



## **Fifth item on the agenda: The employment relationship** (single discussion)

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

1. At its first sitting on 31 May 2006, the International Labour Conference constituted the Committee on the Employment Relationship. The Committee held its first sitting on 31 May 2006. The Committee was originally composed of 204 members (78 Government members, 60 Employer members and 66 Worker members). To achieve equality of voting strength, each Government member entitled to vote was allotted 110 votes, each Employer member 143 votes and each Worker member 130 votes. The composition of the Committee was modified nine times during the session, and the number of votes allocated to each member was adjusted accordingly.<sup>1</sup>

<sup>1</sup> The modifications were as follows:

- (a) 1 June: 224 members (98 Government members with 1,311 votes each, 57 Employer members with 2,254 votes each and 69 Worker members with 1,862 votes each);
- (b) 2 June: 138 members (103 Government members with 286 votes each, 22 Employer members with 1,339 votes each and 13 Worker members with 2,266 votes each);
- (c) 3 June: 134 members (106 Government members with 195 votes each, 15 Employer members with 1,378 votes each and 13 Worker members with 1,590 votes each);
- (d) 5 June: 129 members (108 Government members with 55 votes each, 11 Employer members with 540 votes each and 10 Worker members with 594 votes each);
- (e) 6 June: 127 members (109 Government members with 77 votes each, 11 Employer members with 763 votes each and 7 Worker members with 1,199 votes each);
- (f) 7 June: 125 members (109 Government members with 63 votes each, 9 Employer members with 763 votes each and 7 Worker members with 981 votes each);
- (g) 8 June: 123 members (109 Government members with 7 votes each, 7 Employer members with 109 votes each and 7 Worker members with 109 votes each);
- (h) 9 June: 123 members (110 Government members with 21 votes each, 7 Employer members with 330 votes each and 6 Worker members with 385 votes each);

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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. Van Zyl (Government member, South Africa) at its sixth sitting.

3. At its fourth sitting, the Committee appointed a Drafting Committee, mandated to finalize the text of the proposed instrument in accordance with ILO drafting practice. It was composed as follows:

- Government member:* Mr. J.-M. Crandal (France).
- Employer member:* Ms. P. Gauthier (Canada).
- Worker member:* Ms. A. Debrulle (Belgium).

4. The Committee held 16 sittings.

5. The Committee had before it Reports V(1), V(2A) and V(2B), entitled *The employment relationship*, prepared by the Office on the fifth item on the agenda of the Conference.

## Introduction

6. The Chairperson stated that the key to a constructive discussion would be a fair exchange of views. The Committee members were being given a unique opportunity to share perspectives and learn about the legitimate needs of all members and their responses to shared concerns. Although convergent points of view existed, the task ahead was difficult; only time would tell whether a consensus would be achieved. Not arriving at consensual wording would not necessarily be a failure; it would, however, be a failure if divergent opinions were dismissed outright, and members were unwilling to listen to each other. Even if the Committee could not agree upon exact wording, its work could be considered successful, if a positive effort had been made by all its members to reach agreement and members had sought to find a common goal. She felt optimistic about the outcome and was committed to working towards a good result.

7. In her opening words, the representative of the Secretary-General of the Conference explained that the issue dealt with by the Committee directly impacted on the protection of workers' rights, fair competitiveness and productivity, as well as States' fiscal and social policies. The subject had been on the agenda of the International Labour Conference in 1997, 1998 and 2003 and had been analysed by a meeting of experts in 2000. The proposed Recommendation before the Committee reflected the conclusions of the International Labour Conference general discussion on the scope of the employment relationship (2003) as well as the replies received by the Office.

8. Referring to the preamble of the proposed Recommendation, she emphasized the importance of the employment relationship in the application of labour standards and in the

- (i) 12 June: 126 members (114 Government members with 35 votes each, 7 Employer members with 570 votes each and 5 Worker members with 798 votes each).

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realization of the principles of the ILO Declaration on Fundamental Principles and Rights at Work, 1998. Sustained action was needed to provide effective protection to workers, given that difficulties in establishing the existence of an employment relationship would often negatively affect workers, their families and communities, as well as enterprises. The body of the proposed Recommendation was divided into four parts. The first part outlined elements of a national policy and measures that member States should take into consideration when developing and implementing such a national policy. The second part addressed the question of how the existence of an employment relationship could be determined. It was based on the principle that the determination process should be guided by the facts relating to the performance of work and the remuneration of the worker, and facilitated by a national policy that would comprise indicators and guidelines, as well as dispute-settlement services and the promotion of collective bargaining. The third part covered the monitoring and implementation of measures taken and clarified the roles of the social partners in that respect. The fourth part addressed the need for an international exchange of information and asked the Office to maintain up-to-date information on changes in the patterns and structure of work worldwide and to undertake relevant comparative studies. The speaker expressed her conviction that, when examining the proposed text, delegates would be guided by a spirit of tripartism and constructive negotiations, characterized by mutual respect.

9. The Employer Vice-Chairperson agreed with the Chairperson: the Committee needed to remain open and look for success in many ways. Recalling the difficult discussions which had taken place in 2003, and noting the number of returning delegates from the previous discussion, he expected the discussions to be deep and reflective. For many years, the Conference had struggled to address the subject. In 1997 and 1998, when the issue was framed as contract labour, the discussion had broken down over definitions and the scope of a draft instrument. Employers' concerns in relation to a negative impact on commercial relationships persisted. The Employer members had been resolute that the subject was not suitable for standard setting, as it was viewed differently in different contexts, and was rooted in different cultural and historical traditions. An international definition would introduce rigidity into labour markets and push workers out of the formal economy. The only consensus in 2003 was the agreement to limit the present instrument to disguised employment. This agreement was disregarded by the Office in the run-up to this Conference, and the Committee now faced the same issues that caused the discord in 2003, but with greater potential consequences.
10. The proposed Recommendation contained some useful principles which could, if treated properly, result in a positive outcome. However, it also gave rise to the same fundamental concerns raised in 2003. Unfortunately, the proposed Recommendation went beyond disguised employment relationships. Wording that interfered with legitimate subcontracting and outsourcing, and burdened enterprises as well as the workers servicing them, could not be accepted. The proposed criteria to determine the existence of an employment relationship would have an impact on commercial relationships, affect labour administration and hinder the creation of new jobs. Those criteria would lead to increases in disputes and litigation, and would increase the costs of public administration. They would create uncertainty by raising the potential for multiple employer liability and interfere with legitimate commercial relationships. Although Recommendations did not require ratification, they provided important guidance to countries, were referred to by national courts and tribunals, and established reporting obligations and shaped the work of the Office. Given these important functions, they needed to be developed with care and consideration.
11. The speaker was hopeful that the discussion would lead to a positive and constructive outcome. The Recommendation represented an opportunity to elaborate a set of basic principles on disguised employment, which could find broad consensus within the

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Committee. The Recommendation should promote clarity, but should not define what the scope and coverage of the employment relationship should be. It should provide for accessible mechanisms for speedy, fair and effective resolution of cases and should promote measures to provide guidance on the existence of the employment relationship, combat disguised employment and inform and educate the workplace parties. It should promote respect for the intentions of the parties to the agreement, and acknowledge their roles.

- 12.** The Worker Vice-Chairperson was encouraged by the number of Committee members who had participated in the 2003 discussion and suggested that the Committee could move forward, building on the results of that discussion. The Office text provided a good basis for the Committee's work and reflected the earlier discussion of 2003 and the responses of governments and employers' and workers' organizations to the questionnaire. Placing the need for establishing a legal basis for the determination of an employment relationship in the same context as the need for minimum wages, maximum hours of work and collective bargaining, he explained that the inherent inequality between employers and employees required labour law to provide redress. That inequality required that the employment relationship be distinct from normal commercial relationships. The employment relationship was a legal construct that sought to balance the inequality between employer and employee and create a range of rights and obligations to protect the worker, while recognizing the contractual responsibilities of both parties. It was a universal concept, across all legal systems; criteria to determine its existence were drawn from a limited and consistent range of facts.
- 13.** The Committee could bring to conclusion discussions that had taken place over five decades, supported by one of the most extensive programmes of research and reflection undertaken by the ILO. The time had come for a meaningful instrument to be adopted. In 2003, a compelling case had been made: there was a widespread problem with the scope of the employment relationship, resulting in workers not receiving protection in fact or in law; the problem affected workers worldwide and was growing in size and scope; it was a serious problem for workers, enterprises, governments and society as a whole; but it was a problem that could be tackled, and would benefit from ILO action and the creation of an international labour standard. After the 2003 discussion, the Committee had adopted a set of conclusions to map out what the solutions could entail, including a description of disguised, ambiguous and triangular employment relationships, and proposals for action by member States to address the problems. The conclusions envisaged an international response and should be taken into account in their entirety by the present Committee. Thus, it would not need to revisit debates and discussions, and could draw from agreed text.
- 14.** The Worker Vice-Chairperson highlighted the problems faced by workers who were coerced into becoming independent contractors, forced to work long hours for low wages in exploitative conditions. He cited the example of a South African worker, Ms. Zodwa Zibula, who was a victim of an attempt to deny her the protection of an employment relationship. In that country, campaigning had led to a change in legislation, that established a presumption and shifted the onus regarding the existence of an employment relationship from the worker to the employer. A set of indicators to determine the existence of an employment relationship had been put together, with the full agreement of labour and organized business. That change in legislation had resulted in the problem disappearing, although certain triangular relationships continued to deprive workers of their rights. Basing its deliberations on good practices, the Committee should agree on a meaningful text to address the vast and growing phenomenon. The text proposed by the Office represented a good platform to develop a meaningful outcome.

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15. The Committee was faced with two choices: on the one hand, it could adopt a minimalist position focusing on disguised employment relationships, which would be of limited use to member States; on the other hand, it could develop an instrument which spoke to the realities of disguised, ambiguous and triangular relationships, and set guidance for considering national responses to a global phenomenon. The Workers' group believed that the proposed text did not contain as much substance as was required by the scope of the problem, and that many elements of the 2003 conclusions should be incorporated. The Committee should look beyond the drafted Recommendation and address the difficulties associated with triangular relationships as well as address the gender dimension of lack of labour protection. Report V(2A) pointed to an emerging consensus between a large number of governments; also, a significant number of employers' and workers' organizations' responses reflected a demand for an instrument. The 2003 conclusions provided a template for the Recommendation. The Committee should identify areas where there was agreement on the text in 2003, and add them to the proposed text.
  16. The Government member of Canada considered the proposed text an excellent basis for the Committee's work, as it did a good job in reflecting the various views of the groups present. There had been a tremendous amount of work put into the issue over the past six years by governments, workers and employers as well as by the Office. The proposed text contained enough detail to give clear and efficient guidelines. Yet it allowed enough space and flexibility to accommodate different legal and economic contexts. Some points, however, needed improvement and his Government would be submitting amendments in that sense. All workers and employers needed tools to eliminate the lack of clarity surrounding the employment relationship in some situations. A Recommendation was required so that workers would receive the protection due to them.
  17. The Government member of Lebanon stressed that, firstly, the text should make it clear that laws needed to pinpoint relations which led to an employment relationship; for example the situation of subcontracting remained unclear. Secondly, any law should be accompanied by effective sanctions which would punish situations that were deliberately ambiguous and demonstrated bad intentions on the part of the employer. If such bad faith was identified, then the workers involved should receive their rights retrospectively. Such a situation needed to be addressed in the third paragraph of the preamble to the proposed text. Thirdly, the text needed to include procedures that could help dispel ambiguity, for example by permitting workers to go to the courts; the text would therefore also need to contain protections for those workers who brought complaints.
  18. The Government member of Switzerland reiterated her Government's stand that no new instrument was necessary. However, Switzerland would not object to a non-binding Recommendation, although its vote on the adoption of the draft instrument would depend on whether the final text was acceptable to her Government. Switzerland would prefer a best practices compendium or manual to guide governments. However, previous discussions had indicated that the majority of Members wanted an instrument. In the instrument, her Government would therefore call for a focus on disguised employment relationships.
  19. The Government member of Japan, recognizing how meaningful it was to discuss the employment relationship today, nevertheless stressed that some items still required further debate, such as the legal presumption of an employment relationship contained in Paragraph 11(b) of the proposed text. The Committee needed to take account of the laws, practices and realities in each country and the outcome of its deliberations had to be acceptable to each member State.
  20. The Government member of the United States shared Switzerland's position that there was no need for a new instrument, and that the preferred approach was some form of guidance.

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Noting, however, the strong consensus for a Recommendation, he hoped that the Committee's deliberations would be true to the 2003 consensus, as reflected in paragraph 25 of the conclusions adopted at that time. He asked the participants in the present debate not to draw on all the paragraphs of the 2003 conclusions, but to focus on the disguised employment relationship.

- 21.** The Government member of China observed that the establishment of an employment relationship was the most fundamental social relationship in a country's social and economic life and formed the basis of the labour market. It dictated whether a worker was protected by the labour law or not, for example in the area of social security. It also decided increases or decreases in the employer's costs, and had a direct impact on labour productivity and socio-economic development. The Recommendation should clarify the issues of enforcement and implementation of national policies, how to resolve employment disputes and offer constructive solutions to meet all contingencies while taking account of the various national circumstances. His Government considered that the following principles should be used: the determination of the existence of an employment relationship based on factual realities; in a market economy the employment relationship should be regulated by law; countries should resort to monitoring and legal methods to ensure that employers adhered to their obligations; and countries should adjust their laws and regulations concerning the employment relationship in a timely manner so as to ensure the effective protection of workers. He emphasized that all three parties should work together towards improving the situation. China itself was engaged in a labour law reform – revising its Labour Contract Law – with a view to stabilizing the employment relationship.
- 22.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the European Union (EU) (Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom), reported that most EU Members were positive about the proposed Recommendation but that some concerns and open questions needed to be addressed. Austria, as current President of the EU, hoped that the Committee's negotiations would lead to a good text which was also practical.
- 23.** The Government member of Jamaica considered that the employment relationship was the most central area of the ILO's work as it addressed the fundamental concerns of all sides: the employers, workers and governments, and concerned the laws and practices directly influencing the way in which employees provided their services to employers, in exchange for remuneration, under a contract for service or a contract of service. He stressed the variety of situations: bipolar, triangular, disguised and those of migrant workers. This complexity was amplified by attempts to balance international competition and globalization with human rights and core labour standards. So the development of international regulations and Conventions on the employment relationship was challenging, but a useful starting point would be to establish guiding principles that would assist countries to examine their laws and practices as they sought to reach that balance. Support for the new generation of corporate social responsibility (CSR) would be useful here, because it dealt with the economic, social and environmental concerns of a broad spectrum of stakeholders and could focus attention on public/private partnerships in dealing with social problems such as HIV/AIDS, poverty, unemployment, crime and violence. The ILO could promote – through its technical cooperation work – expanded use of the Global Reporting Index for CSR using core international labour standards, occupational safety and health norms and socially responsible restructuring. A second step would be the distillation of consensus positions previously arrived at in areas directly related to employment relationships, including child labour. A third step would be the sharing of good practices concerning employment relations, also through ILO's technical

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cooperation. The responses to the questionnaire provided some useful signals. He considered that the proposed Recommendation provided a useful framework for developing an international instrument, although amendments to some Paragraphs would be proposed by Government members of Caribbean countries.

- 24.** The Government member of the Bolivarian Republic of Venezuela considered paragraph 25 of the 2003 conclusions to be the basis for the present Committee's debate, in particular the disguised employment relationship and the problem of workers who laboured for third parties and needed national protection. The ILO's experience should guide Members in this process, as its research had demonstrated that globalization had given rise to obstacles to sustained growth and the elimination of poverty. The proposed Recommendation covered disguised employment relationships, triangular ones and offered indicators including the pre-eminence of the facts and a presumption in favour of the existence of an employment relationship. Other useful parts of the text included the need to guarantee the right to collective bargaining and mechanisms for settlement of labour disputes; the right to strike and freedom of association for independent contractors could be useful too. All those measures helped overcome a culture of deliberate fraud on the part of employers, which undermined not only the social security and taxation systems, but also national economies. Clearly, the draft Recommendation should clarify that legitimate commercial relationships were not affected.
- 25.** The Government member of Nigeria recalled that paragraph 25 of the 2003 conclusions had singled out a Recommendation as an appropriate response, and that the draft Recommendation should focus on disguised employment relationships and the need for national mechanisms to ensure that persons in an employment relationship got the protection they were due. Some African countries facing high unemployment, forced labour, child labour and trafficking were seeing the emergence of new forms of employment relationships, which were leading to industrial crises. She considered that social dialogue was needed, but protection could not be provided without an environment to assist workers and employers to settle their differences. Therefore, a Recommendation could assist member States to deal with their specific situations of employment relationships. If all Committee members approached the discussion in a flexible and open-minded way, a consensus could be reached on an acceptable Recommendation which would benefit all the parties.
- 26.** The Government member of South Africa, speaking on behalf of the Africa group (Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Côte d'Ivoire, Democratic People's Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe), supported the adoption of a Recommendation concerning the employment relationship. He stressed the importance of clarifying and adapting employment relationships to emerging labour market trends and realities, as well as ensuring protection of workers in the context of evolving employment relationships. In South Africa, in response to new forms of employment relationships, measures had been put in place to update and clarify the pertinent law. That amendment was in line with international labour standards and consistent with Part II of the proposed Recommendation. Those measures would assist in understanding and interpreting the variety of employment relationships present in the labour market including disguised, ambiguous, atypical and triangular employment relationships, and therefore were pivotal to improved compliance with the law. The proposed Recommendation should take the context, such as the 2003 conclusions, into consideration and therefore his delegation would propose some amendments.

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- 27.** The Government member of New Zealand strongly supported a Recommendation on the employment relationship, building on the 2003 conclusions. He saw the adoption of a Recommendation as essential for helping member States to combat disguised employment relationships where employers used other arrangements to hide an employment relationship and thus denied employees the protection to which they were entitled. The guidance contained in the Recommendation had to be practical and pragmatic and not focused on solutions coming from one particular country or group of States. Such an approach would allow States to resolve specific problems in a manner appropriate to their own circumstances; no one solution fitted all situations. On the two contentious areas of the ambiguous and triangular employment relationships, New Zealand was willing to discuss the triangular employment issue and thought that the key issue for the Committee to address was the lack of a clear problem definition, which had been the reason for the failure of consensus in previous discussions. As with ambiguous situations, the discussion should be focused on ensuring that triangular employment relationships were not used to undermine workers' entitlements and protections. It was clear that there should be no interference with genuine commercial arrangements. He considered that international labour standards should offer a wide range of responses to assist member States in addressing these issues, taking into account their own circumstances.
- 28.** The Government member of Côte d'Ivoire stressed that the employment relationship issue was important for his country in the current context of social, economic, political and historical crisis. As peace returned, new businesses would need more labour and relationships had to be clear. For example, disguised employment relationships were not acceptable. There was a role for labour inspection in settling labour disputes because ambiguous and disguised employment relationships were not dealt with in the national legislation. A Recommendation was needed and should clarify the existence of an employment relationship in simple terms in order to promote decent work in African countries.
- 29.** The Government member of India supported the proposed Recommendation as it would protect the interests of workers and provide them with access to social security, while encouraging employment opportunities and increasing productivity. Changes in the labour market and the workplace, as well as globalization, had led to flexible work arrangements and new forms of employment relationships, giving rise to difficulties in providing protection for all workers. The employment relationship was the legal basis for workers' and employers' rights and obligations. In India, no specific law existed on the employment relationship, but a number of laws specified who the worker was and who the employer was, and defined unambiguous rights. One of those laws, the Contract Labour (Regulation and Abolition) Act, 1970, dealt with work done for contractors. It defined the principal employer, the contract provider and the contract worker in clear and unambiguous terms. The contractor had primary responsibility for wages and welfare amenities, while the principal employer was held liable in the case of default on the part of the contractor. While legitimate civil and commercial contracts needed not to be curbed, disguised employment relationships or the absence of an employment contract were unfair labour practices that should be stopped. In his country, such matters would be resolved by the industrial tribunal. The Indian Government was also making efforts to extend protection to workers in the informal economy so that all workers, irrespective of their employment status, were provided with a minimum of social security protection and decent working conditions.
- 30.** The Government member of Australia agreed with earlier comments by the Government members of Switzerland and the United States. Her delegation was very interested in the Committee's work, but could not support the proposed Recommendation in its current form, since it would circumscribe independent contracting arrangements and hinder business development, economic progress and employment opportunities; the right of



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independent contractors to enter into commercial relationships needed to be protected. However, in recognition of the general support for the proposed Recommendation, her delegation was willing to work towards an instrument which would: focus on disguised employment relationships; be flexible, non-prescriptive and take account of the dynamics of the modern labour market; and be focused on providing guidance in the development of national policies. Her Government's position was reflected in a draft law that was soon to be presented in parliament, which protected the freedom of contract enjoyed by legitimate independent workers and addressed disguised employment relationships. It also extended targeted protection to particularly vulnerable workers.

- 31.** The Government member of Egypt pointed out that his Government had participated in the preparatory work and noted that the proposed Recommendation provided a positive basis for the Committee's work. In principle, his delegation supported the proposed instrument. Recently introduced legislation was compatible with the proposed Recommendation; further work was, however, required to extend protection to workers in a disguised employment relationship. It was important that the responsibilities of the social partners be clearly defined and social dialogue encouraged.
- 32.** The Government member of Germany considered that the proposed Recommendation addressed a key aspect of labour law. Globalization, the advent of new technologies and flexible forms of labour worldwide made this question a pressing one. Some countries faced considerable social and economic problems; unemployment and the threat that many workers would fall outside the protection provided by the employment relationship were growing. This global problem called for an international response that would discourage unfair competition and foster humane societies. Such actions would, however, need to take account of both employers' and workers' interests. In principle, his Government welcomed the proposed Recommendation; the definition and scope of the employment relationship needed to be clarified.
- 33.** The Government member of Sri Lanka explained that the absence of a recognized employment relationship could create problems not only for labour administration but also in terms of industrial unrest. In Sri Lanka, existing employment relationships had been transformed into triangular or disguised forms of employment relationships. Those developments had led to unrest and had negatively impacted on the implementation of the Decent Work Country Programme. It was important that enterprises remained competitive, but it was necessary to avoid the erosion of the employment relationship and workers' rights. His delegation supported the guidance on minimum standards for national policies found in the proposed Recommendation.
- 34.** The Government member of the Republic of Korea said that all workers should enjoy decent working conditions. After the discussion on the scope of the employment relationship in 2003, there had been related tripartite consultations over a period of two years in the Republic of Korea which had unfortunately been unsuccessful. Too much divergence existed between circumstances faced by individual workers. It was, therefore, important that details, such as indicators, be discussed with prudence. The 2003 conclusions had called for a Recommendation flexible enough to take account of different national traditions. He looked forward to the guidance that the Recommendation would give member States and hoped for good national policies, devised with ILO technical cooperation.
- 35.** The Government member of Namibia spoke on behalf of her tripartite national delegation. Having emerged from colonialism and apartheid, only 16 years previously, Namibia was determined to eliminate all vestiges of the discriminatory job reservation and contract labour systems of the past and to prevent their re-emergence. Her Government, as well as the Namibian Worker and Employer members, supported the proposed Recommendation,

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with amendments. Although legitimate commercial relationships must be protected, the Namibian delegation was united in its view that the protections of national employment laws should not be undermined by disguised, ambiguous and triangular employment relationships; therefore, those categories should be included in the Recommendation.

