional text to a number of paragraphs by the Worker members.
- 142.** The Secretary-General of the Conference, Mr. Juan Somavia, noted that the Committee had demonstrated, in adopting its conclusions, that through social dialogue, it was possible to move forward on and find solutions to such a complex topic that recognized the commonality of some of the issues and the diversity of their expression. He expressed particular appreciation that the conclusions had acknowledged the gender dimension and the situation of those in the informal economy.
- 143.** The Employer Vice-Chairperson expressed his group's cautious optimism that the outcome of the Committee would lead to constructive action. The Employer Vice-Chairperson, joined by the Chairperson and the Worker Vice-Chairperson, acknowledged the significant and helpful contributions of the Government members of the Committee. The Worker Vice-Chairperson stated that a consensus had been forged, and called on the Governing Body in prioritizing the allocation of resources to take particular note of the unanimous support of the Committee expressed during the debate for paragraphs 20 to 25 of the conclusions. In closing the proceedings, the Chairperson stressed the importance of achieving consensus in the context of the ILO. She commended the Committee on the frank and free exchange that had resulted in a very positive outcome, providing a road map for national and international action on the employment relationship, and calling particular attention to the need for further discussion on protecting workers in disguised employment. Finally, she called on all members to take steps to implement the conclusions, as an important step forward in making decent work a reality.

Geneva, 17 June 2003.

(Signed) A. van Leur,
Chairperson.

I. Khazâl,
Reporter.

Resolution concerning the employment relationship

The General Conference of the International Labour Organization, meeting in its 91st Session, 2003,

Having undertaken a general discussion on the basis of Report V, *The scope of the employment relationship*,

1. Adopts the following conclusions;
2. Invites the Governing Body to give due consideration to them in planning future action on the employment relationship and to request the Director-General to take them into account both when implementing the Programme and Budget for the 2004-05 biennium and allocating such other resources as may be available during the 2004-05 biennium.

Conclusions concerning the employment relationship

1. The protection of workers is at the heart of the ILO's mandate. Within the framework of the Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity. There are rights and entitlements which exist under laws, regulations and collective agreements and which are specific to or linked to workers who work within the scope of an employment relationship. The term *employee* is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term *worker* is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee. *Employer* is used to refer to the natural or legal person for whom an employee performs work or provides services within an employment relationship. The employment relationship is a notion which creates a legal link between a person, called the "employee", with another person, called the "employer", to whom she or he provides labour or services under certain conditions in return for remuneration. Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.
2. Among other things, employment or labour law seeks to address what can be an unequal bargaining position between parties to an employment relationship. The concept of the employment relationship is common to all legal systems and traditions, but the obligations, rights and entitlements associated with it vary from country to country. Similarly, the criteria for determining whether or not an employment relationship exists can vary even though in many countries common notions such as dependency or subordination are found. Regardless of the criteria used, there is a shared concern among governments, employers and workers to ensure that the criteria used are sufficiently clear so that the scope of application of various laws and regulations can be more easily determined, and that they cover those who are meant to be covered, i.e. those who are in employment relationships.
3. Changes in the structure of the labour market and in the organization of work are leading to changing patterns of work both within and outside the framework of the employment relationship. In some situations, it may be unclear whether the worker is an employee or genuinely self-employed.
4. One of the consequences associated with changes in the structure of the labour market, the organization of work and the deficient application of the law is the growing phenomenon of workers who are in fact employees but find themselves without the protection of an employment relationship. This form of false self-employment is more common in less formalized economies. However, many countries with well-structured labour markets also experience an increase in this phenomenon. Some of these developments are new; some have existed for many decades.
5. It is in the interest of all the labour market actors to ensure that the wide variety of arrangements under which work is performed or services are provided by a worker can be put within an appropriate legal framework. Clear rules are indispensable for fair governance of the labour market. This task is difficult in many countries because of one or a combination of the following factors:
 - the law is unclear, too narrow in scope or otherwise inadequate;

