



Governing Body

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Legal Issues and International Labour Standards Section

LILS

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PROVISIONAL REPORT

Legal Issues and International Labour Standards Section

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1. The Legal Issues and International Labour Standards Section met on Tuesday, 15 November 2011. The person chairing the Section was Mr G. Corres (Government, Argentina). Mr de Regil and Mr Cortebeeck were the Employer and Worker spokespersons.

Legal Issues Segment

First item on the agenda

Promotion of the ratification of the 1986 Instrument of Amendment of the Constitution of the International Labour Organization

2. The Governing Body had before it a paper¹ on promotion of the ratification of the 1986 Instrument of Amendment of the Constitution of the International Labour Organization.
3. A representative of the Director-General (the Legal Adviser) introduced the document, recalling that the Governing Body had decided in November 2010 to relaunch the campaign for the ratification of the Amendment. To that effect, the Office presented a series of actions which had been undertaken throughout 2011, the main ones being set out in the document presented to the Governing Body. Those efforts, which had been ongoing since spring 2011, had not yet had an impact on the number of new ratifications. In all likelihood, that situation was due to the amount of time necessary for ratification to be carried out.
4. Furthermore, since the publication of the document, a special information session had been organized at the 12th African Regional Meeting, held in Johannesburg in October 2011. The discussions which had taken place during that session had given rise to two types of comments. A number of participants, in particular the Governments, had argued that the Office should further intensify its efforts with a view to the ratification of the Amendment. The Employers and the Workers on the other hand had, in general, noted that the entry into force of the Amendment was far from being a certainty and that, in that case, if the aim was to fulfil the objectives implied by the Amendment, in particular, the alteration of the structure of the Governing Body, then another way would have to be found.
5. The Worker spokesperson, supporting the point for decision, welcomed the Office's efforts to promote the ratification of the 1986 Instrument of Amendment, reiterated his group's support for that Amendment and invited the Office to continue its efforts at promotion. The group was pleased with the side event organized at the African Regional Meeting and supported a similar initiative during the Asia and the Pacific Regional Meeting in December 2011. Given the fact that three more ratifications were needed among countries of chief industrial importance, the Office should work closely with the Governments concerned in order to clarify any possible point that could prevent ratification of the Amendment. If current efforts did not lead to the foreseen results, the ILO might need to seriously look into possible alternatives, as had already been discussed in the past.

¹ GB.312/LILS/1.

- 6.** The Employer spokesperson, agreeing with the point for decision, found the action taken by the Office appropriate and complete. The Office should keep reporting to the Governing Body on ratification progress at regular intervals until entry into force. His group also welcomed the proactive approach taken with regard to another ratification campaign relating to the 1997 Instrument of Amendment of the Constitution. On 29 June 2011, the Office had received the instrument of ratification by Slovenia, which meant that only two more ratifications or acceptances were needed for entry into force.
- 7.** A Government representative of Switzerland stated that his delegation was in favour of the rapid entry into force of the 1986 Instrument of Amendment of the Constitution, which had been approved by Switzerland through a decision of 15 June 1987. The measures to be considered regarding the promotion of the Instrument and the process of encouraging the Governments concerned to proceed with its approval should involve targeted action by the Director-General focusing on the eight Members of chief industrial importance, who had yet to accept the Instrument, as well as on around 30 additional Members who could benefit from the entry into force of the Instrument of Amendment. Certain points of the Amendment having already been applied, in particular with regard to the increase in the number of seats in the Governing Body and various aspects concerning the regions, his delegation would be grateful if the Office would provide the Governing Body, for its 313th Session in March 2012, with a document presenting the additional measures to be taken in order to enable other points of the Amendment to be implemented while awaiting a sufficient number of ratifications.
- 8.** A Government representative of Zambia, observing the long delay in entry into force, urged member States of chief industrial importance and other ILO member States to consider ratification of the 1986 Instrument of Amendment.
- 9.** A Government representative of Algeria believed that the Amendment represented a real reform of the ILO. In calling on all those States which had not ratified the Amendment to do so, the non-aligned countries had already taken a decision. The African Union (AU) Labour and Social Affairs Commission had taken the same approach by encouraging all those African countries which had not yet ratified the Amendment to take that step because the Amendment would give rise to fair representativeness between the different continents. Everything possible should be done to ensure implementation as soon as possible.
- 10.** A Government representative of India recalled that his country had ratified the Amendment as early as 22 September 1988, primarily because it would widen the coverage of geographical representation in the Governing Body. The success of any proposal for amendment depended on its universal appeal and all-round support to member States.
- 11.** The Africa group had welcomed the presentation made at the African Regional Meeting held in Johannesburg, South Africa, in October 2011. The spokesperson for the group (a Government representative of Angola) pointed out that more than 27 additional ratifications or acceptances were needed and, given the importance of the Amendment, the group called on the Director-General to play his part by ensuring that the Office actively encouraged the member States to proceed with ratification. The Africa group enjoined all the constituents, and in particular the regional groups, to go ahead with ratification in order to promote a more democratic governance of the Governing Body of the ILO. The entry into force of the Amendment would underline the principles of equity and justice promoted by the ILO, ensuring the Organization's leading role in that regard within the multilateral system.
- 12.** A Government representative of Kenya noted that the principal aim of the proposed Amendment was to make the composition of the Governing Body more representative by

providing a means of appointment that took into account the various geographic, economic and social interests of its constituent groups. The failure to bring into force the 1986 Instrument of Amendment perpetuated the unbalanced representation of Africa, as it remained the only region without permanent representation on the Governing Body. It was more than an African problem, since it underpinned the governance and equity of an international organization, and the ILO had been at the centre of promoting good governance, non-discrimination, diversity and equality in the world of work and beyond. The Office should not only continue the campaign to promote the ratification of the 1986 Instrument, but also submit other options aimed at ensuring Africa's permanent representation for consideration by the Governing Body in March 2012.