- 36.** The Government member of Spain stressed the importance of social dialogue and the social partners for finding a solution. Spanish social partners had recently agreed on measures to stimulate employment growth and to regulate triangular relationships, and particularly work for contractors. It had been agreed to update elements of legislation concerning the organization of decentralized work and workers' rights so as to avoid prejudice to them. Together with the social partners, Spain was also making efforts to improve the effectiveness and efficiency of labour inspection.
- 37.** The Government member of the Islamic Republic of Iran referred to his Government's Fourth Social, Economic and Cultural Development Plan (2005-10), which emphasized the importance of decent work, the reinforcement of labour inspection and new tools in labour relations to ensure an orderly development process. He endorsed the Recommendation as a means to stop disguised employment relationships.
- 38.** The Government member of the Syrian Arab Republic approved the proposed Recommendation and stressed the need for a clear definition of the employment relationship to ensure that the rights of all workers were protected, including migrant workers. Member States needed to combat all forms of work that could harm workers' rights, including discrimination on the basis of gender. Attention needed to be paid to social dialogue, with the government acting as a mediator between the social partners.
- 39.** The representative of the International Federation of University Women suggested that the Recommendation should be based on article 22 of the United Nations Universal Declaration of Human Rights, and on the concept of gender equality found in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well as the Beijing Declaration and Platform for Action of the Fourth World Conference on Women. The instrument would guide policy-makers and narrow the uncertainties in employment relationships. She welcomed the references to gender equality in Part I of the proposed Recommendation.
- 40.** The representative of Social Alert expressed the hope that the Committee's work would be fruitful. His organization had campaigned for many years for the rights of informal economy workers, and in particular for the extension of social protection to them. The discussion touched on the realities faced by informal economy workers. Informal economy workers should not be seen as a third category of workers, as if distinct from employed and independent workers. Informal workers were often found in sectors and occupations where disguised and ambiguous employment relationships prevailed, and where enforcement was problematic. The Recommendation should move beyond ensuring equal protection for workers affected by uncertain employment relationships; it should target those sectors and occupations in which disguised and ambiguous employment relationships were prevalent. Thus, national policies would deal directly with the root cause of the problem and not just with its effects.
- 41.** The representative of International Young Christian Workers pointed out that the disparity in employment contracts resulted in discrimination between temporary and permanent employees. Individual workplace bargaining left young workers vulnerable and created power imbalances and discrimination in the workplace. Many workers were forced to accept temporary employment due to a lack of permanent employment and relinquish their rights. Governments needed to ratify ILO Conventions related to hours of work, freedom of association and collective bargaining, and ensure that they were implemented in all

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workplaces. Laws were needed to promote permanent, decent and sustainable employment. It was important that the Conference developed a standard that defined a “fair employment relationship”.

42. Responding to the opening statements, the Employer Vice-Chairperson welcomed the level of government engagement, and noted that Government members held a variety of positions on the proposed Recommendation: a few supported it; others mentioned the need for some amendments with respect to disguised, ambiguous and triangular employment relationships; yet others supported the Employers’ group’s position that an instrument was not necessary. The Employer members expressed interest in the variety of national contexts that had been described, as well as the many creative and unique solutions that had been found, such as the South African one. Many Government members had referred to adopting a principled approach, and wanted to receive guidance on how to treat employment relationships. Ambiguous and triangular employment relationships had been identified by some Government members as meriting discussion. He repeated that the Employers’ group was not suggesting that the issues of ambiguous and triangular relationships did not merit attention, but rather that they should be discussed nationally and not in the present Committee. The South African example showed the merit of a national solution. The work of the Committee should focus on the disguised employment relationship and seek solutions inspired by some of the creative examples that had been described by Government members at previous meetings.
43. He described an example of another solution: the choice made by independent contractors in Queensland, Australia, who had been brought within the purview of the Industrial Relations Act only to struggle against that imposition in the courts, at considerable expense, before winning the right to remain independent contractors outside of the coverage of legislation. Such workers had a variety of reasons for remaining independent contractors – including using their own equipment and flexible working hours – not least of which was that it was the individual’s own free choice. While he recognized the existence of cases where workers were not given the choice to remain in a valid employment relationship, it was important that the Recommendation did not interfere with those who had opted to remain independent contractors. Another reason for prudence in that area was that independent workers comprised the small businesses that were the engine of economic growth and job creation across the world. He warned against an international instrument which could restrict their growth. While there should be social dialogue on ambiguous and triangular relationships, the Employers’ group was not interested in reopening the 2003 debate. Employer members remained hopeful that the Committee could come up with a useful Recommendation on disguised employment that would be embraced and supported by all.
44. The Worker Vice-Chairperson was encouraged by the insights and examples shared by some 23 Government members in their opening interventions. They would provide guidelines for the work of the Committee, in particular the fact that so many, from different regions and legal systems, referred to the problems associated with triangular relationships. India’s regulation of them through the Contract Labour (Regulation and Abolition) Act, 1970, and Lebanon’s call for strong sanctions for intentionally disguised employment relationships, as well as the many tripartite agreements that had been described, demonstrated that the problem, and solutions, did indeed exist and were expected to be addressed in the text. He recalled that all international standards had evolved in such settings, where a problem was universally recognized and various solutions collected into a standard, just as was being done for the employment relationship.
45. Noting the Employers’ group’s call for the Committee to focus its work on one area, he warned of disappointment for millions of women and men facing employment relationship problems if the Conference could not arrive at a text. The successful approach of South

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Africa (encompassing clear indicators, a legal presumption and monitoring by the competent legal authority) had only come about due to the political will of the three constituents. The Namibian and Spanish national examples of tripartite approaches indicated that consensus could be attained given the gravity of the problems. Not all examples of Australian independent contractors were positive. He referred to the Optus telecommunications company situation, as an example, which involved the dismissal of 70 employee technicians who were then offered re-engagement as independent contractors to do identical work for a substantially lower wage. That was why the adoption of the proposed Recommendation would help. He stressed that the Workers' group was not seeking to prohibit legitimate independent contracting, but rather situations that were disguised genuine employment relationships, or were ambiguous, or were third-party triangular ones that deprived workers of the legal protection to which they were entitled. Moreover, the replies to point 6(2)(c) of the questionnaire showed that 83 per cent of the responding governments, the vast majority of workers' organizations and even 42 per cent of employers' organizations considered it helpful to have a reference to triangular employment relationships in the proposed instrument. He repeated the Workers' group's interpretation of paragraph 25 of the 2003 conclusions: the issue of triangular employment relationships had not been resolved but there was no reason why the present Committee and Conference should refuse to do so; in fact it was a duty towards the millions of workers requiring protection.

## **Consideration of the proposed Recommendation contained in Report V(2B)**

### **Title**

46. The Committee decided to postpone the discussion of the Employer members' amendment to the title of the Recommendation, until such time as the Worker and Employer members could reach consensus. As subsequent informal bipartite consultations did not result in an agreement, the Employer Vice-Chairperson withdrew the amendment.<sup>2</sup>
47. The title was adopted without amendment.

### **Preamble**

#### ***First and second preambular paragraphs***

48. The first and second preambular paragraphs were adopted without amendment.

#### ***Proposed new preambular paragraphs after the second preambular paragraph***

49. The Worker Vice-Chairperson introduced two amendments proposing the insertion of two new preambular paragraphs, reading as follows: "Considering that the protection of workers is at the heart of the ILO's mandate, and" and "Considering the fundamental importance of the 1998 ILO Declaration on Fundamental Principles and Rights at Work, particularly freedom of association and collective bargaining, and the importance of the

<sup>2</sup> For reasons stated in paragraphs 415, 417 and 421 of this report.

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employment relationship in the application of international labour standards, and”. He noted that they might overlap with an amendment proposed by the Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom, which would be dealt with in the discussion on the third preambular paragraph.

50. The Employer Vice-Chairperson considered that these amendments did not substantially contribute to the discussion. However, out of respect for the principles which were important to the different constituents, the Employer members would not object to any of them. He nevertheless warned that, as his group had consistently and repeatedly stated, certain concepts could not be accepted and this level of detail was not appropriate for an international labour standard.
51. In response to the discussion, the Worker Vice-Chairperson withdrew his group’s proposed amendments, on the understanding that the amendment submitted by a number of European Government members would be discussed in the context of the third preambular paragraph.
52. The Worker Vice-Chairperson introduced an amendment to insert the following new preambular paragraph: “Considering that protection of workers offered by national laws, regulations and collective agreements is often linked to the existence of an employment relationship between an employer and an employee, and”. The amendment was important since it explained the rationale for the need to provide guidance on this matter.
53. The Employer Vice-Chairperson suggested subamending the proposed amendment by replacing “is often” with “may be”. This neutral language would take into account the fact that national laws and collective agreements did not exclusively link the protection of workers to the employment relationship.
54. The Worker Vice-Chairperson proposed that wording be used from the first paragraph of the 2003 conclusions, with the proposed amendment reading as follows: “Considering that there are protections offered by national laws, regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and”.
55. The amendment to insert a new preambular paragraph, as subamended, was adopted.
56. The Worker Vice-Chairperson introduced an amendment submitted by the Worker members to add the following new preambular paragraph: “Considering that laws and their interpretation should be compatible with the objectives of decent work, and”. The instrument would be significantly enhanced if there was a reference in the preamble to the common support for the objectives of decent work. Paragraph 6 of the 2003 conclusions was the basis for this proposed amendment.
57. The Employer Vice-Chairperson cautioned the Committee members on using the 2003 conclusions to guide their discussions and reiterated that the Employer members had only supported paragraph 25 of the 2003 conclusions. Referring to wording used in the United Nations 2005 World Summit, he suggested that “and productive” be inserted after “decent”.
58. The Government member of New Zealand deemed both concepts important and supported the subamendment.

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59. The Worker Vice-Chairperson explained that paragraph 6 of the 2003 conclusions had been unanimously supported in 2003. Within the ILO context, decent work was a technical term and captured several elements, which included productivity, remuneration as well as safety and health. If the word “productive” were to be explicitly inserted, an imbalance would result. In response to a request for clarification from the Government member of Jamaica, speaking on behalf of the following Caribbean Community and Common Market (CARICOM) countries: Bahamas, Barbados, Belize, Guyana, Jamaica and Suriname, the Worker Vice-Chairperson pointed out that the wording used related to the standing concept of decent work and was also reflected in the ILO’s four strategic objectives.
  60. The Government member of Mexico proposed a subamendment to take into account the Employer members’ subamendment. Instead of adding “and productive” after “decent”, the words “and especially with that of productivity” could be inserted after “decent work”.
  61. The Government member of South Africa, speaking on behalf of the Africa group, observed that decent work had acquired a universally understood meaning. He, therefore, supported the amendment as originally proposed by the Worker members.
  62. The Government member of New Zealand expressed his understanding for the intention behind the Employer members’ subamendment, but considered that decent work was a well-understood concept; further qualifications might render it cumbersome.
  63. The Government member of Lebanon also opposed the subamendment. It was every employer’s duty to ensure that work conducted under his or her command would be productive.
  64. The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU as well as the Government member of Romania, and the Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of the Common Market of the Southern Zone (Mercado Común del Sur – MERCOSUR) (Argentina, Bolivia, Brazil, Chile, Uruguay and the Bolivarian Republic of Venezuela), as well as the Government members of the Syrian Arab Republic and Jamaica, indicated support for the Worker members’ amendment and did not support the Employers’ group’s subamendment.
  65. The Employer Vice-Chairperson indicated that he was willing to withdraw his group’s subamendment. The wording used by the World Commission on the Social Dimension of Globalization and the United Nations 2005 World Summit had, however, raised an issue that needed to be considered in another setting and went beyond the mandate of this Committee.
  66. The amendment to add a new preambular paragraph was adopted.
  67. The Worker Vice-Chairperson introduced an amendment to insert the following paragraph: “Considering employment or labour law seeks to address what can be an unequal bargaining position between parties to an employment relationship, and” after the second preambular paragraph. The suggested wording came from the 2003 conclusions; it was contained in the second paragraph, which had been adopted unanimously. The proposed amendment clarified that the difference in bargaining power was the reason behind distinguishing the employment relationship from other contractual relationships.
  68. The Government member of Canada proposed to insert the words “in particular” after the words “labour law seeks” to highlight the idea that the imbalance of bargaining power was only one among many objectives of labour legislation.

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69. The Worker Vice-Chairperson, the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU and the Government member of Romania, supported the subamendment.
  70. The Employer Vice-Chairperson supported the subamendment in principle, but suggested replacing the words "in particular" with "among other things".
  71. The Government member of Jamaica, speaking on behalf of the CARICOM countries previously listed, and the Government member of India supported the Employer members' subamendment.
  72. In response to statements by the Government members of Canada and Lebanon on the best translation of the English wording "among other things" into the French language, the Committee decided that the Drafting Committee would need to deal with this question.
  73. The amendment to add a new preambular paragraph, as subamended, was adopted.
  74. The Worker Vice-Chairperson introduced an amendment to insert the following new paragraph, after the second preambular paragraph: "Considering that genuine commercial and civil contracts contracted by persons who are not workers are not covered by this Recommendation as they fall outside the scope of an employment relationship, and". One of the important agreements reached in 2003 was that the new instrument should not interfere with genuine commercial and civil contracts. Although similar provisions were contained in the body of the instrument, his group suggested dealing with this issue in the preamble.
  75. The Employer Vice-Chairperson opposed the amendment; the matter needed to be dealt with in the body of the Recommendation.
  76. The Government member of Austria introduced an amendment, submitted by the Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom, to insert the following new preambular paragraph: "Considering that genuine commercial contracts and contracts for services are not covered by this Recommendation as they fall outside the scope of the employment relationship, and". She agreed that it was necessary to ensure that commercial and civil contracts would not fall within the scope of the Recommendation and noted that the suggested wording was more succinct than that contained in the Worker members' amendment.
  77. The Employer Vice-Chairperson supported the amendment but reiterated that it did not render provisions in the body of the proposed Recommendation unnecessary.
  78. The Worker Vice-Chairperson supported the amendment in principle, but proposed to replace the words "genuine commercial contracts and contracts for services" with the words "civil and commercial contracts" to clarify the paragraph's meaning.
  79. The Employer Vice-Chairperson supported the proposed addition of "civil and" but opposed the deletion of "contracts for services"; this concept was central to the discussion and should not be touched.
  80. The Government member of France indicated that the reference to civil contracts was too broad. Many legal systems considered employment contracts to be civil contracts. The wording "genuine commercial contracts" needed to be retained.

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- 81.** The Worker Vice-Chairperson, considering whether the Workers’ group might withdraw its amendment in the light of the possible adoption of the amendment under discussion, introduced a subamendment to the proposed text, to read: “Considering that genuine self-employment and genuine commercial contractual arrangements are not covered by this Recommendation because they fall outside the scope of the employment relationship”.
  - 82.** The Government member of Austria, speaking on behalf of the sponsors of the proposed amendment, supported the Worker members’ subamendment.
  - 83.** The Employer Vice-Chairperson did not support the proposed amendment or its subamendment. He considered that the text was inconsistent with Paragraph 6 of the operative part of the proposed Recommendation, which the Employers’ group also did not support.
  - 84.** The Government member of Canada, speaking on behalf of a sub-group of Government members of industrialized market economy countries (IMEC) composed of Australia, Canada, Japan, New Zealand, Switzerland and the United States, supported both the amendment and the Worker members’ subamendment, because Paragraph 6 of the operative part of the proposed Recommendation remained in the text.
  - 85.** The Employer Vice-Chairperson, noting the inclusion of the word “genuine”, queried what a “non-genuine” employment relationship would be. He called for clarification by the Government member of Canada as to how the subamendment and Paragraph 6 of the operative part of the proposed Recommendation were linked.
  - 86.** The Government member of Canada replied that the preamble appeared to need a reflection of the existing Paragraph 6 of the operative part of the proposed text and this subamendment echoed that idea.
  - 87.** The Worker Vice-Chairperson explained that the use of the word “genuine” in their subamendment was chosen to contrast with “disguised”. Aware that the Employers’ group and the Workers’ group found common ground in opposing disguised self-employment and disguised contractual arrangements, he had hoped the wording would have been acceptable. The Worker Vice-Chairperson had at first considered the issue of commercial relationships to find its proper place in the preamble. However, he was now convinced by the Employer Vice-Chairperson that there was value in retaining a related clause in the operative part of the Recommendation.
  - 88.** The Government member of Lebanon suggested a change of wording to the subamendment to replace “self-employment” with “own-account work”, as in Arabic the former term was meaningless and the French version not clear. The Employer Vice-Chairperson rejected this suggestion and the Worker Vice-Chairperson did not wish to comment on the appropriateness of the terminology in different languages, which was normally left to the Drafting Committee. The Government member of Lebanon withdrew his suggestion.
  - 89.** The Employer Vice-Chairperson, noting the interest in retaining Paragraph 6 of the operative part of the proposed Recommendation, wondered whether both the Worker members’ amendment and that proposed by the Government members could be withdrawn and the issue discussed afresh in the context of Paragraph 6.
  - 90.** The Worker Vice-Chairperson, noting the concerns of the Employer members, withdrew his group’s amendment, on the understanding that the issue would be discussed in Paragraph 6. The Government member of Austria withdrew the remaining amendment on



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behalf of its sponsors, noting that there would have to be new wording introduced into Paragraph 6 when the Committee came to discuss the operative part of the text.

### ***Third preambular paragraph***

91. The Government member of Austria, speaking on behalf of several Government members of the Committee Member States of the EU and Romania, introduced the amendment referred to previously by the Worker members, which sought to replace the third preambular paragraph with: “Considering that the protection of workers is at the heart of the ILO’s mandate, and in accordance with the principles set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and the Decent Work Agenda, and”. She stated that the proposed amendment emphasized the ILO’s duty to ensure workers’ protection and added a reference to the Decent Work Agenda.
92. The Worker and Employer Vice-Chairpersons supported the proposed amendment and the amendment was adopted.
93. Given the adoption of the amendment, presented by the Government member of Austria on behalf of a number of European Government members, to replace the third preambular paragraph, the Worker members’ proposed amendment to delete this third paragraph fell, as did the Employer members’ amendment to delete part of the third preambular paragraph.
94. The third preambular paragraph was adopted as amended.

### ***Proposed new preambular paragraphs after the third preambular paragraph***

95. The Employer Vice-Chairperson proposed replacing five paragraphs of the preamble with:

Considering that there is a need for mechanisms to ensure that persons with an employment relationship have access to the protection available to them at the national level, and

Considering that, in situations where an employer evades obligations towards individuals in an employment relationship by claiming that such persons are not employees, those persons risk not having access to the protection available to them at the national level, and

Considering that an international response to this issue should provide guidance to member States without defining universally the substance of the employment relationship, and.

He explained that the Employer member envisioned an instrument which was principled and would include issues of clarity, review of national policy, the importance of national practice, guidance for employers and employees, mechanisms for dispute resolution, and respect for civil and commercial agreements, among other things.

96. The Worker Vice-Chairperson opposed the introduction of this amendment, on the grounds that there was a merit in the paragraphs proposed for deletion, and his group would prefer to address each paragraph of the Office text in turn.
97. The Government member of South Africa, speaking on behalf of the Africa group, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and the Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, as well as the Government members of Lebanon and New Zealand opposed

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the amendment. They also proposed to discuss the text paragraph by paragraph for better clarity.

- 98.** The Employer Vice-Chairperson, noting that many Government members had problems with the process of deleting five paragraphs and inserting three paragraphs simultaneously, withdrew the amendment.
- 99.** The Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom withdrew their proposal to add a new preambular paragraph.

#### ***Fourth preambular paragraph***

- 100.** The Employer Vice-Chairperson introduced an amendment to replace the end of the paragraph with “there has been an attempt to disguise the employment relationship in order to avoid obligations arising from such a relationship, and”, the aim of which was to focus the text on disguised employment relationships, as had been the agreement in paragraph 25 of the 2003 conclusions.
- 101.** The Worker Vice-Chairperson did not support the amendment as it narrowed the proposed instrument and would prevent the development of meaningful solutions to the variety of problem areas that had been outlined by so many speakers in the opening statements.
- 102.** The Government member of Lebanon proposed a subamendment to the Employer members’ text in order to preserve the last phrase of the paragraph. That phrase referred to inadequacies or limitations in national laws or in their interpretation or application, an issue that had been highlighted by several Government members in their opening statements.
- 103.** The Employer Vice-Chairperson seconded the subamendment because they acknowledged that there were legal weaknesses that needed to be reflected in the preamble. However, he noted that it could be subsumed by a following amendment, proposed by the Government members of Australia and the United States, which simply deleted the words “the respective rights and obligations of the parties concerned are not clear, where”.
- 104.** The Government member of Lebanon withdrew his subamendment.
- 105.** The Worker Vice-Chairperson opposed the Employer members’ proposed amendment as it added a further criterion for determining the existence of an employment relationship, namely a test of intention on the part of the employer to disguise the employment relationship. He observed that the amendment would place an extra burden on workers, even when there was factual proof that such a contractual relationship did not correspond with the facts of the relationship, whereas the amendment would require proof that the express intent was to attempt to disguise the real nature of the relationship.
- 106.** The Government members of India and New Zealand, as well as the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, also opposed the Employer members’ amendment, as the original proposed text covered in a thorough manner all problem areas that were at the root of the need for an instrument to address the employment relationship.
- 107.** The Committee decided not to adopt the Employer members’ amendment.

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- 108.** The Government member of the United States, speaking also on behalf of the Government member of Australia, explained that their proposed amendment to delete the wording of the fourth preambular paragraph, which referred to unclear rights and obligations of the parties, was intended to focus at least one preambular paragraph on disguised employment relationships and the mechanisms that might help address the recognized problem, without prejudicing the possibility of mentioning other aspects of the problem elsewhere. However, in the light of the discussion, they withdrew their amendment.
- 109.** The Worker Vice-Chairperson withdrew three amendments to insert the words “or are ambiguous”, “or deprive workers of protection”, and to replace the words “or application” with “, observance or enforcement”, noting that some Government members preferred the original text of the fourth preambular paragraph.
- 110.** The Government member of the United States, speaking also on behalf of the Government members of Australia, Canada, Japan and Switzerland, described their amendment to replace certain words with “and the need for mechanisms to ensure that persons with an employment relationship have access to the protection that they are due at the national level” as an attempt to give focus to the preamble. As the Employer Vice-Chairperson clarified that the issue of mechanisms was covered elsewhere in the proposed instrument, the Government member of the United States withdrew the amendment.
- 111.** The fourth preambular paragraph was adopted without amendment.

