INTERNATIONAL LABOUR STANDARDS

INTERNATIONAL ORGANISATION OF EMPLOYERS' POSITION PAPER

INTERNATIONAL ORGANISATION OF EMPLOYERS

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PREAMBLE

In 1999, the ILO formally recognised that its future relevance in the field of international labour standards, and its ability to reassert the usefulness of such standards, depended on reinvigorating its efforts and experimenting with new approaches. Since then, the IOE has been guided in its engagement in standards reform by its *ILO Standards Policy Position Paper* (2000)

The 2008 *ILO Declaration on Social Justice for a Fair Globalization* further recognized that the Organization must "promote the ILO's standard-setting policy as a cornerstone of ILO activities by enhancing its relevance to the world of work and ensure the role of standards as useful means of achieving the constitutional objectives of the Organization".

This revised Guide captures the considerable progress that has been made to date, and sets out further policy positions the Employers' Group is pursuing within the ILO. The evolving economic, social, technological and political environment has highlighted the need for a more flexible approach to setting standards, and more efficient promotion and application methods.

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EXECUTIVE SUMMARY

International labour standards (ILS) have been a central means of action for the International Labour Organization (ILO) since its foundation. More than 180 Conventions and 200 Recommendations, supported by a comprehensive system of supervision, have the objective of promoting social progress. The ILO considers that some 77 Conventions are up-to-date and suitable for promotion on a priority basis and for further ratification by Member States.[1] Others are deemed to be in need of revision or are obsolete. There is particular focus on promotion for ratification of the eight up-to-date "fundamental" or "core" Conventions[2].

The Employers' position is that ILS, and in particular Conventions, should seek to address fundamental workplace issues and have a high-impact. Conventions should be reserved for unchanging principles and for issues on which there exists a broad tripartite consensus that regulation at international level is necessary. Unfortunately, a 'standards for standards sake' approach has often been taken.

Today, ILS still play an important role as guiding principles in labour and social policy. However, some have been criticised for being too rigid, and for failing to respond to changing needs. The *ILO Declaration on Social Justice for a Fair Globalization* (2008) recognized that the Organization must "promote the ILO's standard-setting policy as a cornerstone of ILO activities by enhancing its relevance to the world of work and ensure the role of standards as useful means of achieving the constitutional objectives of the Organization". A debate on reforming the ILS system has consequently gained momentum and has already led to a number of important changes. The Employers' Group in the ILO were amongst those who initiated this debate and have constructively engaged in it.

ILS need to be updated or set aside on a regular basis and new standard setting discussions should be chosen for their relevance to the current world of work.

This document outlines the IOE position on the most important ILO standard-related activities:

- Standard setting
- Promotion of up to date standards
- Review of standards
- Standards supervision
- Standards evaluation

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[1] The up-to-date instrument list 2010 can be found in the following link: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_125121.pdf

[2] On 25 May 1995, the Director-General of the ILO launched a campaign to promote the fundamental ILO Conventions with a view to their universal ratification. Each year the Director-General submits a report for information to the ILO Governing Body on progress made in the ratification of fundamental Conventions during the previous year and on the future prospects for the ratification of these instruments, based on information communicated by Member States.
, i.e.:
Convention N° 87 (1948) on Freedom of Association and Protection of the Right to Organise
Convention N° 98 (1949) on the Right to Organise and Collective Bargaining
Convention N°.29 (1930) on Forced Labour
Convention N° 105 (1957) on the Abolition of Forced Labour
Convention N° 100 (1951) on Equal Remuneration
Convention N° 111 (1958) on Discrimination (Employment and Occupation)
Convention N° 138 (1973) on Minimum Age, and
Convention N° 182 (1999) on the Worst Forms of Child Labour,

STANDARD SETTING

ILS, and in particular Conventions, are not the answer to *every* workplace issue. They should seek to address fundamental workplace issues and have a high impact. Conventions should be reserved for unchanging principles, and address issues on which there exists a broad tripartite consensus that regulation at international level is necessary. Consideration should be given to autonomous Recommendations that give guidance on specific workplace issues. The observance of such Recommendations could be strengthened by follow-up action of a promotional nature.

