

## Governing Body

335th Session, Geneva, 14–28 March 2019

GB.335/LILS/PV

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Legal Issues and International Labour Standards Section

LILS

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### MINUTES

## Legal Issues and International Labour Standards Section

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## Legal Issues Segment

### First item on the agenda

#### **Follow-up to the discussion on the protection of Employers' and Workers' delegates to the International Labour Conference and Regional Meetings and members of the Governing Body in relation to the authorities of a State of which they are a national or a representative** ([GB.335/LILS/1](#))

1. *The Employer spokesperson*, noting that freedom of expression was mentioned in the Declaration of Philadelphia, said that his group shared the same views, interests and priorities as the Workers' group regarding the protection of delegates. Now he wished to hear the Governments' approval of the proposal for submission to the following session of the International Labour Conference in the light of the urgent need to eliminate the current protection deficit, the time already devoted to examining the issue in the Governing Body, the series of informal consultations that had been held to reach tripartite consensus, and the flexibility shown by the Employers' and Workers' groups during the previous Governing Body session in accepting a proposal for a mechanism that provided equivalent protection. Everything had been put in place; all that remained was for the Government group to come on board with writing a new chapter in ILO history. The Employers' group supported the draft resolution, which had already been submitted for its consideration, without reservation. The regulatory, legal and institutional frameworks and scope of application of the resolution were clearly defined, as were the duration of immunities and the procedure for waiving them. The draft resolution was innovative and reinforced the ILO's social and tripartite democracy. States would ratify it in their own time, based on their national circumstances and the commitment of other constituents. He called on the Governing Body to approve the draft resolution for submission to the Conference in the Centenary year.
2. *The Worker spokesperson* said that it was the sixth time that the item had been placed on the agenda of the Governing Body. Her group had requested its inclusion on the agenda in the light of a considerable gap in Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies (1947). Freedom of expression and opinion were key to meaningful social dialogue, and tripartism could be effective only if Worker and Employer representatives taking part in ILO meetings were able to carry out their functions freely and independently and were granted effective protection against reprisals. The draft resolution was the only clear-cut solution and legally sound way to fill the protection gap. As there appeared to be no legally equivalent alternative mechanisms to extend privileges and immunities to Workers' and Employers' delegates, and no substantive alternatives to the proposed draft resolution had been submitted by Governments, her group firmly believed that there was no alternative to the current resolution and urged Governments to move forward on that pressing issue in the ILO's Centenary year. She supported the draft decision.
3. *Speaking on behalf of the group of Latin American and Caribbean countries (GRULAC) and the Africa group*, a Government representative of Brazil said the members of the groups had undertaken the necessary consultations at the national level to appropriately vet the proposal to extend privileges and immunities to Workers' and Employers' delegates. While they were fully committed to finding ways to enhance protection for such delegates, they had reached the conclusion that the measure under consideration would pose insurmountable challenges

in both legal and practical terms. Various Governments had indicated that their internal legal systems severely limited privileges and immunities for their own nationals and that the proposed amendment to Annex I could be considered unconstitutional or in violation of the law. The extension of protection to Employers' and Workers' advisers, as well as their exemption from any restrictions on their free movement, were also problematic. Given that so many members of the groups were not in a position to accept the proposed amendment to Annex I or to include it in their legal systems, they saw no other option than to withdraw their support for the inclusion of the item on the agenda of the Centenary Session. The groups also pointed out that any amendment to Annex I would have to be expressly accepted by the States parties to the 1947 Convention and that 57 ILO member States had not yet ratified said Convention. Moreover, the Conference Credentials Committee already reviewed complaints that were closely related to the concerns of the social partners, including those concerning delegates or advisers prevented from attending the Conference. The functions of the Credentials Committee could be enhanced through amendments of the Standing Orders of the International Labour Conference and, if necessary, the Governing Body could follow up on any outstanding issues. The same applied to the credentials committees of the Regional Meetings. With regard to the protection of members of the Governing Body, a tripartite committee could be established to address violations of members' freedom of expression through diplomatic means. Such a mechanism would be applicable to all ILO member States and not just those that accepted the proposed amendment to Annex I of the 1947 Convention. Neither GRULAC nor the Africa group supported the draft decision.