***Proposed new preambular paragraph after the fourth preambular paragraph***

- 112.** The Worker Vice-Chairperson introduced an amendment to add a new paragraph, worded as follows: “Considering that changing employment arrangements have resulted in a loss of protection to many workers, and”, in an attempt to address, in a stand-alone manner, the fact that changing employment relationships had resulted in diminished employment protection. The Workers’ group noted that a later proposed amendment by the EU Government members may well address the same matter.
- 113.** As the Employer members opposed the amendment because they considered it to be vague and not helpful to the text, and in the light of the later proposed amendment, the Worker members withdrew their amendment.

***Fifth preambular paragraph***

- 114.** The Worker Vice-Chairperson proposed an amendment to delete this paragraph in its entirety because the difficulties which accompanied the changing labour market and alternative work arrangements were addressed elsewhere in the proposed text.
- 115.** The Employer Vice-Chairperson supported this deletion.
- 116.** The amendment was adopted.
- 117.** The Employer members’ proposed amendment to replace the fifth preambular paragraph with new wording fell with the deletion of the entire paragraph.
- 118.** The fifth preambular paragraph was deleted.

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## ***Sixth preambular paragraph***

- 119.** The Employer Vice-Chairperson introduced an amendment to delete the whole of the paragraph, which essentially addressed triangular employment relationships. He stressed that this position was based on the clarity of paragraph 25 of the 2003 conclusions, and that the Employers' group was not prepared to discuss a proposed Recommendation that mentioned triangular employment relationships.
- 120.** The Government members of Australia, Denmark and the United States supported the amendment as they agreed that the issue of triangular relationships should not be part of the proposed Recommendation.
- 121.** The Worker Vice-Chairperson opposed the amendment. He recalled that the preamble should describe current difficulties, thus setting the scene for the operative part of the text where solutions would be proposed. As many opening statements had confirmed that problems existed in the area of determining responsibility for workers' protection, he considered that the Committee should fruitfully discuss the issue of triangular employment relationships.
- 122.** The Government member of Lebanon, the Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU except Denmark, and the Government member of South Africa, speaking on behalf of the Africa group, opposed the deletion. They supported the retention of the original text which, in their opinion, was a crucial issue that had to be addressed. The Government members of the Committee Member States of the EU and of the Africa group hoped that subsequently there would be a draft text that would satisfy the Employer members.
- 123.** The sixth preambular paragraph and Paragraph 3(c) of the operative part of the proposed text were submitted to an informal tripartite working group to seek a set of consensus texts.
- 124.** The Chairperson reported back to the Committee on the work of the informal tripartite working group. The informal tripartite working group had met twice to find consensual text that would address the issues raised by the proposed amendments to the sixth preambular paragraph as well as amendments seeking to change Paragraph 3(c). It was suggested that the following text replace the sixth preambular paragraph and that the Drafting Committee look at the structure and language of the proposed new text:

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protections they are due;

Recognizing that there is a role for international guidance to Members to achieve the protections through national law and practice;

Recognizing that such guidance should remain relevant over time;

Recognizing that national policy should be the result of consultation with social partners and should provide guidance to the workplace parties;

Recognizing that such protections should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance;

Recognizing that national policy should promote economic growth, job creation and decent work;

- 125.** The Worker Vice-Chairperson explained that, although his group would, in other circumstances, have offered subamendments to the text, it recognized the tremendous work

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that had gone into producing a package that accommodated all parties. It therefore supported the proposed amendment.

126. The Employer Vice-Chairperson supported the introduction of the amendment. He expressed his thanks to the members of the informal tripartite working group for identifying the needs and interests of all concerned. The proposed amendment reflected the underlying concerns of the parties and merited careful consideration.
127. The many Government members who spoke on the issue voiced their full support for the proposed new text. Employer, Worker and all Government members agreed to withdraw their amendments that had referred to the provisions that had been dealt with by the informal tripartite working group.
128. The Committee unanimously agreed to replace the Office text with the proposed text as presented by the informal tripartite working group.
129. The agreed text for the sixth preambular paragraph was unanimously adopted.

***Proposed new preambular paragraphs after  
the sixth preambular paragraph***

130. The Government member of Austria speaking also on behalf of the Government members of Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden, introduced an amendment to insert the following new preambular paragraph after the sixth preambular paragraph: “Considering that the globalized economy has increased mobility of workers that are in need of protection at least against circumvention of national protection by choice of law, and”. As a consequence of globalization, the mobility of workers had increased considerably. Since migrant workers were particularly vulnerable and would often, as victims of disguised employment relationships, not enjoy any protection, the issue had increased in relevance and presented a problem for most EU Member States.
131. The Worker Vice-Chairperson supported the amendment. The phenomenon addressed was not only relevant to industrialized countries, due to the global trend towards regional economic integration, and would add value to policy-making in developing countries too.
132. In response to a request for clarification by the Employer Vice-Chairperson, the representative of the Legal Adviser explained that consistently, in an ILO context, preambles have been considered non-binding in nature. A preamble’s primary function was to set out the context for the instrument. Although non-binding, its interpretative value was without question; although preambular paragraphs did not prevail over operative paragraphs, they shed light on their interpretation. Given its nature, a preamble should be as concise and clear as possible.
133. In response to a request for clarification by the Employer Vice-Chairperson, the Government member of Finland clarified that the concerns addressed by the proposed amendment were also reflected in proposed amendments to Paragraphs 4 and 15 of the operative part of the text.
134. The Employer Vice-Chairperson did not support the amendment. He recognized the concerns of its sponsors, but did not consider the text appropriate to be included in the preamble. This issue needed to be discussed later, in relation to the operative part of the text.

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135. The Government member of South Africa, speaking on behalf of the Africa group, the Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Government member of Lebanon supported the amendment.
  136. The Employer Vice-Chairperson respected the views expressed and lent his support to the proposed amendment. It was important, however, that the preamble not be overburdened with references to operative paragraphs to be discussed later.
  137. The amendment to insert this new preambular paragraph after the sixth preambular paragraph was adopted.
  138. The Government member of Austria, speaking also on behalf of the Government members of Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden, introduced an amendment to insert the following new preambular paragraph after the sixth preambular paragraph: “Considering that, in the framework of transnational provision of services, difficulties may exist in establishing who is considered a worker, what rights the worker has and who is accountable for those rights, and”. The amendment sought to tackle the transnational dimension of the employment relationship and highlight the difficulties of establishing who was a worker and what his or her rights were.
  139. The Worker Vice-Chairperson supported the proposed amendment.
  140. The Employer Vice-Chairperson understood the amendment to be set against long discussions on the issue of migrant workers in the EU. The amendment’s wording was, however, problematic, since it was not clear why the text seemed to indicate that it was difficult to establish who the worker was and because it seemed also to deal with issues outside disguised employment relationships.
  141. The Government member of Austria, speaking on behalf of the amendment’s sponsors, proposed to subamend the text by adding the words “in an employment relationship” after “who is considered a worker”.
  142. The Worker Vice-Chairperson supported the subamendment.
  143. The Employer Vice-Chairperson was also in favour of the subamendment. In addition he suggested further subamending it by deleting “and who is accountable for those rights”. There was no question that the employer be accountable.
  144. The Government member of Austria, speaking on behalf of the amendment’s sponsors, opposed the further subamendment. It was crucial that the amendment specify who the employer was. She suggested, therefore, replacing “and who is accountable for those rights” with “and who is considered the employer”.
  145. The Employer Vice-Chairperson agreed that this wording captured the Employer members’ concerns. However, he suggested that better drafting would replace “who is considered” with “who is”. In addition, he proposed to replace “difficulties may exist in establishing” with “it is important to establish”. These changes were in line with the essence of the original amendment. The amendments addressed two concerns: first, the phrasing “difficulties may exist in establishing” led to a line of reasoning which could result in the development of criteria for determining ambiguous employment relationships, which the Employers’ group was not willing to accept. Secondly, the reference to accountability for employment-related rights would have to make clear that it was referring

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to the employer, and it did not require the consideration of provisions relating to triangular employment relationships.

146. The Worker Vice-Chairperson supported the subamendment proposed by the sponsors of the original amendment. He recognized the Employer members' interest in finding precise language, but opposed the deletion of a reference to difficulties, since recognition needed to be given to the problems arising in a transnational context. The sponsors of the amendment had sought to clearly identify against whom rights could be enforced; the Employer members' subamendment did not address that.
147. The Government member of Austria, speaking on behalf of the amendment's sponsors, and the Government member of South Africa supported the text, as subamended by the Employer members.
148. The Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Government member of Mexico supported the amendment, as earlier subamended by the Government member of Austria.
149. The Government members of Lebanon, the Syrian Arab Republic and the United Kingdom preferred to keep the original, unchanged, wording of the amendment.
150. An indicative show of hands by Government members showed that a majority of Government members were in favour of the following text: "Considering that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and".
151. The amendment to insert this new preambular paragraph after the sixth preambular paragraph was adopted, as subamended.
152. The Worker Vice-Chairperson introduced an amendment reflecting the need to ensure fair competition and effective protection of workers in an employment relationship. Noting that similar wording would be proposed later on regarding the eighth preambular paragraph, he agreed to withdraw the amendment, on the understanding that the idea would be discussed subsequently.

### ***Seventh preambular paragraph***

153. The Employer Vice-Chairperson introduced an amendment to replace the words "workers concerned" with "persons concerned" and delete the rest of the seventh preambular paragraph. In order to keep the preamble simple, "persons" was proposed instead of "workers" as there were many kinds of people, not just workers, who might be affected. As regards the productivity and financial performance of enterprises, he pointed out that there were many factors which affected them, and that this reference was unnecessary.
154. The Worker Vice-Chairperson did not support the amendment. The deletion suggested was not acceptable, because it was necessary to recall the wider set of problems arising from the difficulties of establishing the existence of an employment relationship. The Office wording had been carefully chosen, and was flexible enough. It correctly reflected the discussions of the 2003 Conference Committee. The suggestion to delete the reference to workers was unhelpful and puzzling.
155. The Government members of India and the Islamic Republic of Iran did not support the amendment.

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- 156.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, preferred to keep the reference to “workers”, but was in favour of deleting the rest of the paragraph, as originally suggested by the amendment. The Government member of India stated that labour law mainly concerned workers. Therefore, he supported the subamendment suggested by the Government member of Austria.
- 157.** The Employer Vice-Chairperson supported the subamendment.
- 158.** The Worker Vice-Chairperson pointed out that this was linked to a later amendment to be introduced by his group to insert the words “and the sustainability of social security provisions and tax revenues” after the word “enterprises”. If the Committee decided to follow the Employer members’ suggestion to delete the end of the paragraph, his group’s amendment could no longer be considered. This would be unfortunate, since it was important that the preamble sketch out the effects of the problem for society as a whole; it was crucial that the impact on the sustainability of social security provisions and on tax revenues be acknowledged. He therefore suggested adding the words “their communities, enterprises and society at large” after the words “workers concerned”.
- 159.** The Employer Vice-Chairperson deemed the implications too broad and the language used too melodramatic. His group did not object to limiting the reference to “workers” only, if that language was predominantly preferred by the Committee, and suggested deleting the word “enterprises”. The Worker Vice-Chairperson could support this deletion, but noted that the problem on tax revenues was indeed dramatic, and cited data contained in the Office Report V of 2003 *The scope of the employment relationship* involving the United States to illustrate this.
- 160.** The Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, the Government member of New Zealand and the Government member of South Africa, speaking on behalf of the Africa group, also supported this deletion. The proposed text would now read: “Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities and society at large, and”.
- 161.** In view of the discussion, the Government member of Lebanon withdrew his amendment that also referred to text that would be deleted if the Employer members’ amendment, as subamended, was adopted.
- 162.** The amendment was adopted as subamended.
- 163.** The seventh preambular paragraph was adopted as amended.

### ***Eighth preambular paragraph***

- 164.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, introduced an amendment to replace the text after the words “the existence of an employment relationship” with the words “needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law and/or practice, and”. The amendment sought to guarantee fair competition.
- 165.** The Worker Vice-Chairperson supported the amendment, since it was similar to a proposal that the Workers’ group had withdrawn on the understanding that the amendment



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introduced by the Government member of Austria would be discussed later. In the light of this decision, the Worker members also withdrew their amendment to delete the eighth preambular paragraph.

- 166.** In response to a request for clarification by the Employer Vice-Chairperson, the Government member of Ireland explained that the wording did not intend to change the balance between employers and employees; it sought, however, to support those employers who were compliant, ensuring that they would not need to compete against employers who had gained an unfair competitive advantage through undesirable employment practices.
- 167.** The Employer Vice-Chairperson supported the amendment in principle, but remained concerned about the wording “fair competition”; a less protectionist formulation needed to be found. He therefore suggested replacing the words “needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship” with “considering that illegal practices need to be addressed to guarantee effective protection of workers in the employment relationship”.
- 168.** In response to the concerns raised by the Employer Vice-Chairperson, the Government member of Ireland explained that “fair competition” was a very important issue for his Government. The Employer members’ subamendment did not embrace the concept of protecting workers and also supporting employers who were compliant. It was the role of governments to ensure workers’ rights and to protect employers from facing unfair competition.
- 169.** The Employer Vice-Chairperson withdrew the subamendment. The label “fair”, however, was sometimes used to impose burdens on employers or restrict competition. Since the Employers’ group supported the amendment in principle, he suggested a subamendment, to replace the term “fair” with the term “healthy”.
- 170.** The Worker Vice-Chairperson opposed the subamendment and pointed out that the term “fair” was often used by employers themselves. In addition, this language was used in the 2003 conclusions as well as the report of the World Commission on the Social Dimension of Globalization.
- 171.** The Government member of South Africa, speaking on behalf of the Africa group, opposed the subamendment and supported the original wording of the amendment introduced by the Government member of Austria. This wording was consistent with the message delivered at the Conference by the ILO Director-General regarding fairness and social justice as drivers in the world of work.
- 172.** The Government member of Nigeria voiced her support for the Africa group’s position. “Fair competition” was a universal term, something that could not be said about the term “healthy competition”.
- 173.** The Government member of Lebanon opposed the Employer members’ subamendment; “fair” was a more precise term.
- 174.** The Government member of New Zealand, also speaking on behalf of the Government members of Australia, Canada, Fiji, Japan, Switzerland and the United States, as well as the Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, preferred the original wording of the amendment and opposed the subamendment.
- 175.** In view of the support voiced for the original wording, the Employer Vice-Chairperson withdrew his subamendment.

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**176.** The amendment was adopted.

**177.** An amendment to the original wording of the eighth preambular paragraph, submitted by the Employer members, fell as a consequence of the adoption of the amendment introduced by the Government member of Austria.

**178.** The eighth preambular paragraph was adopted as amended.

***Proposed new preambular paragraphs after the eighth preambular paragraph***

**179.** The Worker Vice-Chairperson introduced an amendment which proposed to insert a new preambular paragraph after the eighth preambular paragraph, to read:

Considering that the lack of labour protection of dependent workers exacerbates gender inequalities in the labour market, and taking into account that, 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, and

The amendment reflected the strong and solid support voiced by all groups in the 2003 discussion for the recognition of the fundamental gender dimension of the issue. Five paragraphs of the conclusions dealt with the gender dimension, with two paragraphs dedicated exclusively to the issue. Those discussions were also reflected in paragraph 25 of the 2003 conclusions, which envisaged that a Recommendation should “address the gender dimension”. The text of the proposed amendment was based on language that had been approved by the 2003 Conference Committee.

**180.** The Employer Vice-Chairperson expressed his group’s concern with the amendment, and with a second amendment to be introduced by the Workers’ group. Some of the international labour standards referenced by the amendment might or might not be relevant to the employment relationship. The Employers’ group had concerns with respect to the introduction of the phrase “dependent workers”, since it could be understood to create a new type of worker recognized by international labour standards. If the international standards referred to were instruments that applied to all workers, they were not particularly relevant to this instrument, as it dealt exclusively with employees, which represented only one category of workers. Since the paragraph did not contribute to the substance of the Recommendation, he suggested replacing the two proposed paragraphs with the following text: “Noting all relevant international labour standards”.

**181.** The Worker Vice-Chairperson drew attention to the fact that when the subject had been debated in 2003, the Committee had adopted paragraphs 15 and 16 of the conclusions without objection. As the preamble was intended to create the context for the operative part of the Recommendation, he thought it appropriate to make specific reference to the gender dimension in the preamble.

**182.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, and the Government member of the United States, supported the subamendment proposed by the Employers’ group.

**183.** The Government member of Nigeria supported the Employer members’ subamendment, but suggested that the gender dimension be highlighted by adding the following text to the end of the text suggested by the Employers’ group: “particularly those addressing the protection of women”.

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- 184.** The Worker Vice-Chairperson seconded the proposal of the Government member of Nigeria, and proposed a further subamendment appended to the wording proposed by the Government member of Nigeria: “as well as those that address aspects of the scope of the employment relationship”. Since the speaker was unsure whether a footnote, referencing certain of the relevant international labour standards, could be included in a Recommendation, he asked the representative of the Legal Adviser to assist the Committee, and to advise the standard practice on referring to specific international labour standards in preambles.
- 185.** The representative of the Legal Adviser, in response to a request from the Worker Vice-Chairperson on whether it was standard practice to cite the titles of Conventions in the text of the preamble or in a footnote to an instrument, replied that, for the purpose of recalling the normative framework, it was standard practice to cite international labour Conventions either by a general reference or by citing a specific instrument. It was common to qualify the reference with the words “in particular”, in order to indicate that the list of instruments cited was not exhaustive. Some instruments had used the short titles of other instruments in the text, or referred to them in an appendix to the text; the Office was not aware of any use of footnotes in preambles for such references.
- 186.** In a spirit of compromise, the Worker Vice-Chairperson agreed to having the references to international labour Conventions made in an annex.
- 187.** The Employer Vice-Chairperson did not agree to including the references to Conventions in an annex or a footnote, and objected to a renewed debate on paragraphs 1 to 24 of the 2003 conclusions, which his group had clearly stated they were against. He stressed that the Employer members’ subamendment, to note all relevant international labour standards, was clear and simple. He could, however, accept the subamendment proposed by the Government member of Nigeria as it correctly highlighted the gender dimension, which had been part of paragraph 25 of the 2003 conclusions.
- 188.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, echoed the Employer members’ acceptance of the inclusion of qualifying text made by the Government member of Nigeria, and opposed any footnote references to international labour standards. The Worker Vice-Chairperson agreed to withdraw the subamendment relating to a footnote. The Government members of India and Canada, the latter speaking also on behalf of the Government members of Australia, Japan, Switzerland and the United States, and the Government member of South Africa, speaking on behalf of the Africa group, indicated support for the text as last amended, which read: “Noting all relevant international labour standards, particularly those addressing the protection of women, as well as those that address the employment relationship, and”.
- 189.** The Worker members’ amendment to insert a new preambular paragraph dealing with the gender dimension was adopted as amended.
- 190.** The new preambular paragraph after the eighth preambular paragraph was adopted as amended.
- 191.** In view of the wording covering relevant international labour standards that addressed aspects of the scope of the employment relationship, which had just been adopted in a new paragraph to be inserted after the eighth preambular paragraph, the Worker Vice-Chairperson withdrew an amendment.

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**192.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, withdrew an amendment to insert a further new preambular paragraph after the eighth preambular paragraph.

**193.** In the light of earlier discussions on the sixth preambular paragraph, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, withdrew an amendment for a new preambular paragraph along those lines.

### ***Ninth preambular paragraph***

**194.** The Chairperson explained that an amendment, proposed by the Employer members, to replace the words “the employment relationship, which is the fifth item on the agenda of the session” with “disguised employment relationships” could not be considered by the Committee. The Committee’s work under item 5 of the agenda of the International Labour Conference had been undertaken in the context of the Governing Body’s decision on items for the agenda of the 95th Session of the International Labour Conference, contained in document GB.289/2 (March 2004). Paragraph 7 of that document contained the Governing Body’s list of choices and referred to the employment relationship; it therefore was not possible for the present Committee to attempt to change the wording of the item.

**195.** The Employer Vice-Chairperson explained that their amendment had not been intended to change the decision of the Governing Body. Accepting the ruling, the Employer members nevertheless regretted that wording and the limitation on the sovereignty of the work of a Conference Committee that the Chairperson’s ruling appeared to imply.

**196.** The ninth preambular paragraph was adopted without amendment.

### ***Tenth and eleventh preambular paragraphs***

**197.** The final paragraphs of the preamble were adopted.

**198.** The preamble as a whole was adopted as amended.

## **Operative Parts of the proposed Recommendation**

### ***Heading of Part I***

**199.** The Committee decided to postpone the discussion of the Employer members’ proposed amendment to the heading of Part I, until such time as the Worker and Employer members could reach consensus. As subsequent informal bipartite consultations did not result in an agreement, the Employer Vice-Chairperson withdrew the amendment.<sup>3</sup>

**200.** The heading was adopted.

<sup>3</sup> For reasons stated in paragraphs 415, 417, and 421 of this report.

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## ***Proposed new Paragraph before Paragraph 1***

- 201.** The Employer Vice-Chairperson introduced an amendment to insert a new Paragraph before Paragraph 1 to read: “National law relating to the employment relationship should be clear, including those elements pertaining to coverage, scope and liability for the standards included.” It was a clear and focused amendment, reflecting the Employer members’ vision of how the proposed instrument might reflect commonly accepted principles to guide labour administrations on how to deal with clarity in national laws on the employment relationship.
- 202.** The Worker Vice-Chairperson supported the proposal of the Employers’ group to promote clarity in the law. He observed, however, that while clarity was necessary, it was only one of many elements required and drew attention to the need for adequacy of law as a further example. He therefore asked the Employers’ group to confirm that the main intention of the proposed amendment was clarification. Having received confirmation from the Employer Vice-Chairperson that the new Paragraph had indeed been introduced for purposes of clarity, the Worker Vice-Chairperson therefore proposed a subamendment to insert the words “and adequate” after the words “employment relationship should be clear”.
- 203.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, proposed a further subamendment to insert the words “and/or practice” after the words “national law”, since this wording was commonly used, which was supported by both the Employer and Worker Vice-Chairpersons, as well as the Government member of India.
- 204.** The Government members of New Zealand and Nigeria, supported by the Worker Vice-Chairperson, proposed a further subamendment to insert the words “and adequate to guarantee effective protection for workers” after the words “should be clear”. Adoption of such additional wording would clarify exactly what was meant by the word “adequate”, which on its own was too vague.
- 205.** The Employer Vice-Chairperson recalled that the Committee members should keep in mind the approaches of all the parties concerned and avoid attempting to place in one Paragraph all the issues dealt with by the proposed Recommendation. He stressed that the primary intention of the Employer members’ amendment was to commence the proposed text with a simple, short and clear introductory Paragraph. He supported the subamendment proposed by the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway. However, he opposed the subamendment proposed by the Government member of Nigeria, as it unnecessarily complicated the proposed Paragraph.
- 206.** The Chairperson raised a question regarding the English text of the Employer members’ amendment, namely the words “liability for the standards included” when read against the French and Spanish translations. Before closing the discussion on the various subamendments, she asked the Employer Vice-Chairperson to clarify the original intention of the Employer members’ amendment so that all subamendments could be seen in the correct light.
- 207.** The Employer Vice-Chairperson explained that the use of the word “liability” in the amendment meant “legal responsibility”.
- 208.** In reply to a request from the Chairperson concerning the possible difference between the English phrase “liability for standards included” and the French translation “la

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responsabilité quant à leur application”, the representative of the Legal Adviser gave a reply based on the meanings of the words “responsibility” and “liability”.

