



September 2014

## CONSIDERATIONS FOR THE UPCOMING ILO GOVERNING BODY DISCUSSION ON INTERNATIONAL LABOUR STANDARDS-RELATED ISSUES

Given the critical juncture in the ILO supervisory system, the tripartite constituents are called in the short term to take some important decisions with long term implications. As far as the Employers' Group is concerned, the following points may be useful in undertaking an appropriate discussion in preparation for these decisions. They do not, however, pre-empt the final decision of the Group on the approach to be taken.

### ***1. What would the Employers' Group hope to achieve in this process?***

- An overall improvement of the ILS supervisory system that reinforces its credibility and efficiency, and results in a system that can deal with its challenges in a sustainable manner.
- A system based on certainty and clarity. One that is balanced; that helps to preserve workers' rights, but at the same time supports a proper business environment and takes into account efforts made by governments at national level.

### ***2. What important points for this discussion were included in the decisions of the March and June 2014 Governing Body?***

1. The recognition that “a number of steps could be examined with a view to improving the working methods of the standards supervisory system”.
2. It was deemed “necessary to give further consideration to options to address a dispute or question that may arise with respect to the interpretation of a Convention”.
3. A request to the Director-General to present to the 322<sup>nd</sup> Session of the Governing Body **a time frame for the consideration of outstanding issues in respect of the supervisory system and for launching the standards review mechanism.**
4. Following requests being made by the Employers' Group: that the Office would present a discussion document on a possible tripartite dialogue on strike action as a way to overcome existing problems on this specific issue.

### ***3. What has been undertaken to date by the Office?***

- The DG has presented a document outlining two specific options to address any dispute or question that may arise in relation to the interpretation of an ILO Convention: action under articles 37(1) (International Court of Justice) and 37(2) (Tribunal of the ILO) of the ILO Constitution.
- But he has not yet presented a document to give further consideration to all the different or alternative options, nor has he as yet anticipated **a time frame for the consideration of the outstanding issues in respect of the supervisory system.**

### ***4. What are the Employers advocating for?***

- ❖ Consideration of the supervisory system **as a whole rather than dealing with the different issues in an isolated and separate manner.** Many Governments, and the

Workers themselves, have also been in favour of a holistic approach as there is a balance to be achieved. This means:

- Assuring that the responsibilities of the Constituents are properly assumed, and avoiding shifting them to third parties;
- Achieving good coherence between the different supervisory tools, avoiding overlap and maximising complementarity;
- Rationalising the increasing workload;
- Solving differences or disputes over interpretation in a sustainable and long term manner;
- Urgently tackling a more objective methodology to select the list of cases.

Some urgent points have already been addressed such as the need to provide clarity on the nature of the Experts' report. The way in which the annual CAS cases are selected, and the way in which the conclusions of the cases reflect disagreement, are additional urgent issues to be tackled.

#### **5. Would an ICJ decision solve the problem?**

The way in which the question(s) is (are) formulated is key, but whatever the approach, an ICJ decision *per se* would not automatically bring the solution to the problem. The following points should be considered by all constituents before any decision is taken:

- a. Governance.** The ILO's value and legitimacy is based on **tripartism** and its capacity to bring to the table the diverse and complementary practical experiences of Government, Worker and Employer constituencies in addressing employment and social policies that affect real lives and livelihoods. Social dialogue is one of the ILO's key pillars – for the constituents to turn their back on this essential tool, by seeking resolutions to industrial relations issues outside their own house, has the potential to shake the ILO to its very foundations. **It is not unlikely that constituents could reach consensus on principles linked to strike action as they have done over other essential elements of industrial relations.**
- b. A decision will lead to a winner-and-loser scenario. This could create further tensions among different groups and constituents, which would deteriorate the climate of trust necessary for the ILO to be able to tackle future challenges across the ILS supervisory system. Added value.** Whatever decision an external body (ICJ) or an internal body (article 37.2 of the ILO Constitution) make on either the existence or lack of a link between the right to strike and Convention 87, this will not solve the disagreement on the detailed and specific guidance provided by the Experts on strike action.

