



International Organisation of Employers  
Organisation Internationale des Employeurs  
Organización Internacional de Empleadores  
*The Global Voice of Business*

## Employers' inputs on:

### The Review of ILO Supervisory Mechanisms

## Joint Report of the Chairpersons of the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR)

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## A. General Comments

The Employers welcome this global review of ILO standards supervisory mechanisms. They consider it a timely opportunity that will help ensure that the supervisory mechanisms are better placed to meet present and future challenges. The Employers wish to reiterate their strong support for an ILO standards supervisory system that makes an effective contribution to the application of international labour standards in ILO member States.

For the Employers, key to the effectiveness of the system are: transparency, balance, credibility and relevance for the tripartite constituents. Meeting these criteria requires the assurance of full and meaningful tripartite governance and participation in the mechanisms.

While synergies and complementarity of the individual supervisory mechanisms should be safeguarded and strengthened, it is nevertheless important to better understand and preserve their distinct roles and features. Legal and other differences between individual supervisory mechanisms must be fully appreciated and any confusion and unjustified overlapping avoided.

All supervisory mechanisms receive significant support from the Office in preparing their reports, which is indispensable for their functioning. From a governance point of view, it would be desirable to have more oversight of the support that the Office provides and clearer rules with respect to limits so as to allow the tripartite constituents to adequately fulfil their role in the supervisory system.

Another point of interest would be to consider methods to measure the effectiveness of the individual supervisory mechanisms. Little is known in this regard (the CEACR keeps some statistics regarding cases of progress, among others), but such information seems necessary to take the right measures to improve effectiveness.

The Employers trust that the joint report by the Chairpersons of the CFA and the CEACR, in addition to explaining the supervisory system as it has evolved over past decades - which is needed for a solid understanding of its operation – will make a matter-of-fact critical and fresh review of its strengths and weaknesses, and come up with practical proposals to address identified weaknesses and to reinforce existing strengths. Necessary changes may sometimes require amendments of existing rules, but in other cases it may simple be a matter of more meaningful application of existing rules and paying due attention to the importance of tripartite governance.

It may be recalled in this connection that the ILO's international labour standards, while not the subject of the present review, are the starting point of ILO's standards supervisory mechanisms and the need for them to be adapted as necessary to changes in the world of work must not be overlooked. The findings and recommendations of the Standards Review Mechanism (SRM), which will soon start its work, therefore need to be considered closely along with any proposals to adapt the standard supervisory mechanisms.



## B. Comments on the Report Project Plan

The Employers welcome the opportunity to provide the following comments on the Report Project Plan:

1. **Report substance:** The Employers agree with the proposed substance of the report i.e. 1) functioning of the supervision, 2) interrelationship of the different mechanisms, 3) possible improvements. While a better understanding of the functioning of the system and the interrelationship of the different mechanisms is of course useful, the focus should be on considering possible improvements e. g. with a view to simplifying the system, making it more transparent and eliminating possible weaknesses and inconsistencies,. The Employers invite the Chairs to put the emphasis in their report on point 3) - possible improvements.
2. **Report length:** The Employers agree with the proposed length of the report.
3. **Proposed outline of the report:** The Employers agree with the proposed outline, with one reservation. Given the limited number of pages, the Employers suggest that Part V – *International Monitoring Systems outside the ILO* - be attached as an annex to the report and not included in the 50 pages of the report.
4. **Input by Tripartite Constituents:** Unlike the previous version of the project plan, this section now reflects the important role played by Employers and Workers, not only as users and an essential source of information for the supervisory system, but also and equally important, as actors in the legal evaluation and correction of cases of non-compliance. The Employers encourage the Chairs to emphasize this fundamental aspect in the report.
5. **Tentative Timeline proposed:** The Employers agree with the proposed timeline. However constituents should have the opportunity to provide inputs to the initial draft between the “Presentation of the initial draft” and the “Submission of final report”–. A possible deadline for written comments on the initial draft could be set for end of January 2016.

## C. Specific comments on the different ILO Supervisory Mechanisms

### Art. 22 - Committee of Experts on the Application of Conventions and Recommendations (CEACR)

**Accountability and need for tripartite support:** The CEACR plays a central technical role within the ILO supervisory system. The report of the CEACR, in particular the part containing its observations on ratified Conventions, is probably the most visible output of ILO standards supervision. However, the report is not only attributed to the CEACR, but more generally associated with the ILO and its tripartite constituency as a whole. As the CEACR itself is not tripartite, it is therefore vital that the CEACR functions within a framework set by ILO tripartite bodies and that its comments and recommendations have overall tripartite backing. Being independent of individual national constituents must not be interpreted to mean that the CEACR is not accountable to the ILO’s tripartite constituency.