4. *Speaking on behalf of GRULAC*, the Government representative of Brazil said that his group aligned itself with the preceding statement delivered on behalf of GRULAC and the Africa group. GRULAC wished to draw the Governing Body's attention to the following points: the proposed extension of immunity to advisers attending the Conference and Regional Meetings had no legal basis as it went beyond article 40 of the Constitution and the Conference resolution of 1970 concerning freedom of speech of non-governmental delegates to ILO meetings, which was still in effect; privileges based on freedom of expression were less pertinent to advisers, since they could not take the floor unless acting as substitute delegates; the distinction between delegates and advisers was important given the large number of advisers accredited to national tripartite delegations, and failure to observe that distinction would generate concern and uncertainty; in the countries of his region, the privileges and immunities afforded to parliamentarians, which were similar to the privileges and immunities that the document proposed extending to the Employers and Workers, were enshrined in national Constitutions and extremely restrictive in nature. GRULAC also wished to point out that in many, if not all, of the countries in the region, extending such privileges and immunities would be considered unconstitutional, and that there were legal and practical obstacles to extending the exemption from any restrictions on their free movement to the Employers' and Workers' delegates and advisers. Lastly, in order for the proposals set forth in the document to be effective, the 126 ILO member States that were already party to the 1947 Convention would have to accept the proposed amendment of Annex I and grant privileges and immunities that posed legal difficulties; the other 57 member States that had not yet ratified the 1947 Convention would have to ratify said Convention, as well as the amended Annex I; and another three member States that were party to the 1947 Convention, but had not yet ratified its Annex I, would have to ratify the amended Annex I. GRULAC therefore wished to explore other more practical, effective and realistic paths, such as strengthening the functions of the credentials committees of the Conference and Regional Meetings or establishing a tripartite committee in the Governing Body to examine any violations of its members' freedom of expression. GRULAC was therefore not in a position to support the draft decision.
5. *Speaking on behalf of the Africa group*, a Government representative of Lesotho said that her group wished to align itself with the statement made on behalf of GRULAC and the Africa group. While the Africa group respected the rights of Workers' and Employers'

delegates and fully supported their freedom of speech, it harboured reservations on what it viewed as attempts to grant privileges and immunities in an unrestricted manner, thereby overriding the jurisdiction of sovereign States. The process of waiving immunity in an emergency was also a source of concern. The Africa group did not support the draft decision.