A catalogue of selection criteria should be established to assess whether standard setting is the most appropriate response. Possible criteria could include:

- Suitability of a given topic for legal requirements
- Prospects for ratification
- Utility as a benchmark
- Extent of coverage
- The qualification of the issue as a significant workplace problem
- Factual understanding concerning the proposed Standard
- Economic analysis of its possible impact

A Conference pre-discussion should also be held before formal moves towards assessing suitability for standard setting are made.

Ways should be explored to promote a more responsible attitude of governments in the procedures/votes preceding the adoption of Conventions. Greater realism might result if a government that voted in favour of adoption were obliged to explain (in addition to existing Constitutional obligations), within for example the two years, why it has not ratified.

Any review should also address issues relating to:

- The procedures for entry into force of Conventions
- Denunciation procedures and periods
- The role of all elements of the supervisory machinery to improve efficiency, effectiveness, coherence and transparency

PROMOTION OF STANDARDS

In general, technical co-operation to promote standards should only be considered if the standard in question is realistic, practical and flexible.

There should be coherence between supervisory and promotional procedures

REVIEW OF STANDARDS

Ratification rates on all but the core conventions keep the Employers focused on the need to establish an ILO regular review mechanism to keep the body of standards up-to-date. The objective of having a constant and regular review mechanism is to claim beyond any doubt at any time that the classification of all ILO standards is valid and to ensure that ILS provide effective protection for all workers in the workplace of today while taking into account the needs for sustainable enterprises. This would not only provide a solid justification for the promotion of ILO standards classified as up to date. It would also be in line with the Social Justice Declaration which calls upon the ILO to respond more effectively to the diverse realities and needs of its Members, including through standards-related action.

A permanent process of renewal is indispensable if ILS are to meet current requirements and to give generally accepted guidance.

SUPERVISION OF STANDARDS

The effective and efficient supervision of ILO standards by the constituents lies at the heart of the proper governance of the ILO's normative activity. This governance is lacking and requires updating in light of the modern world of work.

A supervisory system owned and managed by the constituents, rather than by the Office or any external group, should be promoted. Only under these circumstances, can it be ensured that the supervisory machinery is correctly applied and does not, as has been the case, exceed its mandate.

A comprehensive discussion in the ILO Governing Body on improving the functioning and working methods of the CEACR and CFA is essential.

The approach the ILO has been taking in recent years should extend to the area of standards. Its future legitimacy hinges on its ability to deliver improvements that make a difference to the world of work. The IOE is ready to play an active role in exploring innovative and effective ways ahead.

EVALUATION OF STANDARDS-RELATED ACTIVITIES AGAINST THEIR OBJECTIVES

A continuous overall evaluation mechanism should be devised to assess the impact of instruments for their legal, economic and social effects. Such a mechanism should be able to measure success achieved in fulfilling the specific objectives set forth in a Convention or Recommendation and identify any possible indirect or adverse repercussions there might be with respect to other main ILO objectives - for example that of promoting and sustaining employment.

INTRODUCTION

Employers share with workers and governments the objectives of promoting social justice and improving observance of internationally recognized labour principles and rights. International labour regulation through ILO standard setting is one way to further these social objectives.

In the present ever-globalizing economic environment, international labour standards (ILS) have an important role to play in providing internationally recognized guidance to countries on dealing with labour issues. They could also contribute to a wider acceptance of globalization, the continuation of which is a precondition for future economic and social progress.

However, in the Employers' view, ILS will only have these positive effects when they:

- Are relevant to the world of work
- Relate to agreed areas where standard setting helps Governments address the needs of the modern labour market
- Concentrate on setting worldwide, fundamental and essential rules
- Provide realistic and practicable orientation to countries lacking experience in labour standards, rather than seeking international harmonization at an ideal level
- Are flexible enough to apply to all ILO Member States and accommodate changing needs
- Are based on a thorough assessment of their likely impact on the economy.

ILS must also recognize and support the needs of enterprises since only competitive and productive enterprises can create private sector employment.

Since the adoption of the 2000 IOE document on ILO standards policy, IOE objectives remain unchanged. However, it is useful to reflect on how the most important ILO standard-related activities have evolved over this period.