**Self-restraint in making technical assessments of compliance:** In making assessments of the state of compliance by governments with standards-related obligations, the CEACR is held to adhere strictly to its technical mandate and to exercise due self-restraint. Interpretations of Conventions by the CEACR that are contentious and do not reflect at least tripartite acceptance in broad terms are not sustainable in the long run and should be reconsidered by the CEACR. A case in point is the CEACR's interpretations of detailed "right to strike" rules into C. 87 which, as became clear at the tripartite meeting in February on this issue, are not supported by a majority amongst tripartite constituents. Such interpretations, if maintained, threaten the integrity and the credibility of the whole supervisory system.

**CEACR's distinct role vis-à-vis CFA:** Considering the relationship between the CEACR and the CFA, it is necessary that both CFA and CEACR more consistently observe the differences in mandate between the two bodies. While both bodies deal thematically with similar issues regarding freedom of association and collective bargaining, the CEACR task is to monitor compliance with (ratified) ILO Conventions, in particular C. 87 and 98 in this thematic field, whereas the CFA functions as a conciliation body responding to complaints and making its assessments on the basis of the constitutional principles of freedom of association and the effective recognition of the right to collective bargaining, as well as on the basis of the collective expertise and experience of its tripartite membership. There should be no confusion between the two, i. e. the CEACR should stick to the specific provisions of Conventions in the field of freedom of association and the CFA to applying the constitutional principles to the specific situations underlying the complaints. While the CEACR should be coherent in an overall sense with other supervisory bodies, it should avoid integrating in its own observations rules and principles enunciated by the CFA on the basis of the collective experience of its tripartite members. The CEACR should also avoid referring to conclusions/recommendations made by the CFA using language that could be misinterpreted to mean that these conclusions/recommendations are based on ILO Conventions 87 and 98.

**CEACR co-operation and dialogue with the CAS:** The Employers have repeatedly stressed the importance of constant and direct dialogue between the CAS and the CEACR along with representatives of the Office. This could, among others, help improve the CEACR's understanding of the realities and needs of the tripartite users of the supervisory system. There seems to be scope for more interaction and exchange between the CEACR and the CAS which at present is in essence limited to participation by representatives of the CAS in the CEACR opening session and the participation by the Chairperson of the CEACR in the general discussion of the CAS. For instance, briefings could be organized between newly appointed members of the CEACR and Employers' and Workers' representatives from the CAS. Moreover, participation of Employer and Worker representatives from the CAS - as observers - (without the right to intervene; respect of Chatham House Rules) in additional sessions of the CEACR meeting could be considered.

**Dissenting opinions:** The procedures of the CEACR allow for dissenting opinions: *"(i) Although the conclusions of the Committee have traditionally represented unanimous agreement among its members, decisions can be taken by a majority. Where that happens, it is the established*



*practice of the Committee to include in its report opinions of dissenting members if they so wish, ...*<sup>1</sup>

However, in practice, very rare use seems to be made of this possibility. The CEACR should therefore reflect existing important dissenting opinions in its report. This could make the assessment process more transparent and thus more credible for constituents. It could also help spark wider discussion on critical application issues and, through this, help develop a better understanding and an adaptation of the application of ILO Conventions to changing needs. In any case, as the CEACR is composed of some 20 members (university law professors, senior judges and other distinguished legal experts), it would seem not entirely realistic to assume that they always agree in their assessments.

**More user-friendly observations/organization of the CEACR report:** Progress has been made in recent years in focusing the CEACR's comments (observations and direct requests) on essential compliance issues. What could still be improved is the structure and clarity of the comments to facilitate their reading and understanding. All comments should follow a common scheme which, in essence, 1) names the pertinent provision of the Convention, 2) provides available information on the application of this provision (in law and practice), and 3) gives the CEACR's assessment as regards shortcomings.

Improvements could also be made in the organization of the report in that particular sections are created.

First of all, special sections could be set up for cases that have been discussed in the CAS, cases that were listed in a special paragraph of the CAS report, or cases that have their origin in an Art. 26 complaint and are followed up by the CEACR. This would give more visibility and attention to such more serious cases and could accelerate their resolution.

Additional measures could also be explored with the view to making observations more user-friendly by presenting them by country and region, in particular in the online version of the report.

Moreover, the CEACR could make more systematic general observations that precede observations on Conventions in a particular area. This could be helpful to draw attention to matters/practices of relevance beyond a particular country or to discuss trends in the application of a Convention, and thus could be a useful tool to promote compliance with ratified Conventions.

There could also be sections in the report where Employers and Workers could set out their views regarding particular supervisory issues. Such sections could, for instance, be "general observations" preceding the CEACR observations on individual (groups of) ILO Conventions. Such a more participatory report format could strengthen the acceptance of ILO standards supervision.

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<sup>1</sup> Handbook of procedures relating to international labour Conventions and Recommendations, International Labour Office, Revised Edition 2012, page 35



Finally, as the Employers also said in the discussion of the CEACR's General Report in the 2015 CAS, it would be desirable to have a clearer application of the CEACR's distinction between observations (on "more serious or long-standing cases of failure to fulfill obligations" reproduced in the CEACR report and therefore eligible for discussion in the CAS) and direct requests (made "when the questions raised are primarily of a technical nature", or "for the clarification of certain points when the information available does not enable a full appreciation of the extent to which the obligations are fulfilled; not reproduced in the CEACR report and therefore not eligible for discussion in the CAS).