13. *The Governing Body took note of the progress report, encouraged the Office to continue to promote ratification of the 1986 Instrument of Amendment to the Constitution of the International Labour Organization, taking into account the guidance provided during its discussion, and requested the Office to provide updated information at its 313th Session. The Office was further encouraged to consider new proposals arising from the discussion for presentation, as appropriate, to a future session of the Governing Body.*

Second item on the agenda

Matters relating to the representation of employers and workers at the International Labour Conference: Addressing tripartite imbalance within delegations

14. The Governing Body had before it a document ² containing further information and proposals regarding the question of tripartite imbalance in delegations to the International Labour Conference (ILC).
15. A representative of the Director-General (the Legal Adviser), introducing the document, recalled that the item, which had already been discussed at earlier sessions of the Governing Body, concerned imbalance in Conference delegations between the number of advisers in the Government delegation and the number of advisers accompanying the Employers' and Workers' delegates. He referred to the awareness-raising measures undertaken by the Office and to action taken by the Credentials Committee at the 100th Session (June 2011) of the International Labour Conference. As stated in the Committee's report, communications received from governments revealed that the imbalance was often due to the presence of diplomats from the permanent mission in Geneva. One solution could be for certain participants to be accredited as "persons accompanying the minister" or "other persons attending the Conference" rather than as advisers, and some Governments had adjusted their credentials accordingly. The Committee therefore believed that awareness-raising measures could reduce the number of imbalanced delegations. A decision by the Governing Body was now needed on whether the Office should continue awareness-raising or prepare draft amendments to the Standing Orders of the Conference to extend the mandate of the Credentials Committee with respect to tripartite imbalance in delegations.

² GB.312/LILS/2.

16. An Employer member, speaking on behalf of the Employers' group, stressed that tripartite imbalance in ILC delegations was endangering the main pillar of the ILO, which was the principle of tripartism and its notion of equality of arms. Following discussions on the subject in the former Committee on Legal Issues and International Labour Standards in March and November 2010, the Office had added a reference to the requirement of balanced delegations in the convocation letter and inserted explanatory text in the *Conference guide* and the *Explanatory note* on the submission of credentials. The question before the Governing Body was whether it wished to further examine the possibility of amending the Conference Standing Orders or whether it was satisfied with the continuation of awareness-raising activity by the Office and possible action by the Credentials Committee under its current mandate. The Employers supported both proposals contained in the document, in paragraph 7(a) and (b), which were not mutually exclusive. On the one hand, awareness-raising measures were important in many cases and should be continued. On the other hand, it was noted that in 2011 the Credentials Committee had expressed the view that serious cases of imbalance could be best identified and addressed on the basis of specific allegations and had requested the Governing Body to continue considering the possibility of extending the Committee's mandate to specific submissions based on alleged tripartite imbalance in a delegation. As the Committee's current mandate was not adequate to cover those cases, the Employers proposed to consider the possibility of extending the Credentials Committee's mandate. Lastly, it could be suggested that the Credentials Committee undertake in 2012 an analysis of the situation regarding tripartite imbalance of delegations attending the 101st Session of the International Labour Conference in order to have a clearer picture of the reasons for imbalance and that the Governing Body be informed of the outcome.
17. The Worker spokesperson welcomed the awareness-raising activities and the fact that the Credentials Committee had examined the situation in June 2011. As tripartism was the foundation of the Organization, a real and balanced participation in the work of the Conference by all three constituent groups ensured that the outcomes of the Conference corresponded to the needs of the contemporary world of work. The presence of advisers in the work of the Conference was necessary to allow social partners to take part in the work of the various committees. Serious and manifest imbalance in delegations affected tripartism by making it difficult for social partners to play their constitutional role. The Workers welcomed the efforts made by a number of Governments at the 2011 session of the International Labour Conference to adjust their delegations by changing the status of advisers to persons accompanying the minister or other participants in order to reflect the fact that those persons were not members of technical committees. However, as acknowledged by the Credentials Committee, there were cases where numerical imbalances in the number of advisers corresponded to a serious inequality, and those cases could best be identified on the basis of specific allegations. The Workers' group therefore supported an extension of the mandate of the Credentials Committee to cover those types of allegations, since the Standing Orders of the Conference currently allowed for complaints only in cases of manifest imbalance with regard to travelling and subsistence expenses and hence only addressed certain situations of imbalance. The Workers therefore supported the point for decision in paragraph 7(b).
18. The group of industrialized market economy countries (IMEC) welcomed the awareness-raising activity by the Office and the Credentials Committee regarding the requirement for balanced tripartite Conference delegations, as well as the respective improvements to the Conference convocation letter, the *Conference guide* and the *Explanatory note*. The spokesperson for the group (a Government representative of Canada) noted that when, at the last session of the Conference, Governments had been invited by the Credentials Committee to provide information on the reasons for the imbalance in their delegations, the reasons provided had revolved, as IMEC had expected, around the functions in the delegation that were assigned to diplomats of the permanent missions. A number of

Governments had subsequently adjusted their delegations by changing the status of advisers to persons accompanying the minister or other participants. IMEC expected that such awareness raising would further contribute to reducing the number of imbalanced delegations at future sessions. It therefore encouraged the Office and the Credentials Committee to continue awareness-raising activity with governments and supported decision point 7(a).

19. The Group of Latin American and Caribbean Countries (GRULAC) reiterated the group's traditional position in supporting all provisions concerning the representation and participation of the delegates of each of the tripartite constituents. The spokesperson for the group (a Government representative of Brazil) welcomed the action taken by the Credentials Committee at the last session of the Conference, which coincided with the follow-up by the Governing Body, and the fact that express reference was made in the document to the 17 cases in which the credentials submitted by a Government appeared to reveal a notable imbalance between the number of Government advisers accredited and the number of both Employers' and Workers' advisers accredited. His group appreciated the fact that the governments had responded to the Committee's invitation to voluntarily provide reasons and, in some cases, take immediate steps to correct the imbalance. In the group's view, the circumstances did not make it necessary to amend the Standing Orders of the Conference with a view to extending the Credentials Committee's mandate regarding tripartite imbalance in delegations. The Credentials Committee had observed that at the 100th Session of the Conference – as at the 99th Session – it had not received any specific communication on tripartite imbalance in the composition of a delegation. The Office was therefore encouraged to continue awareness-raising activity, keep the question under review and report relevant future developments to the Governing Body, as proposed in paragraph 7(a) of the document.
20. The Worker spokesperson noted that the Governments generally supported the decision point in paragraph 7(a) and that the Employers could accept paragraph 7(a) and (b). The Workers could also agree with paragraph 7(a) on the understanding that, if the awareness-raising activities proved insufficient in reality, it should remain possible to reconsider amendments to the Standing Orders of the Conference, as suggested in paragraph 7(b).