- 209.** Given the Employer Vice-Chairperson’s reiteration that the primary intention of the Employers’ group was to mention the general notion of “legal liability”, which would concern workers, employers and governments, the Chairperson decided to submit the question of concordance of languages to the Drafting Committee.
- 210.** Returning to the subamendment proposed by the Government member of Nigeria to insert the words “and adequate to guarantee effective protection for workers” after the words “should be clear” in the Employer members’ proposed new Paragraph before Paragraph 1, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, and the Government member of New Zealand stressed that they supported the subamendment, since the words “clear and adequate” standing without qualification were too vague.
- 211.** The Employer Vice-Chairperson proposed a new subamendment to the subamendment of the Government member of Nigeria to replace the words “protection for workers” with the words “protection for employees and employers” in order to make the text more inclusive. However, the Worker Vice-Chairperson opposed that subamendment and agreed with the Government member of Nigeria’s subamendment. However, as the Employer members had wanted extra wording, the Worker Vice-Chairperson submitted a further subamendment to insert the words “in an employment relationship” after the words “protection for workers” in the subamendment proposed by the Government member of Nigeria.
- 212.** The Employer Vice-Chairperson suggested replacing the term “liability” with “responsibility”; the term was less technical, could be better translated, and was therefore more appropriate.
- 213.** The Worker Vice-Chairperson supported the new resulting text, as did the Government member of Argentina, speaking on behalf of the Government members of the Committee Member States of the Latin American group (GRULA) (Argentina, Bolivia, Brazil, Chile, Mexico, Uruguay and the Bolivarian Republic of Venezuela) and the Dominican Republic, the Government member of Canada, speaking also on behalf of Australia, Japan, New Zealand and the United States, the Government member of Lebanon, and the Government member of South Africa, speaking on behalf of the Africa group.
- 214.** The Employer Vice-Chairperson did not want to change the wording fundamentally, but suggested replacing the word “guarantee” with “offer”.
- 215.** The Worker Vice-Chairperson wondered whether the Employers’ group could accept replacing the word “offer” with “ensure”.
- 216.** The Employer Vice-Chairperson agreed.
- 217.** The Committee adopted the following new Paragraph, to be inserted before Paragraph 1: “National law and/or practice relating to the employment relationship should be clear and adequate to ensure effective protection for workers in an employment relationship, including those elements pertaining to coverage, scope and responsibility for the standards included.”

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## **Paragraph 1**

- 218.** The Employer Vice-Chairperson introduced an amendment to replace “and, if necessary, clarifying and adapting the scope of laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship” with “the effectiveness of measures to discover and eliminate disguised employment relationships, and to provide the workers involved with adequate remedies”. The proposed amendment was connected with the previous amendment to insert a new Paragraph. It focused on effective measures to combat disguised employment relationships, a specific issue that was probably the most important for many members of the Committee.
- 219.** The Worker Vice-Chairperson did not support the proposed amendment because it narrowed the scope only to disguised employment relationships. Its substance was already reflected in the newly adopted, broader, first Paragraph of the proposed Recommendation.
- 220.** The Government member of Argentina, speaking on behalf of the Government members of the Committee Member States of GRULA and the Government member of the Dominican Republic, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and the Government members of China, Lebanon and South Africa, the latter speaking on behalf of the Africa group, rejected the amendment.
- 221.** The Employer Vice-Chairperson stated his concern that redundant text would now be left in former Paragraph 1. Although this was not of fundamental importance, the issue seemed to be too substantial to be dealt with by the Drafting Committee.
- 222.** The amendment was not adopted.
- 223.** The Government member of Canada introduced an amendment on behalf of the Government members of Australia, Canada, Japan, New Zealand, Switzerland and the United States, which sought to insert the word “pertinent” before the words “laws and regulations”. While the French and Spanish versions of the text before the Committee were correct, he suggested that the word “relevant” be used instead of “pertinent” in English.
- 224.** The Worker and Employer Vice-Chairpersons supported the amendment, as reworded by the Government member of Canada.
- 225.** Paragraph 1 was adopted as amended.

## **Paragraph 2**

- 226.** The Worker Vice-Chairperson introduced an amendment to insert the words “collective agreements” after the words “national law”. The amendment sought to reflect the reality of the role of collective agreements as a very important vehicle in defining the nature and extent of protection given to workers; its wording was in line with other ILO instruments.
- 227.** The Employer Vice-Chairperson did not support the amendment. Collective agreements fell within the scope of national law and practice, which varied from country to country. To include a specific reference to collective agreements added confusion and detracted from the basic point of the Paragraph.
- 228.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, opposed the amendment.

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- 229.** The Government member of Lebanon found that collective agreements and national legislation had joint importance, as illustrated by the fact that in Lebanon there were national bargaining teams.
- 230.** The Government member of Nigeria suggested inserting the words “, including collective agreements” after the words “and practice”. Despite national legislation supporting collective bargaining, it was sometimes the case that employers did not show willingness. Therefore, an explicit statement was helpful.
- 231.** The Government member of South Africa seconded the subamendment, as did the Government member of Lebanon.
- 232.** The Worker Vice-Chairperson supported this subamendment. Paragraph 25 of the 2003 conclusions specifically made reference to collective bargaining.
- 233.** The Employer Vice-Chairperson opposed the proposed amendment, as subamended; the reference in paragraph 25 of the 2003 conclusions needed to be considered in its original context.
- 234.** The Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, did not support the subamendment.
- 235.** The Government member of New Zealand recognized the importance of collective agreements, but deemed it unnecessary to add a reference to them in Paragraph 1, since Paragraph 14 already addressed collective agreements.
- 236.** The Worker Vice-Chairperson stated that, although Paragraph 14 dealt with collective bargaining agreements, its context was different. Paragraph 2 was broader than Paragraph 14. He asked governments to reconsider their positions and pointed out that the proposed amendment was based on the understanding that collective agreements were part of national practice.
- 237.** The Government member of Argentina, speaking on behalf of the Government members of the Committee Member and Associates States of MERCOSUR, opposed the amendment; collective bargaining was already encompassed in national law and practice, and an explicit reference to collective bargaining was made later in the text of the proposed Recommendation.
- 238.** The Government member of China opposed the amendment, as Part I dealt with government policy.
- 239.** The Worker Vice-Chairperson withdrew his amendment. He acknowledged that there was not sufficient support for the amendment and requested that the record show that consensus existed that collective agreements were indeed part of national law and practice. He looked forward to taking up the subject of collective bargaining when the Committee discussed Paragraph 14.
- 240.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, introduced an amendment to insert “/or” in the second line, after the words “national law and”. She explained that the intention of the amendment was to make it clear that governments were given discretion on how the Recommendation would be implemented.



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- 241.** Following a suggestion regarding the wording by the Employer Vice-Chairperson, she proposed to subamend the amendment by replacing “national law and/or practice” with “national law or practice or both”. She recognized that the Drafting Committee would be responsible for finalizing the text.
- 242.** The Worker and Employer Vice-Chairpersons supported the proposal. The amendment was adopted, as subamended.
- 243.** The Government member of South Africa, speaking also on behalf of the Government members of Algeria, Angola, Benin, Botswana, Burkina Faso, Côte d’Ivoire, Egypt, Ethiopia, Guinea, Kenya, Malawi, Morocco, Namibia, Niger, Nigeria, Senegal, Swaziland, the United Republic of Tanzania, Tunisia and Zimbabwe, introduced an amendment to replace “taking into account” with “based on and consistent with”. The amendment was necessary to clarify that member States should not simply take international labour standards into account, but that they should base their laws on them, and ensure that their application was consistent with such standards.
- 244.** The Worker Vice-Chairperson supported the amendment.
- 245.** The Government member of Senegal explained that the amendment provided guidance to member States on the most relevant standards upon which to base labour legislation.
- 246.** The Government member of Lebanon considered that the amendment would strengthen the Recommendation; the wording suggested was clearer and easier to understand.
- 247.** The Employer Vice-Chairperson explained that the Employers’ group could not support the amendment, as it was overly prescriptive and interfered with national sovereignty. States were free to consider the implementation of international labour standards. Given the lack of consensus in the adoption of some international labour standards, governments could not be required to apply all standards. The text in the proposed Recommendation allowed States which wished to base their national legislation on international labour standards to do so.
- 248.** The Government member of Nigeria recalled that several countries had been called before the Conference Committee on the Application of Standards because their laws and practice were allegedly inconsistent with international labour standards. It was important that this Committee not provide governments with a convenient excuse for such shortcomings.
- 249.** The Government member of Canada, speaking also on behalf of the Government members of Australia and the United States, and the Government members of Japan and Switzerland, stated their preference for the original wording.
- 250.** The Worker Vice-Chairperson asked whether a subamendment replacing “based on and consistent with” with “consistent with” would address the concerns of those who opposed the amendment, a suggestion supported by the Government member of Nigeria.
- 251.** The Employer Vice-Chairperson and the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, opposed the Workers’ group’s subamendment.
- 252.** In a final attempt to find suitable language, the Worker Vice-Chairperson suggested that the text be subamended to read “taking into account and inspired by international labour standards”.
- 253.** The Employer Vice-Chairperson opposed the subamendment.

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254. The Worker Vice-Chairperson stated that, although the issue was considered very important by the Workers' group, he was prepared to withdraw the subamendment.

255. The Government member of South Africa withdrew the amendment.

256. Paragraph 2 was adopted without amendment.

### ***Proposed new Paragraphs after Paragraph 2***

257. Reporting on informal consultations between the Employer and Worker Vice-Chairpersons, the Worker Vice-Chairperson subamended his group's proposal to add a new paragraph after Paragraph 2. The new Paragraph should read: "Disguised employment occurs when the employer treats a person who is an employee as other than an employee that hides his or her true legal status. Situations can arise where contractual arrangements can have the effect of depriving workers of the protection they are due." The Drafting Committee would finalize the exact wording of the Paragraph.

258. The Government member of the United Kingdom supported the proposal, but suggested subamending the text by replacing the word "person" with "individual".

259. The Worker and Employer Vice-Chairpersons agreed to this subamendment.

260. The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, and the Government member of South Africa, speaking on behalf of the Africa group, appreciated the agreement reached and expressed their support for the text amended by the Worker and Employer members and subamended by the Government member of the United Kingdom.

261. A new Paragraph after Paragraph 2 was adopted as amended.

262. As a consequence of the adoption of this amendment, an amendment submitted by the Government member of New Zealand fell.

263. Regarding another amendment proposed by the Worker members to insert a new Paragraph after Paragraph 2, the Committee decided to postpone the discussion so that the Worker and Employer members could reach a consensus. As subsequent informal bipartite consultations did not result in an agreement, the Worker Vice-Chairperson withdrew the amendment.

264. An amendment submitted by the Government member of New Zealand to add a further new Paragraph after Paragraph 2, was not seconded and was, therefore, not discussed.

265. Given the adoption of text agreed upon in consultations, one further amendment submitted by the Worker members and another by the Government member of New Zealand were withdrawn.

### ***Paragraph 3***

266. As a consequence of the Committee's prior adoption of agreed text proposed by the informal tripartite working group, proposed amendments to the introductory phrase of Paragraph 3 were withdrawn.

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### **Paragraph 3(a)**

267. The Employer Vice-Chairperson introduced an amendment to delete the words “the parties concerned, in particular”. The proposed amendment sought to simplify the Paragraph, as the essence of the Recommendation was to provide guidance to employers and workers. The reference to “parties concerned” was overly vague.
268. The Worker Vice-Chairperson preferred the Office text; the guidance was intended not only for employers and workers, but also for other actors who might have a need in determining the existence of an employment relationship, such as competent authorities in charge of social security. While the text was intended primarily to guide workers and employers, it recognized that other parties might be interested in the existence of an employment relationship.
269. The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, opposed the amendment; the wording “parties concerned” acknowledged that social security administrations, courts or other actors also needed to be included.
270. This position was shared by the Government member of Argentina, speaking on behalf of Government members of the Committee Member States of GRULA and the Dominican Republic, the Government member of Canada, speaking also on behalf of the Government members of Japan and Switzerland, and the Government member of South Africa, speaking on behalf of the Africa group.
271. In response to these statements, the Employer Vice-Chairperson withdrew the amendment.
272. Paragraph 3(a) was adopted without amendment.

### **Paragraph 3(b)**

273. Following informal consultations between the Employer and Worker Vice-Chairpersons, the Worker Vice-Chairperson subamended his group’s amendment to add the following words after the word “relationships”: “, in the context of, for example, other relationships that may include use of other forms of contractual arrangement that hide the true legal status”.
274. The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of Brazil, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Dominican Republic and Mexico, the Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, the Government member of Lebanon, and the Government member of South Africa, speaking on behalf of the Africa group, appreciated the agreement reached and expressed their support for the text amended by the Worker and Employer members.
275. Paragraph 3(b) was adopted as amended.

### **Proposed new subparagraph after Paragraph 3(b)**

276. In light of the agreement reached by the informal tripartite working group, and after re-evaluating the existing text in Paragraph 3(a), the Government member of South Africa,

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speaking on behalf of the Africa group, withdrew an amendment to insert a new subparagraph on guidelines to determine the existence of an employment relationship.

### **Paragraph 3(c)**

277. The Committee agreed to the following text developed by the informal tripartite working group, which had examined the sixth preambular paragraph and Paragraph 3(c), and noted that the Drafting Committee would look at the structure and language of the proposed text:

3. National policy should at least include measures to:

...

- (c) ensure standards applicable to all forms of contractual arrangements including those involving multiple parties, to ensure that employed workers have the protection that they are due;
- (d) ensure that the applicable standards establish who is responsible for the protections contained therein;

...

278. In view of the unanimous support for this new text, the Employer, Worker and all Government members who had submitted amendments agreed to withdraw them.

279. Paragraph 3(c) was adopted as amended.

### **Paragraph 3(d)**

280. The Employer Vice-Chairperson introduced an amendment to replace Paragraph 3(d) of the original text with the following: “(d) provide mechanisms for dispute resolution that are speedy, inexpensive, fair and efficient;”. Besides being concise, it also introduced additional concepts (namely, “inexpensive”, “fair” and “efficient”).

281. The Worker Vice-Chairperson did not support the amendment and proposed a subamendment that would incorporate the elements proposed by the Employers’ group. The text proposed by the Employers’ group’s amendment should be replaced with “secure effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient mechanisms and procedures for settling disputes regarding the existence and terms of an employment relationship; and”.

282. The Government member of New Zealand agreed that the most important issues addressed in the Paragraph were “fair, efficient, speedy and inexpensive”, but regretted that the Worker members’ subamendment was less concise than the Employers’ group’s original amendment.

283. In response to the Employer Vice-Chairperson’s remark that “provide” might be better wording than “secure”, the Worker Vice-Chairperson further subamended the text, by replacing “secure” with “provide”. For the Workers’ group, the wording “effective access” was particularly important.

284. The Employer Vice-Chairperson accepted the Worker members’ subamendment.

285. The Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, and the Government member of South Africa, speaking on behalf of the Africa group, supported the text as subamended by the Worker members.

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286. The amendment was adopted as subamended.

287. Consequently, an amendment submitted by the Government member of Lebanon fell.

288. Paragraph 3(d) was adopted as amended.

### ***Paragraph 3(e)***

289. Paragraph 3(e) was adopted without amendment.

### ***Proposed new subparagraph after Paragraph 3(e)***

290. The Employer Vice-Chairperson introduced an amendment to add the following new subparagraph after Paragraph 3(e): “ensure protection to vulnerable groups of workers, such as women workers, young workers, older workers, workers in the informal economy and migrant workers, who might find themselves in situations of disguised employment relationships.” The proposed amendment was related to another amendment submitted by his group to delete Paragraph 4. Paragraphs 3 and 4 dealt with the issue of national policy; out of drafting considerations, it seemed preferable to merge them. In addition, the amendment would also eliminate the unclear formulation “equal protection”.

291. The Worker Vice-Chairperson did not support the proposed amendment and pointed out that drafting matters could be left to the Drafting Committee. Paragraphs 3 and 4 were different in substance and could not be merged easily: the wording used in Paragraph 4 (“take particular account”) was distinct from the formulation used in Paragraph 3.

292. The Government member of the United States supported the amendment; it was advisable to make Paragraph 4 a subparagraph of Paragraph 3, as suggested. This view was shared by the Government member of Switzerland.

293. The Government member of Argentina, speaking on behalf of the Government members of the Committee Member States of GRULA and the Dominican Republic, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, and the Government member of South Africa, speaking on behalf of the Africa group, opposed the amendment.

294. Given these statements, the Employer Vice-Chairperson withdrew both amendments.

295. Paragraph 3 was adopted as amended.

### ***Proposed new Paragraphs after Paragraph 3***

296. The Government member of South Africa introduced an amendment, submitted by the Government members of Algeria, Angola, Benin, Botswana, Burkina Faso, Côte d’Ivoire, Egypt, Guinea, Kenya, Malawi, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Swaziland, the United Republic of Tanzania, Tunisia and Zimbabwe, to insert the following new Paragraph after Paragraph 3:

National policy and legislation should provide for appropriate and adequate training in international labour standards, comparative and case law for judicial officers, arbitrators, mediators and other officials responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

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In order to implement the Recommendation, member States needed to give particular attention to training.

- 297.** The Worker Vice-Chairperson supported this amendment.
- 298.** The Employer Vice-Chairperson proposed a subamendment to add “relevant” before the words “international labour standards”. Not all international labour standards were relevant, in particular those that a country had not ratified.
- 299.** The Worker Vice-Chairperson supported the text of the subamendment, but stressed that a standard’s relevance depended on its content, not its status of ratification.
- 300.** The Government member of Argentina, speaking on behalf of the Government members of the Committee Member States of GRULA and the Dominican Republic, agreed with the subamendment, and proposed inserting “labour inspectors” after “mediators”. The Government member of Jamaica, speaking on behalf of the CARICOM countries previously listed, supported this subamendment.
- 301.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, supported the text as subamended by the Government member of Argentina and asked for “legislation” to be deleted from the text.
- 302.** The Worker Vice-Chairperson supported the subamendments by the Government members of Argentina and Austria, since both were true to the spirit of the amendment.
- 303.** The new Paragraph was adopted as subamended.
- 304.** An amendment submitted by the Government members of Barbados, Jamaica and Trinidad and Tobago to add a new Paragraph after Paragraph 3 was withdrawn in light of the adoption of the text agreed on by the informal tripartite working group.

#### **Paragraph 4**

- 305.** An amendment submitted by the Employer members to delete Paragraph 4 had earlier been withdrawn during the discussion on Paragraph 3(e).
- 306.** Following a statement by the Government member of Austria, who withdrew an amendment to replace the word “equal” with “adequate” in Paragraph 4 on behalf of the Government members of the Committee Member States of the EU, the Employer Vice-Chairperson reintroduced the said amendment.
- 307.** The Worker Vice-Chairperson, who had supported the withdrawal, opposed the reintroduction of the amendment by the Employer members.
- 308.** The Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, and the Government members of the Islamic Republic of Iran, Tunisia and the United Kingdom supported the amendment.
- 309.** The Government member of South Africa, speaking on behalf of the Africa group, opposed the amendment.
- 310.** The Worker Vice-Chairperson found acceptable the word “equal” in the original text prepared by the Office. The wording suggested could lead to unfortunate implications,

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since it could be misunderstood to mean that lower standards were acceptable in relation to vulnerable groups of workers. He therefore suggested replacing “equal” with “effective”.

- 311.** The Employer Vice-Chairperson and the Government members of Algeria, and Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, supported this subamendment.
- 312.** The amendment was adopted as subamended.
- 313.** The Worker Vice-Chairperson withdrew an amendment to insert the words “and effective” after the words “ensure equal”.
- 314.** An amendment submitted by the Government members of Algeria, Angola, Benin, Botswana, Burkina Faso, Côte d’Ivoire, Egypt, Guinea, Kenya, Malawi, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Swaziland, the United Republic of Tanzania, Tunisia and Zimbabwe, to replace “the uncertainty as to the existence of an employment relationship, including” by “disguised, ambiguous and triangular relationships, in particular” in Paragraph 4, was withdrawn in light of the adoption of the text agreed on by the informal tripartite working group.
- 315.** The Government member of Jamaica, speaking on behalf of the CARICOM countries previously listed, introduced an amendment to insert the words “, disabled workers” after the words “migrant workers”. In view of their vulnerability, disabled workers needed to be specifically mentioned in the text.
- 316.** The Employer and Worker Vice-Chairpersons supported the amendment.
- 317.** Paragraph 4 was adopted as amended.

#### ***Proposed new Paragraphs after Paragraph 4***

- 318.** An amendment submitted by the Government member of New Zealand and an amendment submitted by the Worker members were identical. They sought to insert the following new Paragraph after Paragraph 4:
- Members should:
- (a) take special account in national policies to address the gender dimension of the problem which arises 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;
  - (b) 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.
- 319.** The Worker Vice-Chairperson and the Government member of New Zealand introduced the amendment, explaining that it reflected the reference to the gender dimension found in paragraph 25 of the 2003 conclusions.
- 320.** The Employer Vice-Chairperson supported the inclusion of a reference to the gender dimension, but did not deem the list of sectors to be helpful. The claims made in the amendment were subject to change over time and were misplaced in an international labour standard. He suggested subamending the text by adding the following text after the

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words “gender dimension of the problem”: “in particular in areas of economic activity where women are particularly represented.” Subparagraph (b) should be deleted.

**321.** The Worker Vice-Chairperson introduced a new subamendment to the Worker members’ own amendment regarding the proposed new Paragraph reflecting the gender dimension, with briefer, clearer wording that would delete the list of different sectors of employment where work was done predominantly by women. The consequent text would read as follows:

Members should:

- (a) take special account in national policies to address the gender dimension of the problem which arises because women workers predominate in certain occupations and sectors where the proportion of disguised and ambiguous employment relationships is relatively high;
- (b) 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.