### **The Conference Committee on the Application of Conventions and Recommendations ("CAS")**

The February 2015 Joint Statement of Employers and Workers and the March 2015 INS 5 GB decision provided the framework for a successful tripartite-driven CAS in June 2015. The work of the Committee took place in a constructive and open atmosphere. CAS demonstrated its ability to lead a meaningful and results-oriented tripartite dialogue. While divergences on substantial issues remain among the tripartite constituents, these were voiced in a spirit of mutual respect and understanding. The CAS also successfully adapted its work to the shortened two-week session of the ILC. This new format did not impede its work, mainly thanks to excellent time management by the Chair and full cooperation by delegates. Nevertheless, additional measures, including technical means, should be explored to make even more efficient use of the Committee's time. A number of suggestions in this regard are listed below.

**List of cases:** The list of 24 cases was negotiated in good faith, and was delivered by the proposed deadline. The Employers regret however that neither of the two cases of progress on the long list were part of the 24 case-list examined. Further efforts should be devoted in the coming years to include cases of progress among the 24 cases in order to showcase good practice in the application of international labour standards and to commend, on a tripartite basis, Governments' efforts in this regard. This would bring a positive element to the usually negative perception created by the inclusion of a country on the list.

Employers are strongly attached to the use of objective criteria for the selection of cases and a balance between fundamental, governance and technical conventions, as well as a geographic balance. Progress should be made in this regard. The elaboration of the list of cases should also improve in the future, establishing more objective criteria and identifying other methods to select the cases. Finally, when making public the long list of up to 40 cases one month before the opening of the ILC, a document containing all 40 observations contained in the long list should be made available to Government Coordinators, and the Employers' and Workers' Secretariat to facilitate the negotiations on the final list.

**Conclusions:** Perhaps one of the most important positive steps taken in 2015 was the way in which conclusions were drafted. According to the February agreement, Workers and Employers played an active role in the drafting of the conclusions. This was essential. CAS experienced real tripartite governance/ownership of its outcomes. The role of the Office as facilitator only upon demand was also very important. Conclusions reflected only consensus recommendations. This is now clear with the insertion of a new paragraph at the beginning of



the section on individual cases which states: “CAS has adopted short, clear and straightforward conclusions. Conclusions identify what is expected from Governments to apply ratified conventions in a clear and unambiguous way. Conclusions reflect concrete steps to address compliance issues. CAS has adopted conclusions on the basis of consensus. CAS has only reached conclusions that fall within the scope of the convention being examined. If the employers, workers and/or governments have divergent views, this has been reflected in the CAS record of proceedings, not in the conclusions”. Controversial issues or fundamental disagreement were not reflected in – and thus not covered by - the conclusions. Divergent views in the CAS are set out in the CAS record of proceedings, - in Part One, the General Report, and in Part Two, the Report on the discussion of individual cases. In their operational part, the Conclusions adopted are short, clear and straightforward, requesting Governments to take concrete measures. CAS operated in 2015 holding rich discussions, reaching consensus whenever possible and highlighting disagreement when needed. This was helpful and healthy. It was also a significant achievement in that Workers and Employers jointly assumed more responsibility in determining CAS conclusions and thus were able to add a more realistic/pragmatic tone to CAS outcomes. This practice must be continued.

**Mandate:** CAS is part of the ILO’s supreme body, the ILC. It has an unrestricted supervisory mandate, as reflected in Article 7 of the Standing Orders of the ILC. CAS uses the report of the CEACR as a starting point for its work, but is not bound by any views of the CEACR.

The employer, government and worker members of the CAS have equal voting rights. CAS members can call the attention of the CAS to any matters which they believe should be considered.

**Relationship with the CEACR:** Mutual respect and good cooperation between the two regular supervisory organs require not only that the CAS consider the views of the CEACR in its evaluation of cases; they also require that the CEACR, in interpreting the scope and contents of Conventions, take into account the views expressed in the CAS. Additional opportunities for dialogue between members of CAS and the CEACR should be explored during the year to share on a regular basis the needs, challenges and achievements of the different mechanisms. (See section CEACR co-operation and dialogue with the CAS)

**Role of the Office within the CAS:** The Office provides indispensable “technical/administrative” support for a well-functioning CAS. The Office should continue to facilitate - in a neutral manner - the tripartite CAS deliberations without interference in genuine social dialogue, in particular in the establishment of the list and drafting of conclusions and outcomes of the General Survey.

**Better use of technology towards a more efficient use of CAS time:**

1. In addition to the use of the clock, it would be desirable to have the names of those registered to speak on a given debate displayed on a screen in the CAS room. This would allow to better managing CAS members’ expectations and would help the Chair and Vice-chair decide whether time allocations need to be reduced in order to complete the agenda of the day. If, for whatever reason, the name of a speaker should not be made public, at least



an indication of whether it is an employer, a worker or a government representative should be made on the screen.