A proper tripartite discussion within the ILO will be required since constituents could legitimately disagree on some of this guidance, and be unwilling to accept it as the ILO's final say. And, as has been established, the CAS is not the place for such a discussion, as it deals with country cases. A sustainable solution is needed.

- c. Precedent.** This proposal needs to be properly reflected upon as it could set a negative precedent as a means of dealing with problems of interpretation. It could

also be used for delaying purposes when important disputes over interpretation arise.

## **6. Convention 87 and the Right to Strike. Reference to the ILO Constitution in the ILO Consultation Note on article 37.1**

- ❖ It is known that Employers have long objected to the guidance provided by the Committee of Experts which links Convention 87 and the right to strike as exceeding their mandate.
- ❖ However, the consultation note presented by the Office (referred to under point 3 of this paper) introduces in the draft resolution (page 35) and in the draft questions (page 36) **the idea that the right to strike may also be protected as part of the principle of freedom of association as contained in the ILO Constitution.** According to this logic, **all Members of the ILO would be bound to respect the right to strike** as set out in Chapter 10 of the digest of decisions and principles of the Committee on Freedom of Association (CFA) of the Governing Body, regardless of whether they have ratified Convention 87. By further extension, Membership of the ILO may therefore require Member States that have not ratified Convention 87 to revise their national industrial relations laws and practices to conform with the ILO Constitution. With regard to those Member States that have ratified Convention 87, it must be borne in mind that when subsequently reading the right to strike into Convention 87, the ILO Experts had close regard for the decisions and principles of the CFA.
- ❖ Therefore, the Office's proposed introduction of the principle of freedom of association as contained into the ILO Constitution in the consultation note requires a **full tripartite discussion before any referral is made to the ICJ given** (1) the potential wide-ranging effect on national sovereignty to determine national industrial relations laws and practices and (2) the need to specify the contents of the principle of freedom of association as contained in the ILO Constitution.

## **7. What constituents need to reflect on:**

- **What are the pros and cons of the different possibilities that are on the table (art. 37.1, 37.2 and a tripartite discussion on the right to strike)?**
- **Specifically, would a decision on recourse to the ICJ, or the creation of a tribunal solve the current problems? An assessment would be needed to determine whether either of these options would contribute to improving the situation, or would they simply further "muddy the waters"?**
- **What other alternatives, if any, could be envisaged to deal with future problems of divergent views on interpretation?**
- **What would be the most appropriate order and timing for discussing the different issues (what should come first, what should come after)?**
- **How can we best assure coherence between the different tools of the ILS supervisory system?**
- **How best can the different components of the supervisory system overcome the workload challenges while remaining efficient and within the scope of their mandate?**

- **Would a tripartite discussion on strike action be useful? What might the possible outcomes be, and how would the different constituencies respond to each?**

#### **CONCLUSIONS:**

- ❖ In-depth discussion and reflection are required by the constituents, given the high impact and consequences of any of the possible outcomes. One single discussion during the GB will not be adequate.
- ❖ Consensus on the way forward is needed. A vote which divides the constituents further is a recipe for disaster.
- ❖ As matters stand, we have as a basis a technical background document which refers to two of the discussion points. Trying to decide on just one point in isolation, without taking into account the overall supervisory framework and context, would be inefficient and counterproductive given the complementarities and interdependences.
- ❖ It is now time to simultaneously take decisions on both a short and a longer term approach, as agreed during the March GB.
- ❖ Therefore, a proper high-level discussion will need to be held as a matter of urgency, not just to exchange views, but also to start taking decisions without further delay on how to approach this issue.

The Employers' Group remains committed to finding a balanced solution to the present stalemate. We call on all constituents, and especially the Workers' Group, to engage in real dialogue, which has been lacking to date, instead of engaging in campaigning activities for the status quo which no longer enjoys enough support as a solution to this crisis.