



Governing Body

320th Session, Geneva, 13–27 March 2014

GB.320/LILS/4

Legal Issues and International Labour Standards Section
International Labour Standards and Human Rights Segment

LILS

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FOURTH ITEM ON THE AGENDA

The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards

Purpose of the document

The Governing Body is invited to give its direction on the action proposed to address the main outstanding issues in the supervisory system as outlined in paragraphs 40–43.

Relevant strategic objective: Promote and realize standards and fundamental principles and rights at work.

Policy implications: None.

Legal implications: The eventual follow-up may have such implications.

Financial implications: To be determined depending on the decisions taken.

Follow-up action required: According to the decision that will be taken.

Author unit: Office of the Director-General (CABINET).

Related documents: GB.319/PV/Draft; Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 103rd Session, Geneva, 2014.

Introduction

1. As requested by the Governing Body at its 319th Session in October 2013,¹ the Director-General launched a consultative process with all groups with a view to submitting to the Governing Body at its current session, concrete proposals that address the main outstanding issues in relation to the standards supervisory system.
2. The Office acted in accordance with the pressing need, underlined by the Governing Body, for substantive progress to be made on matters which were of fundamental importance to the functioning of the ILO supervisory system in advance of the 2014 session of the International Labour Conference. It was also guided by the Governing Body's emphasis on the importance of full tripartite participation in the process as key to the building of consensus and to maintaining the strength and authority of the system.

Consultations

3. The consultations mandated by the Governing Body were carried out from November 2013 to early March 2014 and involved all groups within the Governing Body. After a first round, a non-paper by the Director-General provided the basis for a further round of consultations. The members of the Committee of Experts on the Application of Conventions and Recommendations as well as ILO staff and relevant specialists previously associated with the Office were also consulted.
4. The consultations revealed not only areas where views diverge, but also those where strong consensus does exist, notably:
 - on the need for the ILO to continue to have a strong and authoritative supervisory system enjoying the support of all parties; and
 - the need for action to be taken quickly to preserve the system's strength and authority on the basis of clear proposals to overcome unresolved issues.
5. The consultations showed substantial overall satisfaction with the system among ILO constituents even if some expressed concern on specific issues. It is often regarded as being among the most effective in the multilateral system.
6. Nevertheless, there is also a body of opinion which takes the view that the system is not operating satisfactorily. While that view is not shared by the majority, it is recognized as a reality which requires a response if full tripartite support for the system is to be maintained.
7. The absence of satisfactory responses to these concerns would damage and already has damaged the functioning and strength of the system. Even those who had no fundamental problems with the current operation of the system were ready to contribute to the restoration of necessary consensus.
8. The consultations suggest that even if the current areas of controversy have arisen around the specific issue of the right to strike, action to respond to them needs to address the systemic questions they raise.

¹ GB.319/PV/Draft, paras 565–567.

Key issues outstanding

9. The discussions that have taken place in the International Labour Conference, the Governing Body and elsewhere, particularly since the failure of the Committee on the Application of Standards to complete its work in 2012, have generated extensive statements of opinion which are not repeated in this document. From these, it is possible to identify a limited number of key issues which need to be addressed, and a similarly limited number of possible responses. The consultations point to the need at this juncture for decision-making of a political nature more than further legal or theoretical reflection.
10. For these reasons, the framework for possible responses given below is shaped with a view to facilitating the Governing Body's consideration of major lines of action to ensure the future strength and authority of the supervisory system. Such action, taken in conformity with the ILO's Constitution, could include:
 - an explicit consensus statement on the mandate of the Committee of Experts;
 - possible avenues for action where there is a question or dispute relating to the interpretation of a Convention;
 - a number of adjustments to current working arrangements of the supervisory system; and
 - confirmation of the commitment to establish a standards review mechanism.