Governing Body decision:

21. *The Governing Body requested the Office to continue awareness-raising activity with governments on the question of tripartite imbalance in Conference delegations, keep the question under review and report relevant future developments to the Governing Body, keeping in mind, as the developments may justify, the possibility of amending the Conference Standing Orders in order to extend the mandate of the Credentials Committee to submissions alleging tripartite imbalance.*

(GB.312/LILS/2, paragraph 7, as amended).

Third item on the agenda

Standing Orders of the Conference: Amendments related to the reform of the Governing Body

22. The Segment had before it a document³ for decision containing a proposal for a consequential amendment of the Standing Orders of the International Labour Conference in the light of the reform package to improve the functioning of the Governing Body adopted at its 310th Session.
23. The Worker spokesperson agreed with the proposal for an amendment and endorsed the point for decision.
24. The Employer spokesperson also agreed with the point for decision.
25. The Africa group took note of the proposal for a consequential amendment and supported the point for decision.
26. The Government group observed that, before the reform of the Governing Body, there had been a double examination of matters involving expenditures, by the Programme, Financial and Administrative (PFA) Committee and by the Governing Body, when it came to proposals with financial implications in the context of the Conference. The spokesperson for the group (a Government representative of Sudan) said that, as a consequence of the reform, there was no double examination, since the Governing Body was now organized in sections and the PFA Section was part of the Governing Body plenary. If article 18 of the Standing Orders of the Conference were to be amended as proposed in the document, when the Governing Body delegated to its Officers the authority to exercise the responsibilities under that article, all decisions taken by the Officers on PFA matters would be taken without the participation of Governments. That was due to the fact that, although the officers reflected a tripartite composition, the Government Officer did not represent the Governments as a whole. In the light of the importance it attached to the approval of expenditures, the Government group requested that it be engaged in any final decisions related to proposals involving expenditure. Consequently, it requested that the matter be deferred to the March 2012 session of the Governing Body, in order to analyse its full implications, including in the context of the reform of the International Labour Conference.

Governing Body decision:

27. *The Governing Body decided to defer the matter to the 313th Session (March 2012) of the Governing Body.*

(GB.312/LILS/3, as amended).

³ GB.312/LILS/3.

International Labour Standards and Human Rights Segment

Fifth item on the agenda

Improvements in the standards-related activities of the ILO

ILO standards policy: The establishment and the implementation of a standards review mechanism

28. The Governing Body had before it a document⁴ containing proposals for the establishment and implementation of a standards review mechanism (SRM).
29. A representative of the Director-General (Ms Doumbia-Henry, Director, International Labour Standards Department (NORMES)), recalled that the proposals contained in the Office paper were based on a long series of consultations and discussions, beginning in November 2005, on the four components of the ILO standards strategy. The proposed SRM was the central element of the first component of the standards strategy, namely standards policy. Agreement had already been reached on the other three elements of the standards strategy. Through a series of informal consultations, starting in 2009 and leading to discussions in LILS in November 2010 and March 2011, a convergence of views had emerged on the definition of an ILO standards policy, its guiding principles, and the role of LILS. It had been agreed that the 2008 Declaration on Social Justice for a Fair Globalization would provide the framework for the SRM. Based on the convergence of views, the Office paper therefore drew together the core components of standards policy and provided an overview of the main elements of an SRM. Decisions would be needed on several matters. They included the composition of the working group that would undertake the review of standards, which could be based on the 8:4:4 formula (eight Government members and four members each for the Employers' and Workers' groups) or 8:8:8 (the same number of members for each group). Two options were also outlined for the standards to be reviewed, a broad one and a limited one.
30. In conclusion, she emphasized that the proposals under consideration offered the ILO a unique opportunity to reassert the role of international labour standards (ILS) as a benchmark and point of reference, to support and give meaning to globalization and to respond to the call for social justice, freedom, dignity, effective protection for workers and sustainable enterprises. They offered the opportunity to maintain and dynamize one of the ILO's unique advantages.
31. The Employer spokesperson indicated that, while agreeing with the proposal for elements of the SRM, the Employers' group sought a number of improvements. First of all, the SRM should be established on a permanent basis with the objective of ensuring that the ILO, at any time, had in place a robust body of standards that responded to the changing needs of the world of work, the protection of workers and the promotion of sustainable enterprises. Past review exercises had clearly shown the need for the SRM to be a permanent mechanism that kept ILO standards under periodic review, although the possibility should not be excluded of adapting the SRM in future in line with emerging

⁴ GB.312/LILS/5.

needs, or indeed terminating it if it became obsolete. The most important guiding principle was that the decisions of the SRM should be responsive and relevant to the needs of the world of work. In that regard, it was very important for each group to embark on the exercise in good faith. The Employers were committed to building with the other groups the trust that was key to the development of the SRM. However, in contrast with the indication contained in the paper, the consequences of the absence of a new decision would need to be considered in the concrete circumstances of each case, as it might not always make sense to go back to pre-existing decisions that might have been taken many years earlier in a totally different situation.