2. CAS members should be able to make amendments to the record of proceedings online
3. Computers and printers for the exclusive use of CAS Worker and Employer Vice-Chairpersons should be made available in Room I to facilitate the drafting of conclusions

## Article 24 - Representation procedure

**Rationale: a means to address serious cases:** In recent years, there has been a sharp rise in the number of representations from workers' organizations, leading to an increased workload for the Office and the GB. This seems partly due to the present admissibility criteria which are vague, with the result that basically any representation filed is accepted.

Ways to streamline the procedure should therefore be examined, including tightening the admissibility criteria. In particular, the possibility to limit recourse to Article 24 representations to serious and urgent infringements of ILO Conventions only should be explored. As a consequence, less serious infringements would be examined only by the regular supervisory mechanisms.

**Admissibility: exhaustion of national dispute resolution procedures.** In order to focus the use of the Article 24 procedure, an additional admissibility criterion could be: "*Prior use of available national dispute resolution procedures where this is not unreasonable.*" Prior use of national procedures would be unreasonable, for instance, where evidence exists that the resolution of a matter is urgent and a resolution by means of (independent) national procedures cannot be expected within a reasonable period of time.

On the other hand, use of national dispute resolution procedures would not be unreasonable where such procedures are available and function (independently), in particular when the organization submitting the representation has no intention to use these procedures, or when the obvious intent of a representation is to "pre-empt" or influence the outcome of the national procedure towards a decision in line with the respective ILO body.

Also, the possibility could be explored of establishing an ILO standing tripartite screening committee composed of, for example, three GB members (along the lines of the Credentials Committee) who would evaluate the seriousness of the representations. The screening committee could liaise with the Government at a preliminary stage to explore possible alternative solutions to the allegations.

**Automatic referral of Article 24 Representations on C 87 or 98 to the CFA:** Representations concerning the application of Convention Nos. 87 and 98 are usually referred for examination to the CFA. This has given the misleading impression that the CFA is some kind of standing Art 24 procedure and deals with Conventions 87 and 98. This should be avoided. Complainants filing an Article 24 representation could be requested to inform the GB why they have opted for this procedure and not the CFA. This is a way to limit "forum-shopping".



**Relationship with Article 24 procedure:** It is important that Tripartite Committees set up to examine Article 24 representations consider previous discussions on a country/convention that took place in CAS tripartite deliberations to guide its work.

**Role of the Office:** The Office provides indispensable “technical/administrative” support for well-functioning Tripartite Committees established under Article 24. The ILO Office should ensure that members of Tripartite Committees have all the necessary background material to undertake on their own a comprehensive and informed examination and assessment of the representation. The increasing number of Article 24 cases has led to a situation of time restrictions that could be counterproductive. It is also critically important that sufficient time is allocated for the deliberations amongst the members of the Tripartite Committees. The Office may assist Tripartite Committees in drafting its decisions; however, this should only be done once the Tripartite Committee has discussed the case and provided instructions for the direction of its response to the representation.

**Dissenting opinion:** For Tripartite Committees set up under Art. 24, dissenting opinions seem to be possible. Appropriate use of this means should be considered by any member of a Tripartite Committee.

## Article 26 - Complaints procedure

**Rationale: a means to address particularly serious, tenacious or urgent cases** In the Employers’ view, the rationale of the Article 26 mechanism (similar to the Art. 24 mechanism) vis-à-vis regular standards supervision is to help resolve particularly serious, tenacious or urgent cases of infringements of ILO Conventions. If an Article 26 complaint does not meet these conditions, it should be referred to the CEACR for examination in the regular supervisory process. Referral to the CEACR should also be made in such (less serious/tenacious/urgent) cases if they relate to the area of freedom of association. There should be no automatic referral of these cases to the CFA, as the CFA operates on a different legal basis (principle of freedom of association, as opposed to C. 87). All of the above may be clarified and reflected more concretely in the terms of reference and the admissibility criteria of the Article 26 procedure.

**Admissibility: exhaustion of national dispute resolution procedures.** In order to further meaningfully limit the use of the Article 26 procedure, an additional admissibility criterion could be: *“Prior use of available national dispute resolution procedures where this is not unreasonable.”*

The proposals made under section Article 24 Representation Procedure- Admissibility: exhaustion of national dispute resolution procedures similarly apply to Article 26.

**Dissenting opinion:** For Commissions of Inquiry set up under Art. 26, dissenting opinions seem to be possible, in principle<sup>2</sup>. However, here too, appropriate recourse of this means should be considered.

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<sup>2</sup> For instance, a dissenting opinion has been expressed by a member of the Commission of Inquiry set up to examine the [complaint against Germany, C. 111](#).



