



Final report

**Tripartite Meeting of Experts to Examine the Termination of Employment
Convention, 1982 (No. 158), and the Termination of Employment
Recommendation, 1982 (No. 166)**
(Geneva, 18–21 April 2011)

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Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166): Final report

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I. Introduction

1. The Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), was established by the 306th Session of the Governing Body (November 2009). It met from 18 to 21 April 2011 at the ILO in Geneva. The Office prepared a [background paper](#) for the Meeting, which is available on the [website of the Meeting](#). The website also contains the [list of participants](#), the report of the Meeting and other relevant documents on termination of employment.

II. Composition of the Meeting of Experts

2. The Meeting was composed of six Government experts,¹ six Employer experts² and six Worker experts.³ There were also Government observers from seven member States (Argentina, Botswana, France, Guatemala, Republic of Korea, Portugal and the Bolivarian Republic of Venezuela), two Employer observers and one Worker observer, and representatives from the International Organisation of Employers (IOE) and the International Trade Union Confederation (ITUC).
3. The Officers of the Meeting were as follows:

<i>Chairperson:</i>	Mr Greg Vines (Government expert, Australia)
<i>Worker spokesperson:</i>	Mr Yves Veyrier (Worker expert, France)
<i>Employer spokesperson:</i>	Mr Andrew Finlay (Employer expert, Canada)

III. Opening statements

4. Mr Guy Ryder, Executive Director for Standards and Fundamental Principles and Rights at Work Sector, welcomed the experts and recalled that the termination of employment instruments were the only ones regarding which the Working Party on Policy regarding the Revision of Standards had not been able to reach consensus in March 2001. While Convention No. 158 addressed some of the most significant areas of labour policy, it also touched issues such as the tension between employment protection and job performance, and questions of precarious employment and flexicurity. These issues were among those brought most frequently to labour courts and it was therefore important for the ILO to discuss them. The 2008 Declaration on Social Justice for a Fair Globalization provided the guiding framework and highlighted two points: that ILO social policy must be responsive to the world of work; and that the role of international labour standards should be ensured as a useful means of achieving the ILO's four strategic objectives. He added that in March

¹ Mr Greg Vines (Australia), Mr André Grandizoli (Brazil), Ms Saier Ding (China), Ms Brigitte Zago Koch (France), Ms Ghadeer Atieh (Jordan) and Mr Thembinkosi Mkapili (South Africa).

² Mr Andrew Finlay (Canada), Mr Harrison Okeche (Kenya), Mr Salvador Pasquel Villegas (Mexico), Mr Roberto Suárez Santos (Spain), Mr Varija Ellepola (Sri Lanka) and Mr Christopher Syder (United Kingdom).

³ Mr Horacio Meguira (Argentina), Mr Joel Fetter (Australia), Mr Yves Veyrier (France), Mr Klaus Lörcher (Germany), Ms Shamima Gaibie (South Africa) and Mr Claes-Mikael Jonsson (Sweden).

2011, the Governing Body had discussed the modalities for a standards review mechanism to ensure that the ILO body of standards was responsive and relevant to the needs of the world of work. This Meeting would function as a precursor for that exercise.

5. The Chairperson recalled that over the past 20 years there had been several occasions to reach consensus on a way forward for the termination of employment instruments, but that for a variety of reasons this had not been achieved. Judging from the number of ratifications of the Convention, more had to be done. While the background paper made frequent reference to the need to draw a balance between worker and enterprise interests, in his view it was also relevant to speak of an accommodation in that regard.
6. The Secretary-General, Ms Cleopatra Doumbia-Henry, Director of the International Labour Standards Department, emphasized that Convention No. 158 and Recommendation No. 166 sought to balance and accommodate employment security and employer autonomy in matters affecting the efficient operation of the undertaking; the maintenance of peaceful labour relations while avoiding unnecessary relocations due either to unemployment or unproductive economic units; and labour market effects and employment outcomes. Article 2 of the Convention offered flexibility in terms of the range of means for giving effect to the Convention. She added that the Convention laid out general principles regarding due process, including the period of notice, the right of appeal and consultations, and set out the grounds on which termination of employment would be considered invalid.
7. The Worker spokesperson thanked the Office for the background paper and indicated that the Workers' group was approaching the Meeting with interest and the ambition to consolidate workers' rights and economic progress. He recalled the importance of the right to work, which should be decent, stable and dignifying. The global crisis of September 2008 had spread from the financial markets to the economic sphere and labour markets. Due to increased pressure on returns from investment, risks had grown for enterprises and value chains (particularly SMEs), which had in turn affected employees, with a rise in precarious forms of employment, such as fixed-term employment, partial employment, informal employment and disguised employment relationships, which challenged traditional employment contracts. This caused continuous stress for workers, with extreme consequences in some countries. It was therefore not surprising that ILO constituents had referred to the instruments on the employment relationship and termination of employment in the 2009 Global Jobs Pact. Notwithstanding its moderate rate of ratification, the main principles of the Convention (valid reason for dismissal, an opportunity allowing workers to be aware of and respond to allegations, the right of appeal and the sharing of the burden of proof, the right to compensation and the enunciation of non-valid reasons for dismissal) were present in the labour legislation of most countries throughout the world, irrespective of ratification, as shown in the comparative table in the background paper. This had also been underlined by the Committee of Experts on the Application of Conventions and Recommendations in its general observation on Convention No. 158 in 2009 in the context of the crisis and in the tripartite consultations held in November 2008. Research by the International Training Centre in Turin also showed that a number of national tribunals directly referred to the Convention in judgments relating to dismissals, irrespective of ratification. The pertinence of the Convention was further highlighted by the reference to it in the HIV and AIDS Recommendation, 2010 (No. 200). The European Social Charter (revised), ratified by 23 countries, explicitly reflected the provisions of the Convention. It was important to give meaning to the provisions of the Convention and the Recommendation, in the first instance by protecting workers against unjustified dismissal. But the whole production chain needed to be made aware of its responsibilities and the fact that "labour is not a commodity". The principles contained in the Convention were a matter of common sense and basic respect for human dignity. He emphasized that countries with developed social security systems had absorbed the shocks of the crisis more effectively. Convention No. 158 and

Recommendation No. 166 were pertinent and topical instruments which needed to be promoted and ratified. Labour law was not the enemy, but the condition of progress.

8. The Employer spokesperson thanked the Office for the background paper and emphasized the need to take labour market developments of the past 30 years into account, and not just analyse the Convention in isolation. The Employers' group hoped for a constructive dialogue to discuss ways of better reconciling employment protection and job creation. The preparatory work for the Convention showed that difficult accommodations and compromises had been made. The [discussion of the General Survey at the 1995 ILC](#) and the review by the Cartier Working Party had identified further obstacles to ratification and application. It was unhelpful to ILO constituents interested in guidance from the international level on the subject matter. The lack of ratifications of this Convention and other Conventions reflects negatively on the ILO's standard setting. The Employer spokesperson emphasized that ILO standards could only have an impact in the world when they provide fair and relevant guidance, based on full tripartite support and stressed that the ILO must not satisfy itself with doubtful and contentious standards. Convention No. 158 and Recommendation No. 166 did not fit with all models of worker protection. There are other successful models of protection against dismissal which do not follow the proposition of the Convention. He concluded his opening statement by emphasizing that the Employer experts were committed to help identify barriers to ratification and implementation and other relevant current trends in law and practice as [requested by the Governing Body](#).

IV. Discussion

Common principles on protection against unfair dismissal

9. The Employer spokesperson recalled that the examination of the common principles on protection against unfair dismissal should be done with great care. While, according to the information provided by the Office, principles contained in the Convention and the Recommendation could be found in the legislation of many countries, there were only a few countries that apply all principles (only 18 out of 105 ILO member States). The fact that a principle was applied in many countries did not necessarily mean that it had good outcomes for protection against unemployment; and, vice versa, the absence of a principle in a country did not mean that the protection is unsatisfactory. By way of example, reference was made to the case of Switzerland which, according to the information provided, does not apply four out of 11 principles. The system of protection against dismissal was indeed very liberal; the main features were: (i) no defined reason for dismissal required, although dismissal must not be "abusive"; (ii) even abusive terminations are valid and there is no reinstatement except in case of gender discrimination; compensation is capped at six months wages; (iii) periods of notice are short; and (iv) generally, there is no severance payment. Protection against unemployment still seemed to be very effective with an unemployment rate hovering around only 3.5 per cent. There were great differences in the application at the national level of certain elements of the Convention, which posed a major obstacle to the ratification of the Convention and the achievement of its goals. For instance, several governments indicated concerns with the Article 2 exemptions. Some developing economies were confronted with a large informal economy, in which it was difficult to apply standards. While objectives, such as an unemployment benefit scheme, could be relatively easily achieved in Nordic countries, they were neither realistic nor reasonable in the vast majority of countries. Notice of termination was very costly in some countries, thereby contributing to low employment levels. He emphasized that ILO instruments needed to promote job creation and enterprise development and hoped that governments would indicate the ways in which

they had dealt with the barriers created by the principles of the Convention. In some countries, employment costs were extremely high because of employment protection. The Employer spokesperson proposed that the following principles could be considered common from an employer's perspective on protection against dismissal: (i) effective education and HRD system; (ii) an adequate period of notice; (iii) dismissal must not be arbitrary or abusive; (iv) unemployment income support that encourages active job search.