- 32.** The speaker added that the working group should consist of 24 members, including eight Employer and eight Worker members, which would ensure a balanced representation by region and level of development. In relation to procedural matters, the Employers' group agreed with the proposals in the Office paper, although it considered that meetings of the working group should not be strictly limited to one day. Rather than the Office overseeing the SRM, it would be more appropriate for LILS to do so, on the understanding that ACT/EMP and ACTRAV would be involved in the Office's preparations for the work of the SRM, as appropriate. On the subject of the proposed terms of reference and working methods, the SRM should clearly define the different types of statuses for the classification of standards. In terms of the selection of the standards to be reviewed, it was clear that a permanent SRM would necessarily examine all ILO standards at some point in time, perhaps with the exception of the fundamental and governance standards, and those that had been replaced, withdrawn, or consolidated. Outdated instruments should also be excluded. The Employers' group therefore preferred the first option outlined in the Office paper, although it could also accept the second option on the understanding that, although priority would be given to the standards in that group, the examination of the other standards would follow later. Finally, the Employers agreed that the time frame for the work of the SRM should be in keeping with the schedule of the recurrent reviews, although sufficient flexibility should be allowed for adaptation where necessary. They did not have strong views as to whether the SRM examinations should precede or follow the corresponding recurrent discussions.
- 33.** The Worker Vice-Chairperson emphasized that the objective of the SRM was to achieve stronger support for ILO standards and the ILO supervisory mechanism, with proactive support from the Office for their further ratification. The 2008 Declaration, which underpinned the whole process, reasserted standards as the cornerstone of ILO activities and recalled the responsibility of member States to review their situation with regard to ILO instruments with a view to achieving progressively increased coverage of each of the strategic objectives. The G20 had also emphasized the importance of ratifying and implementing standards. It should be recalled that the primary purpose of ILS was to protect the rights of workers, who were the weakest party in the employment relationship. The indication in the Office paper that standards also had to take into account the need for sustainable enterprises gave the misleading impression that the protection of workers' rights would be conditional on the need for sustainable enterprises. Moreover, he emphasized the key importance of the legal principle that, in the absence of a new decision resulting from consensus, the pre-existing decision taken in respect of any instrument would remain valid until replaced. That principle guaranteed legal certainty. The Workers therefore expected Employers and Governments to subscribe to that principle and firmly requested the Office to draw on the conclusions of that principle in developing labour standards activities. Actually, if that principle had been respected during the review of the Cartier Working Party, the status of the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), would have been up to date.

34. He added that the actions taken for the promotion of up-to-date standards, including technical cooperation, were a key part of the Office's mandate. The issue of the promotion of standards, including the preparation of plans of action, should not be part of the mandate of an SRM and should be removed from the suggested terms of reference. He considered that, in the new setting of Governing Body reform, standards were not yet fully mainstreamed and that interaction between the technical departments and NORMES was still work in progress. Such links should be emphasized as the real way forward to ensure that standards were adequately addressed. Although he welcomed the indication that the 2008 Declaration constituted the overarching framework of the review, the linkages between the SRM and recurrent item discussions were not clear. It was important not to use the same methods as the Cartier Working Party. Instead, there should be better synergies between Office units and, for instance, the SRM might refer some groups of Conventions to meetings of experts, or request further studies, as appropriate. Such processes combined expert technical work and tripartite discussions that took into account the needs of both developing and developed countries. It was therefore to be regretted that such flexibility appeared to be missing from proposals outlined in the Office paper.
35. The Workers' group believed that the SRM should cover the instruments indicated in the second option, namely the standards not reviewed by the Cartier Working Party and adopted between 1985 and 2000, the instruments for which the Cartier Working Party had requested further information, those classified by the Cartier Working Party as having interim status, and those that remained to be revised. The Workers did not consider that Convention No. 158 and Recommendation No. 166 should be covered by the SRM, as they had recently been reviewed by a meeting of experts. The option of reviewing all standards (option 1) was not relevant, as the SRM needed to prioritize its work and finalize what the Cartier Working Party had not covered. However, it was important for governments to follow-up on the recommendations of the Cartier Working Party and ratify the Conventions considered to be up to date. In specific cases, the SRM should also be able to examine certain up-to-date instruments and, for example, suggest the elaboration of a protocol to a given Convention. For that purpose, it would be necessary to consider standards as an entire body, rather than on a case-by-case basis, as the Cartier Working Party had done, which meant that the review should precede, rather than follow the recurrent discussions.
36. Finally, it should be emphasized that the primary condition for the Workers' group to proceed with an SRM was the existence of trust that the three parties were willing to engage in the process of strengthening standards and achieving higher rates of ratification and implementation. Unfortunately, the meeting of experts on Convention No. 158 had created doubts that such a condition would be met. It was a matter of principle that all groups needed to be committed to the implementation of rights at work and the protection of workers. Convention No. 158, which lay at the heart of decent work, provided workers with a basic right in the event of unfair dismissal. Without wishing to question the position taken by one of the tripartite constituents on a specific Convention, what gave rise to concern was that the Worker and Government experts had had to wait until the last day of the meeting to be told that the Employers simply wanted the abrogation of the Convention. In the light of the meeting of experts on Convention No. 158, it was to be feared that an SRM might result in a situation in which the Employers called for the abrogation of all the Conventions they did not like. One solution might be to use the resources proposed for the SRM to convene a tripartite working group with a view to discussing the mix of technical and policy proposals that could be envisaged, based on common values concerning what was to be achieved through the process, and linking it to the social justice mandate and recurrent item discussions. The issues at stake were of the utmost importance for workers and their families worldwide and the process could not be engaged in lightly.