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## Committee on Freedom of Association (CFA)

The CFA is not a court. It does not have a judicial mandate and it does not create legal jurisprudence. It creates non-binding guidance in the form of conclusions and recommendations arising from complaints at the national level. The Employers' group and the CFA Employers' members are increasingly concerned with issues of substance and process affecting the work undertaken by the CFA.

**Mandate:** the CFA was set up by the GB in 1951 to carry out preliminary examinations of the cases for submission to the Fact-Finding and Conciliation Commission (FFCC). Over time the CFA has evolved into “a self-contained complaints body” and extended its activities beyond its original mandate. This evolution was not clearly defined in a formal discussion or decision of the GB on the CFA mandate. In any case, it was clear that the CFA would not have to deal with the application of Conventions No. 87 and 98, because, like the FFCC, it would deal with “*alleged infringements of the exercise of trade union rights*” on the basis of the principles embodied in the ILO Constitution and the Declaration of Philadelphia, in all ILO member States, regardless of their ratification of Conventions No. 87 and 98. Nevertheless, it has in essence assumed itself the functions of the Fact-Finding and Conciliation Commission and it has also encroached on the mandate of other ILO supervisory mechanisms, such as the CEACR, or bodies set up under Article 24 and 26. This has blurred the boundaries amongst ILO supervisory mechanisms and has created uncertainty and confusion.

Based on the competence originally established for the CFA, and further expanded since 1951, the CFA itself has developed a series of rules to regulate its mandate and working methods. These rules are regrouped in Annex I of the Office's “*Digest of decisions and principles of Freedom of Association Committee of the GB of the ILO*”, entitled “*Procedures for the examination of complaints alleging violations of freedom of association*”. The CFA mandate is now defined in Annex I as follows: “*the mandate of the Committee consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions*”. The footnote to this sentence reports to the same version of the Digest (“*2006 Digest, para. 6*”) and therefore there is no link to a formal GB discussion of the CFA mandate and subsequent approval.

Due to the lack of consistency between the original function of the CFA under the FFCC and the current mandate as expressed in the Office's Digest, this definition is confusing and misleading. Confusion also arises over the meaning of “laid down in the relevant Conventions”. In addition, indication in the CFA reports of the ratification status of Convention No. 87 or 98 in member states is not helpful in terms of clarity.

The GB should review and agree a consistent mandate for the work of the CFA. In order to put things back on track, the mandate of the CFA needs to be readjusted on the following understanding:

- a. The CFA is conciliation body, not a supervisory body. It is supposed to help facilitate the settlement of disputes in the field of freedom of association that are the subject of complaints made to it.



- b. the basis for the CFA's considerations are the constitutional principles of "freedom of association and the effective recognition of the right to collective bargaining" which it applies to concrete situations using its members' collective expertise and experience in industrial relations. The basis is not ILO Conventions.

As a result, the CFA should avoid referring to ILO Conventions in its conclusions and recommendations. If a complaint invokes ILO Conventions, the CFA should forward the complaint to the competent supervisory bodies, i.e. the GB for possible initiation of procedures under Article 24 or 26 or the CEACR for examination in regular standards supervision.

Further, the guidance coming from the CFA should be entirely consistent with tripartite agreed policy decisions arising from the GB and the ILC. For instance, the CFA should be receptive of the text of the March 2015 agreement on the right to industrial action. However, at the moment Chapter 10 of the Digest is not consistent with this tripartite agreement.

**Admissibility criteria:** The CFA is characterized by very broad admissibility criteria. National remedies do not need to be exhausted prior to presenting the complaint before the CFA. Nor is there a cooling-off period to respect. The number of cases is constantly on the rise. At the moment, the number of active cases is around 150, the large majority from Latin America. The CFA is increasingly requested to issue conclusions and recommendations to Governments on a variety of issues, ranging from simple human resources disputes, to failure to sign a collective agreement due to the company's alleged lack of will. As a consequence, the impact of serious cases risks being lost by the minor cases.

On many occasions, the CFA is requested to deal with a case while, in parallel, the same question is subject to judicial proceedings and/or appeals at the national level. Overlapping is often a reality: a case has already been solved at national level, but it is nevertheless discussed by the CFA. The CFA is also requested to act as a quasi "appeal body" when the national judge is alleged not to have taken into account the complainant's request. Thus, the complainant in presenting the complaint to the CFA creates international publicity to the case in question. Such publicity can have both national and international political implications. Such practices occur because the complainant expects that the CFA decision will influence the appeal decision by the national Court and reverse the decision made in the first instance. Again, the main problem resides in the lack of understanding of the CFA's non-judicial mandate, which is perceived as a body entitled to issue recommendations on freedom of association principles, without being clear as to the meaning of these principles. This favours the submission of complaints, especially in Latin American countries, where special weight is given to CFA recommendations, which are considered almost as judicial rulings. CFA conclusions and recommendations do not have such status. The proliferation of cases has become good business for labour lawyers in some regions of the world, which is counter to the real nature and purpose for which the CFA was created: to expeditiously deal with violations of freedom of association principles and with no fees. Duplication with national and/or regional processes is inherently time consuming, makes issues more complex and is inefficient. Misconstruing the authority of the CFA's conclusions and recommendations at the national level interferes in the independence of national legal/complaint systems, which should operate independently of member state interference.