- 10.** The Worker spokesperson recalled that the majority of member States, regardless of whether they had ratified the Convention, had included its principles in their national legislation. The Convention had also been referred to recently in the Global Jobs Pact as an instrument of importance in the context of the crisis, and in Recommendation No. 200. Instead of dismissing workers, it was important to invest in increasing capacity, which would pay off in the long term. International labour standards always reflected a compromise, as they were the result of social dialogue, but this did not diminish the Convention's value. Although it was clear that there was increased competition at the national and international levels, it merely reaffirmed the importance of protecting employees from its consequences. Active job search was important, but not directly related to the discussion. Similarly, the question of unemployment benefits, while important, should not be included in a discussion of the Convention, as it was a matter for social dialogue at the national level. The differences between the obligations of member States under the Convention and the application of national legislation by the courts needed to be taken into account. The Convention affirmed principles, but did not establish detailed requirements for their implementation. While the Convention did not relate to the informal economy in developing countries, relevant legislation was needed to ensure that the principles of termination of employment also applied to precarious contracts. Finally, he warned that it would not be useful to reopen the debate on protection versus employment creation, as no studies had come to systematic conclusions one way or the other.
- 11.** The Chairperson observed that, while the Convention had been adopted nearly 30 years ago, the nature of work and the economy had changed significantly in recent years. The continuing relevance of the principles of the Convention, and their applicability, required consideration.
- 12.** The Government expert from France maintained that the Convention set out minimum principles of protection, which did not pose any particular problems. The Convention provided necessary forms of protection in case of unfair dismissal and, as such, was not contrary to economic growth and job creation. However, while recalling the French experience in the 2005–08 period with the new employment contract (CNE – as reflected in the background paper), she indicated that the wide array of judicial decisions may be a source of confusion. The Government expert from South Africa added that, although his country had not ratified the Convention, its legal procedures were in compliance with it. The only problem related to dismissals based on operational needs, when employees with high skills were likely to be kept on, making it more likely that newer employees would be terminated, with lower severance costs. The Government and the social partners could enter into social dialogue to address these issues.
- 13.** The Worker expert from Germany recalled that the principles and sometimes even the wording of the Convention were embodied in the European Social Charter (revised). While 17 European States had ratified the Convention, 24 European ILO member States had agreed to be bound by it as a consequence of its adoption in the relevant provision of the European Social Charter (revised). Moreover, the Members of the European Union (in so far as they implement EU law and are not covered by the respective Protocol) as well as the European Union itself were bound by the Charter of Fundamental Rights of the European Union of 2007, which recognized the fundamental social right to protection against unfair dismissal. The Worker expert from Argentina added that the Convention should not be seen in isolation from the provisions of international and regional human

rights' texts. The African Charter on Human and People's Rights and the Additional Protocol to the American Convention on Human Rights referred to the right to work and the principles covered by the Convention. Protection against termination of employment was a fundamental right and the Convention therefore formed part of general standards on the protection of all rights at work. The principles of the Convention were important for employment stability and were linked to freedom of association and the right to collective bargaining. Economic efficiency was not an absolute concept, while the principles set out in the Convention were fundamental rights.

- 14.** The Employer expert from Sri Lanka emphasized that employers were affected by decisions taken at the national level for the implementation of the Convention. There were cases in which, for political reasons, governments took decisions that increased costs and prevented progress, for example by denying permission for dismissals relating to the introduction of automation. He emphasized the need to take a balanced view that took into account all sides of the issue. The Employer expert from the United Kingdom questioned whether the current protection could be effective at the national level. In view of the variety of types of employees, workers, agency workers and contractors, and the variety of legal rights that applied to them, it was highly questionable whether the principle that the Convention applied to "all employed persons" was still valid. Moreover, the increasing cost and legal complexity of dismissal claims for both employees and employers was making the application of the principles of the Convention more difficult. The Employer expert from Kenya added that the Convention was fully implemented in his country by the Employment Act of 2007 and the previous practice of the courts. Although paragraph 2 of Article 2 offered some flexibility in relation to the scope of the Convention, that was removed by paragraph 3. The application of the Convention placed particular constraints on employers in his country in relation to the hiring of short-term employees and those with specific functions, as well as in relation to specifying the reasons for termination of employment, which had become a very delicate matter. Moreover, greater flexibility was required with regard to valid reasons for termination, as a large number of complaints were made to the courts in that respect, which could give rise to very high awards that were out of all proportion to the original situation.
- 15.** The Worker spokesperson indicated that, when referring to the cost of dismissal, it should be recalled that the system of compensation was negotiated at the country level. In the case of Sri Lanka, while the Convention was not at fault, national application seemed to cause problems according to what was said by the employers. As the Convention only established the main principles, it was for negotiation at the national level to determine their application. The case of the CNE in France showed that national problems could be resolved by a process of social dialogue at the local level and this is the way which should have been followed at the beginning. In France, dismissal when the worker was at fault was not contested as a valid reason for dismissal. However, the fault needed to be explained to the worker in order to prevent a similar situation from reoccurring in future. This was in the overall interests of the worker, the employer and the economy in general.
- 16.** The Government expert from South Africa observed that the discussion seemed to indicate that the main problems relating to the Convention arose from the way it was applied at the national level. Social dialogue facilitated the proper application of the Convention, for example by reducing the risk of overcompensation. The ILO should therefore focus its efforts on strengthening social dialogue with a view to resolving such problems.
- 17.** The Employer spokesperson observed that, by way of illustration, although Spain practised social dialogue and implemented all of the principles of the Convention in law and practice, it had the highest incidence of fixed-term contracts, unemployment and youth unemployment. In contrast, Singapore seemed to not comply with many of the principles of the Convention, especially in relation to giving reasons for dismissal and severance pay, yet it had a high level of employment. It was therefore clear that the principles of the

Convention were not conducive to economic success, and particularly employment growth. Although some of the principles of the Convention were valuable, provided that they were well implemented, other principles were absent altogether, such as considerations related to employment growth and enterprise promotion.

- 18.** The Chairperson recalled that Australia had ratified the Convention and had one of the lowest levels of unemployment worldwide.
- 19.** The Worker spokesperson observed that the point made by the Government expert from South Africa encapsulated the essence of the discussion. The problems that arose were related to the application of the principles, not the principles themselves. The Meeting should therefore call for the promotion of the principles of the Convention and its ratification, together with the provision of technical assistance to member States on compliance with the principles. A high number of complaints and lengthy procedures were problematic for both enterprises and workers. The rise in complaints was mostly linked to the crisis, and the resulting dismissals. Employment creation was also important for workers and the Convention should therefore be promoted jointly with other standards, and particularly the Employment Policy Convention, 1964 (No. 122). Finally, without wishing to get into a discussion of employment protection versus job creation, he recalled another example of the French experience where, even though the need for administration authorization for dismissal had been eliminated in 1986, unemployment had increased significantly.
- 20.** The Employer expert from Spain emphasized that the establishment of very rigid rules and practices inevitably led to the inability to create jobs. The implementation of the provisions and principles of the Convention in his country did not favour the desired balance between employment protection and job creation. In particular, Article 4 gave rise to distortions and needed improvement.
- 21.** The Secretary-General clarified that almost all ILO Conventions provided for an initial broad scope, i.e. “all workers”, and thereafter introduced a flexibility clause to allow certain exclusions based on tripartite consultations and relative economic development. The exceptions were the sectoral Conventions, which were limited to workers in the respective sectors.
- 22.** The Chairperson noted that there did not appear to be significant concern with the principles of the Convention per se. Indeed, a number of comments indicated that those principles remained as relevant today as they had been in 1982, and were appropriate to the current economic circumstances. Both workers and employers recognized that the Convention contained a set of principles that were critical to workplace relationships. Two further points had emerged from the discussion: (1) the measures adopted by both ratifying or non-ratifying States to apply the principles of the Convention affected costs, time and complexity, which was due less to the respective principles, and more to the way they were applied by law or interpreted by the courts; in this respect, it was important to emphasize the role of social dialogue; and (2) with regard to economic considerations of job creation and enterprise development, several other ILO instruments were applicable, and consideration should be given to the cross promotion of these instruments. Consensus might be identified on the promotion of the complementary principles relating to termination of employment and employment creation. The discussion should focus on the main provisions of Convention No. 158, the effectiveness of their implementation and whether other principles underpinned the Convention and would require a review of the Convention, or could be considered already implied in the instrument.
- 23.** The Employer spokesperson disagreed that an agreement existed on the principles of the Convention. Many concerns, for example relating to the scope of definitions, had already existed at the drafting stage and history had shown that they still caused problems. The

form of the requirement that employers justify terminations was onerous and could be partly blamed for the high level of non-ratification. Furthermore, the use of non-explicit terms, such as “reasonable” or “unreasonable”, was too ambiguous. Problems of practical application also arose in relation to the “period of notice”, as the objectives of such a period were not clear. Should the Convention focus on encouraging employment or on job retention? Compensation, in the form of redundancy pay and reinstatement, also posed problems for employers. Indeed, all the burdens of the Convention rested with employers. Moreover, it was not possible to treat all employers in a similar manner, as they differed, among other characteristics, in their respective sizes (for example, multinationals, SMEs or small owner-operated businesses, to name a few). A balancing of obligations was necessary. For instance, employees should bear some responsibility for training and reclassification to help employees find new employment, and the role of governments in supporting employees should be clarified. Furthermore, it was not clear at which stage the Convention came into play when redundancies were envisaged. In brief, the Convention was not sufficiently clear and its history of non-ratification had shown that it was not functioning properly. As requested by the Governing Body, it was now necessary to identify why that was so.