6. *Speaking on behalf of the group of industrialized market economy countries (IMEC)*, a Government representative of the United States said that her group unequivocally supported the full protection of the freedom of speech of Employers' and Workers' delegates, but that the effectiveness of the revision of Annex I to the 1947 Convention hinged on its ratification by member States, many of whom had indicated that their governments would not be in a position to ratify the proposed amended Annex. The proposed amendments offered unprecedented immunities to private citizens and while the unique tripartite structure of the ILO may warrant the extension of such immunities, member States were carefully considering the implications of such a decision beyond its direct impact on the work of the ILO. IMEC wished to know what modality would be used to adopt the draft resolution at the Conference and expressed concern at the message that would be sent should member States not be a position to support the resolution during a record vote. The Governing Body should not place the Organization in a position where it might take a decision that could be interpreted as undermining freedom of speech, particularly during its Centenary year. In view of the foregoing, the Office should clarify whether other mechanisms could be established to ensure the protection of Workers' and Employers' delegates in the exercise of their duties at the ILO. While IMEC understood that there were no alternative legal proposals to extend additional privileges and immunities to Workers' and Employers' delegates, the Office should explore proposals to establish stronger mechanisms for bringing concerns to the attention of the Office or the Governing Body and for engaging Governments when issues arose. Such mechanisms would draw greater attention to any issues and be more effective in resolving them.
7. *The Employer spokesperson* said that the Employers had noted the rejection of the proposal by various, but not the majority of, Governments. It was a great pity that such deep divides existed on freedom of expression and social justice, which were central issues for the ILO. It was clear that interpretations of the Declaration of Philadelphia varied. Instead of proposing alternative mechanisms or instruments at the current session, Governments with misgivings had repeated their reasons for refusing the draft resolution. To take no action would be to force the Workers' and Employers' delegates to face uncertainty and to expose them to risks. The Employers did not want that outcome. The limitations of existing ILO mechanisms, specifically, the Credentials Committee and the Committee on Freedom of Association, were clear. He emphasized that the next step at the national level would be, simply, ratification. The legal gap would then be filled by the legislature and the problem resolved. However, in view of the numerous opportunities provided and the lack of results yielded, he proposed ending the discussion on the issue.
8. *The Worker spokesperson* said that she held the ILO legal team in high esteem and assumed that they maintained their opinion given during the 334th Session (October–November 2018) of the Governing Body, which was that no viable alternative mechanism existed. The lack of alternative proposals from Governments, the exhaustive explanations from the Office, and the significant amount of Governing Body time that had already been dedicated to the issue more than sufficed. While legal arguments for or against the proposal could always be found, political will among some Governments was lacking and there was no way forward. It was embarrassing and sad that the draft resolution could not be submitted to the Conference, when the Organization was celebrating 100 years of tripartism.
9. *A representative of the Director-General* (Deputy Director-General for Management and Reform) confirmed that the Office stood by the legal advice given at the 334th Session (October–November 2018): an amendment to the Annex to the 1947 Convention was the

only legal way to fill the gap in the protection of the Employer' and Worker' representatives. The Governments had indicated that a number of them would not be in a position to ratify the amendment and to translate it into national law. In response to IMEC's query, he said that the normal process for adopting such an amendment would be submission to the Conference followed by adoption by consensus. However, a record vote may be requested under article 19(6) of the Standing Orders by a show of hands of not less than 90 delegates, or by the Chairperson of a group. In response to queries about alternative mechanisms, he reiterated that no legal alternative existed and advised that the Credentials Committee of the Conference and credentials committees at Regional Meetings would have limited capacity, as they only sat during meetings and their mandate extended no further. The option of establishing a tripartite committee to manage complaints was within the scope of the Standing Orders of the Governing Body and the Office could provide further advice on how to move forward in that direction. However, that solution would be of a political or moral nature, not a legal one. The Office would accommodate further discussions in another form if the Governing Body so wished.

10. *The Chairperson* impressed on the Governing Body that if there was no agreement on the draft decision, the discussion on the protection of Employer and Worker representatives in relation to the authorities of their own States through privileges and immunities would be definitively closed.
11. *The Worker spokesperson* said that the debate on privileges and immunities and should be closed in view of the minimal prospects for progress. However, she emphasized that the Governments remained responsible for protecting freedom of expression for Workers' and Employers' delegates.
12. *The Employer spokesperson* supported the proposed course of action and emphasized the responsibility that now lay with the Governments.
13. *Speaking on behalf of IMEC*, a Government representative of the United States supported in principle the course of action proposed in the draft decision. However, in view of the discussions and the Office's willingness to present a paper detailing other options, she was wondering how the draft decision could be amended to reflect that way forward.
14. *A Government representative of Brazil* agreed that the discussion should be closed for the time being. He thanked the Office for its constructive response on available options and emphasized that a consensus-based solution that served the interests of the entire Governing Body was needed. He conveyed his high esteem to the ILO legal team and commended its work but stressed that the interpretation of domestic law was beyond its mandate. Furthermore, members of the Governing Body must be more attentive to different perspectives and legal systems; there was no one-size-fits-all model. He expressed deep disappointment in relation to comments that could imply that legally sound and legitimate concerns might be considered as not being presented in good faith.
15. *The Chairperson* confirmed that the draft decision could not be adopted and that the draft resolution would not be submitted to the following session of the International Labour Conference.