The admissibility criteria should include more elements to be kept in mind by the potential complainant, including evidence of the alleged facts and reference to the national legislation and/or practices that is being questioned. The complaint should be very specific in the way in which each allegation made is said to raise freedom of association and/or collective bargaining issues and to identify the relief sought. Complaints in the form of general commentary on a labour relations system or human resources dispute should be considered not receivable if the Committee cannot identify the freedom of association and/or collective bargaining issue. For instance, the Standing Orders of the International Labour Conference are much more specific on the receivability of objections presented to the Credentials Committee.

The admissibility criteria should be tightened to ensure that the CFA's conciliation procedure is limited to cases where no other remedial action at national level is available and to avoid overlapping between a judicial decision at national level and the CFA's non-judicial conclusions and recommendations. Thus, the use of the CFA's (limited) resources is justified and the CFA thus can bring genuine added value. Accordingly, in the following cases, admissibility may be denied:

- (Independent) national procedures are available, but the complainant has not used them and has no intention to use them. (i.e. case No. 2844 Japan).
- (Independent) national procedures have been used by the complainant, but the procedures have not yet delivered a decision or possible legal recourse has not yet been exhausted (i.e. case No. 3066 Peru).

When a case is examined by an independent national jurisdiction whose procedures offer appropriate guarantees, the CFA should not be requesting the government involved to reverse the independent legal decision of the Judge in the first instance. The separation of powers cannot be ignored. It is a matter of national sovereignty.

The CFA Spokespersons for the Workers' and Employers' Secretariats could be informed when a complaint is lodged. The role of the Government coordinator should also be considered. As an alternative, a tri-partite "screening group" could be established to consider the admissibility of a case before the CFA. The "screening group" could also undertake a first-hand investigation on the issues presented in the complaint.

**Digest of decisions and principles:** the Digest is a compilation of statements taken from cases discussed in the CFA over 60 years. The Digest is prepared only by the Office, without consultation with, or formal approval of, all of the CFA members or the Workers', Employers' and Government Groups in the GB. The Digest is created with minimal governance, which is unacceptable. While the Digest is intended as a tool "to guide reflection relating to the policies and actions to be adopted" and to ensure continuity and coherence, the present Digest, which was published back in 2006, resembles a codification of international rules on freedom of association and collective bargaining. This is not its purpose and in any case the Office should not have the authority and it does not have the competence to determine such a codification. Nevertheless the Office prepares the draft working documents to be discussed by the CFA and regularly includes full or partial Digest references to support CFA conclusions and recommendations. The Office also regularly uses the Digest references when providing ILO



training in Turin and ILO Technical Assistance to ILO Member States. We repeat that the current version of the Digest dates back to 2006. It is out of date. Previous versions are not available on the ILO webpage.

The use of citations from the Digest is problematic due to the inaccuracy resulting from extrapolating a sentence from its original member state complaint context for application as a general principle in all countries of the world. Despite the fact that, on various occasions, it has been established that, theoretically, the CFA should not be tied to past decisions, the principles captured in the Digest are over time being misrepresented as “*legal precedents*” for many of the ILO’s member states. They are even erroneously called “jurisprudence”, without being the result of a judicial process. They are then applied to different contexts. The world of industrial relations does not stand still, so it follows that Digest references will need reviewing and possible tripartite-agreed amendment, without which they become outdated and unhelpful to member states when seeking to conciliate and resolve the complaint made against it. The historical mandate of the CFA made the Digest more related to workers’ rights. The inclusion of past Digest references dating back to 1954 in new Digest versions has resulted in the lack of insertion of “*principles with a more inclusive approach towards employers’ issues*”. There is no clarity as to how a sentence contained in a CFA report is then chosen by the Office to be part of the Digest, thus becoming a “general principle”.

In order to remove misinterpretations of the Digest and to ensure a more relevant and meaningful use of the work of the CFA, the Employers propose the discontinuation of the Digest in its present form and to set up, as an alternative, an online database of CFA conclusions and recommendations on freedom of association and collective bargaining issues, similar to the [online database of decisions made by the ILC Credentials Committee](#).

This database would be organized around issues/keywords as reflected in the headlines (and sub-headlines) of the present Digest, e.g. “11. Dissolution and suspension of organisations” and “Reasons for dissolution”, but would not refer to the CFA principles themselves. When searching for particular issues/keywords the database would refer to the full text of the decisions made that relate to the issues/keyword. In this way, CFA guidance developed under issues/keywords could be considered in the context of the complete CFA decisions in a particular case, not just in abstract, as is the case with the present Digest. This would provide a critical benefit to member states when assessing their own industrial relations systems.