The mandate of the Committee of Experts

11. In this area, two related issues have arisen. The first concerns whether or not the Committee of Experts has exceeded its mandate in respect of the meaning that it has attributed to Conventions in its reports.
12. The second regards the standing and legal value of the comments the Committee presents in its reports.
13. An initial objection has been that the experts have engaged in interpreting the meaning of Conventions when the Constitution reserves that function to the International Court of Justice. Subsequently, consensus seems to have formed that a degree of interpretation is inherent and necessary to the experts' task of assessing the application of ratified Conventions. However, there remain some differences of opinion about the extent of such interpretation.
14. Linked to the foregoing are some concerns about the question of the substantive effect of the comments of the experts, particularly when they are not the object of specific tripartite discussion and conclusions as one of the 25 cases selected for examination in the Conference Committee. This issue has gained in significance as the contents of the experts' reports have increasingly been used as points of reference outside the ILO.
15. Much attention to date has been given to the inclusion in the report of the Committee of Experts of text which would state explicitly the nature and limits of their mandate and of the standing of its opinions and recommendations. The experts already dedicated

paragraphs in the general part of their 2013 report to these matters and have done so again this year in their 2014 report as reproduced below:²

Mandate

The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions.

16. The Experts have provided a clear statement of the mandate conferred on them by the Governing Body. Substantial change in that mandate could only result from a political decision by the relevant ILO bodies. Discussions and consultations to date would indicate that the formulation provided by the experts in their 2014 report could adequately address the concerns that have been raised and command consensus.

Action in case of disagreement on the interpretation of a Convention

17. It is generally recognized (including by the experts themselves) that it is legitimate for ILO constituents to have and to raise disagreement with the views of the Committee of Experts on the application or interpretation of a Convention. Indeed, from the outset, the ILO Constitution foresaw and makes specific provision for such eventualities in its article 37 reproduced below:

Article 37

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organisation and any observations which they may make thereon shall be brought before the Conference.

² ILO: *Application of International Labour Standards 2014 (I)*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Conference, 103rd Session, Geneva, 2014, para. 31.

18. Considerable, and inconclusive, debate has already been devoted by the Governing Body to the options for action under article 37(1) or 37(2), during which objections have been raised in the past against both:
 - in the case of article 37(1), that recourse to the International Court of Justice could be slow and cumbersome; that it might in any case not provide practical answers; and that there would be disadvantage in demonstrating the ILO's incapacity to resolve its difficulties internally; and
 - in the case of article 37(2), that the establishment of a tribunal (or similar mechanism) could undermine the authority of the Committee of Experts and be used with excessive frequency and for purposes of political convenience rather than legal clarity. Cost considerations are also a concern.
19. While there has been much reluctance to date, to make use of either option under article 37 of the Constitution, ILO constituents have not been able to move towards consensus on any other methods of resolving the specific and disruptive issue with which they are currently confronted.
20. In these circumstances, and given the improbability of continued tripartite dialogue restoring consensus within the institutional status quo as well as the urgency of overcoming the current impasse, the Governing Body will need to give serious consideration to action under article 37.
21. Consultations revealed interest in exploring further the possibilities for action under both article 37(1) and article 37(2) with divergent views expressed on the relative advantages of each.
22. The views expressed point to the need to further explore in greater detail the possible modalities, costs and safeguards that might be associated with each of these options.
23. In addition, the option exists of an International Labour Conference discussion of issues arising from the application of given international labour standards, where this has led to differences of understanding. At the current stage however, it appears that this course of action would be unlikely to resolve the matters at hand. Nevertheless, it is apparent that alongside the Committee of Experts, the Committee on the Application of Standards itself does provide an important forum for tripartite discussion of issues arising in relation to the application of specific Conventions informed by concrete country situations.