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- the employment relationship is disguised under the form of a civil or a commercial arrangement;
 - the employment relationship is ambiguous;
 - the worker is in fact an employee, but it is not clear who the employer is, what rights the worker has, and against whom those rights can be enforced;
 - lack of compliance and enforcement.
6. It is agreed that clarity and predictability in the law are in the interests of all concerned. Employers and workers should know their status and, consequently, their respective rights and obligations under the law. To this end, laws should be drafted in such a way that they are adapted to the national context and provide adequate security and flexibility to address the realities of the labour market and to provide benefits to the labour market. While laws can never fully anticipate every situation arising in the labour market, it is nonetheless important that legal loopholes are not created or allowed to persist. Laws and their interpretation should be compatible with the objectives of decent work, namely to improve the quantity and quality of employment, should be flexible enough not to impede innovative forms of decent employment, and promote such employment and growth. Social dialogue with tripartite participation is a key means to ensuring that legislative reform leads to clarity and predictability and is sufficiently flexible.
7. Disguised employment occurs when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status. This can occur through the inappropriate use of civil or commercial arrangements. It is detrimental to the interests of workers and employers and an abuse that is inimical to decent work and should not be tolerated. False self-employment, false subcontracting, the establishment of pseudo-cooperatives, false provision of services and false company restructuring are amongst the most frequent means that are used to disguise the employment relationship. The effect of such practices can be to deny labour protection to the worker and to avoid costs that may include taxes and social security contributions. There is evidence that it is more common in certain areas of economic activity but governments, employers and workers should take active steps to guard against such practices anywhere they occur.
8. An ambiguous employment relationship exists whenever work is performed or services are provided under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship. In an increasing number of cases, it is very difficult to distinguish between dependent and independent work, even where there is no intent to disguise the employment relationship. In this respect, it is acknowledged that in many areas the distinction between employees and independent workers has become blurred. One of the characteristics of some new forms of work is the autonomy or greater independence of employees.
9. In the case of so-called *triangular* employment relationships where the work or services of the worker are provided to a third party (the user), these need to be examined in so far as they may result in a lack of protection to the detriment of the employee. In such cases, the major issues at stake consist of determining who the employer is, what rights the worker has and who is responsible for them. Therefore, mechanisms are needed to clarify the relationship between the various parties in order to allocate responsibilities between them. It should be noted in this respect that a particular form of triangular employment relationship relating to the provision of work or services through temporary work agencies has already been addressed by the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation (No. 188).

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- 10.** Respect for the law is a fundamental principle and there should be a strong political commitment from the State to ensure compliance with the law, supporting all mechanisms that facilitate this, also involving the social partners where appropriate. Cooperation should be promoted between the different government enforcement agencies, particularly the labour inspectorate, the social security administration and the tax authorities, and there may also be a role for greater coordination with the police and the customs services. This would enable the pooling and more efficient use of resources and data to combat abuses arising out of disguised employment arrangements. Labour administrations and their services have a crucial role to play in monitoring the application of the law, collecting reliable data on labour market trends and changing work and employment patterns, and combating disguised employment relationships.
 - 11.** It should be acknowledged that many countries have reliable enforcement mechanisms and institutions while many others have not. Poor enforcement and lack of compliance with the law can be significant factors which explain why many workers lack protection. The effective implementation and enforcement of rights associated with employment in many countries is weak because of under-resourcing, lack of training and inadequate legal frameworks. The Labour Inspection Convention, 1947 (No. 81), provides that a system of labour inspection should secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work. It is also recalled that under this Convention, inspection staff are to be composed of public officials whose status and conditions of service are such that they are assured of stability of employment and are independent of changes of government and of improper external influences.
 - 12.** The problem of enforcement is not limited to the question of resources; it is also essential that labour administration staff, and particularly the labour inspectorate, where applicable, receive appropriate training. Such training should include a good knowledge of the relevant laws and regulations, including court decisions, relating to how to determine the existence of an employment relationship. Training materials, which could include guidelines elaborated by the social partners, could greatly help to enhance the skills of the staff and their capacity to tackle effectively the problems associated with disguised and ambiguous relationships. In addition, exchange of experiences and working methods in different countries could be achieved through detachments of professional staff, particularly between the labour administrations and the labour inspectorates, where applicable, of developed and developing countries.
 - 13.** Labour administrations, in line with the role envisaged for them under the Labour Administration Convention, 1978 (No. 150), may also play an important role at the earlier stages of the formulation of laws and regulations aimed at addressing the problems relating to the scope of the employment relationship. It is highly desirable that both employers' and workers' organizations be closely associated with the rule-making process and machinery so that the elaboration of draft laws and regulations can benefit from the knowledge and experience of the key labour market actors. While laws and regulations should be sufficiently clear and precise leading to predictable outcomes, they should avoid creating rigidities and interfering with genuine commercial or genuine independent contracting arrangements.
 - 14.** Dispute resolution machinery and/or administrative procedures for determining the status of workers is an important service which should be provided by the appropriate agency. Depending upon the national industrial relations systems, such machinery may be tripartite or bipartite. It could have general competence or it may be limited to specified sectors of the economy. It is essential that employers and workers have easy access to fair, speedy and transparent mechanisms and procedures to resolve disputes about employment status.
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- 15.** There is evidence that the lack of labour protection of dependent workers exacerbates gender inequalities in the labour market. Data worldwide confirm increased participation by women in the workforce, particularly in the informal economy where there is a high prevalence of ambiguous or disguised employment relationships. The gender dimension of the problem is reinforced because women workers predominate in certain occupations and sectors where the proportion of disguised and ambiguous employment relationships is relatively high such as domestic work, the textile and clothing industry, sales/supermarket jobs, nursing and care professions and home work. Exclusions or restrictions in relation to certain rights, for example in some export processing zones, clearly disproportionately impact on women.
 - 16.** There is a need to have clearer policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension of the problem can be effectively addressed. At the international level, the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), clearly apply to all workers and the Maternity Protection Convention, 2000 (No. 183), specifies that it “applies to all employed women, including those in atypical forms of dependent work”.
 - 17.** To better assess and address the various issues relating to the scope of the employment relationship, governments should be encouraged to develop a national policy framework in consultation with their social partners. As stated in the common statement adopted by the Meeting of Experts on Workers in Situations Needing Protection (Geneva, May 2000), such a policy might include but not be limited to the following elements:

 - providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
 - providing effective appropriate protection for workers;
 - combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
 - not interfering with genuine commercial or genuine independent contracting;
 - providing access to appropriate resolution mechanisms to determine the status of workers.
 - 18.** Collection of statistical data and undertaking research and periodic reviews of changes in the structure and patterns of work at national and sectoral levels should be part of this national policy framework. The methodology for the collection of data and for undertaking the research and reviews should be determined after a process of social dialogue. All data collected should be disaggregated according to sex, and the national and sectoral level research and reviews should explicitly incorporate the gender dimension of this question and should take into account other aspects of diversity.
 - 19.** National labour administrations and their associated services should regularly monitor their enforcement programmes and processes. This should include identifying those sectors and occupational groups with high levels of disguised employment and adopting a strategic approach to enforcement. Special attention should be paid to those occupations and sectors with a high proportion of women workers. Innovative programmes of information and education and outreach strategies and services should be developed. The social partners should be involved in developing and implementing these initiatives.

Role of the ILO

20. The ILO has a significant role to play in this area, and the capacity of the Office to gather comparative data and to undertake comparative research is widely recognized. This work helps all ILO constituents better to understand and assess this phenomenon. The ILO should expand its knowledge base, and use such to promote good practice. This could include:

- commissioning regular country studies to capture ongoing labour law reforms in the area of the scope of the employment relationship;
- comparative analysis of the information and studies already completed, to identify trends, and new policy developments;
- producing publications on specific aspects of the subject, such as to include both the description of the phenomenon across national boundaries, as well as to examine the policy responses that have been developed;
- undertaking studies on regional, sectoral and gender dimensions on the subject;
- doing work on the development of usable, comparative data, and data categories;
- hosting meetings at regional and subregional levels to share experiences, disseminate the results of country studies, and build the capacity and knowledge of the ILO constituents;
- convening meetings of experts to consider specific aspects of the subject, as appropriate;
- place related topics as a subject matter for consideration by sectoral meetings.

The ILO should allocate resources for a programme of technical cooperation, assistance and guidance to member States on the scope and application of the employment relationship, to address:

- the scope of the law;
- general aspects of the employment relationship;
- access to courts;
- policy guidelines and capacity building to strengthen administrative and judicial action to promote compliance.

In addressing this subject, the ILO should recall the conclusions of the Committee on the Informal Economy, especially those concerning the importance of governance and the legal and institutional framework.

21. As compliance and enforcement are critical aspects of this question, the Office should strengthen its assistance to national labour administrations, and in particular to labour inspectorates. It should review its internal organizational arrangements in relation to labour administration and labour inspection, where applicable, in order to ensure that the Office provides a more coherent and efficient service to constituents in this area.

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- 22.** In most countries, courts and tribunals play a key role in the adjudication and resolution of disputes concerning the employment status of workers. It is highly desirable that judges, mediators and other designated officials dealing with these disputes receive adequate training on this issue, including on international labour standards, comparative law and case law. The Office should be encouraged to further strengthen its programme of collaboration and cooperation with the designated officials and judges of the relevant bodies and courts.
- 23.** It is acknowledged that a substantial number of innovative measures have been introduced in many countries to address the problems relating to the determination of the employment status of workers. Member States, with the cooperation of the social partners, should engage in the search for appropriate and viable solutions to these problems. Each State should undertake an in-depth review to identify shortcomings in order to explore appropriate and balanced solutions that take different interests into account. Some measures have taken the form of new laws or the revision of existing laws, while others have emerged through case law. Measures that have been adopted by countries include:
- the law defines the employment relationship;
 - the law establishes a legal presumption of employment if work is performed or services are provided in specified circumstances, unless it is shown that the parties had not intended to enter into an employment relationship;
 - criteria for identifying the employment relationship are set out in law, case law or a code of practice developed by or with the social partners.

Other measures that have been used have provided for a competent authority to declare that an employment relationship exists. All such innovative measures warrant careful consideration. Bipartite and tripartite efforts, for example in the form of guidelines, voluntary codes and dispute resolution mechanisms and procedures, have also contributed at national level to addressing these problems. All measures should be pursued with technical advice from the ILO, as appropriate.

- 24.** The ILO should step up its dialogue with other international institutions, including the international financial institutions, whose policies could impact on the employment relationship.
- 25.** The ILO should envisage the adoption of an international response on this topic. A Recommendation is considered by the Committee as an appropriate response. This Recommendation should focus on disguised employment relationships and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. Such a Recommendation should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and address the gender dimension. Such a Recommendation should not interfere with genuine commercial and independent contracting arrangements. It should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level and should take into account recent developments in employment relationships and these conclusions. The Governing Body of the ILO is therefore requested to place this item on the agenda of a future session of the International Labour Conference. The issue of triangular employment relationships was not resolved.

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