24. The Worker spokesperson reiterated that no problems appeared to arise in relation to the principles of the Convention. The information from countries did not point to any clear conclusion with regard to its application, as the same principle could lead to different ways of application according to countries’ specific situations. The key to the success of the Convention was social dialogue. With regard to reinstatement or compensation, the worker’s right could not be dependent on the size of the enterprise. While the procedures might differ, the protection of workers in SMEs gave rise to particular problems as workers often found themselves in precarious situations. Workers who had worked for several years in the same company particularly merited severance, especially as redundancy was not their fault and it was more difficult for them to find new employment. With regard to finding new employment, in addition to reskilling and reclassifying workers, reference should be made to unemployment insurance schemes and the provisions of collective agreements. In brief, it was therefore necessary to examine how to promote the principles of the Convention and remove obstacles to their implementation.
25. The Government expert from France said that problems had arisen in her country because of the time it took for reinstatement to be effective, due to appeal procedures. A law had therefore been enacted that did not require reinstatement (in the event of dismissal for economic reasons) if it was not possible. This showed that countries could solve problems with the implementation of the Convention. She added that most of the prohibited reasons for dismissal listed in Article 5 were also unlawful grounds under the European directives on discrimination, which also established the requirement to inform workers and the administration of planned collective redundancies. She observed that in France around 20 per cent of court cases involving termination raised problems, but the others did not. In view of the difficulties arising with severance payments, countries should try to combine compensation with pre-termination measures, such as training to find new employment.
26. The Worker expert from Australia observed that Article 4 of the Convention established an appropriate balance between the needs of enterprises and those of workers. In Australia, of the approximately 100,000 dismissals each year, only 2 to 3 per cent resulted in arbitration or were challenged in the courts, meaning that the others were apparently in compliance with Australian legislation and the requirements of the Convention. Timing was also important in cases of reinstatement, and in Australia court proceedings in that regard had to be completed within three months, while arbitration was normally even shorter. ILO technical assistance should be provided to help countries deal with claims within a limited time frame and to share examples of best practices. With regard to the burden of proof, the Worker expert from Argentina observed that the comments of the Committee of Experts on the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), showed

that the burden of proof was only reversed in limited cases in which the person concerned would otherwise suffer discrimination. Convention No. 158 allowed that the burden of proof be reversed in such cases.

27. The Chairperson indicated that, in addition to the two points for further discussion relating to the implementation and promotion of Convention No. 158 and its relationship with the Conventions dealing with employment and job creation, and particularly Convention No. 122, a third point for consideration was the mutual obligations of employers and workers in the employment relationship. He expressed his hope that the promotion of the Convention would be acceptable to constituents.
28. The Employer spokesperson recalled that his group opposed any promotion of the instruments because of the lack of agreement on the principles therein. He suggested that the following principles could be considered common on protection against dismissal for international guidance purposes: (i) effective education and HRD system; (ii) an adequate period of notice; (iii) dismissal must not be arbitrary or abusive; (iv) unemployment income support that encourages active job search.
29. The Worker spokesperson hoped that agreement would be reached on how to progress with the Meeting. After focusing on application in various areas, it was now important to examine the principles, as set out in the points for discussion outlined in the background paper.

Main objectives for ILO action on protection against unfair dismissal

30. The Employer spokesperson said that the main objectives for ILO action on protection against unfair dismissal had to be considered in context and could not be considered in isolation from overall employment objectives. Protection against unfair dismissal rules and practice had an effect on the employers' ability and willingness to hire. Thus, it had an impact on the achievement of overall labour market objectives. For many countries, a key labour market objective was the creation of jobs with a view to fighting unemployment and achieving full employment in inclusive labour markets. Similarly, Convention No. 122 set out full, productive and freely chosen employment as the overall objective of employment policies. Any ILO objectives in the field of protection against unfair dismissal should be aligned to these objectives and priorities and contribute to them. The background paper did not provide evidence that ratification and implementation of Convention No. 158 by member States was conducive to full, productive and freely chosen employment. Rather the opposite: countries such as Gabon, the Bolivarian Republic of Venezuela and Yemen had an insufficient labour market performance and large segments of the workforce are in the informal sector and thus remained without any protection. There were hardly any countries that have ratified and implemented Convention No. 158 and had shown a good employment performance in terms of full employment. On the other hand, some evidence existed that countries that did not apply one or more of the core principles of the Convention had good employment records like Austria, Singapore and Switzerland, among others. These countries also showed generally very high standards of working conditions.
31. The Worker spokesperson emphasized that the specific issue before the Meeting was not employment, but workers' rights in the case of termination of employment, and particularly in relation to unfair dismissal. It was important to recall that a significant number of countries had ratified the Convention, and others were applying it without difficulties. Clearly, the overall objective was to establish a set of minimum international standards for workers in a market economy, and most notably to avoid labour becoming a commodity, as outlined in the Declaration of Philadelphia. The Convention did not prohibit termination of employment. It was therefore important to determine how to protect

workers from unfair dismissals, and to determine whether the Meeting could agree that the provisions of the Convention were still appropriate today, in the context of a global jobs crisis. The Meeting should therefore review what could be done to promote the Convention and increase its ratification, and the role of social dialogue in that respect.

- 32.** The Government expert from France reiterated that the main objective of the Convention was to strike a balance between the protection of workers from unfair dismissal and the necessary economic development of enterprises by preserving the right of employers to dismiss workers for valid reasons. For that purpose, it was necessary to combine macroeconomic policy measures (government) and microeconomic policy measures (employers ensuring the employability of their employees) to ensure that workers were rapidly employable.
- 33.** The Chairperson recalled that the objective of the Meeting was to examine the Convention as it currently stood. Although there was a need for broader consideration of employment issues, the Meeting should maintain its focus on protection against unfair dismissal and the objectives of ILO action in that respect.
- 34.** The Employer expert from Spain said that the scope of the discussion was much broader than unfair dismissal and included protection against termination of employment, including termination for economic reasons. What was of paramount importance in that respect was the cost of dismissal.
- 35.** The Government expert from South Africa observed that, unless employers were claiming the right to dismiss workers unfairly, the Convention was still relevant today. He considered that the Employers' group had not clearly explained their problem with Article 2. In his view, the problem lay with the application of the Convention at the national level, not with its provisions.
- 36.** The Employer spokesperson considered that the issue at stake was far broader than termination of employment and concerned the need for a more innovative and vibrant promotion of employment policies. It was not therefore possible to examine Convention No. 158 without looking at other instruments, such as the Global Jobs Pact and Convention No. 122.
- 37.** The Worker spokesperson welcomed the endorsement by the employers of the strategic objective of employment promotion, as set out in Convention No. 122 and the Global Jobs Pact, and emphasized that the underlying principle was that the largest number of persons should be in and remain in employment. The Meeting should focus on how to improve understanding of the provisions of Convention No. 158 so that they could be implemented in the best possible way.
- 38.** The Employer expert from Mexico acknowledged that the Convention sought to strike a balance between the employer's right to terminate the employment of the worker and the worker's right not to be deprived of work unfairly. However, Article 4 needed to be designed to allow the drafting of flexible legislation aimed at creating more productive workers, and more productive enterprises.
- 39.** The Worker expert from South Africa emphasized that the Convention was valid both in times of economic prosperity and economic distress. The Worker expert from Australia indicated that, as there appeared to be no problems with the text of the Convention, the difficulties of the Employer experts must be related to the application or perception of the Convention. Several Worker experts requested clarification from the Employer experts on the difficulties in relation to giving a valid reason for termination and notice periods.

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40. The Employer expert from Spain noted that the Convention not only covered protection against unjustified dismissal, but also protection against collective dismissals. When reviewing the Convention, which was necessary due to the low ratification rate, consideration should therefore be given to job creation and the possibilities of workers to find a new job, although the present wording of the Convention made it impossible to strike the necessary balance in that respect.
 41. The Government expert from France believed that there was a problem of terminology, which required clarification. What was at issue was not justified dismissal, but justification. All terminations should be founded on an objective fact, and the underlying reasons or grounds needed to be justified. In France, the substantive requirements included the existence of a valid reason (the absence of which meant that dismissal was not justified) and the procedures that had to be followed for dismissals to be lawful.
 42. The Government representative from the Republic of Korea (attending the Meeting as an observer) said that the labour legislation in his country was very strict, especially for large companies with strong unions. The Meeting should develop means to facilitate dialogue with unions before employment was terminated. The ILO should give further guidance on the objective, rather than subjective reasons for dismissal that were allowed under the Convention. The Government representative from Botswana (also attending the Meeting as an observer) indicated that the industrial courts in her country had handed down several judgments in compliance with the Convention requiring a valid reason for termination. The Government expert from Jordan added that section 28 of the Labour Code in her country listed the valid reasons for dismissal, in compliance with the Convention.
 43. The Government expert from South Africa observed that millions of workers had been dismissed for operational reasons during the global economic crisis, including in his own country. Clearly, Article 4 did not prevent dismissal under those circumstances. It was not therefore clear why there was a problem with giving a reason, even an economic reason.
 44. The Worker spokesperson recalled that the aim of the Convention was not to prohibit the dismissal of workers. Research did not show any relationship between the level of protection of workers against unfair dismissal and employment levels. Employers should retain responsibility for the employability of workers through training and retraining. Many difficulties could be resolved through social dialogue. The Meeting should conclude that, if there was agreement on the principles, the Convention should be promoted and its provisions explained by the Office.
 45. The Employer spokesperson considered that strict employment protection regulation encouraged by Convention No. 158 increases the costs of hiring workers, and also hits hardest the weakest groups in the labour market. Diminishing the job chances of young workers as one example was tantamount to promoting future long-term unemployment for that group. The ILO must not ignore these effects. The objectives for ILO action on protection against dismissal should therefore be limited to: (i) preventing abusive and arbitrary dismissal that can be equated to a breach of the employment contract; and (ii) providing for a period of notice, allowing the worker to find a new job. At the same time, any ILO action should make sure that protection against dismissal rules are transparent and clear in terms of time/costs afforded for employers and do not unduly burden employers and hence their ability and willingness to hire.