## Decision

16. ***The Governing Body did not approve the draft resolution in the appendix of document GB.335/LILS/1 for submission to the 108th Session (2019) of the International Labour Conference and closed the discussion on the matter.***

(GB.335/LILS/1, paragraph 3, as amended by the Governing Body)

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## Second item on the agenda

### Improving the functioning of the International Labour Conference: Comprehensive review of the Standing Orders of the Conference ([GB.335/LILS/2\(Rev.\)](#))

17. *The Worker spokesperson* took note that a fourth set of amendments would be circulated by the Office following the current Governing Body session. She emphasized the importance of leaving sufficient time for consultations on the consolidation of comments into a comprehensive review of the Standing Orders of the Conference in order to reconcile any differing views on a number of proposed amendments. She supported the draft decision.
18. *The Employer spokesperson* welcomed the progress made and the opportunity to simplify the Standing Orders of the Conference. He asked the Office for information on how many further consultations were foreseen, which parts of the Standing Orders those consultations would address, the timetable for the completion of the comprehensive review and when a comprehensive set of amendments might be submitted to the Governing Body for approval or consideration. He approved the draft decision.
19. *Speaking on behalf of the Africa group*, a Government representative of Morocco noted with interest that no amendment would be decided until the Governing Body had taken a decision on the comprehensive set of amendments. He welcomed the consultation process and the transparent, balanced and impartial approach to gathering constituents' perspectives on each amendment. He did not object to any of the opinion trends expressed during consultations on the Conference committees, particularly concerning codifying certain practices, and supported the limitation of statements by representatives of non-governmental organizations to the opening sitting and only if time permitted. He also supported the clarification that the Drafting Committee would be convened with a changing composition depending on formal instruments to be negotiated and that its composition would reflect a geographical and linguistic balance. He further supported the suggestion to allow more time for speeches made on behalf of a group. Regarding the suggestion to specify that when an amendment was rejected, all similar amendments would fall, he said that those amendments must be meticulously checked to ensure that they were indeed similar. He supported the compilation of a fourth set of proposed amendments and would welcome an opportunity to discuss possible ways to streamline the overall structure of the Standing Orders.
20. *Speaking on behalf of IMEC*, a Government representative of the United States took note of the progress report with great interest. She wondered why, according to one comment, the Secretary-General of the Conference or his or her representative would need more than the permission of the Chairperson to address committees. Requiring the Chairperson to consult the Vice-Chairpersons first would be very time-consuming as the Secretary-General or his or her representative intervened frequently to give necessary additional explanations, often on procedural or legal matters. IMEC looked forward to the circulation of the fourth set of amendments.
21. *A representative of the Director-General (Legal Adviser)* recalled that the initial intention was to complete the rationalization and simplification of the Standing Orders as part of the Governance Initiative of the Director-General in 2019, a goal that now seemed unrealistic. Therefore, the fourth set of proposed amendments would be circulated between the 335th Session (March 2019) of the Governing Body and the 108th Session (2019) of the Conference and would be discussed in the autumn. That meant that a consolidated text could only be ready for the Governing Body's consideration at its 338th Session (March 2020), it

being understood that sufficient time had to be allowed for prior consultations on the draft text. The following items for consideration would be certain provisions concerning the Convention and Recommendation procedure and the Governing Body elections. In response to IMEC, he said that the last bullet point in paragraph 4 of the document was a comment the Office had received and did not reflect the Office's position.