**322.** The Employer Vice-Chairperson opposed the Worker members’ subamendment, although it did attempt to arrive at a crisper text. The Employer members’ subamendment to reduce the issue – which both groups supported – to one, relatively short Paragraph, was a more simple solution. They considered that subparagraph (b) of the Worker members’ amendment contained an unclear reference to legislation “at the national level”, as this differed from country to country. There was even greater concern over subparagraph (a), in particular the reference to a “relatively high” proportion of disguised and ambiguous employment relationships without indicating how high and in relation to what baseline. The phrasing also reopened questions of definition of the words “disguised and ambiguous”; the informal tripartite working group’s approach had been to achieve a focused concept of those issues without trying to define them. In any case, in his opinion the text already contained a reference to gender policies and their enforcement.

**323.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government members of Lebanon and South Africa, the latter speaking on behalf of the Africa group, supported the amendment as subamended by the Worker members.

**324.** The Employer Vice-Chairperson insisted on highlighting the danger of including the words “or ambiguous” and proposed a further subamendment to delete them.

**325.** The Government member of Ireland asked the Employer Vice-Chairperson to expand on the precise nature of the Employer members’ concern with the use of the word “ambiguous” in this context, which, in his opinion, should have been of interest to them. He considered that ambiguity in the employment relationship constituted a problem for governments and employees in terms of law enforcement; more importantly, it could create problems for employers as well, in situations where they believed themselves to be in an employment relationship clearly of one type and then found themselves faced with a court decision deeming it to be a quite different one.

**326.** The Employer Vice-Chairperson responded by stating that, wherever there was an employment relationship, there was unambiguously some type of employment relationship in fact or in law, even if the typology was unclear. Therefore, the word “ambiguous” would not help the users, including governments, of the eventual international instrument in addressing the problem. Once an ambiguous employment relationship was defined, it would logically have been made clear as, for example, a definition covering an attempt to defraud.



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**327.** Following informal consultations between the Employer and Worker Vice-Chairpersons, the Worker Vice-Chairperson suggested their new subamendment to the text to read:

Members should:

- (a) take special account in national policies to address the gender dimension which arises because women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships or there is lack of clarity in the employment relationship;
- (b) 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.

The Drafting Committee would finalize the exact wording of the Paragraph.

**328.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand, Switzerland and the United States, and the Government member of South Africa, speaking on behalf of the Africa group, appreciated the hard work of the Employer and Worker members and expressed their support for the text as amended.

**329.** The proposed new Paragraph after Paragraph 4 was adopted as amended.

**330.** The Government member of Austria, speaking on behalf of the Government Members of the Committee Member States of the EU with the exception of the United Kingdom, and Norway, introduced an amendment to add another new Paragraph after Paragraph 4 and immediately introduced a subamendment to add an introductory Paragraph, such that the text read:

In the context of the transnational movement of workers, the following measures should be considered:

- (a) In framing national policy, a Member should, after consulting the most representative employers' and workers' organizations, consider adopting appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory who may be affected by uncertainty as to the existence of an employment relationship;
- (b) Where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices having as their purpose the evasion of the existing arrangements for the protection of workers recruited or placed to perform work in the context of an employment relationship.

**331.** She explained that the amendment addressed the transnational movement of migrant workers in a globalized world, which affected both developed and developing countries, and echoed the wording that had already been agreed upon for a new preambular paragraph in the proposed text. The Government member of Finland further indicated that this amendment would link to cooperation among States, which was dealt with later in the proposed text at Paragraph 15; the amendment was based on the experiences of EU Member States, and sought to highlight that collaboration was the only way to deal with the problem. It broadened the original text and underlined the need for social dialogue in the form of consultations with the social partners.

**332.** The Worker Vice-Chairperson supported the amendment as subamended by the Government members of the Committee Member States of the EU, because it would add

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value to the proposed Recommendation in a number of ways. First, it was consistent with an important concept which had been introduced into the preamble. Secondly, it was relevant to issues with which countries were currently grappling. Thirdly, it spoke to the concerns of developing and developed countries alike. Fourthly, it filled a gap, dealing with the transnational aspects of the employment relationship, which had not previously appeared in the proposed Recommendation. Finally, it suggested a helpful mechanism – bilateral consultations and agreements – that fell within the ILO tradition of promoting cooperation between countries. He nevertheless proposed a further subamendment, to replace the term “adequate” with “effective”, in subparagraph (a), since the word “adequate” was insufficient to cover the needs of vulnerable workers such as migrant workers.

- 333.** The Worker members’ subamendment to subparagraph (a) of this new Paragraph, to replace the term “adequate” with “effective”, was supported by the Government members of the Committee.
- 334.** The Workers’ group’s amendment to subparagraph (a) of the new Paragraph after Paragraph 4 was adopted.
- 335.** The Employer Vice-Chairperson supported the general aim of the proposed amendment as the situation of migrant workers had comprised an important aspect of the ILO’s work in recent years. However, the Employers’ group was concerned that the amendment entered the realm of temporary employment agencies, which had already been sufficiently addressed at both international and national levels. He therefore proposed a further subamendment to delete two, related, phrases: in subparagraph (a) “recruited or placed in its territory” and in subparagraph (b) “recruited or placed”. This proposal would avoid the unintentional encroachment on the issue of employment agencies. He warned against interfering with the Private Employment Agencies Convention, 1997 (No. 181).
- 336.** In response to the Worker Vice-Chairperson’s request for further elaboration on what difficulties might arise from the inclusion of the words “recruited or placed”, the Employer Vice-Chairperson explained that illegally operating gang masters were the problem. On the contrary, firms or agencies which recruited and placed workers in other countries were often, as in Europe, well-established and regulated businesses. Mainstream, legitimate temporary employment agencies were surely not what the Government members of the Committee Member States of the EU were trying to address with the introduction of the new Paragraph. In his opinion, their amendment was targeting gang masters who operated illegally. The amendment, in that case, would not tackle the non-compliance and illegality that EU governments were trying to address.
- 337.** The Worker Vice-Chairperson disagreed with the Employer Vice-Chairperson’s explanation. He argued that the proposed amendment would address the problem of gang masters, as they fell among the groups that “recruited and placed” workers, even if illegally. The proposed Paragraph was intended to address instances where workers needed protection, and therefore legitimate companies which respected the law had nothing to fear. There were also situations where legitimate placement companies did not stop abuses of migrant workers. The Worker members therefore opposed the deletion, proposed by the Employers’ group, of the two phrases.
- 338.** The Government member of Finland, speaking on behalf of the Government members of the Committee Member States of the EU, with the exception of the United Kingdom, and Norway, clarified that their amendment did not intend to deal with temporary agency work, which was already regulated by Convention No. 181. In any case, such non-encroachment was the subject of another amendment yet to be introduced by the Employers’ group in a later part of the proposed Recommendation. He supported the deletions proposed by the

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Employers' group as they did not change the content of the amendment, the wording of which clearly referred to making national policy for workers on the State's own territory, and to cooperation needed when workers moved to other territories.

- 339.** The Government member of Lebanon considered that the amendment under discussion was intended to protect both outgoing and incoming migrant workers from abuses and therefore the text required clarification along the lines of the Employer members' deletion before it could be supported by his Government.
- 340.** The Worker Vice-Chairperson returned to the effect of the Employers' group's deletion on subparagraph (b), because the text would then read: "Where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices having as their purpose the evasion of the existing arrangements for the protection of workers to perform work in the context of an employment relationship." Not only would such wording be grammatically awkward, but it would also limit the scope of subparagraph (b) to situations where work had commenced. He was of the opinion that protection should begin from the moment when the worker was first recruited, whatever the country in which the worker was located, and hoped that the acceptance of the sponsors of the amendment of the deletion of the words "recruited or placed" would not result in a gap in the protection being offered.
- 341.** In acknowledgement of the grammatical issue in subparagraph (b), the Employer Vice-Chairperson proposed yet a further subamendment to replace the words "workers to perform" with "workers who perform". With respect to the feared gap in protection offered to workers prior to taking up work, he suggested that such an interpretation would mean that ILO instruments would be riddled with such gaps. He considered, on the contrary, that the text as subamended described elements of the whole process of entering into, and functioning within, an employment relationship. However, in order to address the transitional element raised by the Workers' group, he proposed to delete the words "to perform work". The text of subparagraph (b), with its various amendments, would then read: "Where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices having as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship."
- 342.** In the light of all the debate, the Employer members' group of amendments concerning subparagraph (b) was supported by the Worker Vice-Chairperson, the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Finland, speaking on behalf of the Government members of the Committee Member States of the EU, with the exception of the United Kingdom, and Norway.
- 343.** The various Employers' group's amendments to subparagraph (b) of the new Paragraph after Paragraph 4 were adopted.
- 344.** Returning to the Employer members' amendment still outstanding to delete words from subparagraph (a) of this new Paragraph, the Government member of South Africa, speaking on behalf of the Africa group, proposed the retention of the words "in its territory" in order to make the text read smoothly, as follows: "... protection for and prevent abuses of migrant workers in its territory ...".
- 345.** The Worker Vice-Chairperson and the Employer Vice-Chairperson supported this further subamendment proposed by the Africa group, as did the Government member of Finland. The Government member of the Philippines likewise supported the retention of the words "in its territory" in subparagraph (a) of this new Paragraph. She stressed that migrant workers, by their nature as temporary workers operating outside of their home territory,

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were particularly susceptible to abusive practices and needed protection especially where there were uncertainties regarding the existence of an employment relationship.

- 346.** The Africa group's amendment to subparagraph (a) of the new Paragraph after Paragraph 4 was adopted.
- 347.** Following indications of support by the Workers' and Employers' groups, as well as the Government members of the Committee Member States of the EU, the new Paragraph after Paragraph 4 was adopted as subamended.

### **Paragraph 5**

- 348.** The Employer Vice-Chairperson introduced an amendment to replace Paragraph 5 with the following text: "National policy should be formulated and implemented after consultation with the most representative employers' and workers' organizations, where they exist, in accordance with national law and practice." He considered that the amendment represented an effort to promote clarity and pointed out that national policy was formulated and implemented by governments following consultations with, but not necessarily "in collaboration with", workers' and employers' organizations, as indicated in the current text of the proposed Recommendation. In addition, the term "in accordance with national law and practice" had been missing from the proposed text.
- 349.** The Worker Vice-Chairperson preferred the original text of the Recommendation, but could support replacing "in collaboration" with language that ensured the strongest level of consultation possible. He pointed out that the original text was both shorter and simpler than the amendment proposed by the Employers' group. In his opinion, the Employer members' addition of the words "national law and practice" was redundant, as all consultations were carried out in accordance with arrangements applying in any given country. Such an addition might be interpreted to excuse a state of affairs in a country where consultations with workers' and employers' organizations were not in line with national law and practice. He therefore proposed a further subamendment to remove the reference to "in accordance with national law and practice" and to replace "after consultation" with the words "in consultation".
- 350.** The Employer Vice-Chairperson supported the replacement of "after" with "in", and the Government member of India supported the whole of the subamendment proposed by the Workers' group.
- 351.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, supported the first part of the Worker members' subamendment, but could not accept the second part which would remove the reference to "in accordance with national law and practice". She proposed a further subamendment to delete "where they exist".
- 352.** The amendment to replace the word "after" with "in" was adopted.
- 353.** The Worker Vice-Chairperson and the Employer Vice-Chairperson supported the deletion of the words "where they exist". The Worker members consequently withdrew an amendment that they had yet to submit, which overlapped with this agreed amendment.
- 354.** The Government member of South Africa, speaking on behalf of the Africa group, the Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, Switzerland and the United States, and the Government member of Argentina, speaking on behalf of the Government members of the Latin America group (Argentina, Brazil, Chile, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico,

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Nicaragua, Peru, Uruguay and the Bolivarian Republic of Venezuela), supported the entirety of the further subamendment proposed by the Government members of the Committee Members States of the EU.

- 355.** The Worker Vice-Chairperson acknowledged the clear views expressed by the majority of Government members of the Committee. However, he asked for clarification as to whether there was precedent within the many ILO international labour standards where the phrase “in consultation with the most representative employers’ and workers’ organizations” was followed immediately by the words “in accordance with national law and practice”, as the Workers’ group did not want to introduce a new interpretation to past practice.
- 356.** The Legal Adviser responded to the Worker Vice-Chairperson’s request for clarification on whether there was precedent in ILO instruments of the two phrases existing alongside each other. She confirmed that both phrases were used often, but not together. In any case, the amendment under discussion suffered from a lack of clarity because the words “in accordance with national law and practice” appeared to qualify many different parts of the proposed text. A way around that lack of clarity would be to move the phrase “in accordance with national law and practice” closer to the portion of the text which it was meant to qualify.
- 357.** In the light of the Legal Adviser’s explanation, the Worker Vice-Chairperson agreed with the other Committee members who had proposed the retention of the phrase “in accordance with national law and practice”, but suggested that it be placed directly before “in consultation with the most representative employers’ and workers’ organizations”, so that the phrase could not be interpreted as qualifying “representative employers’ and workers’ organizations”. The amended text would now read: “National policy should be formulated and implemented, in accordance with national law and practice, in consultation with the most representative employers’ and workers’ organizations”. The Chairperson indicated that the Drafting Committee would finalize the exact wording of the entire text of the proposed Recommendation.
- 358.** The amendment to Paragraph 5 was adopted as subamended.
- 359.** A further amendment to Paragraph 5, proposed by the Government members of Australia and Canada, fell due to the adoption of the Employer members’ amendment for new wording of Paragraph 5.
- 360.** Paragraph 5 was adopted as amended.

## **Paragraph 6**

- 361.** An amendment proposed by a number of European Government members to delete Paragraph 6 in its entirety was withdrawn.
- 362.** The Worker Vice-Chairperson introduced an amendment to replace Paragraph 6 with the following wording: “National policy for protection of workers in an employment relationship should not interfere with genuine civil and commercial relationships concluded freely by parties who are not in an employment relationship, while at the same time ensuring that persons with an employment relationship have access to the protection they are due.” He explained that the overall intent of this amendment was to ensure that the proposed instrument would not interfere with genuine and legitimate civil and commercial relationships, a position that had been agreed upon in the 2003 discussions. More particularly, the amendment addressed “civil relationships” because in some jurisdictions, such as France, these also embraced employment relationships. The amendment also proposed to change Paragraph 6’s adjective “legitimate” which qualified civil and

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commercial relationships because there was a need to make it clear that genuine commercial relationships could not be used as a defence to frustrate other parts of the instrument.

- 363.** In the interest of shortening the amendment under discussion and given that the concept was covered by the title of this Part of the proposed text, the Worker Vice-Chairperson proposed a subamendment to delete the words “for protection for workers in an employment relationship”. He also proposed to subamend the amendment to delete the words “concluded freely by parties who are not in an employment relationship”, and his third subamendment proposed the replacement of the last phrase with the following words: “however, under all circumstances, persons within an employment relationship should be duly protected”, as this reflected the common concern of all parties that this was an important element.
- 364.** The Employer Vice-Chairperson agreed that the original text of Paragraph 6 could have been misinterpreted because the language was possibly too broad. In his opinion, the Worker Vice-Chairperson’s subamendment, which amounted to a transposition of the agreed language of Paragraph 3(c), was a good attempt to avoid such misinterpretations. However, it did not go far enough; the Employer members therefore proposed a further subamendment to retain the wording “while at the same time ensuring that persons with an employment relationship have access to the protection they are due”. The Employer Vice-Chairperson also opposed the Worker Vice-Chairperson’s amendment aimed at replacing the adjective “legitimate” with “genuine”. Attempting to explain the nuances of the words “genuine” (false, lacking sincerity, etc.) and “legitimate” (referring to legality), he noted that the latter was preferable and easier to interpret, as a relationship was either legitimate or illegitimate. He conceded that the Worker members’ proposed amendment was cleaner than the original text, but he proposed the retention of the words “for protection of workers in an employment relationship”. If adopted, Paragraph 6 would then read: “National policy for protection of workers in an employment relationship should not interfere with legitimate civil and commercial relationships, while at the same time ensuring that persons with an employment relationship have access to the protection they are due.”
- 365.** The Worker Vice-Chairperson, sensing that a common framework wording was emerging for the amendment to Paragraph 6, proposed a further subamendment to the Employer Vice-Chairperson’s proposed text, namely to delete the words “access to”. He noted that while “legitimate” meant being in compliance with the law, the word “genuine” had the added reference to the fundamental character or arrangement of the relationship, which was worth keeping in the text. It was also a word that had been used previously in this Committee.
- 366.** The Government member of South Africa, speaking on behalf of the Africa group, the Government member of New Zealand, and the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, supported the subamendment’s use of the word “genuine”, as there was a clear difference between “legitimate” and “genuine”.
- 367.** The Government member of Canada, speaking also on behalf of the Government members of Australia, Japan and Switzerland, supported the subamendment, but with the qualifier “legitimate”.
- 368.** The Government member of Argentina, speaking on behalf of the Latin America group, drew the Committee’s attention to the French and Spanish translations of the word “genuine”, and the Government member of Lebanon, noting that there was a clear difference between “legitimate” and “genuine” in these other languages, stated his Government’s preference for “genuine” as it corresponded well to the French translation

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(“authentiques”). The Chairperson explained that the issue of the French and Spanish translations of the word “genuine” would be dealt with by the Drafting Committee.

- 369.** Following informal consultation, the Employer and Worker Vice-Chairpersons introduced the agreed text arrived at concerning this qualifier, namely to use the words “true civil and commercial relationships”.
- 370.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of Brazil speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Dominican Republic and Mexico, the Government member of Canada, speaking also on behalf of the Government members of Australia, Fiji, Japan, New Zealand, Switzerland and the United States, the Government member of Jamaica, speaking on behalf of the CARICOM countries previously listed, and the Government member of South Africa, speaking on behalf of the Africa group, all supported the amendment, and congratulated the Worker and Employer members on their work.
- 371.** In response to a remark by the Employer Vice-Chairperson, the Chairperson pointed out that the Drafting Committee would examine whether the wording “persons” also needed to be changed to “individuals” in this context.
- 372.** The Worker members’ amendment was adopted as subamended.
- 373.** Paragraph 6 was adopted as amended.

### **Paragraph 7**

- 374.** The Government member of New Zealand withdrew an amendment to Paragraph 7.
- 375.** The Employer Vice-Chairperson introduced an amendment to Paragraph 7. Since this amendment was closely connected with another amendment proposed by his group, he suggested that the Committee consider the substance of both amendments together. To this effect, he proposed replacing Paragraph 7 with the following text: “When determining the nature of a relationship, account should be taken of the intentions of the parties and of the facts of the relationship. In the enforcement of employment protections, fraud should not be tolerated.” This amendment sought a balance between the concerns of the Workers’ group and those expressed by his group. It acknowledged the different legal systems existing in member States and introduced the notion of respect for the intention of the parties to an employment relationship. Most legal systems looked at the intentions of parties to determine the nature of a contractual relationship, and considered them alongside facts and the language used by the parties. The amendment was intended to suggest that the intentions of the parties should be included as one element, thus giving discretion to governments and allowing national laws to determine an appropriate balance. The second part addressed fraud; although fraud was not the only element to be addressed by the Recommendation, the Employer Vice-Chairperson stated that fraud would not be tolerated.
- 376.** The Worker Vice-Chairperson opposed the amendment as subamended. Although the Workers’ group agreed that fraud should not be tolerated, they were opposed to the introduction of the term “fraud”. This term had a very precise meaning in a number of legal systems and specific tests needed to be met for courts to establish cases of fraud. These tests included: intentionality, misrepresentation of material facts, knowledge of falsity, purpose of inducing the other person to act, reliance of the other party on representation, and resulting injury or damage. If these very specific tests all needed to be met in order to determine whether the relationship in question was a disguised employment

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relationship, the ability to identify and effectively address disguised employment relationships would be limited in a non-acceptable manner. In addition, the introduction of language related to the parties' intentions clouded the original text of the Paragraph that asserted the primacy of facts. The underlying facts determined the nature of the relationship; the determination of its existence needed to be guided by them.

- 377.** The Employer Vice-Chairperson asserted the importance the Employer members gave to their proposal addressing fraud, but proposed a further change to his group's amendment in the interest of finding language that was acceptable to all. He proposed the following text: "The determination of the existence of an employment relationship should be guided by the facts, taking into account the intention of the parties."
- 378.** The Worker Vice-Chairperson maintained that the Office text was clearer and rightly referred to the primacy of facts. The suggested reference to the intention of the parties would create further ambiguity.
- 379.** The Government member of Brazil, speaking on behalf of MERCOSUR and Associate States, and the Government members of the Dominican Republic and Mexico, could not support the Employer members' subamendment, stating that the existence of an employment relationship was determined by the facts; moreover, it was difficult to determine parties' intentions.
- 380.** The Government member of Lebanon proposed to subamend the text to read: "The determination of the existence of an employment relationship should be guided by the facts, taking into account the intention of the parties that have to do with the facts relating to the provision of services and the remuneration thereof."
- 381.** The Worker Vice-Chairperson appreciated the Government member of Lebanon's suggestion, but preferred the Office text.
- 382.** The Employer Vice-Chairperson explained that, in most countries, courts considered the intentions of parties as an important element when interpreting contracts. However, to address concerns of States whose legal systems did not refer to the intention of parties, he suggested appending the words "in accordance with national law and practice" to the end of the subamended text. He opposed the text proposed by the Government member of Lebanon: the reference to the provision of services and remuneration narrowed the discretion given. Moreover, these were but two elements of an employment relationship. If Members wanted these two criteria to be singled out, other factors would need to be added. Since a list of criteria should not be established, such a move would endanger consensus.
- 383.** The Worker Vice-Chairperson stressed that the essence of the Office text was the primacy of facts and opposed the amendment and subamendments.
- 384.** The Government members of China and New Zealand, and the Government member of South Africa, speaking on behalf of the Africa group, also supported the text drafted by the Office.
- 385.** The Government member of Australia, speaking also on behalf of the United States, expressed support for the text, as subamended by the Employers' group, and pointed out that the intention of the parties was a part of the facts to be considered. The Government member of the United States added that the Office text disregarded the intention of the parties; this was not consistent with his country's law.
- 386.** The Government member of Senegal supported the Office text and indicated that the determination of an employment relationship should not be based on the intention of the



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parties. Many developing countries faced difficulties when qualifying employment contracts, since workers were sometimes willing to agree to contracts that did not provide them with the appropriate protection, given the unequal balance of bargaining powers between employers and workers, which was further aggravated by high levels of unemployment.