Functioning and working methods of the Committee on the Application of Standards and the Committee of Experts

24. The consultations confirm strong constituent support for the roles and authority of the Conference Committee on the Application of Standards and the Committee of Experts as the crucial and complementary components of the supervisory system.
25. Nevertheless, there are long-standing concerns over aspects of the functioning of these bodies which some constituents believe need to be addressed in the overall response to outstanding issues.
26. Underlying these concerns is the background trend of the continuing increase in the workload of all parts of the supervisory system. This is explained primarily by the increase in the number of member States and of ratifications, and the increased knowledge and use

by constituents of reporting, representation and complaints mechanisms. The following table gives some indicators of the changes in the volume of work of the Committee of Experts.

Selected quantitative information on ILO standards supervisory system

	1990	2013	2014	% change	
				2013–1990	2014–2013
Number of Conventions	171	189	189	10.5	0.0
Number of Ratifications	5 508	7 919	7 929	43.8	0.1
Article 22 reports requested	1 719	2 207	2 319	28.4	5.1
Article 22 reports received	1 260	1 497	1 719	18.8	14.8
Pages of CEACR report	580	917	674	58.1	-26.5
Number of experts on CEACR	20	18	18	-10.0	0.0

Source: ILO.

- 27.** The most frequently voiced concern is over the list of national cases selected for examination by the Committee on the Application of Standards at each session of the Conference.
- 28.** It is generally accepted that Governments themselves should not take a role in the determination of the list, and that this be primarily the responsibility of Workers and Employers. But there are calls for more clearly understood use of agreed and objective criteria in the selection of cases, which could respond to: requirements of balance in the range of Conventions covered and in regional coverage; the guidance of the experts themselves on the seriousness of cases; overall transparency; and adequate visibility for cases of progress.
- 29.** Consultations particularly stress the need to ensure timely publication of a list, and also to counter misperceptions about what a member State's inclusion in the list really signifies. It is widely held that such inclusion constitutes, in itself, a political rebuke, and is therefore something to be avoided, resulting in active lobbying and a damaging politicization of the process. The practice that has been instituted for Employer and Worker representatives to explain to Government members of the Committee on the Application of Standards the rationale for the selection of cases has proven helpful and could be built upon.
- 30.** The consultations reveal some concerns over the appropriate use of the different components of the supervisory system (reports considered by the experts under articles 22 and 23 of the Constitution, representations under article 24, and complaints under article 26, as well as cases before the Committee on Freedom of Association) and the need for balance between them. Questions were raised concerning the appropriate routing of communications, raising points of law, points of practice or specific situations and, in addition, the possibility of using different mechanisms successively and on a graduated basis.
- 31.** The Committee of Experts itself faces challenges arising from an increasing workload, and consequently has given active consideration to necessary modification to its own working methods. It has sought to increase the use of (unpublished) direct requests to governments and to include more precise observations in its reports.

32. Coping mechanisms to deal with this growing workload have included adjustments to the frequency with which reports are required of ratifying governments, increased resource allocations and the introduction of on-line reporting systems. But concerns about overload still exist, and the question has arisen as to whether there are acceptable ways of moderating or rationalizing the flow of communications into the supervisory system and of ensuring that matters that might more properly be dealt with elsewhere are so treated. Some constituents have also raised the option of further extending the reporting cycles for ratified Conventions and of increasing the number of members of the Committee of Experts.
33. In view of the shared opinion that it is important to assure the strength and authority of the supervisory system, the Governing Body could give consideration to concrete action to improve the working methods of the supervisory bodies in ways which will strengthen and not compromise their strength and authority.
34. Specifically, the Governing Body can examine: the methodology for deciding the list of cases to be examined at the Conference including any “default” steps; the relationship between the different supervisory mechanisms; possibilities for action to ensure that access to the supervisory system is assured in line with the established purposes of each of its components; and whether there is a margin for further adjustments to reporting cycles on ratified Conventions.
35. In parallel, the Office could further examine the ways in which it supports the work of the Committee of Experts as well as efforts to ensure that the Committee of Experts works with a full complement of experts, with a view to achieving optimal efficiency in work processes and enabling the experts to make the best use of their necessarily limited time.
36. All parties are aware of the need to guarantee access to the supervisory system to all those who need it. But in circumstances where receivability criteria are generally purely formalistic, the experience of a number of member States in establishing national mechanisms to deal with matters that would otherwise come directly to the ILO can prove instructive. Such mechanisms would require careful design and tripartite acceptance. The procedures provided for in the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), could be of use in this regard. Initial experience with technical cooperation in respect of such mechanisms has proven productive.
37. In all these matters, dialogue between constituents and the Committee of Experts, which has proven valuable in recent months, should be further promoted.