STANDARD SETTING

OBJECTIVES OF STANDARD SETTING

The increasing complexity of labour and social issues demands a diverse and flexible approach. Unless the ILO can position itself as the organisation which addresses the social and labour dimension of globalization, its ability to remain relevant and credible will be lost. ILS are one of many means of action at the ILO's disposal.

ILS, and in particular Conventions, should seek to address fundamental workplace issues on which there can be a broad consensus on applicable policies or principles, and have a high impact. An example is the Convention on the Elimination of the Worst Forms of Child Labour (No. 182). Over-detailed Conventions do not enjoy high levels of ratification, impact or credibility.

Creating a Convention should be reserved for issues where there exists a consensus that regulation at international level is necessary. The content of Conventions should be confined to regulating essential and unchanging principles and minimum standards. Although the aim of the IOE is not to reduce the number of Conventions produced by the ILO, if the ILO concentrates on unchanging principles, Conventions will certainly be used in a more restricted way in the future.

The present practice of adopting both a Convention and an accompanying Recommendation on a given subject has contributed to the proliferation of Conventions that remain increasingly un-ratified. This practice has also weakened the status of Recommendations, which have often become "dustbins" for all of the difficult issues raised in Convention debates. This is the result of a "standards for standards sake" approach.

Employers have consistently repeated that a "*Less is More*" approach to Conference standard setting debates is politically and technically more desirable. This view is gradually gaining some resonance. Since 2000, seven ILO Conventions[3] and ten ILO Recommendations[4] have been adopted. This trend has been influenced by the Employers' strategy of requiring standard setting items to be of high relevance and enjoy consensual support. ILO action has now impacted all major areas of the world of work and further standards are no longer needed.

The adoption of guidance in the form of autonomous Recommendations may present a way forward for the ILO. However, Recommendations should be namely that, and not merely aspirational "good practice" statements. Recommendations, which are more easily revised, updated, or replaced, could be better suited to an international social environment increasingly characterised by rapid change and the consequent need for flexibility together with the demand to provide "decent work". Furthermore, in order to strengthen the status of autonomous Recommendations, a reporting mechanism of a promotional nature based on Article 19 of the Constitution could be devised along the lines of the follow-up procedures of the *1998 Declaration on Fundamental Principles and Rights at Work.*

[3]C. 183 Maternity Protection Convention, 2000, C184 Safety and Health in Agriculture Convention, 2001
C185 Seafarers' Identity Documents Convention (Revised), 2003, MLC Maritime Labour Convention, 2006
C187 Promotional Framework for Occupational Safety and Health Convention, 2006 and C188 Work in Fishing Convention, 2007 and C189 Domestic Workers Convention, 2011

[4]R.191 Maternity Protection Recommendation, 2000, R192 Safety and Health in Agriculture Recommendation, 2001, R193 Promotion of Cooperatives Recommendation, 2002, R194 List of Occupational Diseases Recommendation, 2002, R195 Human Resources Development Recommendation, 2004, R197 Promotional Framework for Occupational Safety and Health Recommendation, 2006, R198 Employment Relationship Recommendation, 2006, R199 Work in Fishing Recommendation, 2007, R200 HIV and AIDS Recommendation, 2010 and R201 Domestic Workers Recommendation, 2011

The ILO should consider the important complementary role of non-binding instruments, such as Declarations, Guidelines and Codes of Practice. Declarations, reserved for exceptional occasions to highlight important principles or policies covered by international labour standards (such as the *1998 Declaration on Fundamental Principles and Rights at Work*) Guidelines and Codes of Practice, which could complement international labour standards by offering concrete guidance on technical and/or sectoral issues.

IDENTIFICATION OF POSSIBLE STANDARD-SETTING ITEMS

Criteria should be established to assess whether standard setting is the most appropriate answer to a given problem. These could include:

- Suitability of the topic for legal requirements
- Prospects for ratification
- Utility as a benchmark
- Extent of coverage
- The qualification of the issue as a significant workplace problem
- Factual understanding concerning the proposed Standard
- Economic analysis of its possible impact

To balance business realities and worker protection, indicators should be established to measure whether the criteria are met, e.g. as regards "utility", expectation of positive effects for the protection of workers, absence of negative effects on the competitiveness of enterprises (and their ability to sustain and create employment), etc.