- 387.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, and the Government member of Canada supported the Office text; it was clear and well balanced. The Government member of France added that, in France, the principle of primacy of facts was predominant as regards the determination of the existence of an employment relationship. The French *Cour de Cassation* had clearly established that the intentions of the parties were not completely excluded from consideration, but that the appreciation of the facts should prevail.
- 388.** The Employer Vice-Chairperson thanked the Government members for their explanations. He stressed that all legal systems respected the right of the parties to a contract to decide for themselves the nature of their relationship. It was, therefore, most unfortunate that the Office text completely disregarded the intentions of the parties. This challenged the fundamentals of contract law. For his group, the text in the proposed Recommendation, if adopted, was unacceptable.
- 389.** The Worker Vice-Chairperson stressed that the flexibility of the Office text was evident, in particular, in the use of the words “should be guided by”. By its nature, a Recommendation did not and, legally, could not revise the underpinnings of commercial contracts; instead it provided guidance for member States on how the existence of an employment relationship could be determined. This was also demonstrated by the absence of words such as “solely, only, exclusively”. The text proposed by the Office was flexible and balanced.
- 390.** The Worker Vice-Chairperson nevertheless, in a spirit of compromise, introduced a subamendment to add the word “primarily” after the words “should be guided” and to add in the last phrase, after “notwithstanding”, the words “how the relationship is characterized in”. The addition of “primarily” sought to clarify the primacy of fact, without restricting the text to a closed list of elements to be considered. The addition of “how the relationship is characterized in” was aimed at reflecting the real intention of the original text.
- 391.** The Employer Vice-Chairperson appreciated this effort made towards addressing some of the Employer members’ concerns, but preferred replacing the word “primarily” with “inter alia”. He also suggested deleting the part of Paragraph 7’s original text that enumerated criteria, namely the words “relating to the performance of work and the remuneration of the worker”.
- 392.** The Worker Vice-Chairperson could not support this deletion as proposed deletions to the original text of Paragraph 7 had already been specifically rejected by the Government members. The Worker Vice-Chairperson also opposed using the weaker phrase “inter alia”, as it would not reflect the primacy of fact. He noted that the following text had received broad support from the members of the Committee: “For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed by the parties.”
- 393.** The Employer Vice-Chairperson thanked the Worker Vice-Chairperson for the effort made in proposing a compromise amendment, but he could not support it.

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394. Paragraph 7 was adopted as subamended by the majority of the members of the Committee.

### ***Proposed new Paragraph after Paragraph 7***

395. In view of the discussions concerning the previously adopted text, the Employer members withdrew an amendment to add a new paragraph referring to the importance of the intention of the parties.

396. The Government member of Lebanon introduced an amendment, supported by the Government member of Qatar, dealing with the concept of punishment of employers who, by fraud, intentionally entered into disguised employment relationships. Having heard from the Worker Vice-Chairperson that he would propose a similar reference to sanctions in the form of removal of incentives that might tempt employers to use fraud, and acknowledging the Employer Vice-Chairperson's indication that, in most countries, there were already legal processes in place to deal with the criminal offence of fraud, he withdrew the amendment.

### ***Paragraph 8***

397. The Government member of South Africa, speaking on behalf of the Africa group, withdrew an amendment to Paragraph 8, in the light of the debates thus far.

398. The Employer Vice-Chairperson introduced two related amendments to Paragraph 8: to replace the words "should clearly define" with "can consider clearly defining" and to delete the last phrase which covered three examples, in particular the criteria of subordination and dependence and the words "the work is done for the benefit of another person". These latter words were unhelpful here if they were intended to refer to a triangular relationship.

399. The rationale behind the amendments was to create a focused Paragraph. He enumerated a number of reasons why Paragraph 8 should not contain a listing of criteria or examples: paragraph 25 of the conclusions of the 2003 discussions had specified that the Recommendation should give guidance without defining universally the substance of the employment relationship; the introduction of criteria would, intentionally or otherwise, create an imbalance in national legal systems which had built up their own criteria relevant to their own contexts; the Recommendation, even if a non-binding instrument, would be used by national courts and tribunals and result in pressure on governments to adapt or adopt national criteria; a static list of criteria would not evolve with changing times; a specific list of criteria could be easier to circumvent; at the same time the criteria in Paragraph 8 were too general and omitted regional and sectoral specificities; and the use of the terms "subordination" and "dependence" could have the effect of undermining small business arrangements and unbalance or limit business growth.

400. The Worker Vice-Chairperson opposed the Employer members' amendments although he had listened carefully to the comprehensive justification. He did not agree that the criteria listed in Paragraph 8 were too prescriptive or a closed list; they merely offered some examples for establishing what constituted an employment relationship. He recalled that paragraph 25 of the 2003 conclusions did indeed specify that there should be no universal definition of the employment relationship, but there was no definition here, only guidance. Recognizing that criteria evolved over time and that there was a danger that they could become irrelevant, the examples listed did not constitute a finite list and member States were free to add new criteria or disregard those that were no longer useful. He disagreed

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with the Employer Vice-Chairperson's fear that this listing would scare off small business initiatives.

- 401.** The Government member of Brazil, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Dominican Republic and Mexico, and the Government members of Burkina Faso, Canada and Japan did not support the Employer members' amendments because the Office text of Paragraph 8 outlined only some basic criteria and examples for determining the existence of an employment relationship.
- 402.** The Government member of the United States agreed that it was useful to clarify the conditions for establishing the existence of an employment relationship and thus was unable to support the first part of the Employer members' amendment. However, he supported the amendment to delete the list.
- 403.** The Government member of South Africa, speaking on behalf of the Africa group, supported the part of the amendment to delete the rest of the phrase after the word "relationship".
- 404.** The Chairperson referred the text of Paragraphs 8, 9 and 11 and these amendments to the informal bilateral consultations in an attempt to find agreed text, which would be reported back to the Committee.
- 405.** The Worker Vice-Chairperson reported that bilateral discussions with the Employer Vice-Chairperson on the package of proposed Paragraphs had occurred twice. The Workers' group engaged in the process on the basis that it was important to think beyond the parties' formally mandated positions and constituencies. They used the Office text as a basis – although aware that the Employer members were not happy with the proposed text – as this appeared to be the best way to commence finding a successful solution which accommodated the Employer members.
- 406.** On Paragraph 8, the Worker members were prepared to accept either a deletion of the words "the fact that the work is done for the benefit of others" or to qualify the examples given in the text. They considered it helpful to add a reference to the role of national-level social dialogue in Paragraph 8, so that the Employer members would be comfortable with the Paragraph. In this way it would be clear that the social partners would be expected to sit down together and work out a national policy. In Paragraph 9, the Worker members proposed the incorporation of the concerns of the Employers' group by language that stressed the importance of national-level social dialogue in the development of indicators. Their proposal also responded to the strong message from the Government members regarding guidance concerning indicators. The Workers' group had offered a choice of addressing this in the phrase introducing Paragraph 9 or retaining a list of possible examples, introduced with words such as "examples of which include". In Paragraph 11, the Worker members again offered the inclusion of social dialogue as a means of determining the existence of an employment relationship, as well as the addition of language to clarify that the examples listed did not constitute an exhaustive list. Words could be added to specify that relevant indicators should be determined nationally. The Worker Vice-Chairperson stressed that the proposed amendments to Paragraphs 8, 9 and 11 were even more flexible than those in the Office text. Regrettably, he had to report that there had been no meeting of minds on all these proposals.
- 407.** The Employer Vice-Chairperson, agreeing with the summary given by the Worker Vice-Chairperson, was disappointed that they had reached an impasse. There had been an opportunity to find a solution. He recounted the various stages of progress: at the Committee's first sitting the Employer members had struggled with, but overcome, the

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hurdle that the 2003 agreement, achieved with such difficulty, had not been respected; then came the seemingly insurmountable problem of triangular relationships, but with imagination and creativity the members of the tripartite informal working group had reached agreement on that element of the text; however, there were other difficult issues for the Employer members, which were still unresolved. In his opinion, therefore, the Employer members had made great efforts. On the outstanding Paragraphs concerning indicators, during the process all sides had made their positions clear, not least the Employer members. They had tried to explain clearly, since well before 2003, that they would not be able to agree to references to criteria, dependency or presumptions of employment in an instrument. He respected what the Worker members had tried to achieve with the proposed amendments, but it was clear that the Worker members were unable to recognize that the Employer members could not, and would never, support an instrument containing this language. He accepted that the Committee had the right to proceed and include any language it agreed upon, but the Employer members would not be able to support it. Some members of the Committee might be frustrated by the Employer members' position, but he asked that they at least acknowledge and respect the Employer members' clarity over the years.

- 408.** The Chairperson regretted very much that there was no agreement. The Government members had been extremely patient and accommodating, as had the Chairperson. There had been an understanding that an agreement would be reached on the basis of consensus, which was the most important thing. Now the Committee's time was up and she sought the advice of the Government members regarding the next step.
- 409.** The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, referred to the discussions within the various tripartite informal working group meetings where the Government members had expressed their preference for proceeding with the Office text of Paragraphs 8, 9 and 11. It constituted a way to achieve a flexible, clear and effective instrument. There was flexibility in the draft and the list of examples was prefaced with the words "might include", implying that the list was not exhaustive and that one or more or none of the examples might be used. As the member States wanted the instrument to give guidelines and inspiration, the instrument needed to contain criteria or indicators which could give guidance during the adoption of national policy. The Government members wanted a unanimous consensus on the proposed Recommendation and considered that this was still possible. While he preferred the Office text, amendments to the text to clarify its scope could still be proposed, on condition that such amendments were reasonable and pursued in a constructive vein. As the parties to the bilateral discussions were close to their aim, with only a few Paragraphs left to agree on, he asked them to resume the informal talks in the same spirit that had earlier inspired the informal tripartite working group with success.
- 410.** The Government member of South Africa, speaking on behalf of the Africa group, expressed his disappointment with the lack of bilateral agreement on the outstanding Paragraphs by the Employer and Worker members. He recalled that they had been accorded much time and entrusted with a clear mandate to progress on the proposed text. Their report gave a sense that the parties were not working together towards resolution of the matters before them despite the seriousness of the issue, which went beyond concepts and touched the lives of working women and men. The decisions made in the Committee were impacting on these people, and would continue to do so in the future. He implored the parties to move forward with the seriousness that the matter warranted.
- 411.** The Government member of Nigeria compared the impasse to mediation of labour disputes in her home country, which often were rooted in uncertainty about the existence of employment relationships. The lack of clarity in the employment relationship represented an ongoing problem for her Government, and when it led the nation to an oil and gas crisis,

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as was occurring now, there were implications not only for people in Nigeria, but around the world. A Recommendation agreed in the Committee would make the lives of all the Members easier when they returned to their home countries. She had heard that the Workers' group had made proposals to help reach consensus, but that the Employers' group had not shifted its position, one that they had clung to throughout the earlier discussions which had taken place in 1997, 1998, 2000 and 2003. She questioned whether the negotiations had taken place in good faith. Social dialogue required that the parties accommodate one another, rather than holding fast to one position. She appealed to the Employers' group to offer a counter proposal to the amendments suggested by the Workers' group, which the Government members could use to facilitate a process of reaching consensus. She expressed the hope that the discussion could result in a credible output, in order to show that the Committee had been productive.

- 412.** The Government member of China regretted that no agreement had been reached. Pointing to the considerable progress made under the leadership of the Chairperson, he suggested that the moment was crucial, with the Committee needing only one step to move forward. He offered a number of proposals to facilitate a consensus. Noting that the Office text of the proposed Recommendation was good, and was sufficiently flexible for countries to adapt to their own circumstances, he suggested that the Committee undertake consultations based on that text. He hoped that the good faith shown on the part of the Workers', Employers' and Government groups could transcend whatever differences they faced.
- 413.** The Government member of Uruguay, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Dominican Republic and Cuba, supported the Government members of Canada and South Africa, and joined with the Government member of China in his request for the Workers' and Employers' groups to seek a solution to the problem. He stressed that the problems being faced by the member States with respect to the employment relationship were serious and required immediate resolution.
- 414.** The Chairperson recalled that the Committee had heard strong and clear views from the majority of Government members appealing to the Workers' and Employers' groups to reach some positive consensus. She asked the Employer Vice-Chairperson to reconsider the position that he had taken earlier.
- 415.** The Employer Vice-Chairperson stated that, although an agreement on Paragraphs 8, 9 and 11 had not been reached, the Employers' group had not ceased to be open to dialogue with the other groups of the Committee. He would remain open to suggestions for a solution, until such time as he was told that this was no longer possible. The statement that the Employers' group had not taken the Committee's work seriously was unfair. The Worker and Employer members took the process seriously and had done so throughout the work of the Committee. The Employers' group had made considerable efforts in seeking solutions in the Committee, as well as in the preparation for the Committee's discussion. However, the group could not accept an instrument that included criteria or presumptions. Maintaining their position could not be construed as an act of bad faith. Not reaching agreement was a fact of social dialogue; it did not mean that one party was not serious about the negotiations. With regard to the Employers' group not having accepted the suggestions provided by the Worker members in bilateral discussions, the Employer Vice-Chairperson pointed out that his group had offered language which, unfortunately, had been unacceptable to the Workers' group. The Government members' earlier indications that they would proceed with the adoption of the Office text of Paragraphs 8, 9 and 11, if Worker and Employer members could not find consensual wording, implied that Government members did not support the Employers' group's amendments. If this was indeed the case, the Employers' group would be obliged to either withdraw its amendments or to proceed to the disruptive process of calling a vote. Since the Employer

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members did not want to disrupt the work of the Committee, they would withdraw all amendments and disengage from the process. In that case, his group would allow the Worker members and Government members to continue discussing the Recommendation. That Recommendation could then, however, not be supported by his group. Any further discussion would be on a bipartite basis between Worker and Government members.

- 416.** The Chairperson returned to the discussion of the amendments previously introduced by the Employers' group.
- 417.** The Employer Vice-Chairperson reiterated that, if the Government members indicated that they did not support the amendments, the Employers' group would withdraw all amendments and disengage from the discussion process. In his view, there was no opportunity left for making negotiated changes to Paragraph 8 once it had been adopted by the Committee, and asked the Legal Adviser to confirm his understanding.
- 418.** The Legal Adviser pointed out that, when the Committee met again to adopt the report, it would review the entire text of the draft report, as well as the text of any instrument that had been referred back to it from the Drafting Committee. The Committee would then have the opportunity to review and suggest changes to the entire text before adopting it. Even after its adoption by the Committee, the Recommendation could still be reviewed and amended in the plenary sitting of the Conference before the Conference formally adopted it; this would, however, be unusual.
- 419.** The Employer Vice-Chairperson asked whether there was any precedent for a situation where text, having been adopted by a Committee, was significantly altered in the process of adopting the report. He had no recollection of such an event taking place.
- 420.** The Legal Adviser suggested that providing a specific response to the Employer Vice-Chairperson's query required research but, in general, such adjustments had been made in cases where the secretariat had misunderstood the will of the Committee, or where the Committee disagreed with wording offered by the Drafting Committee. There was, however, the possibility for changes to occur at that stage on substantive issues.
- 421.** The Employer Vice-Chairperson stated that the clarification provided by the Legal Adviser suggested the existence of a possibility that was not realistic. Once the Paragraph was adopted without the amendments submitted by the Employers' group, the Committee would have reached an impasse that could not be overcome by a negotiated solution. He viewed the adoption of the Paragraph, as originally proposed, as a final rejection of the concerns expressed by the Employers' group. The Employers' group could accept the Committee's decision to foreclose the possibility of a negotiated solution but, at that point, their participation in the Committee became moot. He suggested that, after that point, the Employers' group could either simply oppose the Recommendation or try to suggest amendments that, in the end, would not make the Recommendation any more acceptable to them. He expressed disappointment with the fact that the Committee had come to the point where such a decision was necessary, and wanted to make sure that, when the Committee made this decision, all members clearly understood the consequences.
- 422.** The Government members of Australia and the United States supported the amendments; the examples were limiting and unnecessary.
- 423.** The Government member of Canada, speaking on behalf of a number of Government members of the Committee Member States of IMEC, introduced a subamendment to append the following words to Paragraph 8: “, for example, subordination or dependence”. He and other Government members were prepared to continue the discussion paragraph by paragraph in a spirit of openness so that a consensus could be reached.

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- 424.** The Worker Vice-Chairperson expressed support for this subamendment.
- 425.** The Employer Vice-Chairperson was not prepared to support Paragraph 8, as subamended, for the reasons given previously (see paragraphs 415, 417 and 421 above).
- 426.** The Government member of Chile, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, the Government member of Nigeria, the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of the Syrian Arab Republic supported the subamendment suggested by the Government member of Canada.
- 427.** The Government member of the United States did not support the subamendment, although it was consistent with national law. Paragraph 8 had been one of the stumbling blocks between the parties. In his opinion, the Paragraph as amended by the Employer members could easily have become part of a good instrument.
- 428.** The amendment was adopted, as subamended by the Government member of Canada.
- 429.** The Government member of Austria withdrew an amendment to Paragraph 8.
- 430.** Paragraph 8 was adopted as amended.

### **Paragraph 9**

- 431.** As already noted, the Committee had postponed the discussion of all amendments to Paragraph 9 until such time as the Worker and Employer members could reach a consensus. As subsequent informal bipartite consultations did not result in an agreement, the Employer Vice-Chairperson withdrew his group's amendment with respect to Paragraph 9.<sup>4</sup>
- 432.** The Government member of Chile, speaking on behalf of the Government members of Argentina, Bolivia, Brazil, Chile, Uruguay and the Bolivarian Republic of Venezuela, introduced an amendment to replace Paragraph 9 with the following text:
- (a) Members should consider the possibility of defining in their laws and regulations, or by other means, the essential features that characterize an employment relationship, namely:
    - (i) the fact that the work is carried out according to the instructions and under the control of another physical or legal person;
    - (ii) that the work involves the integration of the worker in the organization of the enterprise;
    - (iii) that the work is performed solely or mainly for the benefit of another person, enterprise or organization;
    - (iv) that the work is carried out personally by the worker;
    - (v) that the work is of a particular duration;
    - (vi) that the work requires the worker's availability and compliance with specific working hours;
    - (vii) that the remuneration constitutes the worker's sole or principal source of income.

<sup>4</sup> For reasons stated in paragraphs 415, 417 and 421 of this report.

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- (b) The following should be regarded as indicators of the existence of an employment relationship or as evidence of the same:
    - (i) the work is carried out within specific working hours;
    - (ii) it takes place at a workplace specified or agreed by the party requesting the work;
    - (iii) the tools, materials and machinery are provided by the party requesting the work;
    - (iv) the worker receives periodic payments of remuneration, either in cash or partly in kind; and
    - (v) there is recognition of entitlements such as weekly rest and annual holidays.

**433.** The proposed amendment made a distinction between the different elements contained in the Office draft. Subparagraph (a) listed the essential features which characterized an employment relationship; subparagraph (b) grouped the indicators of the existence of an employment relationship. The amendment would improve clarity and legal certainty.

**434.** The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, followed the line of reasoning of the amendment's sponsors, but preferred the Office text. He suggested that the Drafting Committee should consider restructuring the Paragraph. The Government member of the United Kingdom added that she regretted that the discussions had reached this stage. Her delegation understood the instrument to be flexible and to provide many options for interpretation.

**435.** The Government member of South Africa, speaking on behalf of the Africa group, also supported the Office text.

**436.** The Government member of Chile, speaking on behalf of the amendment's sponsors, withdrew the amendment in an effort to reach a consensus.

**437.** The Government member of South Africa withdrew a number of amendments to Paragraph 9 and its subparagraphs, submitted by the Government members of Algeria, Angola, Benin, Botswana, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Guinea, Kenya, Lesotho, Malawi, Mali, Morocco, Mozambique, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Swaziland, the United Republic of Tanzania, Togo, Tunisia, Zambia and Zimbabwe. He explained that these were withdrawn in favour of the Office text and for the sake of flexibility.

**438.** An amendment to Paragraph 9(b), submitted by his group, was withdrawn by the Worker Vice-Chairperson.

**439.** An amendment to Paragraph 9(b), submitted by the Government member of Lebanon, was not seconded and therefore not discussed.

**440.** The amendment to add a clause after subparagraph (c), submitted by the Government member of New Zealand, was not seconded and therefore not discussed.

**441.** Paragraph 9 was adopted without amendment.

## ***Paragraph 10***

**442.** The Employer Vice-Chairperson introduced an amendment to replace the rest of the Paragraph after the word "should" with the phrase "consider clear methods for guiding workers and employers as to the determination of the existence of an employment



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relationship”. The aim was to simplify the text on methods for guiding workers and employers as to the determination of the existence of an employment relationship.<sup>5</sup>

**443.** The Worker Vice-Chairperson supported the proposed amendment, but subamended it to replace “consider” with “promote”.

**444.** This subamendment was supported by the Employer Vice-Chairperson, the Government member of South Africa, speaking on behalf of the Africa group, the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, and the Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC.

**445.** The amendment was adopted as subamended.

**446.** An amendment proposed by several Government members and another amendment proposed by the Worker members fell as a result.

**447.** Paragraph 10 was adopted as amended.

### ***Paragraph 11***

**448.** The Committee had postponed the discussion of all amendments to Paragraph 11 until such time as the Worker and Employer members could reach a consensus. As subsequent informal bipartite consultations did not result in an agreement, the Employer Vice-Chairperson withdrew his group’s amendment to delete Paragraph 11 and its subparagraphs.<sup>6</sup>

### ***Paragraph 11(a)***

**449.** Given that no consensus between Worker and Employer members had been reached on Paragraph 11, the Government member of South Africa, speaking on behalf of the Africa group, withdrew an amendment to Paragraph 11(a) and suggested that the Drafting Committee should revise the language used in the Office text.

**450.** An amendment to subparagraph (a), submitted by the Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom, was also withdrawn.

### ***Paragraph 11(b)***

**451.** An amendment submitted by the Government members of Argentina, Bolivia, Brazil, Chile, Uruguay and the Bolivarian Republic of Venezuela was withdrawn by the Government member of Chile. The Government member of Austria also withdrew an amendment to Paragraph 11(b), submitted by the Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece,

<sup>5</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

<sup>6</sup> For reasons stated in paragraphs 415, 417 and 421 of this report.

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Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Spain, Sweden and the United Kingdom.

### **Paragraph 11(c)**

452. The Government member of Chile withdrew an amendment to Paragraph 11(c) submitted by the Government members of Argentina, Bolivia, Brazil, Chile, Uruguay and the Bolivarian Republic of Venezuela.
453. The Government member of South Africa, speaking on behalf of the Africa group, withdrew an amendment to subparagraph (c) and asked the Drafting Committee to revise the language of the Paragraph.
454. The Worker Vice-Chairperson withdrew an amendment to subparagraph (c) and suggested that the Drafting Committee revise the language of the Paragraph, in order to keep consistency with previous decisions.
455. Paragraph 11 was adopted without amendment.

### **Paragraph 12**

456. An amendment proposed by the Government member of Lebanon was withdrawn.
457. Paragraph 12 was adopted without amendment.

### **Paragraph 13**

458. The Government member of South Africa, speaking on behalf of the Africa group, introduced an amendment to replace, after the introductory words “The competent authority should”, the rest of the Paragraph with the following:

, in conjunction and collaboration with other public authorities and regulators, adopt measures with a view to ensuring, in particular through labour inspection services and services provided by such other public authorities and regulators, respect for, and implementation of, laws and regulations concerning the employment relationship with respect to the various aspects considered in this Recommendation.