- 37.** IMEC hoped that the proposals in the Office paper would lead to the setting up of the SRM by March 2012. The spokesperson for the group (a Government representative of Canada) said that IMEC had previously indicated its agreement with the establishment of an SRM, for which the priorities would need to be established and which would complete the work of the Cartier Working Party. All the parties would need to have full confidence in the SRM, which should be flexible, regularly evaluated and adjustable as necessary. Emphasis should be placed on the importance of clarity, transparency and consistency, as well as the principle of consensus. The process should be comprehensive and complete, and it would be important to have a clear understanding of the distinct roles and strengths of the SRM, LILS, the recurrent discussions, and the International Labour Conference, respectively, in achieving the overall goal of improving ILO standards-related activities.
- 38.** IMEC supported the proposed objectives of the SRM, and its focus on an up-to-date body of standards. The outcomes of the SRM should include a clear follow-up mechanism to ensure that instruments in need of revision or partial revision were put on the agenda of the ILC within a reasonable time. IMEC also agreed with the proposed guiding principles, the proposed framework of the SRM, and the role of LILS. A single tripartite working group should be established with an 8:4:4 composition, and its members would need to be knowledgeable concerning ILO standards, their evolution, implementation and interpretation, and the functioning of the supervisory bodies. Nevertheless, membership should be flexible to enable the groups to change their representatives according to the subjects under discussion, with an independent chair from the Government group, in addition to the eight Government members. Out-of-session consultations should be held to keep the process as inclusive as possible. The working group could meet once during each March and November Governing Body session, and its costs would be met through existing resources. Although the group supported the participation of non-Governing Body members, such participation should be limited for cost reasons: for instance, the Workers' and Employers' groups might each nominate one non-Governing Body member and the Government group two. The amount of the proposed budget should be reduced to US\$189,600, in view of the reduced participation of non-Governing Body members.
- 39.** IMEC agreed with the proposed terms of reference and working methods and considered that the review should proceed by strategic objective, although care should be taken to ensure coherent outcomes for the instruments on specific categories of workers, which usually covered more than one strategic objective. Although there was value in the holistic approach in option 1 for the standards to be reviewed, the review might need to be carried out in stages. Within each group of instruments, priority should be given to the issues left open by the Cartier Working Party. What was missing from the second option was the examination of instruments on the specific categories of workers, and whether they might be improved by consolidation, along the lines of the Maritime Labour Convention, 2006 (MLC, 2006), and the fishing instruments. With regard to the time frame of the review, the working group should benefit from input from the respective recurrent discussions, and it would not therefore be logical to start with social dialogue. Once the first subject had been chosen, the next would automatically follow the sequence of the recurrent discussions, although LILS should have autonomy to review and amend the time frames, as necessary.
- 40.** The Asia and the Pacific group welcomed the establishment of an SRM. The spokesperson for the group (a Government representative of the Islamic Republic of Iran) emphasized the other three interrelated and mutually reinforcing components of the standards policy and the need to improve the impact of the standards system by delivering efficient technical cooperation projects. The objectives and proposed outcomes of the SRM should also include ascertaining the reasons or constraints for non-ratification and investigating the manner in which existing standards could be made more flexible for wider ratification. The proposed composition of the tripartite working group provided for the proper representation of all ILO constituents, fair regional representation and a balance between

developed and developing countries. A single working group should be established with an 8:4:4 composition, including non-Governing Body members. Out-of-session consultations should be held with non-Governing Body members, at no cost to the Office, with the working group meeting during the March and November Governing Body sessions.

41. The Asia and the Pacific group preferred the option of the reviews following the respective recurring discussions, and believed the General Surveys would be excellent starting points for reviews. The purpose of the SRM was distinct from the task of reviewing standards policy. The SRM should first identify and prioritize the standards that best met the needs, challenges and opportunities prevailing in today's world of work. In addition to its existing knowledge and expertise, the Office should not hesitate to initiate new research. In view of the vital importance of the SRM in increasing the relevance, scope and impact of the Organization, members of the working group should have in-depth knowledge of ILO standards, the history of standard-setting mechanisms and the results of earlier standards reviews, as well as ample technical competence and experience of the various legal, social and economic systems, and the different labour law systems.
42. GRULAC welcomed the in-depth paper and supported the establishment of an SRM from 2012 with a view to obtaining a clear, robust and up-to-date body of ILO standards. The spokesperson for the group (a Government representative of Brazil) while agreeing with the proposed objectives and outcomes, observed that non-ratification did not necessarily mean non-compliance, as national labour laws often set out, and even went beyond the minimum standards of international conventions. Although the group endorsed the proposed guiding principles, constituents should not be called upon to make decisions "as quickly as possible", but rather the most appropriate decisions, with emphasis being placed on the support that the SRM would provide to governments, employers and workers the world over. The framework for review should be the 2008 Declaration, and the standards reviewed should be classified under one of the four strategic objectives. The LILS Section should oversee the SRM, on behalf of the Governing Body, and should work closely with the tripartite working group.
43. GRULAC preferred the creation of a single working group with an 8:4:4 composition, in which a balance was envisioned between industrialized and developing countries, and with the members being appointed by each group independently. It was important for the members of the working group to have the necessary expertise in the subject and at least a general understanding of the ILO and its standards. The review process should be as inclusive as possible, and consultations should be held with other members, at no cost to the Office. The working group should meet once during the March and November sessions of the Governing Body, and could include non-Governing Body members where necessary, but the social partners should endeavour to help reduce costs by keeping to Governing Body members where possible. GRULAC did not approve the proposal to recruit an associate expert, as the ILO already had many experts on its staff, as well as access to relevant research material. With regard to the terms of reference of the working group, where decisions could not be taken by consensus, they should be referred to the Governing Body, through LILS. The working group could take the recommendations of the Cartier Working Party into account, but it should not necessarily be required to do so. This working group would be entirely new, and would work in the context of current realities at the national and international levels, in accordance with the 2008 Declaration. The review should be structured around the four strategic objectives, with standards relating to specific categories of workers being distributed appropriately by strategic objective. Reviews should be undertaken following the respective recurrent discussion. Finally, GRULAC agreed with the proposed budget for the SRM.
44. A Government representative of Switzerland supported the establishment of an SRM, which should begin work in March 2012. He endorsed the proposed objectives and

outcomes outlined in the Office paper, the guiding principles and suggested framework, the envisaged role of LILS and the establishment of a single working group with an 8:4:4 composition, avoiding the participation of non-Governing Body members where possible. He supported the proposed working methods, terms of reference and review of standards by strategic objective. The review of the standards should precede the recurrent review, starting with employment, and thereafter following the sequence of the recurrent discussions. The proposed budget was acceptable.