Identification of provisions in Convention No. 158 that give rise to difficulties

Article 2 of Convention No. 158: Exclusions

46. The Employer spokesperson stated that what made the Convention difficult was that it was – overall – conceived from a worker’s perspective: it was not about restriction of termination of employment on the initiative of both employer and worker, but about restriction of termination of employment on the initiative of the employer only. While not each single provision of the Convention looked unreasonable, it was the combined effect of a comprehensive set of provisions that overly restricted the employer’s contractual freedom. With respect to Article 2, the scope of the provisions was imprecise, leading to unfortunate results. For example, they could apply to self-employed workers, which would be unjustified in many situations. Moreover, the exemptions allowed were not useful, as economic changes after ratification could require further exemptions, which were not permitted, as confirmed by the supervisory bodies.
47. An Employer representative from France (attending the Meeting as an observer) added that the uncertainties of Article 2 related mainly to the exclusions under paragraph 2(b). For example, France had adopted legislation in 2005 enabling enterprises with fewer than 20 employees to employ workers without providing the protection required under the Convention during their first two years of employment. The objective was to facilitate the employment of workers in SMEs. However, the unions had claimed that the legislation was not in compliance with the country’s international obligations under the Convention. The Court of Cassation had found that the Convention was directly applicable and that two years could not be considered as a reasonable period under Article 2, paragraph 2(b). The legislation was abrogated in 2008. When a Convention was directly applicable in national law, its provisions needed to be sufficiently precise to prevent legal uncertainty. Countries should be able to make reservations and exclusions to adapt the application of the Convention to their employment policy over time, not only in their first report. The length of procedures, the cost of dismissing workers and the legal uncertainty created by the Convention were all barriers to its ratification. Article 2 needed to be entirely reviewed. For example, it was not currently possible to make any exclusions relating to Article 13 (the size of enterprises), which was also fundamental to make the Convention attractive for ratification.
48. The Worker spokesperson regretted that the discussion was again focusing on a particular national case. It should be emphasized that the legislation on the CNE had been adopted unilaterally without prior consultation with workers’ and employers’ organizations. The experience of Spain had also shown that facilitating dismissal did not necessarily create employment. In France, some statistics showed that 900,000 CNE contracts had been concluded, but they had all been in place of employment contracts of indefinite duration, instead of creating new jobs. Indeed, following its abrogation, there had been no loss of employment, as all the CNEs had been replaced with contracts of indefinite duration. Similarly, the first employment contract (CPE) for young persons under the age of 24 had been heavily contested in 2006. This showed that it was common sense that workers could not be dismissed without a valid reason and an explanation, and that social dialogue was always the best solution. Concerning the exclusion of SMEs, he added that Article 13, paragraph 2, allowed their exclusion for collective economic dismissals. With regard to self-employed workers, the Convention covered all persons employed under an employment relationship.
49. The Chairperson noted that discussion of the CNE case in France related to the interpretation of the wording of Article 2, paragraph 6, which raised the question of whether the interpretation of that provision could be seen as a restriction on the ability of

member States to ratify or comply with the Convention. Hypothetically, two countries could implement the Convention differently: for example, a country that had ratified the Convention in the 1980s might not have foreseen some categories of workers that it would subsequently wish to exclude, while a country which ratified the Convention in the middle of the current crisis, could identify those categories. Moreover, the decision by the Governing Body to set up a standards review mechanism demonstrated that standards needed to be reconsidered to ensure that they remained contemporary and suitable for application, particularly where, as in the case of Convention No. 158, ratification rates were low.

- 50.** The Worker expert from Germany, referring to the preparatory work for Article 2, recalled that a proposed amendment to allow changes to be made to the list of categories of employees excluded from the protection of the Convention had not been approved in the Conference committee that prepared the instruments. The eventual formulation of Article 2 reflected a tripartite consensus. The Worker expert from Australia said that Article 2 provided for adequate flexibility. It was a long-standing principle that agreements had to be kept, and it was inconsistent to derogate from an obligation because of future developments. Moreover, the background paper showed that two-thirds of the countries listed made no exclusions for SMEs. The need for SME exclusions was not therefore borne out in a majority of States.
- 51.** The Government expert from France explained that the objective of the CNE had been to relieve SMEs of some of the obligations relating to termination of employment, relying on Article 2, paragraph 2(b). It should be noted that the CNE was a contract of indefinite duration. France had not opted to invoke the exclusions foreseen in paragraph 5, which referred to structural problems, while the CNE had been intended to respond to cyclical problems. However, workers with a CNE had not been totally excluded from the protection of the Convention, as they could not, for example, be terminated for discriminatory reasons. In addition, it was a temporary measure. As the CNE was a contract of indefinite duration, workers covered by a CNE were entitled to severance pay in the event of dismissal.
- 52.** The Worker spokesperson, referring to paragraphs 5 and 6 of Article 2, failed to understand the justification for depriving workers in SMEs of their rights. Admittedly, SMEs were subject to economic pressures. However, there could be no derogation of workers' rights relating to termination of employment and the entire production chain needed to be made aware of this responsibility.
- 53.** The Employer spokesperson responded that it would be interesting to know whether countries would ratify the Convention if paragraph 6 did not exist. With regard to honouring the consensus reached when the Convention was adopted, the fact that the present Meeting had been convened demonstrated that the consensus had not been adequate. Furthermore, with regard to the claims made that there was no evidence that such restrictions and costs had an impact on hiring decisions, the fact that some studies did not demonstrate a connection did not mean that it did not exist. For example, a survey conducted by the Institute of the German Economy in 2008 showed that a considerable number of enterprises were convinced that legal protection against dismissal hindered the creation of new jobs. More than half of the enterprises had already faced a situation where it had decided not to hire a new worker because of onerous and costly legal protections against dismissal. A more flexible legal protection against dismissal and more flexible regulation regarding fixed-term employment would motivate a large majority of enterprises to create additional jobs in Germany. The same could most probably be said for employers in many countries with strict protection against dismissal regulation. Small businesses were particularly affected by such costs.

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- 54.** The Employer expert from Spain said that Article 2, paragraph 3, could give rise to two scenarios: a high rate of temporary contracts, which had to be seen by some interpretations as a way of circumventing the protection afforded by the Convention; and the abuse or fraudulent use of temporary contracts, which might be understood as a violation of the protection afforded by the Convention. It was for member States to provide adequate safeguards to ensure protection, such as those suggested in Recommendation No. 166. Moreover, the Committee of Experts had noted that fixed-term contracts played a varying, somewhat ambiguous role, since they could serve as means of integration, or alternatively of exclusion from employment. However, the wording of the Convention was not clear and could have been badly interpreted on the way temporary contracts could be considered as abuse of its protection. The Employer expert from Kenya added that flexibility could not be provided in his country under this Convention. The focus should be on creating more employment opportunities, not restricting them through rigidity. Was the ILO's objective to protect existing jobs, or to ensure that more people were employed?
- 55.** The Government expert from South Africa found it unacceptable that, based on the 1982 consensus, no changes could be made to the exclusions specified under Article 2, paragraph 6, even when the decision was based on social dialogue. The Government expert from France added that a State ratifying the Convention today could make use of the maximum number of exclusions to protect itself and would always be in compliance with the Convention in the face of future developments. It would therefore be at an advantage in comparison with countries that had ratified the Convention 20 years earlier, without making such exclusions. There was a strong argument for allowing temporary flexibility negotiated on a tripartite basis. France did not want to denounce the Convention, but the Government wished to be able to have recourse to temporary exclusions, not just for SMEs.
- 56.** The Secretary-General indicated that the flexibility provisions in Article 1 offered a wide range of means for member States to implement the objectives of the Convention, and that there was substantial provision for flexibility in Article 2. Most ILO Conventions began with the standard clause applying to "all branches of economic activity" and "all employed persons", meaning all persons in an employment relationship, whether or not there was a written contract. "All branches of economic activity" referred to the different sectors of economic activity at the national level, such as the rural sector. Reading Article 2 in its totality, and not in isolation, demonstrated that the Convention began with a broad provision of scope, and then immediately provided that member States could exclude certain categories of employed persons in particular contractual situations, which addressed the comments made by the Employer expert from Spain. The first category of employed persons that could be excluded were those with contracts for a specified period of time, such as a short-term, or specific task, followed by those serving probation and qualifying periods of employment, and workers engaged on a casual basis. Paragraphs 4 and 5 provided for further types of exclusions, such as the possibility to exclude certain categories of workers whose terms and conditions of employment were governed by special arrangements from all or certain of the Convention's provisions, such as public service employees. Limitations to these exclusions were set out in paragraph 6, in so far as member States had to indicate these exclusions in their first report. As noted by the Worker expert from Germany, interpretation of the Convention was guided by the preparatory work, during which an amendment to paragraph 6 to open up the possibility of making exclusions after the first report had not been accepted. Three important principles applied to the flexibility framework: (1) it could only be applied through tripartite consultation; (2) it must be a transparent, good-faith process; and (3) governments must be accountable by reporting the flexibility that was exercised. By virtue of paragraph 6, there was no possibility to add additional exclusions after the first report, even following tripartite consultations. In response to other points, she indicated that Article 2, paragraph 2(a), (b) and (c), allowed for the exclusion of temporary and seasonal workers. Paragraph 3 provided for safeguards against abuse in relation to the exclusions under paragraph 2.