In ILO questionnaires, respondents should be asked specifically to address these issues and how they can be balanced against the need for a new standard. Agreement of the broad majority of ILO constituents including representatives from both developed and developing countries should be required regarding the fulfilment of the criteria.

PREPARATION OF STANDARDS

The "Portfolio" approach has been a step in the right direction in broadening the selection basis and has begun to help to eliminate unsuitable subjects. However, a mechanism is missing to help identify selection criteria which would give ILO constituents a general overview of subjects and enable them to identify or reject more systematically items for standard setting and also to identify existing standards needing abrogation, withdrawal or revision.

If no particular topic requires urgent and appropriate attention, no selection should be made. There is a concern that the selection of topics might in some instances be undertaken solely for the purpose of compiling the Conference agenda. The existence of structures for the development of standards is an insufficient reason for the selection of new standards.

In order to give the Office and constituents the fullest possible information on a subject, a Conference pre-discussion should be held before formal moves towards assessing suitability for standard setting are made. Such pre-discussions would create a better understanding of the differences and practical problems in various countries and regions and, on a topic by topic basis, consideration may have to be given of whether pre-discussions should be held on a global or regional basis. Pre-discussions could also crystallise agreement on core fundamentals essential for an intended standard; and pave the way for a better understanding during the tripartite debate on a

given standard-setting issue at the Conference. If the Conference then decides that an item is of interest, it should adopt a Resolution recommending the item to the Governing Body for possible inclusion in a future Conference agenda. By starting with a pre-discussion, items that are not ripe for standard setting will not advance in the process.

Shortlisting items in the Portfolio should better reflect the wishes of the Governing Body rather than the state of preparation of a particular issue within the Office. Before any pre-discussions take place, the Governing Body (through for example a working party) could also provide an advisory role to the Office and Governing Body in discussing issues for standard setting which should not take place in a policy vacuum. The Governing Body discussion on a potential standard should take place near the end, not the beginning, of the process.

ILO questionnaires need to ask for more than simply affirmative or negative responses. The Office needs to take into account detailed responses, and tailor the draft proposal for a standard to fit the responses received. The questionnaires should deal with broad policies and principles and avoid micromanaging the issue in the national context. Two types of questionnaire, cleared in advance through the Governing Body, could be used: a general, broad questionnaire for the pre-discussion, and the second tailored to the conclusions of the Conference pre- discussion. As often not enough ILO constituents respond to questionnaires, this can lead to an imbalance in the interpretations of the responses. Ways should be explored to meet the need for better quality representative information from constituents to be at the disposal of the Office, taking into account that, for many organisations, responding to ILO questionnaires represents a real administrative and technical burden.

THE NEGOTIATING PROCESS

Time is often wasted during Conference discussions due to the late arrival of "key players" at the meetings. This is not always due to "behind-the-scenes" discussions to progress the formal debates. Chairpersons of committees need to be fully briefed prior to the first meeting regarding ILO protocol, rules, etc., not during the time allotted for the committee to meet. A further time-saving measure would be for the ILO Secretariat to make use of PCs to put the proposed wording of amendments, etc. under discussion on a screen instead of repeating the whole text for the slowest writers to copy the words.

At the Conference, there is a tendency to resolve differences of opinion by vote. A more consensus-based approach needs to be developed. (This would be easier to do if a consensus already exists on the need for a particular Standard.)

There is also a discrepancy between the mostly positive reactions and votes of governments in the creation of new Conventions and their subsequent ratification of the Instruments. Ways should be explored to promote a more coherent and responsible attitude in the procedures/votes preceding the adoption of Conventions. It is odd that the system allows for a situation whereby governments that vote in favour of the adoption of a Convention (after having participated positively and actively in its formulation) sometimes state publicly that they are in no position to ratify. Greater realism might be introduced in the debates at Conference if each government that voted in favour of the adoption of a given Convention were obliged to explain, (for example within the two years), why it has not ratified. This would be in addition to the existing constitutional reporting requirements on non-ratified Conventions.