## Decision

- 22. *The Governing Body took note of the third progress report on the intersessional consultations concerning the comprehensive review of the Standing Orders of the Conference and provided guidance on the next stages.***

(GB.335/LILS/2(Rev.), paragraph 8)

## International Labour Standards and Human Rights Segment

### Third item on the agenda

#### **Proposed form for reports to be requested under article 19 of the ILO Constitution in 2020** ([GB.335/LILS/3](#))

- 23.** *The Employer spokesperson* said that forms for reports to be requested under article 19 of the ILO Constitution should include all substantive provisions of the instruments concerned, though not necessarily as separate questions, and should be drafted so as to closely reflect the content and wording of those instruments. Report form questions should not go beyond the scope of the instruments' provisions, and should not imply a legal obligation to apply the provisions, since report forms under article 19 were addressed to countries that had not ratified the respective Conventions, and Recommendations were, moreover, not legally binding. Since some of the questions in the report form did not faithfully reflect the instruments concerned, his group wished to propose a number of amendments to the form.
- 24.** *The Worker spokesperson* welcomed the General Survey on care economy workers and noted that the report on the Future of Work Initiative had put the transformation of the care sector at the centre of implementing an agenda for gender equality. The report form was comprehensive and well designed to gather adequate information for analysis by the Committee of Experts, and in turn to provide constituents with information to help increase ratifications of the Conventions and identify areas for further work by the Office. General Surveys were a valuable source of information, and the proposed report form was aligned with the recurrent item discussion on the strategic objective concerning social protection and would support informed discussions.
- 25.** The speaker noted that the General Survey would examine the different categories of care workers covered by the instruments, in both the formal and informal economies and with respect to direct and indirect care, and take into consideration the application of the relevant provisions to migrant workers, who played a significant role in the care sector. While more gender-specific questions would have been appreciated, she trusted that the emphasis on gender would be taken into account when assessing the responses to questions throughout

the report form. She supported the draft point for decision, subject to tripartite consultations on the amendments proposed by the Employers.

26. *Speaking on behalf of the Africa group*, a Government representative of Cameroon welcomed the choice of instruments for the General Survey, which related to the strategic objective of social protection. The report form was clear, appropriate and accurate and corresponded to the provisions of the selected instruments. He particularly welcomed the note clarifying that the form was to be used only with regard to unratified Conventions. His group supported the draft decision.
27. *Speaking on behalf of IMEC*, a Government representative of the United States noted that, although her group had consistently asked the Office to ensure that questionnaires were concise, focused and grounded in the provisions of the instruments concerned, the proposed report form was nevertheless lengthy, containing 56 questions. It was regrettable that IMEC's proposed electronic consultations on the form in advance of the Governing Body session had not taken place, as that could have resulted in a shorter survey by combining questions and eliminating redundancies. She enquired about the efforts made by the Office to develop a more succinct survey, which would yield a higher response rate and more informative responses. If the issue was the number of instruments for the selected topic, consideration should be given to topics that included fewer instruments for future article 19 questionnaires. She requested the Office to make available a Microsoft Word version of the report form, in order that governments could complete it electronically.
28. *A Government representative of India* welcomed the proposed General Survey on the situation regarding care work, an area of increasing demand in a context of ageing societies and the increased participation of women in the workforce. Care economy workers – often female migrants and women from ethnic minority communities – were frequently subjected to poor working conditions, particularly in terms of pay and hours of work. He therefore expressed particular appreciation for the inclusion in the report form of a separate section on migrant workers. He suggested that the issues of social protection and its portability, safeguards against violence in the workplace and the rights of freedom of association and collective bargaining for both nursing personnel and domestic workers should be included in that section of the report form, in order to facilitate understanding of the equivalence of provisions for migrants and for nationals. He supported the draft decision.
29. *A representative of the Director-General* (Director, International Labour Standards Department (NORMES)) said that she had heard the delegates' call for more concise report forms. While it was difficult to find a balance between adequately addressing the number of instruments and their respective provisions, and keeping the number of questions in the report form to a minimum, greater efforts would be made in the future. The lack of early electronic consultations was an omission on the part of the Office but would be used in the future, and report forms that could be completed electronically would be made available on the ILO website.
30. *The Chairperson* said that the Employers' proposed amendments to the report form would be discussed in informal consultations, after which the amended form would be submitted to the Governing Body for approval.
31. *The Employer spokesperson* reported that a working group had managed to resolve the issues identified by each of the parties and a new version of the form had been circulated. One of the agreements had been to replace "other care workers" with "all categories of nursing personnel and domestic workers"; however, there had been an omission in question 48, where "nursing and domestic work and other types of care work" should be replaced with "all types of nursing and domestic work". The Employers' group approved the new version of the form, subject to the agreement of the Workers' group.