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- 57.** The Worker expert from Australia said that the specific needs of SMEs did not justify either temporary or permanent exemptions. The case of Australia was instructive concerning Article 2, paragraphs 5 and 6. When Australia had first ratified the Convention, it had made an exclusion for employers with fewer than 15 employees, which it had reported under Article 2, paragraph 6. But in 2006, the law had been changed to exclude SMEs with fewer than 100 employees, thereby excluding 80 per cent of employees. However, there was no evidence that this had had an impact on the economy. Moreover, in 2009, during the crisis, this provision had been repealed, again with no discernible impact in terms of either employment or unemployment. The Worker expert from South Africa added that, if SMEs were to be excluded, 80 per cent of the African workforce would not benefit from the protection afforded by the Convention. South African labour legislation was modelled on the Convention and, even with a reasonable period of probation, employers were still in a position to comply with the requirement to provide a valid reason for dismissal. It would be dangerous to allow any further exceptions, which would be contrary to the primary objective of the Convention of not allowing arbitrary dismissals. The Worker expert from Germany further noted that Article 2, paragraph 6, allowed for additional flexibility compared to other international labour standards, which required exclusions to be notified at the time of ratification, rather than in the first report.
- 58.** The Worker spokesperson recalled that the idea underpinning Article 2 was that the application of the Convention would be progressively extended. Under Article 2, paragraph 6, a country which excluded categories of employed persons pursuant to paragraphs 4 and 5 was required to report on the situation of the categories excluded and indicate how it envisaged applying the Convention to them. The prevalence of exclusions would therefore be contrary to the ILO's objective of promoting social progress through social dialogue, which was a valuable way of overcoming these issues. For example, the voluntary breach of the employment contract by mutual agreement (*rupture conventionnelle du contrat de travail*), based on a simplified termination procedure, while at the same time ensuring the rights of workers, was cited as an example of the achievement of social dialogue in France.
- 59.** The Government expert from China observed that, with new developments over time, it would be quite possible for new forms of employment relationships to emerge. The Convention should therefore allow for exclusions to be reviewed at a later stage. The Government expert from South Africa emphasized that, where true social dialogue took place and the parties agreed to include or exclude employees, it was uncomfortable not to allow this process.
- 60.** The Chairperson indicated that the main issues arising from the discussions concerned the need for certainty of regulation and processes, and the need to apply the Convention's flexibility provisions taking into account changes in the economy and social circumstances. Where flexibility was introduced, there was a heightened need for effective social dialogue and greater transparency. The Employer experts had noted a number of concerns with the provisions of Article 2, which generally arose from ambiguities that could be read into the wording. From the Government perspective, the application of Article 2, paragraph 6, seemed to be the main obstacle to ratification.
- 61.** The Worker spokesperson recalled that article 19 of the ILO Constitution required Members to report on their progress in applying ILO Conventions, and allowed a certain degree of flexibility and the progressive extension of the application of Conventions. Social dialogue should not be considered as a means of making exclusions. Indeed, if social dialogue followed the logic of exclusion from minimum international standards, that would be the end of international labour law. Instead, at a time of globalization, it was necessary to harmonize national legislation. Bipartite and tripartite social dialogue was helpful in adapting the implementation of Conventions to the national context, not to abrogate from the provisions of Conventions. In view of the sensitivity of these issues, it

would be best for the social partners to promote the Convention with a view to the further harmonization of national labour law. Workers and work should not be one of the variables of economic adjustment.

Article 4: Valid reason for termination

- 62.** The Employer expert from Mexico expressed philosophical, practical and legal concerns with regard to Article 4 of the Convention. The fact that two elements had to be met was particularly problematic. As justification for termination needed to be based on a cause, this placed an extra burden on the employer, who had to provide severance pay, while having to find and train a new employee. Moreover, the fact that the “valid reason” could be questioned by legal procedures did not lead to legal certainty, as different bodies might interpret the reasons differently. The wording of Article 4 therefore resulted in inflexibility in labour relations, resulting in a closed market. The cost it imposed on employers was also too high. Furthermore, the lack of an additional element of “trust” was also problematic. In countries where labour relations were based on trust, if the employer lost the trust in the worker, Article 4 did not adequately include “lack of trust” as a valid reason for termination of employment. The rigidity of the Convention resulted in greater use of disguised employment relationships. In view of the lack of acceptance of the Convention, as shown by its low ratification rate, other measures for worker protection needed to be sought. In Switzerland, for example, a very high level of employment security was achieved although (or rather because) it did not apply the “core provisions” of the Convention, thus showing that Convention No. 158 should not be considered as the only model.
- 63.** The Worker spokesperson emphasized that “justification” and “valid reason” were the cornerstones of the Convention. It was crucial for all workers to know the reason for termination, such as downsizing of the enterprise or individual reasons. This knowledge enabled the worker to learn for the future. It could not be concluded that this Article prevented countries from ratifying the Convention, as the background paper showed that most countries agreed that having a “valid reason for termination” was common sense. He acknowledged the risk that justification based on Article 4 might encourage a shift to the informal economy or to precarious employment contracts, but emphasized that deviant practices could not be corrected by legalizing them.
- 64.** The Employer expert from the United Kingdom noted that, according to the background paper, in Denmark a valid reason for termination was only necessary for workers covered by collective agreements. As only 80 per cent of the Danish workforce was covered by collective agreements, the question arose as to the protection that existed for the other 20 per cent. It was therefore important to know how countries such as Austria, Denmark or Switzerland reconciled their approach towards the provisions of Article 4 for workers not covered by collective agreements, as the fact that the Convention applied to all branches of economic activity and to all employed persons was a clear impediment to ratification.
- 65.** The Secretary-General indicated that the broad scope of Article 1, which did not require a specific method for giving effect to the Convention, together with the flexibility of the exclusions allowed under Article 2, ensured a wide range of methods of application. In the case referred to, it was feasible that part of the 20 per cent might be covered by a specific status, for example as members of the civil service.
- 66.** The Government expert from South Africa did not see any evidence that the justification requirement inhibited the ratification of the Convention. He noted that 22 countries, which had not ratified the Convention, agreed that the requirement of justification was fair and right.

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67. The Worker expert from Australia concurred with the view expressed by the Government expert from South Africa. There were also other reasons for the low ratification rate, such as the federal structure of certain countries. This was borne out by the contrast between the low rate of ratification and the high level of compliance. The Worker expert from Argentina emphasized that dismissal was a unilateral act by the employer which removed workers from their social network and deprived them of participation in society. A contractual framework was therefore necessary with rules so that safeguards existed in the case of termination. The Worker expert from Germany expressed concern that an employer's lack of trust could constitute justification for the termination of the employment relationship, which was in violation of the fundamental principles of the Convention. If "trust" was recognized as a valid reason for termination, the basis of the Convention would be destroyed.
68. The Employer spokesperson emphasized that the real purpose of the Convention still needed to be identified. One possible purpose, as indicated by the Worker experts, was for the employment relationship not to be terminated. Another could, however, be to enable new employment to be found. The approaches used, for example, in Austria and Switzerland, focused on employment and re-employment and raised the question of whether these approaches could not be accommodated under the Convention. They could not. He added that it was difficult to understand why a valid reason, as narrowly defined in Article 4, was necessary. For example, there was no requirement in Switzerland for a valid reason for termination, but employment security was still at a very high level, as was the employment rate in general.
69. The Worker spokesperson considered that the examples provided in the background paper concerning flexicurity were very illustrative. Although some countries might wish to follow the Danish approach, they soon realized that the provision of a similar social security system was very expensive. The four European case studies in the background paper offered examples of flexicurity, and the legislation in all cases complied with the requirements of the Convention. The requirements of the Convention did not therefore constitute an obstacle to the so-called "flexicurity" approach in Europe.
70. The Employer expert from Mexico indicated that the concern at the rigidity of Article 4 was related to two points: that a reason for termination had to be given; and that the reason had to be further justified and considered as valid, which meant that it might be subject to differing legal interpretations. In the legislation of at least three Latin American countries, exhaustive lists existed enumerating just and valid reasons and, although other reasons for the termination might exist, they could not be used.
71. The Secretary-General added that Mexican legislation distinguished between two different categories of ending a contract: termination and dismissal. This categorization did not necessarily exist in other countries.
72. The Worker spokesperson reiterated that the protection afforded by Article 4 became visible on the day an employment contract was terminated as the worker was then able to count on that protection. He acknowledged that small companies may face problems regarding termination. Nevertheless, the problem was even greater for workers, especially in SMEs, who were often isolated and did not have access to information on possible recourse against termination.

Articles 5–6: Non-valid reasons for termination

73. The Employer spokesperson noted that Articles 5–6 of the Convention were related to Article 4. He added that the rigidity of an exhaustive list of invalid reasons for termination, which did not include trust, meant that informal employment relationships were likely to

be given preference. An example of an employment relationship based on trust would be a medical practitioner–patient relationship, in which the patient had to trust the physician. The grounds in the two Articles could make dismissal an incalculable risk for an employer.