The most important feature of ILS vis-à-vis national labour regulation is their universality. This means that ILS should provide standards and social policy objectives that are realistic and useful for ILO member States at all stages of development and in all regions of the world. The most important means to achieve universality is flexibility. Flexibility devices are already contained in the ILO

Constitution[5]. In the past decades, flexibility devices regarding scope, extent of obligations and methods of application have been developed by the Conference.[6] However, there is a need to use these flexibility devices more systematically. It is imperative that the employers taking part in the standard-setting process are not only aware of these means of flexibility, but also take a proactive role in proposing them, wherever appropriate (see box below). Moreover, employers should be creative in identifying practicable new forms of flexibility. The ILO should provide better information on flexibility devices to the constituents and make more suggestions for their use. The most recent approaches in Conventions n. 182, MLC, 187, and 188 should also continue to be used. However, flexibility devices, such as exceptions and exemptions, should not be seen as a justification for the setting of inappropriately high protection levels. This would be contrary to the function of ILS as universal minimum standards.[7]

Flexibility devices for ILS

- Adopting a Convention laying down general principles only; an accompanying Recommendation (or a code of practice) gives guidance on practical implementation.
- Adopting instruments/provisions whose validity is connected to a time limit (trial instruments/clauses), if the possible impact of a standard is unclear.
- Defining minimum conditions. This does not imply a lowering of existing higher national standards, as the ILO Constitution explicitly states that ILS do not hinder more favourable conditions at the national level (Art. 19, Para. 8).
- Fixing the general aims of social policy and leaving the determination of methods for application to the national level (promotional standards).
- Omitting provisions if their universal relevance and lasting value are seriously questioned.
- Including clauses which allow exemption from certain obligations for particular economic branches or certain categories of enterprises/workers.
- Adopting Conventions consisting of several parts. Ratifying Member States can choose a minimum number of parts for compliance.
- Including "equivalence" clauses, which allow departure from a given standard provided comparable protection is afforded overall.
- Including so-called "escalator" clauses, which permit interim lower standards for countries at a lower level of economic/administrative development.
- Including modifiers which seek to widen the latitude of implementation, such as "wherever practicable", "in accordance with national law and practice", "by methods appropriate to national conditions and practice and by stages as necessary" or "in appropriate circumstances".
- Using clauses which give national employers' and workers' organizations a more prominent role in implementation, stating for instance that effect should be given to the provisions of a Convention "in cooperation with employers' and workers' organizations" or "by means of collective agreements or in any other manner consistent with national law and practice".
- Adopting an autonomous Recommendation only (this has rarely been used since 1970).

[5] Article 19, paragraph 3

[6] Employers' handbook on ILO standards related activities, 2001, page 18. For more details see : ILO: Handbook of procedures relating to international labour Conventions and Recommendations, Rev. 2 (Geneva, 1998). Servais, J. M.: "Flexibility and rigidity in international labour standards", International Labour Review, Vol. 125, No. 2, March-April 1986.

[7] Idem

RATIFICATION, ENTRY INTO FORCE, IMPLEMENTATION, DENUNCIATION

There are currently some 7,700 ratifications of ILO Conventions; representing as many commitments under international law made by individual ILO Member States to implement the respective Conventions in national law and practice. This corresponds to roughly 42 ratifications per ILO Member State. The number of ratifications has been increasing year by year, e. g. between 15 June 2009 and 15 June 2010, there were 66 new ratifications of ILO Conventions. A particularly crucial phase is when a new Convention has been adopted and the government of an ILO Member State is considering its ratification and implementation in national law and practice. The national Employers' Organisation should advise their government on the business perspective on ratification and on business-compatible ways of implementation. The following questions may arise in this context:

- What are the potential problems of ratification and implementation of a particular ILO Convention?
- What are the possibilities to implement the Convention in a way that is compatible with employers' needs?
- How best can flexibility clauses in the Convention be used for applications that are tailored to the situation of a country?

As a matter of principle, Employers have always insisted that ratification of an ILO Convention should be considered as the last step of the process, after the Convention is appropriately implemented in law and practice. The growing number of observations and direct requests each year in the CEACR report is a clear sign that the Office should focus its efforts on helping ILO members to implement ILS rather than seeking only their ratification.

Obstacles to the ratification of Conventions include:

- The adoption of instruments by narrow majorities at Conference – wide ratification cannot flow from a weakly supported instrument
- A "one-size-fits-all" approach
- Lack of relevance of the standard
- Too much direction on what a government must do to implement and enforce the standard
- Uncertainty about obligations under instruments caused by out-of-mandate "interpretation" by ILO supervisory bodies, in particular the Committee of Experts.