45. A Government representative of Australia strongly supported the prompt establishment of the SRM, in accordance with the elements outlined in the Office paper, with an 8:4:4 composition. The SRM would be of most value if it reviewed all standards, with the exception of fundamental and governance Conventions. The reviews should commence following each recurrent discussion. Regarding the number of working groups, the Office and LILS should keep an open mind on the option of establishing multiple tripartite working groups to undertake future reviews, since having more than one tripartite working group, each reviewing a group of standards, would result in a comparatively quick completion of all the strategic objectives.
46. A Government representative of France called for the establishment of an SRM by March 2012. His Government fully supported the proposed objectives and guiding principles of the review. The four strategic objectives of the 2008 Declaration provided the appropriate framework for the SRM, and LILS was best placed to provide oversight over the process. Regarding the operational aspects, a single working group should be established, with sufficient flexibility in the choice of members to ensure expertise. The composition should follow the 8:4:4 formula, with emphasis being placed on appropriate regional representation and the balance between industrialized and developing countries. The broadest option should be selected concerning the standards to be reviewed (option 1).
47. A Government representative of India welcomed the establishment of an SRM, which was necessary to ensure the continued relevance of ILO standards in protecting workers' rights and promoting sustainable enterprises. The proposed objectives of the SRM could include ascertaining the reasons for the non-ratification of standards and exploring the manner in which existing standards could be made more flexible for wider adaptability. Standards should also take into consideration the vast informal economy existing in many developing countries, and the socio-economic disparities between member States. The consolidation of existing standards should also be included under the guiding principles with a view to removing duplication and strengthening the instruments, while maintaining the protection afforded to workers. The 2008 Declaration should be the framework for the review, and the process should be monitored by LILS and supported by NORMES. The 8:4:4 formula would allow balanced regional representation and the participation of developed and developing countries in a single working group, which should meet during the Governing Body sessions. The review of standards should be organized by strategic objective and should be as comprehensive as possible (option 1).
48. A Government representative of Japan requested clarification as to whether member States which were not members of the working group could participate and/or make statements in the group as observers.
49. A Government representative of China fully supported the establishment of the SRM with a view to ensuring that ILO standards were compatible with socio-economic development and the situation of constituents, so that standards could be better implemented and constituents could make more progress in achieving social justice. The SRM process should be open and transparent, and should fully guarantee the participation of the tripartite constituents. The composition of the working group should be fully representative and include more representatives from developing countries, with decisions being adopted

by consensus. The SRM would undoubtedly be a long process. The evaluation of standards should be based on the work of the Cartier Working Party.

50. The Employer spokesperson noted the consensus that a regular SRM should be established within the context of the broader standards policy discussed by the Governing Body. The periodic review of standards was a major missing element of standards policy and a clear decision should be taken to start the reviews as soon as possible, based on the very specific mandate to proceed with work on the subject.
51. The Worker Vice-Chairperson stated that the Workers' group had listened carefully to all of the statements made on a subject of the greatest importance for workers and the Organization. He reiterated his group's support for the 2008 Declaration, which should provide a framework for the review of standards, based on their recognition by all parties as the cornerstone of ILO action. GRULAC was correct in asserting that ratification was not the only criterion to be taken into account, as many countries already had laws in compliance with Conventions. However, the Workers could not support a process that favoured a statement of principles over the ratification of standards, which were subject to supervision by the ILO.
52. The Workers' group had always been ready to discuss solutions to difficulties relating to particular standards. However, the Workers' experience during the meeting of experts on Convention No. 158 meant that they did not think that the conditions existed at present to move forward with the SRM. Too often, efforts to adapt to the modern world involved the adaptation of social standards to the interests of enterprise, without acknowledging workers' interests. The establishment of a permanent SRM would lead to the permanent destabilization of the standards system, thereby blocking in practice the promotion and ratification of standards, with Conventions continuously being revised. The claim by the Employers that, in the absence of consensus under the SRM, the previous decision would not necessarily prevail was also a cause of concern and would result in legal uncertainty, which would be prejudicial to the consolidation of the standards system. In terms of working methods, the articulation and contradictions which might arise between the proposed SRM and the recurrent discussions had still not been resolved. The prerequisite for progress in that respect was trust. However, that requirement was not currently met and the point for decision was therefore not acceptable. Nevertheless, the Workers' group remained willing to continue frank discussions with a view to building trust.
53. A representative of the Director-General (Ms Doumbia-Henry) replied to some of the points raised during the discussion. First, she reaffirmed that oversight of the SRM process was of course the responsibility of the Governing Body, and more specifically LILS, and not the Office. She also confirmed that outdated Conventions would not be included in either of the options for the review of standards. With regard to the comments of the Employers' group on what would happen in the absence of a new decision being taken by consensus, she emphasized that it was a very important and entrenched legal principle that the pre-existing decision taken in respect of any instrument remained valid until replaced. It was common sense that an instrument adopted by the Conference would be promoted, unless there was a clear tripartite decision by the Governing Body to do otherwise. With reference to the comments concerning the lack of references to technical departments, and also relating to the involvement of ACT/EMP and ACTRAV, she added that the use of the term "the Office" included all the various departments and units of the Office, including the technical units, ACT/EMP and ACTRAV and others. Moreover, the links with the 2008 Declaration and the recurrent discussions of the Conference were a necessary part of any decision to review standards. The proposed terms of reference of the SRM were quite broad and offered ample scope to take account of the outcome of recurrent item discussions. With reference to the comment by GRULAC concerning the possible recruitment of an associate expert, she clarified that that would have no financial

repercussions for the Office, as associate experts were generously funded by member States. Concerning the question of the Government of Japan as to whether non-Governing Body members could participate as observers in the working group, although that had not been specified in the proposals, past experience of the ILO working groups indicated that other members of the Governing Body, or even non-members, could attend meetings, but certainly not participate in taking decisions.