The standards review mechanism

38. The need for full tripartite consensus on an authoritative supervisory system to enhance the relevance of international labour standards through a standards review mechanism were the substance of the “Standards Initiative”, one of seven centenary initiatives proposed by the Director-General at the 2013 session of the International Labour Conference, and subsequently approved by the Governing Body. The task of ensuring the continued relevance of international labour standards in the contemporary world of work is an integral part of the outstanding standards-related issues to be addressed. In November 2011, the Governing Body already agreed in principle to the establishment of a standards review mechanism for this purpose. Successful resolution of difficulties in respect of the supervisory system will provide the necessary platform of confidence and understanding for that mechanism to be made operational.

The 103rd Session of the International Labour Conference

39. The consultations offer reason to hope that at its current session, the Governing Body will be in a position to advance the construction of consensus around the outstanding issues in respect of the standards supervisory system. But it will not be in a position to conclude that task in advance of the 2014 session of the International Labour Conference. It is therefore of critical importance to the achievement of the overall goals of the standards initiative that the Committee on the Application of Standards is able to undertake its work successfully and that all parties commit to cooperate to that end.

Draft decision

40. The Governing Body:

- (a) reaffirms that in order to exercise fully its constitutional responsibilities, it is essential for the ILO to have an effective, efficient and authoritative standards supervisory system commanding the support of all constituents;*
- (b) welcomes the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report;*
- (c) deems it necessary to give further consideration to options to address a dispute or question that might arise with respect to the interpretation of a Convention;*
- (d) underscores the critical importance of the effective functioning of the Committee on the Application of Standards in conformity with its mandate at the 103rd Session of the International Labour Conference; and*
- (e) recognizes that a number of steps could be examined with a view to improving the working methods of the standards supervisory system.*

41. The Governing Body therefore requests the Director-General to:

- (a) prepare a document for its 322nd Session in November 2014 setting out the possible modalities, scope and costs of action under articles 37(1) and 37(2) of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention;*
- (b) present to the 322nd Session of the Governing Body, a timeframe for the consideration of remaining outstanding issues in respect of the supervisory system and for launching the standards review mechanism;*
- (c) continue to enhance the effectiveness of the support provided by the Office to the Committee of Experts in the discharge of its mandate;*
- (d) take all necessary action to expedite the filling of vacancies on the Committee of Experts and to propose any adjustments to the relevant procedures to facilitate this objective; and*

- (e) *continue informal consultations with all groups of the Governing Body in respect of all matters referred to in this decision.*

42. The Governing Body also:

- (a) *encourages the continuation of informal dialogue between the Committee of Experts and the Conference Committee on the Application of Standards; and*
- (b) *invites the Committee of Experts to continue to examine its methods of work with a view to further enhancing its effectiveness and efficiency. As in the past, the experts may wish to communicate any progress made in their annual report and through its dialogue with the Committee on the Application of Standards.*

43. The Governing Body further:

- (a) *recommends to the Conference Committee on the Application of Standards that it consider convening its Working Party on Working Methods to take stock of current arrangements and develop further recommendations on the Committee's working methods; and*
- (b) *calls on all parties concerned to contribute to the successful conclusion of the work of the Conference Committee on the Application of Standards at the 103rd Session of the International Labour Conference.*