32. *The Worker spokesperson* indicated her group's agreement. She expressed satisfaction that agreement had been reached on the report form so that it could be circulated in a timely manner. Her group would encourage workers' organizations to respond so that the Office would have the most comprehensive information available to support the recurrent discussions. The Office should make available the necessary resources to ensure that the information gathered could be processed and published in a timely and user-friendly manner.
33. *The Employer spokesperson* reiterated the need for future report forms to closely reflect the content of ILO instruments. He added that consultations on the report form prior to the session would save time and facilitate approval by the Governing Body. Furthermore, the number of questions should be reduced.
34. *The representative of the Director-General* (Director, NORMES) said that the Office would rectify the omission in the revised report form and had noted the requests for support to constituents to assist them in engaging in the reporting for the survey process.

## Decision

35. *The Governing Body:*

- (a) *requested governments to submit reports for 2020, under article 19 of the Constitution, on the Nursing Personnel Convention, 1977 (No. 149), the Domestic Workers Convention, 2011 (No. 189), the Nursing Personnel Recommendation, 1977 (No. 157), and the Domestic Workers Recommendation, 2011 (No. 201); and*
- (b) *approved the report form concerning these instruments set out in the appendix to document GB.335/LILS/3, as revised during the session.*

(GB.335/LILS/3, paragraph 4)

## Fourth item on the agenda

### **Proposed amendments to the form for reports to be requested under article 22 of the ILO Constitution in relation to the Maritime Labour Convention, 2006, as amended (MLC, 2006)** ([GB.335/LILS/4](#))

36. *The Worker spokesperson* welcomed the fact that the Maritime Labour Convention, 2006, as amended, (MLC, 2006), had been ratified by 90 member States. Although no modifications to the report form regarding seafarers' protection against shipboard harassment and bullying had been proposed, as it was considered to have been adequately covered by the existing question on Guideline B4.3.1, she emphasized the importance of the amendment to improving seafarers' safety and welfare and the expectation in the Code that the *Guidance on eliminating shipboard harassment and bullying* was taken into account. She encouraged member States to report on efforts made to address shipboard harassment and bullying in their answers to the question concerning Guideline B4.3.1. The Workers supported the draft decision.

37. *The Employer spokesperson* said that his group understood that the proposed amendments to the report form were based on the advice provided by the Officers of the Special Tripartite Committee of the MLC, 2006, and were thus supported by the Shipowners. The Employers supported the draft decision.
38. *Speaking on behalf of the Africa group*, a Government representative of Chad noted that the proposed amendments to the MLC, 2006, and the corresponding modifications to the report form were intended to ensure that seafarers enjoyed decent working and living conditions. He emphasized that the MLC, 2006, benefited not just seafarers, but also the States that supplied maritime labour, and would therefore contribute to the achievement of Sustainable Development Goal 8 (decent work and economic growth). He expressed the hope that the MLC, 2006, would reach 100 ratifications during the ILO Centenary year, and supported the draft decision.

## Decision

39. *The Governing Body approved the proposed changes to be inserted in the report form for the Maritime Labour Convention, 2006, as amended (MLC, 2006), to be used as the basis for the preparation of reports due under article 22 of the ILO Constitution.*

(GB.335/LILS/4, paragraph 7)