- 54.** Another representative of the Director-General (Mr Ryder, Executive Director, Standards and Fundamental Principles and Rights at Work Sector (ED/NORMES)) noted that the Governing Body found itself in a complicated position on an item that everybody agreed was of critical importance to the ILO, and on which a number of speakers had called for rapid action. Despite the sense of urgency, the Workers' group had said very clearly that it was not in a position to support the point for decision. It appeared particularly difficult to launch a process in the absence of consensus when that very process was intended to operate on the basis of consensus. He noted that the Workers' group had not rejected the SRM per se, and was prepared to continue discussions in an open and a frank spirit on the way forward. The Governing Body could not allow itself to stay in an impasse, and the best way forward would perhaps be to establish informal consultations, in line with the modalities envisioned during the Governing Body reform process, and return to the issue at the March session.
- 55.** The Employer spokesperson indicated that his position regarding a pre-existing decision in absence of a new consensus was not just a legal matter. It might not always make sense to go back to previous decisions, which might have been taken many years earlier in totally different circumstances. He was not suggesting that consensus should be discarded, but just that it might perhaps make sense to find ways of moving on if certain standards were no longer totally adapted to the current situation. He noted that a very clear consensus had been expressed that the Governing Body should move forward with an SRM and that progress should not be delayed in view of the rapidly changing political and economic conditions in the world.
- 56.** A Government representative of France requested clarification as to the format and time frame of the informal consultations that might be used to find consensus on the present issue.
- 57.** The Africa group considered that the document had not been thoroughly discussed and therefore supported the position that further consultations were required.
- 58.** A Government representative of Canada expressed disappointment that no agreement had been reached on the establishment of an SRM and hoped that the issue would be discussed again in March 2012.
- 59.** A representative of the Director-General (Mr Ryder) confirmed that the newly reformed Governing Body offered the opportunity for consultations to be undertaken "sooner rather than later" and that, if the members so wished, the coordinating group could explore ways of proceeding before the end of the current session.
- 60.** The Employer spokesperson supported the proposal to engage in consultations on how to move forward.
- 61.** The Worker Vice-Chairperson said that the Workers' group would be willing to take part in informal consultations during the current session, but that further discussions would be needed before the March 2012 session of the Governing Body.
- 62.** After consultations, the Governing Body adopted the following decision:

Governing Body decision:

63. *The Governing Body, taking full account of the statements made, agreed to the establishment of a standards review mechanism (SRM), and invited further consultations on the modalities of the SRM with a view to identifying and resolving the concerns in relation to such a mechanism and to make a proposal to the Governing Body in March 2012 on the options set out in GB.312/LILS/5, bearing in mind the views expressed by the Governing Body members under this agenda item.*

Sixth item on the agenda

Report and outcome of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166)

64. The Governing Body had before it the report and outcome of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), with a covering document.⁵ For the discussion of this item, Mr Syder was Employer spokesperson and Mr Veyrier was Worker spokesperson.
65. A representative of the Director-General (Ms Doumbia-Henry) recalled that the Governing Body had decided to convene a tripartite meeting of experts on the only instruments on which there had been no consensus in the Cartier Working Party. The Governing Body now needed to determine the next steps to be taken with regard to the termination of employment instruments in light of the results of the Tripartite Meeting of Experts held in April 2011.
66. The Employer spokesperson recalled that the purpose of the Tripartite Meeting of Experts had been to identify obstacles to the ratification and implementation of the termination of employment instruments and other current trends in law and practice. As tripartite consensus had not been achieved on the outcome of the meeting, there had been an outcome of Government and Worker experts, and another dissenting outcome of Employer experts. However, a document entitled the “Proposed way forward of the Chairperson”⁶ had been placed on the ILO website in April 2011. Subsequently, the final report of the Meeting had also been placed on the website. The Employers’ group considered that to have been a mistake which risked being misinterpreted by the outside world. The question therefore arose, with regard to the point for decision, of what point there was in asking the Governing Body to authorize the communication of the report to constituents and others when the final report was already accessible on the ILO website.
67. The speaker added that the Employer experts had submitted their own outcome document to the Tripartite Meeting of Experts concerning obstacles to ratification and implementation and other current trends in law and practice. Although there had been

⁵ GB.312/LILS/6 and TMEE/C.158-R.166/2011/2.

⁶ TMEE/C.158-R.166/2011/1.

points of convergence in the Meeting, which should not be overlooked, the Employers had no option but to object to the report in its current format, in which in the section “Adoption of the outcome” exclusively reproduced the views of the Government and Worker experts, while ignoring the views of the Employer experts, which were only indicated in the section “Discussion of the outcome”. That way of proceeding risked being construed as a serious attack on the need to strengthen tripartism and social dialogue, one of the four strategic objectives of the Organization. That was unacceptable. In order to prevent misunderstandings, they called for their views to be given equal visibility by placing on the ILO website the outcome document prepared by the Employer experts, which indicated the points of convergence, but also what they considered to be the obstacles to ratification and implementation and other current trends in law and practice. With regard to the point for decision, the Director-General should be asked to bear in mind, when drawing up proposals for future action, the current discussions in the Governing Body. It was the view of the Employers’ group that the ILO had to refrain from promoting Convention No. 158 and Recommendation No. 166 because of the lack of consensus on their principles and there should be thorough tripartite reflection to allow a fresh, balanced and holistic examination of what the ILO’s action should be on protection against dismissal.

- 68.** The Worker spokesperson highlighted the quality of the discussions in the Tripartite Meeting of Experts on the problems and difficulties relating to the rights of workers in the event of dismissal. The discussions had reaffirmed the importance of the Convention’s principles and provisions and the need to promote its ratification, while emphasizing that the legislation in many countries that had not ratified the Convention nevertheless applied its provisions. Several recent instruments highlighted the importance of the protection envisaged by Convention No. 158, including the Global Jobs Pact, the HIV and AIDS Recommendation, 2010 (No. 200), and the Revised European Social Charter. There had been no attempt to hide the lack of consensus at the Meeting and the views of the Employer experts were clearly stated in the report. However, it should be emphasized that the underlying principles of the Convention were based on common sense and respect for the dignity of workers. It was essential that workers should be informed of the reason for their dismissal and have the opportunity to defend themselves in case of invalid reasons for termination. Moreover, the general argument of the Employer experts that the protection of workers’ rights in relation to termination of employment was an obstacle to job creation was clearly false, as Convention No. 158 could not be blamed for the millions of jobs lost in recent years and the 20 million increase in global unemployment. In view of the constraints of the market economy, much more attention needed to be paid to the relations between employers and subcontractors, delocalization and the employment relationship, rather than reducing the rights of workers in the event of dismissal. It was important to recall that the right of workers to protection against unfair dismissal was the counterpart to the employers’ right to dismiss workers. The ratification of Convention No. 158 should therefore be promoted, particularly in countries where the legislation already gave effect to it. ILO technical assistance should be provided and tripartite discussions continued on the termination of employment instruments.
- 69.** A Government representative of France noted that, of the current members of the Governing Body, only four had ratified Convention No. 158. Although he would be willing to participate in further discussions on the termination of employment instruments, the important issue at the present time was to determine how to proceed in view of the lack of agreement between the Employers and the Workers.
- 70.** A Government representative of Brazil indicated that the termination of employment instruments were closely related to the principle of social dialogue, which was of particular importance during times of crisis, and set forth elements that were important for decent work. He mentioned that Convention No. 158 was being examined by the National

Congress with a view to its second ratification. Note should therefore be taken of the discussions of the Meeting of Experts, as indicated in the point for decision.