74. The Employer expert from Spain referred to the Danish model of dismissal as a successful model not converging with Convention No. 158. Justification based on “trust” may not be possible under the Convention, even though the concept was becoming increasingly relevant. While workers required protection, for example under Article 12, it needed to be balanced by recognizing the concept of “trust” as a valid reason for termination.
75. The Government expert from France indicated that the Court of Cassation in France had found that lack of trust had to be based on objective elements or some actions by the worker. However, trust could not constitute the sole reason for termination in France.
76. The Worker expert from Australia acknowledged that loss of trust as a result of a worker’s conduct could constitute a valid reason for termination. In the case of Mexico and other countries, this specific concern could be further reviewed. The Worker expert from Argentina said that the right of the employer to hire was not the same as the right to dismiss a worker. Although employers had the right to dismiss workers, they needed to respect the legislation in so doing.
77. The Secretary-General said that the model used in the Convention was sufficiently general in scope and could be applied to all the different approaches.
78. The Chairperson indicated that the scope of Article 4 was very broad and could accommodate “trust”, in the meaning that a worker had behaved in a manner that resulted in the loss of the capacity to perform the job. If trust was linked to the conduct of a worker, it could constitute a valid reason for termination of employment. He added that governments might spend years verifying compliance with the provisions of a particular Convention before deciding whether or not to ratify it. During that period, legislation could be amended to comply with the Convention.

Articles 7–10: Procedures

79. The Employer spokesperson indicated that procedural provisions, such as Articles 7–10, often gave rise to problems, and that their scope was often limited as a result of interpretation. Article 7 provided that a worker before termination for reasons related to conduct and performance must have an opportunity to defend himself unless the employer cannot reasonably be expected to provide this opportunity. While this rule looked fair for most cases, it may constitute an unnecessary delay in others. Moreover, where an employer had not given such an opportunity to the worker for good and valid reasons, the worker may challenge this, thus creating additional uncertainty.
80. The Employer expert from Spain said that the letter of dismissal used in his country, which detailed the reasons for dismissal, could have been considered insufficient in relation to the requirement of Article 7 for the worker to have the “opportunity to defend himself against the allegations made”. However, in practice the worker could appeal against termination, as emphasized by the interpretation of Article 7 by the Spanish courts. The Employer expert from Kenya complained that the process of dismissal was very costly for SMEs in his country and delays in court procedures for reinstatement had reached ridiculous levels, such as over 14 years following dismissal, with retroactive pay being awarded.
81. The Worker spokesperson emphasized that the problems referred to in relation to Article 7 were solely related to the application and implementation of the Convention and not to the provision itself. It was true that appeal procedures often took time, as the number of

appeals increased. However, alternatives such as conciliation could limit the number of the cases that ended up in the courts.

- 82.** The Worker expert from Australia, referring to the notion of quasi-judicial proceedings, said that nothing in the Convention required a particular process. It was for national practice to determine the procedures to be used. For example, in Australia, conciliation was favoured over a judicial process. The Worker expert from Germany added that Article 7 provided some flexibility through the wording “unless the employer cannot reasonably be expected to provide this opportunity”, which allowed certain exemptions.
- 83.** The Government expert from France emphasized that an internal process within the enterprise and external procedures had to exist with regard to Article 7 of the Convention. In France, conciliation was mandatory, although in general, there were few conciliation cases in labour courts.
- 84.** The Government expert from China indicated that, despite its importance, Article 7 could cause some difficulties for employers wishing to dismiss employees. The Government representative from the Republic of Korea (attending the Meeting as an observer) explained that the strictness of Article 7 constituted the most significant barrier to ratification for his Government. He added that it was important for both employers and workers to recognize the importance of employment security in minimizing dualities in the labour market.
- 85.** The Employer spokesperson considered that Articles 8–10 dealt with the procedure of appeal. These provisions did not just provide workers with a right to appeal, but also seek to facilitate the workers’ position in the procedure – to the detriment of the employer – by ensuring that the worker did not have to bear alone the burden for proving that the termination was not justified. Moreover, it was stipulated that the court (or other competent body), in addition to having the power of declaring a dismissal invalid, must have the competence to award the full spectrum of remedies, including reinstatement, adequate compensation or “such other relief as may be deemed appropriate”. Especially, a reinstatement order could have disruptive effects on the operations of an enterprise. The Employer expert from Sri Lanka added that, even if an employer was initially satisfied that there existed a valid reason for dismissal, there would still be a lengthy procedure during which the employer once again had to demonstrate to a third party the reasons for dismissal, which constituted a huge burden for employers.
- 86.** The Worker spokesperson emphasized that the right to be heard by an impartial body was a basic principle of law and the foundation of due process. Some cases could be problematic, but that was a result of requirements at the national level. The Worker expert from Argentina added that procedures of appeal and reparation were part of many international instruments, including the International Covenant on Civil and Political Rights. It was therefore necessary to see the Convention, not as an isolated instrument, but as part of a wider regulatory system which included other international treaties and regional agreements.
- 87.** The Secretary-General indicated that Article 8 was not a one-size-fits-all provision, but that it illustrated mechanisms to settle disputes, such as arbitration committees, a conciliator, or any other impartial body determined by the national legal system. While emphasis was laid on the impartiality of the body, its composition might differ, and in some countries tripartite bodies existed. Article 8 therefore left it to the country to find the appropriate system adapted to its national circumstances.
- 88.** The Chairperson recalled that, in Australia, 81 per cent of cases were resolved within 25 days or less of the claim. Some cases were even resolved through conciliation over the telephone.

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89. The Employer expert from the United Kingdom indicated that there were increasing delays in the United Kingdom caused by the number of employment tribunal claims arising from dismissals associated with the tough economic environment despite the availability of pre-claims conciliation.

Articles 11–12: Period of notice, severance allowance and other income protection

90. The Employer spokesperson expressed the view that notice and severance were different, although overlapping concepts. Both concepts could be related to length of service thereby compensating employees for service twice.
91. The Employer expert from the United Kingdom acknowledged that a balance had been struck between the interests of the employer and of workers in Article 11 with its requirement for a period of notice of termination. However, Article 12 did not take into account the various national legal systems, as shown by the example of unfair dismissal compensation in the United Kingdom, which was only awarded following a determination that the dismissal was unfair. The main issue with Article 12 was that it laid down the obligation to pay severance on the employer. Article 12 therefore constituted a significant obstacle to ratification, as employers in countries without an insurance system had to cover the cost of a severance allowance or other separation benefits, irrespective of whether they were at fault in dismissing, which in circumstances where regrettably dismissals are necessary to ensure sustainable enterprises exist did not strike the appropriate balance.
92. The Worker spokesperson disagreed that Articles 11 and 12 constituted obstacles to ratification. The notice period required by Article 11 was intended to ensure that a worker was able to adapt to the change of situation. It was a factor to be envisaged in advance and constituted a practice that was to be expected from a reasonable business. He also disagreed that Article 12 lacked flexibility, as it allowed the member State to determine a scheme for the provision of assistance in case of termination. If no insurance system was established, the employer could foresee the cost of termination by requiring the worker to participate in a mutual fund, or otherwise factor the expected costs into business costs.
93. The Worker expert from Australia agreed that Article 12 imposed an obligation on the employer, irrespective of any fault. However, this also needed to be seen from the perspective of workers who, without having violated any obligations arising from the employment contract, would have to carry the consequences, for example the outsourcing of work to an off-shore location. The Worker expert from Germany added that, according to the background paper, a majority of countries had legislation in place obliging the employer to pay a severance allowance or other separation benefits. In a number of States, social security provisions existed relieving the employers.
94. The Secretary-General indicated that a clear distinction existed between Articles 10, 11 and 12 of the Convention. In this regard, the 1995 General Survey indicated that “[s]everance allowance, one of several forms of income protection, needs to be distinguished both from the compensation paid in the event of unjustified termination of employment, when it is not practicable to declare the termination invalid or reinstate the worker (Article 10) and from the compensation in lieu of notice (Article 11). The three types of compensation vary in terms of the criteria taken into account to determine their amount” (paragraph 262).

Articles 13–14: Collective dismissals

- 95.** The Employer spokesperson observed that Articles 13–14 dealt with consultation of workers’ representatives and notification to the competent authority in the specific case of terminations of employment for economic, technological, structural or similar reasons. While this provision might in many cases allow for a smooth restructuring process, it can also delay in other cases necessary and urgent adaptation processes. It might also not be practicable. In situations due to the sensitive or confidential nature of the changes, employers might not be able to provide such opportunity to workers or their representatives.
- 96.** The Worker spokesperson recalled that Article 13 invoked the principles of social dialogue and collective bargaining, which were founding principles of the ILO itself. He requested detailed clarifications of the exact nature of the problems to which the employers were referring, and doubted that Article 13 would have the effect of limiting foreign investment. In the majority of European countries, the principles of negotiation, consultation and social dialogue prevailed, as reflected in the European Social Charter (revised). Both workers and employers should have faith in social dialogue to develop solutions acceptable to both parties. He added that Council Directive 98/59/EC of 20 July 1998, which was in line with the principles of Convention No. 158, was binding in 27 European Union Member States, and that a substantial part of the global economy therefore applied the provisions of the Convention.
- 97.** The Government expert from France recalled that Article 13 of the Convention allowed for a certain flexibility, particularly under paragraph 2. Referring to Council Directive 98/59/EC, which included some of the principles contained in Convention No. 158, she stressed that provisions on termination of employment for economic reasons at the international level were meant to harmonize the legislation of States, while avoiding unfair competition between them.
- 98.** The Worker expert from Australia emphasized that, during the crisis, the measures taken based on the consultation requirement in Article 13 had enabled several economies to recover more easily, illustrating that ratification had proved not to be a barrier. A study of the situations of these countries had shown that they had coped better with the effects of the crisis, as consultations had enabled the social partners to envisage common measures, such as part-time work to enable people to be kept in employment. In other countries, such as the United States, which had not ratified the Convention and where a consultation requirement did not exist, the crisis had in most cases resulted in massive lay-offs.
- 99.** The Employer spokesperson said that if studies showed these effects, they would be interesting and should be produced. There are certainly cases where dialogue did not help and many cases where companies protected employment without the requirement of dialogue contemplated by the Convention. Looking at the policies of the United States, it was acknowledged that American car companies had done well in protecting themselves and workers in the process, and that their dialogue also took place with the Government and financing organizations. The Employer representative from Germany (attending the Meeting as an observer) added that there was no requirement in the European Union generally requiring consultations, but that they were required in regard to collective lay-offs.
- 100.** The Worker expert from Germany added that Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 established a general framework for informing and consulting employees in the European Community. Indeed, informing and consulting workers in good time was key to solving problems. If workers’ representatives and trade unions were involved in finding solutions to prevent collective redundancies, employers would also benefit, as they could keep their workforce, which would enable

them to restart more quickly when the recovery arrived. The Worker expert from Argentina cited the example of General Motors, which had envisaged 2,500 dismissals in Argentina. Following tripartite consultations, not only were those jobs saved, but an additional 1,500 were created.