**Draft of the tentative working documents and the role of the Office:** The Office currently drafts the working documents, including conclusions and recommendations in their entirety, without a preliminary discussion/briefing with CFA members. Due to time constraints (CFA members work under extreme pressure with the aim of concluding the agenda of cases by each sitting – an average of 40 cases is examined in 2 days of work) and the high number of cases, no real tripartite discussion or negotiation on the Office text is allowed in all of the cases on the agenda. If proposals are made for alternative drafting, these are collected by the Office on paper. There is no possibility to see displayed on a screen the changes that are being proposed. In addition, CFA members have no secretariat support in the CFA sittings, which is detrimental to their work and highly problematic as CFA members have other roles and responsibilities which materially affect how much time is available to prepare in advance of each



sitting of the CFA.

These elements create capacity and governance concerns, especially given the fact that the CFA final report is adopted by the CFA in its entirety in circumstances where, because of its length and detail, the GB relies solely upon the CFA members to confirm the appropriateness of adoption. CFA members sit in their individual capacities and without bias towards the Groups from which they come. However, they are also GB members and once their report is agreed, they return to the GB to then adopt their own report. Don't the CFA members have a conflict of interest as they are required to adopt their own report? The GB should be allowed a longer period to review and reflect upon the CFA's report before it is adopted.

Time pressure must not be accepted as an excuse for limiting the time of the CFA for dealing with complaints. The CFA must be in a position to properly do its work in order to take responsibility for its decisions. It must not be compelled – for time pressure – to delegate major substance of its work to the Office. There are other ways to reduce the workload, e. g. by reducing the number of CFA complaints (tightening of the receivability criteria).

Given the CAS 2015 successful experience, CFA members could jointly prepare conclusions and recommendations for CFA cases. Recommendations would be then tailored to the specificity of each case and would better reflect the actual discussion among CFA members. Such a goal would be reached if the number of cases to be discussed during each session were reduced and with adequate preparation prior to the meeting. The Office maintains its indispensable “technical/administrative” neutral support for the well-functioning of the CFA but this should be limited only to the presentation of the facts of the case. In order to enable the CFA members to fully assume their responsibilities and to ensure genuine tripartite ownership of this procedure, a particular procedure should be followed regarding the decision-making process. Before the first substantial discussion by the CFA of a complaint the Office provides information to CFA members which explains what the issues at stake are and the spectrum of possible solutions for the CFA members' discussion. It follows that a review of the resources of the Office to support the work of the CFA is required.

**Dissenting Opinions:** According to Annex I “*The Committee always endeavours to reach unanimous decisions*” (Paragraph 11). At the moment, there is no information on the possibility to express disagreement on a certain text. However, it should be clear that disagreements must occur and it is a basic human right that CFA members enjoy freedom of expression.

With a specialised GB Committee working on the basis of an unclear mandate, an outdated Digest, working documents drafted by the Office with no input from the CFA members, and with very broad admissibility criteria, CFA members who participate in their personal capacity should be at least entitled to express their constructive disagreement on certain principles or text proposed by the Office which is not capable of achieving unanimous consensus. The CFA produces guidance to member states. It does not have a judicial mandate nor does it create legal jurisprudence. Constructive identification of points of divergence may well help at the national level to resolve the complaint. Freedom of expression is a basic human right, which is being denied to the members of the CFA. Consensus does not necessarily mean unanimous support for the conclusions and recommendations in each case. It often means compromise,



sometimes due to time-pressure, which considering how the work of the CFA is then used outside of the CFA, it seriously risks misunderstanding of the policy positions of its tripartite members. For example, this risks the work of the CFA being inconsistent with the work of the CAS, which undermines the relevance and credibility of the current supervisory system.

**Relationship with other ILO Supervisory Mechanisms:** there is an unclear link between the CFA and the CEACR, the CAS, Article 24, and Article 26. The CFA entrusts to the CEACR the examination of legislative aspects of certain cases where the country involved has ratified Convention No. 87 and 98. However, there is no specific rule guiding the CFA on this practice and this generates further lack of clarity on the CFA mandate and the respective roles of CFA and the CEACR. CFA recommendations are meant to be practical advice to address very specific situations and they are not meant to have any legal status or to be legally applicable jurisprudence. Therefore, as a matter of principle, the follow-up to CFA recommendations should be done only by the CFA itself. Follow-up should not be delegated to the CEACR or to the CAS, given that the CEACR and the CAS have different and detailed mandates. Furthermore, the CFA members do not have the capacity or training to examine legislative aspects of cases. Accordingly, the Employers are concerned that the CFA is being viewed as a form of experts' committee for legislative aspects, which is not the case. The concern relates to the outside world being unclear as to the capacity and training of individual CFA members.

Similarly, clarity has to be provided regarding the difference between the CFA and the representation procedure under Article 24 on Conventions No. 87 and 98. Under actual practice, representations regarding Conventions No. 87 and 98 are generally referred for examination directly to the CFA. This has given the misleading impression that the CFA is some kind of standing Article 24 procedure for freedom of association and collective bargaining, which is incorrect.