71. An Employer member from Brazil recalled that the Convention had been previously denounced. Employers' organizations in the country were completely opposed to the re-ratification of Convention No. 158 under the current conditions resulting from globalization.
72. A representative of the Director-General (Ms Doumbia-Henry) in reply to the comments by the Employers' group, indicated that it had been the practice for some years, at the request of the constituents, to place the final reports of sectoral meetings on the ILO website. The availability of such reports on the ILO website did not remove the Office's obligation to communicate the documents and decisions of the Governing Body officially to constituents. What was missing was the indication that the report was not yet approved by the Governing Body. She added that the Office had an inherent obligation to promote the instruments adopted by the Conference and could not unilaterally withdraw from that obligation unless the instruments were declared by the Governing Body or the Conference to be out of date.
73. The Employer spokesperson indicated that his group was not in a position to agree with the points for decision as currently drafted. In particular, paragraph 4(b), by calling on the Director-General to bear in mind the matters raised in the report when drawing up proposals for future action by the Office, failed to draw sufficient attention to the consistent lack of consensus on the instruments in recent years, including in the Cartier Working Group and in the Tripartite Meeting of Experts.
74. The Worker spokesperson emphasized that the report of the Meeting of Experts set out clearly and in detail the views of all the experts. It also made it clear that any problems lay, not with the provisions of the Convention itself, but with their implementation at the national level, and that such problems could be solved through social dialogue.
75. The Africa group agreed with the points for decision. The spokesperson for the group (a Government representative of Angola) highlighted the need for consensus.
76. A representative of the Director-General (Mr Ryder) said that the report of the Meeting reflected in detail, in the section "Discussion of the outcome", the views of the Government, Worker and Employer experts, and that readers would therefore be left in no doubt as to the views of the Employer experts.
77. Following consultations, the Employer spokesperson announced that the Employers' and Workers' groups had agreed on an amended text for paragraph (b) of the point for decision contained in paragraph 4 of the Office paper (see below).
78. The Worker spokesperson indicated that, although in agreement with the original text, his group had agreed to the proposed solution to move forward in that particular case, and in view of the importance of the matter for the advancement of the rights of workers. The objective was always to reach a consensus during tripartite meetings, and the fact that it had not been possible in the current situation made that case particular.
79. The Governing Body approved the text as amended.

Governing Body decision:**80. *The Governing Body decided to:***

- (a) authorize the Director-General to communicate the report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), to governments of member States, to the employers' and workers' organizations concerned, and to the non-governmental international organizations concerned; and*
- (b) request the Director-General to bear in mind, when drawing up proposals for future actions of the Office, the matters raised in the final report of the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), taking into account in this particular case the way forward of the Tripartite Meeting of Experts of the Government and the Worker Experts as referred to in paragraph 127 and the outcome of the Employer Experts as referred to in paragraphs 118 and 119 of the final report, as well as the discussions in the LILS Section of the Governing Body.*

(GB.312/LILS/6, paragraph 4, as amended.)

Seventh item on the agenda

**Joint ILO–UNESCO Committee of Experts on
the Application of the Recommendations
concerning Teaching Personnel (CEART):
Interim report on allegations submitted
by teachers' organizations**

- 81.** The Governing Body had before it a paper prepared by the Office⁷ providing an overview of the functioning of the CEART in relation to allegations concerning non-observance of the provisions of the Recommendation concerning the Status of Teachers, as well as a summary of the CEART's previous consideration and its findings and recommendations in a case concerning ongoing dialogue with the Government and teachers' organizations of Japan. The paper proposed a point for decision to take note of the CEART interim report⁸ and to transmit it to the Government and teachers' organizations of Japan for their appropriate follow-up action. During the discussion of this item, Ms Horvatic was Employer spokesperson and Mr Cortebeeck was Worker spokesperson.
- 82.** The Worker spokesperson called on the Government of Japan to speed up legislative reform on public services and negotiations within the social dialogue framework and to inform the CEART accordingly. The Workers' group supported the point for decision.

⁷ GB.312/LILS/7.

⁸ CEART/INT/2011/1.

83. The Employer spokesperson noted the overview and history of the CEART's functioning presented in the Office paper, and the actions requested in the point for decision, namely for the Governing Body to take note of the interim report and to authorize the Director-General to communicate it to the concerned constituents in Japan. The CEART mandate was to monitor and promote the application of the international Recommendations on teachers of 1966 and 1997, and to report thereon to the Governing Body and to the Executive Board of UNESCO. In the past, the Employers had objected to language used in Office documents submitting such reports for consideration, which suggested a binding character of the two Recommendations. The Employers considered that in the meantime their concerns had, in essence, been taken into account and therefore supported the point for decision.
84. A Government representative of Botswana, speaking on behalf of the Africa group, expressed the group's appreciation for the interim report by the CEART on the allegations submitted by the teachers' organizations of Japan pertaining to observance of the ILO/UNESCO Recommendation of 1966. The Africa group urged the concerned parties to continue to engage in dialogue in order to find a lasting solution to the allegations raised, and called upon the Government of Japan to bring about legislative reforms in order to establish stable union-management relations in the public services. The group agreed with the CEART's recommendations contained in paragraph 17 of its interim report, as well as the point for decision in the Office paper.

Governing Body decision:

85. *The Governing Body decided to:*

- (a) *take note of the situation and findings set out in the CEART's interim report and the recommendations contained in paragraph 17 therein; and*
- (b) *authorize the Director-General to communicate the report of the CEART to the Government of Japan, ZENKYO, JTU, and to other representative teachers' organizations in Japan, and to invite them to take the necessary follow-up action as recommended in the report.*

(GB.312/LILS/7, paragraph 5.)

Geneva, 21 November 2011