- 101.** The Government expert from France explained that a national interoccupational agreement had been concluded in her country to limit the effects of the crisis, which covered, inter alia, partial unemployment and training. The Government expert from Jordan indicated that employers in Jordan had abused the crisis to justify dismissals. With a view to enhancing worker protection, the Government had amended the legislation and the employer was now required to notify the minister of planned workforce reductions. The minister was, in turn, required to form a tripartite committee to verify the validity of the procedures taken by the employer and provide recommendations to the minister.
- 102.** The Employer spokesperson reiterated that it would be helpful to collect information, research and objective data with respect to alternative approaches that proved successful, including those implemented by ratifying and non-ratifying States. This information would help countries by offering an understanding of the costs and benefits of such an approach.
- 103.** In response to the call by the Employer spokesperson for the collection of information on alternative approaches that proved successful, the Secretary-General recalled the example of Singapore, where the ILO had conducted a case study, not focusing on the Convention, but on Singapore's exemplary utilization of tripartism and social dialogue in overcoming the economic downturn, particularly with respect to keeping workers employed and training those who were unemployed as a consequence of the global crisis.
- 104.** The Government expert from Brazil recalled that Brazil had ratified the Convention in 1995, then denounced it less than one year after its entry into force because it had not been in conformity with the Constitution. Ratification was once again under consideration, and it was expected that the Convention would be ratified. The Convention was strictly related to the principle of social dialogue, which played an important role, especially in times of crisis by giving employers the opportunity to explain the difficulties causing redundancies and offering alternatives to overcome the consequences of the crisis. Governments in turn could adopt measures, such as fiscal exemptions allowing enterprises not to terminate workers.
- 105.** The Employer spokesperson expressed the same concerns regarding Article 14 of the Convention as with Article 13 in relation to the process and time requirements. There was certainly a need for flexibility in this area. The requirement to notify governments led local competent authorities to believe that they had a say in such decisions, resulting in additional processes and challenges.
- 106.** The Worker spokesperson, with regard to the notification of the competent authority, recalled that one of the most important decisions of G20 leaders and the Global Jobs Pact was to promote measures, such as partial unemployment, supported by the authorities and public finances. This had been necessary for enterprises and tripartite agreement had been reached. In the same way, when an enterprise was affected by a crisis, informing the public authorities as soon as possible was in the interests of everyone.
- 107.** The Government expert from France noted that the competent administrative authority to which collective dismissals were notified also provided advice and could assist workers and employers to find solutions. As the competent administrative authorities often participated in retraining and relocation programmes, it was important for them to be aware of the number of dismissals to evaluate the necessary financial contribution to social plans.

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- 108.** The Employer expert from the United Kingdom warned that, in view of the need to wait for approval before making terminations, the requirements of Article 14 were likely to slow down responses, and risks giving a competitive advantage to companies operating in countries not covered by such requirements. Moreover, if permission were denied, employers would have to either abide by the decision and deal with the impact on their businesses or run the risk of the dismissals being deemed unjust despite their view that dismissals are necessary for the business to remain sustainable. The Employer spokesperson noted that Gabon provided a good example of this point, and highlighted what employers feared would happen in many countries contemplating ratification. He re-emphasized the need for further research, noting that the important aspect was the capacity to adjust. There had been examples of success during the recent crisis, and there were also examples of hundreds of thousands of jobs being lost due to the inability to adjust to changing circumstances.
- 109.** The Worker expert from Argentina emphasized that Article 14 was based on the ILO's basic principles of social dialogue and collective bargaining. Collective redundancies needed to be avoided through social dialogue, especially in times of crisis. The Worker expert from Australia indicated that, for developed countries, the purpose of Article 14, if an unemployment insurance scheme existed, was to enable governments to take action to accommodate the workers affected by termination. In addition to averting the negative impact, the importance of Article 14 for governments of less developed countries, especially if they only had a limited number of big enterprises, was that the information obtained could supplement their labour market data and improve their knowledge of the situation of the domestic economy. The Worker expert from Germany, with reference to the comparative table in the background paper, recalled that a large majority of States required notification to the competent authority.
- 110.** The Government expert from China emphasized the importance of Article 14 in case of large-scale redundancies, such as those caused by the financial crisis, because obtaining notice enabled the Government to assess the impact and assist enterprises in the payment of severance allowances, thereby helping to maintain social stability. The Government expert from South Africa explained that, while the law in South Africa did not require notification, dialogue between all three actors was important and the employers' organizations had therefore agreed to report problems voluntarily to the competent authority, which had helped to minimize lay-offs during the crisis. The Chairperson agreed that the competent authorities could use such information as an economic stability tool.
- 111.** The Worker spokesperson reaffirmed that the objective of notification was to obtain advice from the authorities and for the government to verify compliance with national law. A large number of member States had included the requirement of notification in their national legislation, as they wished to be notified of large-scale dismissals so that they could plan the measures to be taken at the policy, social and industrial levels.

The appropriateness of Convention No. 158 and Recommendation No. 166 to achieving the ILO's objectives

- 112.** The Chairperson observed that the comments of the Government experts showed that the Convention served a wider economic purpose than general protection of employment. They had not raised objections to any provisions as barriers to ratification. The Employer experts had raised concerns at the manner in which the Convention was implemented at the national level, but not objections to the Convention itself. The question arose as to whether problems of implementation might have their origins in a misunderstanding or lack of clarity concerning the actual requirements of the Convention. There was a clear need to

ensure comprehensive social dialogue between governments, workers and employers on the implementation of these provisions. The ILO could conduct further research and provide better information and advice to the social partners about implementation, successful alternative models and approaches that had received tripartite support. The Convention sought to take into account a full spectrum of social, economic and cultural arrangements in implementing countries, and it would not therefore be feasible to envisage a Convention that proposed a one-size-fits-all approach. Many experts had emphasized that the protection of employment was a fundamental role of the ILO and an area in which social dialogue was most needed.

- 113.** The Employer spokesperson re-emphasized that his group was not suggesting that the application of the Convention was the only concern. The combined effect of the comprehensive set of provisions and the principles enshrined in the Convention and the Recommendation overly restricts the employers' contractual freedom and made termination of employment for employers both expensive and incalculable. Laws built on these provisions meant for an employer that every dismissal potentially may be challenged with respect to fairness, procedure or both with the following consequences: (i) long court procedures with uncertain outcomes especially with regard to damages; (ii) dismissal might be declared invalid by the court and create uncertainties particularly if reinstatement is ordered; and (iii) discouragement of job creation and investment into sustainable enterprises. The main objective should be the objectives set forth in Convention No. 122, i.e. full, productive and freely chosen employment. The ability of employers to create and maintain productive jobs was a key element, and they did not believe that Convention No. 158 struck a meaningful balance in this regard. Governments appeared to share this view; since its adoption 30 years ago, only 20 per cent of member States (35 out of 183) had ratified it; and in terms of the workforce covered, only countries covering 9 per cent of the world population had so far ratified it, and none of the countries with the largest populations. From a regional perspective, ratification of the Convention was uneven: most ratifications were in Europe (17) and Africa (12), with hardly any in Asia and the Pacific (two), the Americas (one), the Caribbean (two) or the Arab countries (one). It was particularly telling that the economically booming Asian region, which was by far the largest region in terms of numbers of working people, "had been lost". Obviously, governments in this region did not think that the protection described in the Convention was compatible with their plans for economic and employment growth. Moreover, almost 70 per cent of the 35 ratifying countries were considered developing economies, and eight were least developed countries. A significant number of ratifying developed countries had difficulty applying the Convention, as shown by the comments of the supervisory bodies. The Convention had failed to establish a level playing field among member States in the area of employment protection. One important issue not contemplated in the Convention, which had not been addressed in the background paper, was the perception of employment security and its relationship with protection against dismissal. Citing the results of a European Social Survey of 2004, based on the responses to a questionnaire covering 34,000 workers in 14 European countries, he noted that the perception of employment security did not follow the strictness of regulation against termination; indeed, it demonstrated an inverse relationship between the two factors. Of those countries studied, the Czech Republic had the lowest perception of employment security, although with Portugal it stood as a country with the highest labour market regulations. On the other hand, Switzerland, which apart from the UK had the least strict employment regulation, showed the best results in terms of perceived employment security. Also among the countries with the highest perceived employment security was Denmark, despite a high level of labour mobility (800,000 changes of job per year, with an overall number of 2.8 million workers). This all went to show that full employment and an open labour market were more important for perceived employment security than strict protection against dismissal regulation. He therefore doubted that the Convention provided an adequate response to the issue of employment security, and reiterated the need to balance the ILO's objectives with sensitivity and respect for workers' and employers' rights.