Every ILO Convention includes provisions for its entry into force. Normal practice is to provide for entry into force 12 months after registration of the **second ratification**. The required number of ratifications for entry into force of a Convention is too low now that the ILO has grown to 183 Member States. The required number should increase proportionately as a percentage of membership and/or the approach to entry into force should change. For example, the Maritime Labour Convention, 2006 (MLC), will enter into force 12 months after 30 countries, representing 33 percent of the world's gross tonnage, ratify it. Given the aim for standards to be relevant and have a high impact, a higher number of ratifications required before the instrument comes into force or new approaches such as the MLC one, can be a litmus test of the text. This also means the supervisory system can avoid having to address standards relevant to only a few member states.

Every Convention contains an article which sets out the conditions under which a State that has ratified it may end its obligations. There are precise conditions, but in general:

- **Conventions Nos. 1 - 25**: Denunciation is authorized at any time five or ten years (depending on the provisions) after the Convention comes into force.
- **Convention No. 26 onwards**: Denunciation is authorized five (usually) or ten years (depending on the provisions) after the Convention comes into force, but then has a one-year deadline. Similarly, denunciation is again authorized after each new period of five or ten years, depending on the provisions.

A five or ten-year denunciation procedure is too rigid. Rigidity deters member States from ratifying. In an ideal situation, a country denouncing a Convention should be able to deposit its intention to denounce a given Convention at any time. However, it is reasonable that a country ratifying a Convention remains bound by its provisions for a minimum period of time.

PROMOTION OF STANDARDS

Linking the delivery of technical co-operation to the ratification of standards should not be accepted. In general, technical co-operation to promote standards should only be considered if the standard in question is realistic, practical and flexible. A better understanding of what a standard seeks to achieve, together with a greater degree of consensus on the desirability of achieving the goal, could lead to an approach of co-ownership and increase prospects for ratification and better application of the Standard. The preparation phase, and pre-Conference consultations and discussions, could contribute significantly to establishing a more coherent approach.

There should be coherence between supervisory and promotional procedures. Although the basic legal difference between the supervisory procedures and promotion of the ILO Declaration must be observed and respected.

REVIEW OF STANDARDS

With more than 380 ILS adopted over more than 90 years, the question of renewal has become increasingly relevant. The central method of renewing and keeping ILS up-to-date is by revising them. Important indicators of the need to revise a particular instrument are government reports forming the basis of "General Surveys", the findings of Governing Body Working Parties mandated to review existing ILS, ratification and denunciations rates of Conventions.[8]

There have been three tripartite Working Parties of the Governing Body to review ILO standards: the two Ventejol Working Parties in the 1970s and 1980s and most recently, from 1995 until 2002, the Cartier Working Party. The Ventejol Working Party stressed that its "classification was made at a given point in time and that it would require to be reviewed from time to time in the light of developments". The Employers' Group has repeatedly stressed the need to continue reviewing existing ILO standards to keep it up-to-date. Given ongoing globalization, this is more valid today than ever.

Ratification rates on all but the core Conventions keep the Employers focused on the need to establish an ILO regular review mechanism to keep the body of standards up-to-date. The objective

[8] Employers' handbook on ILO standards related activities, 2001, page 18. For more details see : ILO: Handbook of procedures relating to international labour Conventions and Recommendations, Rev. 2 (Geneva, 1998). Servais, J. M.: "Flexibility and rigidity in international labour standards", International Labour Review, Vol. 125, No. 2, March-April 1986.

of having such as mechanism is to be able to justifiably claim at any time that the classification of all ILO standards is valid and to ensure that ILS provide effective protection for all workers in the workplace of today while taking into account the needs of sustainable enterprises. This would not only provide a strong basis and solid justification for the promotion of the classified up-to-date ILO standards, it would also be in line with the Social Justice Declaration which calls on the ILO to respond more effectively to the diverse realities and needs of its Members, including through standards-related action.