This amendment would cover situations where other arms of government might have to determine who was or was not in an employment relationship, such as the taxation authorities.

459. The Government member of the Dominican Republic pointed out that the Spanish version of this amendment to Paragraph 13 did not include the words “conjunction and” and asked that this be corrected by the Drafting Committee.
460. The Worker Vice-Chairperson supported the amendment because it addressed the very important element of cooperation for the success of enforcement. He pointed out that the Worker members would be introducing a similar amendment later on in the text, referring to the cooperation that should be promoted between the different government enforcement agencies, and proposed that the two amendments be merged.
461. The Employer Vice-Chairperson also supported the amendment, but proposed a subamendment to delete the words “in particular through labour inspection services and services provided by such other public authorities and regulators”. He also asked for

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clarification on the value of having two words to introduce the phrase, namely “in conjunction and collaboration”.<sup>7</sup>

- 462.** The Government member of South Africa, speaking on behalf of the Africa group, agreed that the words “and collaboration” could be dropped and supported the merging of their amendment with the wording of the Worker members’ amendment.
- 463.** The Worker Vice-Chairperson agreed that the wording should accommodate those countries that did not have dedicated labour inspectorates. He therefore proposed the following subamendment to replace Paragraph 13: “The competent authority should adopt measures with a view to ensuring, for example through labour inspection services and their collaboration with social security administration and the tax authorities, respect for, and implementation of, laws and regulations concerning the employment relationship with respect to the various aspects considered in this Recommendation.” He explained that this text combined the collaboration concept as expounded in the amendment of the Government member of South Africa and examples of the agencies being referred to, while taking account of the specific situations in different member States.
- 464.** The Government member of Switzerland opposed the Worker members’ subamendment as she preferred the original amendment which did not mention “labour inspectorate”, a term that was inappropriate in Paragraph 13.
- 465.** The Employer Vice-Chairperson supported the subamendment, as did the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of Canada, speaking also on behalf of the Government members of Australia, Japan, New Zealand and the United States, and the Government member of South Africa, speaking on behalf of the Africa group.
- 466.** The amendment was adopted, as subamended.
- 467.** An amendment proposed by the Employer members and several amendments proposed by various Government members fell as a result.
- 468.** Paragraph 13 was adopted as amended.

### ***Proposed new Paragraphs after Paragraph 13***

- 469.** An amendment proposed by the Worker members to insert a new Paragraph on cooperation between different government enforcement agencies was withdrawn in the light of the above discussion.
- 470.** The Worker Vice-Chairperson introduced an amendment to insert the following new Paragraph:

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

<sup>7</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

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education and outreach strategies and services should be developed. The social partners should be involved in developing and implementing those initiatives.

He explained that it was important that the proposed instrument include mechanisms to help States in establishing the existence of an employment relationship.

- 471.** The Government member of New Zealand supported the amendment as serious consideration should be given to monitoring programmes.
- 472.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, proposed a subamendment to shorten the text, by deleting the second sentence and the two last sentences, and also proposed inserting after the word “should” the words “consider to”.
- 473.** The Worker Vice-Chairperson supported the subamendment.
- 474.** The Government member of Nigeria also supported the first part of the subamendment to shorten the text, but opposed inserting after the word “should” the words “consider to” as such a change would weaken the duty to undertake regular monitoring. Her proposal was supported by the Government member of Lebanon, and by the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, who agreed to withdraw the latter part of their subamendment. It now read: “National labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to those occupations and sectors with a high proportion of women workers”.
- 475.** The subamendment was adopted.
- 476.** This proposed new Paragraph after Paragraph 13 was adopted as amended.
- 477.** The Worker Vice-Chairperson introduced an amendment to insert a new Paragraph after Paragraph 13 which would read as follows: “Members should, as part of the national policy, develop enforcement measures aimed at removing the commercial incentive to disguise an employment relationship.” In the light of the previous discussions on introducing a sanction against attempts to disguise an employment relationship, he noted that this provision was required to ensure adherence to, and enforcement of, the law, but at the same time the language at the international level should be flexible enough to leave to Members a choice of measures appropriate to their national circumstances.
- 478.** The Employer Vice-Chairperson, for fear that the amendment could be interpreted to place restrictions on commercial activities, proposed a subamendment to replace the word “enforcement” with “effective”, and to delete the words “the commercial”.<sup>8</sup>
- 479.** The Worker Vice-Chairperson supported the subamendment as it retained the original meaning, as did the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Canada, speaking on behalf of the Government members of the Committee Member States of the EU and Member States of IMEC.
- 480.** The amendment was adopted as subamended.

<sup>8</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

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481. This further proposed new Paragraph after Paragraph 13 was adopted.

#### **Paragraph 14**

482. The amendment proposed by several Government members to delete the whole Paragraph was withdrawn.
483. The Employer Vice-Chairperson introduced an amendment to delete Paragraph 14, since the role of collective bargaining in dealing with employment relationship issues would not be helpful. He indicated that other measures and mechanisms were more appropriate.<sup>9</sup>
484. The Worker Vice-Chairperson appealed to the Employers' group to withdraw this amendment in favour of the Worker members' later amendment which would explain the role of collective bargaining and social dialogue in helping to determine the existence of employment relationships. The Worker members' proposal was faithful to the earlier agreement in paragraph 25 of the 2003 conclusions, according to which the Recommendation "should promote collective bargaining and social dialogue as a means of finding solutions to the problem at national level". The Worker Vice-Chairperson hoped it would also be acceptable to insert the words "collective agreements" after the words "collective bargaining".
485. The Employer Vice-Chairperson accepted the retention of Paragraph 14 with part of the Worker members' proposed amendment, but was against any reference to "collective agreements" in this process-oriented Paragraph, as they were the outcomes of the process. He introduced a subamendment to replace the word "promote" with "consider" so that the text would read: "Members should consider, as part of the national policy, the role of collective bargaining and social dialogue as a means of finding solutions to questions related to the scope of the employment relationship at the national level."
486. The Government member of the United States supported the subamendment to replace the word "promote" with "consider". The Government member of Australia wondered if it would assist the Employers' group to add the phrase "or other measures appropriate to national circumstances" after the words "the role of collective bargaining".
487. In the light of the 2003 conclusions, the Worker Vice-Chairperson opposed the subamendment to replace the word "promote" with "consider".
488. Given the Employer Vice-Chairperson's difficulties in supporting the idea of collective bargaining and social dialogue as excluding other means of finding solutions to questions related to the scope of the employment relationship, the Worker Vice-Chairperson proposed a further subamendment to insert the words "inter alia" after "the role".
489. The Government members of Canada, Lebanon and New Zealand supported this further subamendment, as did the Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Jamaica, speaking on behalf of the CARICOM countries previously listed.

<sup>9</sup> This intervention occurred prior to the Employers' group's disengagement set out in paragraphs 415, 417 and 421 of this report.

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490. The amendment to include a reference to national conditions for collective bargaining, proposed by a number of Government members, was withdrawn.

491. The amendment was adopted as subamended.

492. Paragraph 14 was adopted as amended.

### **Paragraph 15**

493. Paragraph 15 was adopted without amendment.

### **Proposed new Paragraph after Paragraph 15**

494. The Government member of Finland introduced an amendment, submitted by the Government members of Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Spain and Sweden, to insert a new Paragraph after Paragraph 15 to address the transnational provision of services and to encourage member States to exchange views and systematically establish contact. In view of earlier discussions, its authors wanted to subamend the amendment. As subamended, the new Paragraph would read: “Members should establish specific mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. In particular, consideration should be given to developing systematic contact and exchange of information on the subject with other States.” The amendment was linked to an earlier amendment to the preamble.

495. The Worker Vice-Chairperson referred to his earlier statements on similar amendments dealing with the transnational dimension of the issues under discussion. He supported the first part of the subamendment to delete a reference to disguised employment relationships. He was also prepared to support the deletion of “innovative programmes on information and education” in an effort to build consensus, although he had supported the original wording contained in the amendment.

496. The Employer Vice-Chairperson supported the amendment as subamended by its authors, in principle, but suggested the following changes: the word “national” should be added before the word “mechanisms” and the word “current” should be added before the word “framework”; the words “transnational” and “In particular” should be deleted. The Employer members were concerned that the proposed amendment introduced EU issues into the Recommendation that were not within the remit of the ILO. The issue of transnational workers was of particular interest to the EU, although migrant workers also existed in other parts of the world. The proposed subamendment ensured that the instrument would be more relevant to a broader range of national governments.<sup>10</sup>

497. The Government member of Finland, speaking also on behalf of the Government member of Norway and the Government members of the Committee Member States of the EU, excluding the United Kingdom, agreed with three of the four changes suggested by the Employer Vice-Chairperson. Instead of deleting the word “transnational” other wording (such as “international”) should be considered by the Committee.

<sup>10</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

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- 498.** The Employer Vice-Chairperson did not support the suggestion put forward by the Government member of Finland. At its core, the amendment sought to introduce EU-specific issues related to the draft Directive of the European Parliament and of the Council on services in the internal market. The Committee was, however, not the right forum in which to hold these discussions. Slight changes in wording, such as replacing “transnational” with “international” did not address this fundamental problem. If the member States so wished, they were free, however, to understand the wording “provision of services” to apply within or outside a member State’s borders.
- 499.** The Government member of Finland, speaking also on behalf of the Government member of Norway and the Government members of the Committee Member States of the EU, excluding the United Kingdom, underscored the importance of including a specific reference to the transnational dimension.
- 500.** Referring to the four changes suggested by the Employers’ group, the Worker Vice-Chairperson accepted the proposal to delete “In particular”. The Workers’ group was also willing to accept the insertion of “national”, in order to encourage consensus, but noted that limiting the development of mechanisms to the national context unnecessarily restricted flexibility. He sought clarification from the Employer members for their proposal to add “current” as a qualifier, a proposal that the Worker members did not support. On the subject of deleting reference to transnational provision of services, he drew attention to the fact that the Paragraph sought to address a set of concerns that had been clearly identified and agreed upon in the preamble. Removing the word “transnational” would make the Paragraph too vague. Also, the issues addressed were in no way unique to the EU; the subject was also highly relevant to the worldwide emergence of economic communities.
- 501.** The Government member of Japan supported the text, in the light of an explanation given by the Government member of Finland that the text took into account differences in national law and practice and left the establishment of mechanisms up to the individual member States.
- 502.** The Government member of South Africa, speaking on behalf of the Africa group, supported the amendment as introduced by the Government member of Finland. The subamendments proposed by the Employer members did not address the issues that the amendment had been drafted to address.
- 503.** In response to a request for clarification by the Government member of South Africa and the Worker Vice-Chairperson, the Employer Vice-Chairperson explained that the insertion of the word “current” was motivated by the notion that governments should ensure that public policy only addressed problems that were current and real. Given that this was understood, his group agreed to withdraw the suggestion to insert “current”. However, the focus of the amendment on transnational provision of services was too limiting. It seemed that the amendment was pursued for reasons not connected with the Committee; it was serving as a proxy for a debate occurring elsewhere. Therefore, the Employer members could not support the reference to “transnational”.
- 504.** The Government member of Nigeria spoke in support of the position of the Africa group, and suggested that the Committee deal with the amendment on its own merits and without prejudice.
- 505.** The Worker Vice-Chairperson recalled that the preamble, which had been discussed and adopted by all groups in the Committee, made clear reference to the “framework of transnational provision of services”. The adoption of that text reflected the recognition from all three groups of the importance of this principle.

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- 506.** The Government member of Lebanon supported the text as presented by the Government member of Finland. The problem addressed in the amendment was not exclusive to the EU. The suggested deletion would render the Paragraph meaningless.
- 507.** The Government member of Algeria also supported retaining the reference to “transnational”.
- 508.** The Employer Vice-Chairperson agreed to withdraw the subamendment to add “current”, but reiterated that the Employers’ group did not support the inclusion of “transnational”. He pointed out that the preambular reference to the transnational provision of services was not part of the operative text, and that that text was less specific than the Paragraph before the Committee. If the Paragraph had to contain a reference to transnational provision of services, he proposed that the text be further subamended, replacing “should establish” with “may wish to consider establishing”.
- 509.** The Government member of Finland, speaking also on behalf of the Government member of Norway and the Government members of the Committee Member States of the EU, excluding the United Kingdom, suggested that the language proposed by the Employers’ group did not fit with the language found elsewhere. The Employer members’ subamendment of the wording was too loose.
- 510.** The Worker Vice-Chairperson agreed with the Government member of Finland and opposed the subamendment. The original amendment was not prescriptive and retained a significant amount of flexibility. Given the problems workers faced, the set of mechanisms foreseen in the amendment needed to be established.
- 511.** The Government member of Nigeria opposed the subamendment, as it significantly diluted the text. The Paragraph, as introduced, outlined the responsibilities of governments. Since they were willing to take up the responsibility to establish such mechanisms, the text should not be amended.
- 512.** The Government member of Switzerland supported the Employer members’ subamendment, since the resulting text was more flexible.
- 513.** The Government member of South Africa, speaking on behalf of the Africa group, questioned why the Employers’ group had problems with the reference to “should establish”, since the Committee had adopted Paragraph 15, which included the same words. For consistency, he suggested that the Committee retain the language in the original amendment, and opposed the subamendment.
- 514.** The Government member of Lebanon and the Government member of Uruguay, speaking also on behalf of the Government members of Argentina, Brazil, Chile, the Dominican Republic, Mexico and the Bolivarian Republic of Venezuela, supported the amendment and did not support the Employer members’ subamendment.
- 515.** In the light of the opposition to the deletion of “transnational”, the Employer Vice-Chairperson withdrew that part of his group’s subamendment. He appreciated the support that had been given to their suggestion to insert “national”, but added that his group did not support the Paragraph.
- 516.** In response to a statement by the Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, and to a statement by the Chairperson, who explained that the Committee seemed to support the inclusion of “national”, the Worker Vice-Chairperson expressed his concern that this wording



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unnecessarily restricted the flexibility of the guidance contained in the text. However, given the support expressed, the Worker members accepted the Paragraph as amended.

**517.** The proposed new Paragraph after Paragraph 15 was adopted as amended.

### **Paragraph 16**

**518.** The Worker Vice-Chairperson introduced an amendment to delete the words “, where they exist,” in Paragraph 16. Since the Committee had previously adopted a similar amendment, it should also give its support to this amendment, in the interest of consistency.

**519.** The Employer Vice-Chairperson referred to the many other international instruments that dealt with social dialogue and workers’ and employers’ organizations; the wording seemed unnecessary, but before taking a final decision, his group wanted to hear Government members’ views.<sup>11</sup>

**520.** The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, the Government member of Barbados, speaking on behalf of the CARICOM countries previously listed, the Government member of Uruguay, speaking also on behalf of the Government members of Argentina, Brazil, Chile, the Dominican Republic, Mexico and the Bolivarian Republic of Venezuela, and the Government member of Lebanon supported the amendment.

**521.** The amendment was adopted.

**522.** The Employer Vice-Chairperson introduced an amendment to delete the words “and the organization of work” in Paragraph 16. The organization of work was left to every employer’s discretion and should not be included in Paragraph 16.

**523.** The Worker Vice-Chairperson pointed out that Paragraphs 15 and 16 were linked. The mechanism referred to in Paragraph 16 was the same mechanism referred to in Paragraph 15.

**524.** In response to a statement by the Employer Vice-Chairperson, the Worker Vice-Chairperson suggested that, instead of deleting “the organization of work” and thus breaking this link, the Committee consider changing the wording of Paragraph 16 to resemble that of Paragraph 15. This could be achieved by adding “developments in” before “the labour market.”

**525.** The Employer Vice-Chairperson, the Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, the Government member of South Africa, speaking on behalf of the Africa group, and the Government member of Uruguay, speaking also on behalf of the Government members of Argentina, Brazil, Chile, the Dominican Republic, Mexico and the Bolivarian Republic of Venezuela, supported this subamendment.

**526.** The amendment was adopted as subamended.

**527.** Paragraph 16 was adopted as amended.

<sup>11</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

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## **Paragraph 17**

528. Paragraph 17 was adopted without amendment.

## **Heading before paragraph 18**

529. The Committee had postponed the discussion of the two amendments to the heading of Part IV until such time as the Worker and Employer members could reach a consensus. As subsequent informal bipartite consultations did not result in an agreement, the Employer and Worker Vice-Chairpersons withdrew their groups' amendments.<sup>12</sup>

530. The heading was adopted.

## **Paragraph 18**

531. The Worker Vice-Chairperson withdrew an amendment to Paragraph 18 submitted by his group, since it overlapped with a draft resolution to be proposed by the Government members of the Committee Member States of the EU, and was thus superfluous.

532. Given the lack of consensus in relation to Paragraphs 8, 9 and 11, the Employer Vice-Chairperson withdrew his group's amendment to delete Paragraph 18.<sup>13</sup>

533. Since the draft resolution to be proposed would address the issues dealt with in Paragraph 18, the Worker Vice-Chairperson reintroduced the amendment to delete Paragraph 18.

534. The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, the Government member of Chile, speaking on behalf of the Government members of the Committee Member and Associate States of MERCOSUR, and the Government member of South Africa, speaking on behalf of the Africa group, supported the proposal to delete Paragraph 18.

535. Paragraph 18 was deleted.

## **Proposed new Paragraph after Paragraph 18**

536. The Committee had postponed discussion of an amendment, submitted by the Worker members, to insert a new Paragraph after Paragraph 18, until such time as informal consultations could arrive at a text. As these consultations did not result in an agreement, the Worker Vice-Chairperson withdrew the amendment.

537. The Employer Vice-Chairperson introduced an amendment to insert a new Paragraph after Paragraph 18 as follows: "Nothing in this Recommendation should be construed as affecting the meaning or the application of the Private Employment Agencies Convention, 1997 (No. 181), or the Private Employment Agencies Recommendation, 1997 (No. 188)". The proposed amendment aimed to clarify the relationship between the Recommendation and the Private Employment Agencies Convention, 1997 (No. 181), and its accompanying Recommendation, No. 188. The Employer members were concerned that the new

<sup>12</sup> For reasons stated in paragraphs 415, 417 and 421 of this report.

<sup>13</sup> *idem*.

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Recommendation might have adverse effects on Convention No. 181 and breach the careful balance that had been achieved in that earlier instrument. The amendment highlighted the importance of maintaining consistency between ILO instruments and recognized the sensitivity of an issue that was extremely important to the Employers' group. Private employment agencies ensured the smooth and efficient functioning of the economy in many countries. Given the importance of those agencies, a number of countries had found constructive ways of regulating them, while at the same time respecting the agencies' rights and interests.<sup>14</sup>

- 538.** The Worker Vice-Chairperson pointed out that the interplay of instruments was a complex issue. He understood the Employer members' concerns, but requested that the Legal Adviser explain the extent to which the new Recommendation, if adopted, could influence the interpretation of existing ILO instruments. The Legal Adviser might also give an opinion on whether it was more advisable to include a reference to those instruments in the preamble instead of in the operative Paragraphs.
- 539.** In response to the request for clarification on the effect that would result from the adoption of such a Paragraph, the Legal Adviser explained that it was necessary to look at the legal principles followed in the ILO, possible precedent, the ILO's drafting practice endorsed by tripartite consensus and the Final Articles Revision Convention, 1946 (No. 80). The relationship between a Convention and a Recommendation was clearly established in the ILO Constitution and the Standing Orders of the International Labour Conference. A Convention was a treaty, with binding obligations resulting from ratification by a member State and, as such, could not be revised or modified by a Recommendation. It followed that any proposed provision that would suggest that a Recommendation could affect the meaning of a Convention would have no legal effect. As for the relationship between one Recommendation and another Recommendation, it was constitutionally possible to revise a Recommendation only if that intention was explicitly stated in the Governing Body's decision to place the item on the agenda of the International Labour Conference, which had not been the case for the proposed Recommendation here. No precedent had been found where one Recommendation sought to limit another specific Recommendation or Convention in the manner of the amendment under discussion. Very few cases had been identified where a final clause stated specifically that the Recommendation did not revise any existing Recommendation; this was the case in, for example, the Collective Bargaining Recommendation, 1981 (No. 163). Nevertheless, that practice was discouraged given that there was no recognized principle that one Recommendation could implicitly revise another. The vast majority of Recommendations followed the established drafting rule not to have such a reference. Regarding the proposed amendment's reference to affecting the application of the other instruments, the Legal Adviser explained that the term "application" had a specific meaning in the ILO context, as it referred to the supervisory machinery which monitored the application of international labour standards.
- 540.** The Worker Vice-Chairperson appreciated the advice given and proposed a subamendment to reflect the language of the example cited by the Legal Adviser, so that the amendment would read: "This Recommendation does not revise the Private Employment Agencies Convention, 1997 (No. 181), or the Private Employment Agencies Recommendation, 1997 (No. 188)." He feared, however, that this wording still appeared to conflict with the advice given by the Legal Adviser that a Recommendation could not revise a Convention, and any text implying this was to be avoided.

<sup>14</sup> This intervention occurred prior to the Employers' group's disengagement set out in paragraphs 415, 417 and 421 of this report.

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- 541.** The Employer Vice-Chairperson supported the Worker members' subamendment. Despite the advice that it was impossible at law for the proposed Recommendation to revise the Private Employment Agencies Convention, 1997 (No. 181), he considered that it was important for non-lawyers to see in the text clear wording about the relationship with the Convention and Recommendation on private employment agencies.
- 542.** The Government member of Lebanon and the Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, also supported the subamendment. While it spoke to what was already evident – that a Recommendation could not revise a Convention – there nevertheless was value in including it in the text. The Drafting Committee would finalize the exact wording.
- 543.** The Legal Adviser drew attention to article 19(8) of the ILO Constitution, which contained another general principle that governed the deliberations of the International Labour Conference. It stated that in no case should the adoption of a Convention or Recommendation by the Conference, or the ratification of a Convention by any Member, be deemed to affect any law, award, custom or agreement that ensured more favourable conditions to the workers concerned than those which were provided for in the Convention or Recommendation. She noted that the Committee was considering the adoption of text that had no legal meaning, as it made no legal sense to say that a Recommendation did or did not revise a Convention.
- 544.** The Government member of Bahamas, speaking on behalf of the CARICOM countries previously listed, introduced a further subamendment to avoid referring to the specific Convention and Recommendation. The subamendment would replace the words “the Private Employment Agencies Convention, 1997 (No. 181), or the Private Employment Agencies Recommendation, 1997 (No. 188)” with “any existing Convention or Recommendation”.
- 545.** The Worker Vice-Chairperson supported the CARICOM subamendment, although he recognized that it did not address the institutional concern expressed by the Legal Adviser. The Government member of South Africa, speaking on behalf of the Africa group, also supported the CARICOM subamendment, although after listening to the Legal Adviser he considered the amendment to be redundant.
- 546.** The Employer Vice-Chairperson, reiterating the importance in the domestic context of having a provision which clarified that the Recommendation would not interact with those two specifically listed instruments, proposed a further subamendment to the CARICOM subamendment, to read: “any existing Convention or Recommendation, including the Private Employment Agencies Convention, 1997 (No. 181), or the Private Employment Agencies Recommendation, 1997 (No. 188)”.
- 547.** The Worker Vice-Chairperson and the Government member of Canada, the latter speaking on behalf of the Government members of the Committee Member States of IMEC, opposed this further subamendment.
- 548.** The Government member of China warned that the Committee should adopt a cautious approach in the Recommendation, and he therefore supported the CARICOM subamendment to delete the reference to the Convention and Recommendation on private employment agencies.
- 549.** The Employer Vice-Chairperson considered that the discussion was leaning towards a specific rather than a general reference. He therefore withdrew his latest subamendment and reiterated his support for the Worker members' subamendment to state that “This

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Recommendation does not revise the Private Employment Agencies Convention, 1997 (No. 181), or the Private Employment Agencies Recommendation, 1997 (No. 188).”