### **Other suggestions to improve the work of the CFA**

1. **CFA member preparation:** Working documents must be received by CFA members at least two weeks before the CFA sitting; otherwise they should not be discussed. Working documents could be received by e-mail or through a "password protected" computerised system prior to the CFA meeting and in hard copy on the arrival of the CFA member in Geneva. Thus only one copy would be printed and savings made.

CFA members need to be provided with full reference to the previous CFA decision, to ensure consistency of approach or to the previous CAS decision, to ensure consistency of approach within the ILO supervisory system.

2. **Draft agenda:** The Office prepares the agenda, without any prior consultation with CFA members. Transparency on the elaboration of the agenda is vital. For instance, CFA members could be provided with a document prepared by the Office (in the form of an Excel table) where, for each active case, they have information about: when the case was received, when the government replied, when the complainant provided further information, etc. In this way, CFA members would have a full overview of all CFA cases. The internal process of the Office for choosing cases for the agenda would then be more transparent.



3. **Number of cases included in the agenda:** The number of cases to be heard during each session needs to be reduced by limiting the admissibility criteria so that there are ideally no more than a maximum of 8 or 10 per day, 20 per session, subject to the detail of the complaint.
4. **Status of cases and introduction to the report:** There are three categories of CFA reports: interim, follow-up and definitive report. Clearly distinguishing the differences would assist, as would clarify on what basis a case is included in the introduction. Whether there is an established practice to include follow-up cases in the introduction is neither mentioned in the CFA report, nor in the Digest, nor on the ILO webpage. Some revision of the kind of reports could be envisaged to increase clarity for the general public, especially on follow-up cases.
5. **Fact-finding activity:** The CFA members do not investigate the facts. The Office does all of the investigation on behalf of the CFA, and CFA members accept this investigation often without questioning it. Clarity about this process should be introduced to ensure transparency of process and good governance of the work of the Office. As an alternative, the complaint and all the annexed documents should be made available to CFA members and nominated individuals in their Secretariat's on an "online platform" secured by a password system. Furthermore, of particular concern is if a complaint involves a private sector enterprise, the enterprise is wholly reliant upon the government to present its comments to the Office. The CFA members should receive a written assurance that the enterprise's comments have been provided freely, without duress, and that it agrees with the facts presented by the Government on its behalf. Indeed, in addition to hearing from Governments, when appropriate, where facts are in dispute and conciliation appears difficult at the national level, the CFA should also be able to hear from the enterprise and/or complainant, as appropriate, before providing its guidance in the form of conclusions and recommendations.
6. **Secretariat Support to Employer Members:** The IOE secretariat is not allowed to participate in the CFA meetings. This means that Employer members have to participate, listen, and take notes on the proposed changes. The IOE secretariat could be sitting in the CFA meeting as an observer to help take notes of the proposed changes and as administrative support. The same applies to the ITUC secretariat.
7. **Preparation for the adoption of the final report:** the copies of the final report are given to CFA members on the Thursday of the week after the CFA sitting and the final approval of the report is scheduled for the following day. This procedure does not give CFA members sufficient time to read the report carefully and to be able to propose revisions if needed. It also affects their participation in the GB. Either the report should be provided one/two day(s) before (and with track changes to highlight the amendments), or the discussion to approve the report should be scheduled for the following week (on Monday) to avoid affecting participation in the GB.
8. **Adoption of the report:** The final report is proposed for adoption without track changes. Given that the Chair does not read out the agreed changes, CFA members need to read



the whole report, compare it to their notes, ask again, etc. This can lead to confusion and oversights. The final report has to be proposed with clear track changes, with changes that have been agreed and spelled out by the Chair during the two-day meeting.

9. **Length of the process:** The length of the process needs be reduced and reviewed in line with national dispute resolution processes (the first analysis of a normal case is scheduled, as a minimum, after 13 months after the complaint is filed and 16 months as a maximum. For urgent cases 12 months are required to analyse a complaint). Clarity should be ensured on the meaning of “urgent cases”.

#### **D. Concluding remarks**

The global review of ILO standards supervisory mechanisms is a timely endeavour to ensure that the supervisory mechanisms are better placed to meet present and future challenges of the world of work and to provide an effective contribution to the application of international labour standards in ILO Member States for the protection of workers and the interest of sustainable enterprises.

A critical analysis from the authors is expected to make sure meaningful and innovative improvements both in terms of process and substance to the different mechanisms are proposed to the Governing Body for meaningful consideration.

The above comments and suggestions for improvement and innovation are made in a constructive and respectful spirit. While some suggestions for improvement can be implemented in the short term, others need to be implemented in the medium and long term following tripartite discussions. All of them are inspired by a profound respect to the supervisory system, the need to preserve its relevance and the fundamental role tripartite governance has in the supervision of international labour standards.