Based on a number of informal consultations and subsequent discussions at the Governing Body, there appears to be consensus on setting up a standards review mechanism the operational aspects of which still need to be defined by the Governing Body. Such a regular check of ILO standards would offer only advantages. While the reviews would involve identification of standards that are no longer relevant, they would also identify new needs for standard setting (new standards, revision, and consolidation). A permanent process of renewal is indispensable if ILS are to meet current requirements and give generally accepted guidance

THE SUPERVISORY SYSTEM

ILS supervision covers the various constitutional obligations arising for Member States in connection with ILS. Its basic purpose is to promote proper implementation of ratified Conventions, in particular to raise shortcomings in their application and work towards correction. ILS supervision comprises legal assessment, tripartite scrutiny and, where appropriate, direct contacts and technical support to Member States. It is based on the philosophy that the best implementation will be achieved through dialogue, encouragement and advice/assistance. [9]

Employers and workers are not only an essential source of information for the ILS supervisory system, they also play a central role in the legal evaluation and correction of cases of non-compliance. The effective and efficient supervision of ILO standards by the constituents lies at the heart of the proper governance of the ILO's normative activity. This governance is lacking and requires updating in light of the modern world of work. A supervisory system owned and managed by the constituents, rather than by the Office or any external group, needs to be promoted. Only by resuming control, can it be ensured that the supervisory machinery is correctly applied and does not, as it has been doing, involve itself in issues beyond its mandate.

Committee on Application of Standards and the Committee of Experts

The ultimate responsibility for ILO standards supervision lies with the ILO's tripartite constituency through the International Labour Conference. According to the ILO Constitution[10], summaries of the reports that Member States have to provide under Articles 19 and 22 have to be submitted to the Conference for examination and assessment. Over time, the number of ratified Conventions and ILO Member States, and hence the amount of supervisory work, has increased and made necessary administrative adaptations. As the Conference itself was no longer in a position to cope with this work on its own, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) was set up which, with the support of the Office, is supposed to make a preliminary legal examination of the compliance in law and practice with standards-related obligations in order to allow the Conference, through its Committee on Application of Standards (CAS), to deliver its supervisory work.

[9] Employers' handbook on ILO standards related activities, 2001, page 38
[10] Article 23 paragraph 1

These adaptations, however, do not alter the fact that it is the Conference and the ILO's constituency (governments, employers and workers) who are accountable for the effective delivery of standards supervision. This basic principle established for the functioning of the supervisory system has unfortunately got somewhat lost in that the largest part of the supervisory work has been assumed, and is controlled by, the Office and the CEACR, an external expert body, without approval by the Conference and for the most part virtually unnoticed by it. This is evidenced in the following:

The CEACR's 2010 report, for instance, which contained more than 800 observations, that is individual assessments of compliance with ratified Conventions. The tripartite Committee on the Application of Standards (CAS) selects from the CEACR report 25 observations which it discusses in more detail; this corresponds to only some 3% of all observations made by the CEACR. No other mechanism is available to review any other observations made for suitability and accuracy.

The CEACR assessments, which are made according to working methods developed by the Office and the CEACR. The ILO's tripartite constituents are informed, but not consulted, nor are they asked to participate in their formulation or approve the content and veracity of their report.

The CEACR's reference in its observations in a general way to discussions that have taken place in the CAS. However, views expressed by tripartite constituents in the CAS, in particular dissenting views, are virtually never taken into account by the CEACR.

The CEACR prepares and submits its report to the Governing Body. However, the report requires neither adoption, nor approval, by the Governing Body, the Conference, or any other tripartite ILO body.

The self-assigned role of the CEACR in making final legal assessments of obligations under ratified ILO Conventions including interpreting the provisions of Conventions. The role assigned to the CAS has been to simply reinforce and emphasize the findings of the CEACR. However, the Employers have repeatedly emphasized that the CEACR has no formal mandate to interpret the provisions of ILS, but can only express opinions. Extensive interpretations made by the CEACR which go beyond its role and the text of the Conventions may also explain the low level of ratifications of ILO Conventions.

There are further indications that the CEACR, with the support of the Office, is negating the principle of tripartite governance in ILO standards supervision.

CEACR meetings, except the opening session to which the spokespersons of the Employers and the Workers are invited, are private. Employers and Workers are not even allowed to attend as observers.