- 550.** The Worker Vice-Chairperson, on reflection, considered the reference redundant and withdrew the subamendment that mentioned the international instruments by name.
- 551.** The Government member of Germany indicated that the question was one of logic in that a Recommendation could only revise a Recommendation; the proposed amendment and subamendment did not state that, and he could not support them.
- 552.** The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, and supported by the Worker Vice-Chairperson, proposed a further subamendment to insert at the beginning of the proposed new Paragraph the words “In accordance with the Constitution of the ILO,”. He considered that this wording respected the spirit of the amendment, as well as the logic of the ILO’s legal interpretation rules.
- 553.** The Legal Adviser, while welcoming the spirit of the IMEC subamendment, recalled that, in accordance with the Constitution of the ILO, a Convention could be revised exclusively by another Convention. She cautioned against the internal inconsistency that would arise in the proposed text if the subamendment were adopted with this reference to accordance with the ILO Constitution. She explained the legal obligations of the ILO within the United Nations system, including the requirement of registration of treaties with the United Nations.
- 554.** The Employer Vice-Chairperson, welcoming the participation of the Legal Adviser in the debates of the Committee, agreed that legal concepts had to be respected, but so did the sovereignty of the International Labour Conference. He considered that the original Employer members’ amendment to add a new Paragraph was entirely reasonable, avoided any confusion, and respected the legal drafting rules and the Constitution of the ILO.
- 555.** The Chairperson confirmed that she had called for clarification from the Legal Adviser at the request of the Worker Vice-Chairperson. Noting that the Employer members’ amendment was unusual and gave rise to a legal problem which required resolution, she inquired whether a rewording of the Paragraph as follows might be acceptable to all: “This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).”
- 556.** The proposal was unanimously supported by the Committee.
- 557.** The proposed new Paragraph after Paragraph 18 was adopted.

## **Discussion on a draft resolution**

- 558.** The Chairperson sought the clear consent of the Committee to address at this point a draft resolution, proposed by a number of Government members, and noted the Committee’s agreement to this.
- 559.** The Government member of Austria, speaking on behalf of the Government members of the Committee Member States of the EU, and Norway, introduced a draft resolution to instruct the Director-General of the International Labour Office to help all ILO constituents better to understand and address difficulties encountered by workers in certain employment relationships. Noting that proposed Paragraphs 15, 16 and 17 recommended

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that Members should establish and maintain monitoring and implementing mechanisms, the draft resolution aimed at ensuring and reinforcing that there was assistance for such mechanisms, the collection of up-to-date information and comparative studies, and the promotion of good practices.

- 560.** The Employer Vice-Chairperson supported the draft resolution because it was helpful in directing the Office in a practical way and focused on activities that would help member States. He proposed an amendment to add a new subparagraph (d) which invited the Governing Body of the International Labour Office to instruct the Director-General also to: “undertake surveys of legal systems of member States to ascertain what criteria are used nationally to establish the existence of an employment relationship and make the results available to member States to guide them, where the need exists, in developing their own national approach to the issue”. He explained that the intent of the additional subparagraph was evident, as the Government members had expressed the need for guidance, and the ILO had a range of resources available to meet this need.<sup>15</sup>
- 561.** The Worker Vice-Chairperson supported the draft resolution and pointed out that the Drafting Committee should amend paragraph numbering, if necessary. However, he noted that Paragraph 18 of the proposed Recommendation contained almost the exact wording of this draft resolution, except for one phrase that had been omitted in the draft resolution. He therefore proposed an amendment to the fifth preambular paragraph of the draft resolution, to add the words “and in the process achieve a fairer globalization”. He opposed the Employer members’ amendment to add references to research on criteria because the listing of indicators or criteria was the very issue that had been before the Committee in deferred Paragraphs 8, 9 and 11 of the proposed Recommendation, which had not been resolved.
- 562.** The Employer Vice-Chairperson announced that the Employers’ group would no longer participate in the discussion on the draft resolution and withdrew his group’s amendment.<sup>16</sup> He deferred to the social partners to proceed with a bipartite discussion.
- 563.** The Government member of Canada, speaking on behalf of the Government members of the Committee Member States of IMEC, reintroduced the amendment to the draft resolution adding to paragraph 2 a further subparagraph (d), because the reference to surveys on the criteria being used nationally to establish the existence of employment relationships would be very helpful to governments. He proposed a subamendment to renumber that subparagraph as paragraph 3 of the draft resolution.
- 564.** The Worker Vice-Chairperson reported that he had reflected on the content of the draft resolution and still supported it, as renumbered, and withdrew his amendment to add the words “and in the process achieve a fairer globalization”. His group was prepared to support the amendment to the resolution previously submitted to the Committee by the Employers’ group, in the light of the Committee’s adoption of the text of the Recommendation.
- 565.** The Government member of Mexico, speaking on behalf of GRULA and the Dominican Republic, and the Government member of South Africa, speaking on behalf of the Africa

<sup>15</sup> This intervention occurred prior to the Employers’ group’s disengagement set out in paragraphs 415, 417 and 421 of this report.

<sup>16</sup> For reasons stated in paragraphs 415, 417 and 421 of this report.

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group, supported the IMEC amendment as well as the Worker Vice-Chairperson's amendment to withdraw his earlier text.

- 566.** The Employer members withheld their support for each paragraph of the draft resolution and requested that the record show their position that the draft resolution was the result of a bipartite decision and was opposed, as a whole, by the Employers' group.
- 567.** The first, second, third, fourth, fifth and sixth preambular paragraphs, as well as operative paragraphs 1, 2 and 3 were adopted as amended.
- 568.** The draft resolution concerning the employment relationship was adopted as amended.

## Concluding statements

- 569.** The Chairperson stated that she had had mixed feelings when the Recommendation was adopted, because, while pleased that the Committee had arrived at an instrument through great negotiation efforts, she was disappointed that not all elements of the Recommendation had been agreed by consensus. On the whole, the Committee had been more successful than she had expected: all members of the Committee had known that the discussions would be very difficult but had expressed their points of view frankly and clearly; members had been honest with each other; and the debate had been on a very high level even though it concerned a complicated issue. She was proud of the Government group, whose members had come to the discussions well informed and had played a major role in the Committee at key moments, for example, in appealing to both the Worker and Employer members to strive for consensus on the outstanding texts. She thanked all the Government members for the commitment they had shown to social dialogue worldwide. She expressed her respect for the Workers' group, especially the Vice-Chairperson, thanking them for their relentless and firm commitment to improving the situation for women and men workers around the world whose employment status was unclear. She likewise conveyed her respect for the Employer members and their Vice-Chairperson for the way in which they had been clear, firm in their convictions and honest. While they had not been as flexible as she would have liked, she recognized that such flexibility was not always possible. The Employers' group had participated with a great deal of respect for the other groups and for the process. On the outcome of the whole Committee's work – the draft Recommendation and accompanying resolution – a large part of the Recommendation was the fruit of tripartite consensus.
- 570.** The Government member of Nigeria, speaking on behalf of the Government group, expressed their appreciation to the Chairperson for the able manner in which she had conducted the affairs of the Committee. In particular, she thanked the Government members, including the spokespersons for all regional groups, for the constructive contributions they had made to the discussions. She also thanked the Worker and Employer Vice-Chairpersons, as the members of the Committee had learned a great deal from their positions and the way in which they negotiated, which would help them when they returned home to deal with problems faced by workers and employers and improve industrial relations.
- 571.** The Employer and Worker Vice-Chairpersons thanked those members of the Committee who would be leaving before the adoption of the report and highlighted the commitment of all who had taken part in, or contributed to, the work of the Committee.

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## **Adoption of the draft report**

572. The Reporter presented the draft report. The Employer and Worker Vice-Chairpersons, as well as a number of Government members, submitted amendments to the draft report. The Employer Vice-Chairperson stated that his group could not accept the wording as it stood, because, due to the fact that the layout of the report followed the structure of the instrument, his group's disengagement from the process at a certain point was not evident. His group's amendments would attempt to make clear which paragraphs had been accepted and which remained unacceptable to the Employers' group.

573. The draft report, by parts and as a whole, was adopted as amended.

## **Adoption of the proposed Recommendation**

574. The proposed Recommendation was adopted, as amended, by parts and as a whole.

## **Adoption of the draft resolution**

575. The six preambular paragraphs and the three operative paragraphs of the draft resolution were adopted.

## **Closing statements**

576. The Employer Vice-Chairperson recalled that, from the beginning of the process, it had been recognized that there were a number of critical issues that needed to be addressed to obtain a positive outcome. One of them had been that of triangular relationships. He commended the Workers' group for joining the Employers' group in taking an interest-based approach to that problem and coming up with a solution. However, the Committee's success in agreeing on language which demonstrated respect for true commercial relationships, rather than being a cause for celebration, made it even more disappointing for the Employers' group which could not support the instrument. The Employers' group had come to the discussions with an agreement reached in 2003 being disregarded by the Office. The Office had not responded to the Employers' concerns and had produced a text that contributed to this failure because the Employers' group had stated from the outset that it could not support language on indicators and criteria, nor language that would create presumptions of an employment relationship. He considered that the criteria contained in the text now before the Committee were not helpful, and could be abused to characterize many independent contractor relationships as employment relationships. Moreover, the wording would threaten many businesses in the service industry and would create new uncertainty as to relationships. He stressed that the text, despite a promising start in overcoming one hurdle, was an instrument which was largely bipartite, between the Government and Workers' groups. He added that, throughout the discussions the Government group had, with a few exceptions, consistently supported a text that the Employers' group could not support; ironically it was the Workers' group which had been more helpful in finding a balanced and reasonable text, at least in the area of triangular relationships. The Employer Vice-Chairperson emphasized that his group could not support the language on criteria, indicators, and presumption of employment relationship. There had been a way for the Employers' group to say "yes" to the instrument, but this had been denied by a lack of willingness to respond to its concerns.



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**577.** Nevertheless, the Chairperson's efforts were to be complimented. He also thanked the Drafting Committee, which had devoted long hours to a difficult task. Special thanks were due to the Worker Vice-Chairperson and to his group, who had been constructive and positive, seeking a solution to the very end. He also thanked his own Employers' group, which had had to deal with a complicated set of issues and a process which was not the most conducive to dealing with them. He stressed that the Employer members took their work seriously, and had been supportive in exploring alternate solutions.

**578.** The Worker Vice-Chairperson stated that the Committee was proud to have been led by this Chairperson, whose skill, perseverance and impressive knowledge of the subject had contributed greatly to its outcome. He also thanked the Government members who, in the course of the discussions in the Committee and in the informal tripartite working group, had shown a high level of patience, flexibility and insight into the problems faced by workers and employers regarding employment relationships. The Government group had urged the Workers' and Employers' groups to come to an agreement, and had trusted in them to negotiate a solution. He particularly thanked the insight on national situations given by the Government members of Nigeria and New Zealand, as well as the interventions by the Government member of Austria who spoke on behalf of the European Union, not only for the unified position, but also for the ambition for what could be accomplished by the Conference Committee. He noted the humanity that the Africa group had continually brought to the Committee's discussions. The Latin American group impacted strongly on the debates in the Committee and in the working group, where they had made the profound observation that, in order for the standard to be relevant and meaningful, it needed to be more than an empty shell. He congratulated the Government member of Canada for his courteous and calm representation on behalf of the Government members of the Committee Member States of IMEC. He also thanked other Government members who made contributions based on their own positions, for example Lebanon's interventions expanding the Committee's insight into the problem. He also appreciated the competence of the secretariat, led by the representative of the Secretary-General, as well as the interpreters, without whom the Committee would have faced many problems. According to him, the Office text provided a good basis for the Committee's work and reflected the earlier conclusions of 2003 as well as the responses of governments, employers' and workers' organizations. Lastly, he commended the Employer Vice-Chairperson, who had brought an innovative approach to the Committee's work. The Employers' group had worked hard to ensure good bilateral relations, which represented an excellent investment in working together. He also paid tribute to the Workers' group, who humbled him with their insights into national situations. The Worker Vice-Chairperson stated that, on his return to South Africa, he would be proud to report to women such as Ms. Zodwa Zibula (the Kwa Zulu woman textile worker had become an icon representing the importance of the work of the International Labour Conference in Geneva) that their experiences had led to a positive instrument concerning the employment relationship.

**579.** The Secretary-General stated that the employment relationship had been recognized, since 2003, as one of the most challenging and important issues under scrutiny. The question of whether an employment relationship existed between two parties was of crucial importance for many reasons, not least of which was that most legal systems linked workers' protection and access to social security to the existence of such a relationship. As many delegates had observed in the discussion of his report on the changing patterns of work, there was a trend towards more flexible working arrangements, very often in connection with globalization, that affected the employment relationship debate. It was no longer a matter of purely academic interest. Many countries, as witnessed by the Office's law and practice report, had adopted measures to deal with this issue; many others were interested in finding a balanced approach to the development of national policies to address it. The ILO was expected to give initial guidance on this matter, and he congratulated the Committee for the spirit in which it had carried out its work. The Committee's

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deliberations had been open and constructive. All views and concerns had been considered and debated; consensus was reached wherever possible. On the basis of the resulting Recommendation concerning the employment relationship, the Office would continue to build a larger consensus through further dialogue and exchange of views. It would be a helpful instrument to guide member States in developing, improving or maintaining national policies to address this important subject. This issue was in flux and newer and better practices were likely to surface. This underscored the strong resolution concerning the employment relationship, which called on the Office to continue monitoring the issue. He congratulated the Committee members and the secretariat for their hard work.

**580.** The Chairperson thanked the delegates for the open and frank discussion on a difficult issue. Points of view had been expressed freely and the level of debate had been one of the highest that she had experienced in the ILO. The Government members had played a major role. She praised them for having been united and strong; they had made it known that they did not want an empty shell and had consistently called for guidance on what was and what was not an employment relationship. In particular, she thanked the Government members who had spoken on behalf of the Government members of countries of regional groups: Argentina on behalf of MERCOSUR, Austria on behalf of the EU, Canada on behalf of IMEC, and South Africa on behalf of the Africa group. She also appreciated the inputs of the Government members of India and New Zealand for their active participation in the working group, and the Government member of Nigeria for having chaired the Government group. She recalled that the Employer members had had serious concerns and had made no secret of this. They had wished to guard against an undue shift of responsibility to employers and, while they also wanted due protection for those in an employment relationship, they had no interest in a definition of such a relationship. She congratulated the Employer Vice-Chairperson who had been clear and straightforward, and had participated actively in the Committee. Regarding the Employer Vice-Chairperson's disappointment concerning the "Office text" when referring to the text of the proposed Recommendation, she reminded the Committee that the Office had done nothing more than cut and paste the replies received to the questionnaire. The Office was merely a facilitator of a process. The content of the Recommendation that they had adopted had been shaped by the opinions of the members of the Committee. Summing up the Workers' group's position, the Chairperson noted that they had been particularly interested in the protection of workers in an employment relationship and in preventing the serious problems that could arise when the employment relationship was unclear. She praised the Worker Vice-Chairperson for the great job he had done, which she believed would protect the *Zodwas* of this world. She saw the deliberations of the Committee as tripartism in action. While it would have been even better had there been agreement on the original Paragraphs 8, 9 and 11, she considered the result more than acceptable. She thanked the secretariat, especially the interpreters, without whom the work of the Committee would not have proceeded successfully.

Geneva, 12 June 2006.

*(Signed)* A. van Leur,  
Chairperson.

A. van Zyl,  
Reporter.

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## Proposed Recommendation concerning the employment relationship

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Ninety-fifth Session on 31 May 2006, and

Considering that there is protection offered by national laws and regulations and collective agreements which are linked to the existence of an employment relationship between an employer and an employee, and

Considering that laws and regulations, and their interpretation, should be compatible with the objectives of decent work, and

Considering that employment or labour law seeks, among other things, to address what can be an unequal bargaining position between parties to an employment relationship, and

Considering that the protection of workers is at the heart of the mandate of the International Labour Organization, and in accordance with principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and the Decent Work Agenda, and

Considering the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application, and

Noting that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due, and

Recognizing that there is a role for international guidance to Members in achieving this protection through national law and practice, and that such guidance should remain relevant over time, and

Further recognizing that such protection should be accessible to all, particularly vulnerable workers, and should be based on law that is efficient, effective and comprehensive, with expeditious outcomes, and that encourages voluntary compliance, and

Recognizing that national policy should be the result of consultation with the social partners and should provide guidance to the parties concerned in the workplace, and

Recognizing that national policy should promote economic growth, job creation and decent work, and

Considering that the globalized economy has increased the mobility of workers who are in need of protection, at least against circumvention of national protection by choice of law, and

Noting that, in the framework of transnational provision of services, it is important to establish who is considered a worker in an employment relationship, what rights the worker has, and who the employer is, and

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Considering that the difficulties in establishing the existence of an employment relationship may create serious problems for those workers concerned, their communities, and society at large, and

Considering that the uncertainty as to the existence of an employment relationship needs to be addressed to guarantee fair competition and effective protection of workers in an employment relationship in a manner appropriate to national law or practice, and

Noting all relevant international labour standards, especially those addressing the particular situation of women, as well as those addressing the scope of the employment relationship, and

Having decided upon the adoption of certain proposals with regard to the employment relationship, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of a Recommendation;

adopts this ... day of June of the year two thousand and six the following Recommendation, which may be cited as the Employment Relationship Recommendation, 2006.

#### I. NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

1. Members should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.

2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.

3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.

4. National policy should at least include measures to:

- (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;
- (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;
- (c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties so that employed workers have the protection they are due;

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- (d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;
  - (e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;
  - (f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and
  - (g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.

5. Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

6. Members should:

- (a) take special account in national policy to address the gender dimension in that women workers predominate in certain occupations and sectors where there is a high proportion of disguised employment relationships, or where there is a lack of clarity of an employment relationship; and
- (b) have clear policies on gender equality and better enforcement of the relevant laws and agreements at national level so that the gender dimension can be effectively addressed.

7. In the context of the transnational movement of workers:

- (a) in framing national policy, a Member should, after consulting the most representative organizations of employers and workers, consider adopting appropriate measures within its jurisdiction, and where appropriate in collaboration with other Members, so as to provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship;
- (b) where workers are recruited in one country for work in another, the Members concerned may consider concluding bilateral agreements to prevent abuses and fraudulent practices which have as their purpose the evasion of the existing arrangements for the protection of workers in the context of an employment relationship.

8. National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

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## II. DETERMINATION OF THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

9. For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

10. Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.

11. For the purpose of facilitating the determination of the existence of an employment relationship, Members should, within the framework of the national policy referred to in this Recommendation, consider the possibility of the following:

- (a) allowing a broad range of means for determining the existence of an employment relationship;
- (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and
- (c) determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.

12. For the purposes of the national policy referred to in this Recommendation, Members may consider clearly defining the conditions applied for determining the existence of an employment relationship, for example, subordination or dependence.

13. Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. Those indicators might include:

- (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
- (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

14. The settlement of disputes concerning the existence and terms of an employment relationship should be a matter for industrial or other tribunals or arbitration authorities to which workers and employers have effective access in accordance with national law and practice.

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15. The competent authority should adopt measures with a view to ensuring respect for and implementation of laws and regulations concerning the employment relationship with regard to the various aspects considered in this Recommendation, for example, through labour inspection services and their collaboration with the social security administration and the tax authorities.

16. In regard to the employment relationship, national labour administrations and their associated services should regularly monitor their enforcement programmes and processes. Special attention should be paid to occupations and sectors with a high proportion of women workers.

17. Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.

18. As part of the national policy, Members should promote the role of collective bargaining and social dialogue as a means, among others, of finding solutions to questions related to the scope of the employment relationship at the national level.

### III. MONITORING AND IMPLEMENTATION

19. Members should establish an appropriate mechanism, or make use of an existing one, for monitoring developments in the labour market and in the organization of work, and for formulating advice on the adoption and implementation of measures concerning the employment relationship within the framework of the national policy.

20. The most representative organizations of employers and workers should be represented, on an equal footing, in the mechanism for monitoring developments in the labour market and the organization of work. In addition, these organizations should be consulted under the mechanism as often as necessary and, wherever possible and useful, on the basis of expert reports or technical studies.

21. Members should, to the extent possible, collect information and statistical data and undertake research on changes in the patterns and structure of work at the national and sectoral levels, taking into account the distribution of men and women and other relevant factors.

22. Members should establish specific national mechanisms in order to ensure that employment relationships can be effectively identified within the framework of the transnational provision of services. Consideration should be given to developing systematic contact and exchange of information on the subject with other States.

### IV. FINAL PARAGRAPH

23. This Recommendation does not revise the Private Employment Agencies Recommendation, 1997 (No. 188), nor can it revise the Private Employment Agencies Convention, 1997 (No. 181).

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## Resolution concerning the employment relationship

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 95th Session, and

Having adopted the Recommendation concerning the employment relationship,

Noting that Paragraphs 19, 20, 21 and 22 recommend that Members should establish and maintain monitoring and implementing mechanisms, and

Noting that the work of the International Labour Office helps all ILO constituents better to understand and address difficulties encountered by workers in certain employment relationships,

Invites the Governing Body of the International Labour Office to instruct the Director-General to:

1. Assist constituents in monitoring and implementing mechanisms for the national policy as set out in the Recommendation concerning the employment relationship;

2. Maintain up-to-date information and undertake comparative studies on changes in the patterns and structure of work in the world in order to:

- (a) improve the quality of information on and understanding of employment relationships and related issues;
- (b) help its constituents better to understand and assess these phenomena and adopt appropriate measures for the protection of workers; and
- (c) promote good practices at the national and international levels concerning the determination and use of employment relationships;

3. Undertake surveys of legal systems of Members to ascertain what criteria are used nationally to determine the existence of an employment relationship and make the results available to Members to guide them, where this need exists, in developing their own national approach to the issue.



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