The CEACR unilaterally decides on matters concerning its mandate, e.g. it recently decided to identify "cases of good practice" and introduced new criteria for the examination of Workers' and Employers' submissions made in non-reporting years. The tripartite constituents were informed of this, but not asked to make suggestions, let alone approve.

The CEACR – again without asking for approval of ILO tripartite bodies – decided to cooperate with international bodies (UN Committee on Economic, Social and Cultural Rights; European Committee of Social Rights (ECSR) for assistance in the examination of 20 reports on the application of the European Code of Social Security and its Protocol).

There is a need for greater, genuine involvement of the constituents in ILO standards supervision . A comprehensive discussion in the ILO Governing Body on improving the functioning and working

methods of the CEACR is essential.

The terms of office of the members of the CEACR should be limited to two terms of three years. There should also be more transparency of selection procedures.

The CEACR should acknowledge better that it plays a preparatory role for the Conference and that the observations contained in its report therefore are not final. In certain instances, the Committee of Experts has accorded interpretations to standards that were not contemplated at the time they were adopted. These create obligations not always directly discernible from the texts. A case in point is the over-extensive interpretations of Convention No. 87 on Freedom of Association. This is not only in contradiction with the provisions of the Vienna Convention of the Law of Treaties, but also an over-extensive interpretation of a particular Convention can almost be considered as creating a new standard. Only the International Labour Conference, and no other body, has the power to create new standards. This uncertainty has no doubt contributed to a reluctance to ratify Conventions – the obligations imposed on Member States can be open-ended in the sense that they are subject to re-definition and extension in an interpretative process that does not permit any direct influence by the Member concerned.

Instead of criticising minor deviations from obligations under ratified Conventions, the experts should focus on the application of essential principles and clearly defined provisions. This would involve giving less extensive explanations on the contents of provisions of ratified Conventions, accepting the fact that ILO Conventions are not "set in stone" and are not the solution to all the problems of the world of work. There should also be more emphasis on “cases of progress” in the CEACR’s and CAS’s work.

The general discussion at the CAS provides a unique opportunity to address general developments on standards supervision.

Committee on Freedom of Association (CFA)

Complaints made to the CFA relate to governments. However, in many instances Employers’ Organisations have specific information about cases, and recommendations made by the Committee may have a direct impact on enterprises. The ILO should therefore adopt new procedures to ensure that national Employers' Organisations are consulted on cases concerning their country and, if they so desire, are able to present their views directly to the Committee.

There are differences between the freedom of association rights considered by the CFA and the obligations strictly derived from Conventions 87 and 98. The Committee should therefore focus on the enforcement of these basic principles rather than continuing to build up an extensive so-called "jurisprudence" which has no legal basis and erodes the authority of the Committee's findings. There is a general lack of understanding of the Committee's procedures and working methods. This contributes no doubt to the repeated requests by constituents for transparency.

Other concerns being addressed by Employers within the CFA include:

- Reducing references to companies as complaints are meant to be directed to countries
- Revising the digest of recommendations to balance the text by referencing employer outcomes
- Looking at the regional balance of cases to avoid any one region becoming a focus for cases
- Addressing receivability criteria, timeframes for issues to be dealt with

On substantive issues, attention is being given to modernising the CFA recommendations to be respondent to the real needs of the world of work in key areas such as: the definition of essential

services; the right to strike; circumstances for reinstatement of a dismissed worker; and the need to respect national legal procedures.

Other Procedures

Articles 24 and 26 of the ILO Constitution are sometimes abused in that conflicts are brought to an international forum for publicity. Means to limit this practice, perhaps by applying strict receivability criteria, or introducing a filter mechanism, should be considered to prevent automatic discussion of a receivable complaint.

The way in which Articles 24 and 26 procedures complement the regular supervisory machinery should also be considered in order to prevent overlapping and provide more coherence.

EVALUATION OF STANDARDS-RELATED ACTIVITIES AGAINST THEIR OBJECTIVES

A continuous overall evaluation mechanism should be devised to assess the impact of instruments for their legal, economic and social effects. Such a mechanism should be able to measure success achieved in fulfilling the specific objectives set forth in a Convention or Recommendation and identify any possible indirect or adverse repercussions there might be with respect to other main ILO objectives - for example that of promoting and sustaining employment.

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