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- 114.** The Worker spokesperson indicated that no issues had been identified in the Article by Article analysis of the Convention. Instead, problems of practical application had emerged. Furthermore, the issue of informal work was a problem per se, and not an issue related to the Convention. Discussion of the case of Denmark in the background paper, especially on flexicurity, showed that the practice was in line with the Convention. European countries were bound by the European Social Charter (revised) and by Directive 98/59/EC on collective redundancies, which was based on the principles of Convention No. 158. On the question of whether regulation might hamper employment and the objectives of Convention No. 122, it was important to make all the actors concerned responsible in times of crisis in order to promote full, productive and freely chosen employment. Under the Global Jobs Pact, Convention No. 158 was agreed to be a relevant instrument to cope with the crisis. He emphasized the value of the instruments on termination of employment as strategic ILO objectives.
- 115.** The Government expert from France observed that the scope of the Global Jobs Pact and the 2008 Social Justice Declaration was much broader than that of Convention No. 158, which was not a tool to promote employment creation or to ensure employment security. The Convention set certain minimum standards which were necessary to ensure fair competition, although consideration should be given to other more active measures, such as training, social benefits and financial assistance to enterprises. Discussions could be held on the flexibility of the Convention, which did not create any obstacle for the achievement of the ILO's strategic objectives.
- 116.** The Employer spokesperson recalled the issues raised in the Article by Article analysis with regard not only to the application of the instruments but also the texts themselves and the principles enshrined therein.

V. Discussion of the outcome

- 117.** The Chairperson introduced a [draft outcome](#) he had prepared as a basis for discussion and which aimed to highlight issues that had arisen during the Meeting. He indicated that the draft was an attempt to bring together the main issues and concerns identified by the three groups in their interventions during the course of the Meeting, and proposed a process for further action.

Employer experts' views

- 118.** The Employer spokesperson indicated that his group had reviewed the document and did not believe that it reflected at all any of the points that they conveyed. He indicated that his group was very concerned that the draft document completely failed to acknowledge or reflect in any way their participation in the process. In terms of recommendations, they did not agree at all with regard to promotion of the instruments. He highlighted what the group understood as points of convergence coming out of the Meeting: (1) that protection should be provided to workers in the event of termination; (2) that Convention No. 158 and Recommendation No. 166 had linkages with other ILO Conventions and objectives and that there should be balance in any policy work in this area; (3) that any ILO action should take into account these convergences; and (4) that further fact-based research on different models of protection of workers in the event of termination would be valuable. Since the adoption in 1982 of Convention No. 158 and Recommendation No. 166, the world of work had changed significantly: globalization had led to even more competitive pressures and greater need for sustainable enterprises to adapt swiftly; and countries placed more emphasis than ever on creating attractive conditions for investment and job creation to foster a dynamic labour market. In view of the economic crisis, the need for greater

flexibility to enable sustainable enterprises to react without uncertainty and obstacles to the ups and downs in the economic situation had become even more evident. The combined effect of a comprehensive set of provisions and the principles enshrined in the Convention and the Recommendation overly restricted the contractual freedom of employers and could make termination of employment for employers both expensive and incalculable. Laws built on these provisions meant that every dismissal could potentially be challenged with respect to fairness, procedure or both with the following consequences: (1) long court procedures with uncertain outcomes, especially with regard to damages; (2) dismissal might be declared invalid by the court and create uncertainties, particularly if reinstatement was ordered; and (3) and the discouragement of job creation and investment in sustainable enterprises. In particular, the Employer experts had unresolved concerns with regard to: the lack of flexibility in Article 2, the inadequacy of the exceptions and the inability to adapt to change, and its scope; Article 4 led to rigid rules, excessive litigation and great uncertainty in terms of the cost and duration of the litigation and third-party interference with management decisions; Article 7 contained prescriptive procedures that assumed all employment was the same; Articles 10–12 imposed layers of remedies with a material impact on employers in terms of creating and protecting jobs; and Articles 13–14, which restricted the ability of employers to adapt to changing circumstances. The Recommendation magnified the weaknesses of the Convention. Most importantly, Convention No. 158 did not fit with all models of worker protection. The Convention was based on the premise that one aspect of worker protection, namely termination of employment, could be regulated in isolation, without taking into account the broader picture, and particularly the impact of protective regulation on other socio-economic objectives. Moreover, the Convention did not take into account the development of modern, more market-aligned concepts, such as flexicurity, or changing priorities, such as the achievement of high employment rates and inclusive labour markets, and it posed a potential barrier to the achievement of other ILO objectives. After almost 30 years, other successful models of termination needed to be examined. Countries such as Austria, Denmark, Singapore and Switzerland did not apply the main principles of the Convention and still achieved high levels of employment protection, coupled with high wealth levels, high employment rates, low unemployment, inclusive labour markets with good job chances for marginalized groups, and very good overall working conditions. While there was some protection in these countries against arbitrary and abusive dismissal, the focus of protection was to enable workers to find new jobs swiftly. Employers remained unconvinced that these countries following an alternative model, even in the event of ratification, would be in full compliance with the provisions of the Convention. In addition, the ILO supervisory bodies, and particularly the Committee of Experts, had made an extensive interpretation in a number of cases which made the provisions of the Convention even more rigid and implementation even more difficult. The ILO needed to reconcile employment protection with competitiveness and focus on job creation, employability and adequate income support that encouraged unemployed workers to look for work. The main objectives for any ILO action on protection against dismissal should fit the overall labour market objectives of full, productive and freely chosen employment. The Employers emphasized that ILO standards could only have an impact in the world of work if they were based on full tripartite support and best practice.

- 119.** The Employer spokesperson indicated that his group was not disputing the need for worker protection in the event of termination. As a way forward, he believed that the Meeting should acknowledge that principles related to sustainable enterprises, which were key for employers, were not present in the Convention; that employment protection regulation was directly linked to the ability of employers to create jobs; that there were other successful models of protection against dismissal which did not follow the approach of the Convention and were worth examining. On that basis, the ILO should be encouraged to undertake fact-based research on: the use of rigid rules as a barrier to ratification; and alternative models of employment protection. This fact-based research should be undertaken in conjunction with the World Bank and the Organisation for Economic

Cooperation and Development (OECD). The ILO should refrain from promoting the Convention and the Recommendation because of the lack of agreement on their principles. In order to allow the ILO to give a fresh, balanced and holistic look at the issue of termination of employment, there should be thorough tripartite reflection on what the ILO's action on protection against dismissal should be, which could include, once the 1997 Constitutional Amendment came into force, consideration of placing the Convention on the agenda of the Conference with a view to abrogation, so that a standard that reflected the needs of all tripartite constituents could be promoted by the ILO.

Worker experts' views

120. The Worker spokesperson indicated that the draft outcome submitted by the Chairperson offered a good synthetic basis on which the Worker experts were ready to work to reach conclusions. He noted that the Meeting was facing a problem of trust. If during the discussions the employers had called for the abrogation of the Convention, the Meeting and all the discussions would not have been necessary. He reiterated his belief in tripartite social dialogue and emphasized the commitment of all the participants of the Meeting. He recalled that the objective of the Meeting was to examine the obstacles to ratification and to the implementation of the Convention. The participants at the Meeting were present as experts on issues related to the Convention and on the methods and processes of the ILO. He agreed that the Convention posed a number of problems and that it was not ratified sufficiently. These issues had been discussed in detail and certain problems had been identified. However, these problems were not caused by the Convention, but by its implementation at the national level. The views of the Employer experts also raised major problems in their comments on the work of the Committee of Experts. Article 19(8) of the ILO Constitution provided that member States were free to establish more favourable conditions in their national law and practice. Another major problem with the views expressed by the Employers was the assertion that the Convention could not be promoted as long as it did not receive the support of the constituents. Not only within the ILO, but generally, the clear legal principle could not be denied that, in the absence of a new decision resulting from consensus, the pre-existing decision taken by the constituents in respect of any instrument would remain valid until replaced.

Government experts' views

121. The Government expert from Brazil indicated that his country was often mentioned as an example of excessive regulation of labour relations. However, the financial crisis arrived late to and left quickly from Brazil, and this was achieved through social dialogue. Proper interpretation of the Convention is needed, in particular with respect to the implementation of the flexibility provisions. In the same way, the Government expert from South Africa indicated that the difficulties with the Convention stemmed from the interpretations undertaken at the national level. The Government expert from France also recalled the necessity to maintain an instrument which laid down a minimum basis and provided States with an important margin of manoeuvrability in its implementation by national legislation. She also emphasized the importance of the necessary flexibility of the Convention and recalled that European Member States were covered by the provisions of the Convention since its requirements were included in the European legislation.

122. The Government expert from China stated that ensuring a balance between flexibility and workers' rights as enshrined in the Convention was crucial. Since the adoption of the Employment Contract Law in June 2007 to this effect, this principle was ensured in China. The Government expert from Jordan indicated that the provisions introduced in the Labour Code in 2008 and 2010 reflected the provisions of the Convention.

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- 123.** The Government expert from France, speaking on behalf of all Government experts, stated that Governments were not able to accept a position that included an abrogation of Convention No. 158.

VI. Adoption of the outcome

- 124.** The Employer spokesperson said that, with respect to the proposed draft outcome presented by the Chairperson, the document should make clear that his group did not endorse those views. Even though the conclusions indicated a divergence of views, the Meeting had value. He recalled the points of convergence that: (1) protection should be afforded to workers in the event of termination; (2) Convention No. 158 and Recommendation No. 166 were linked to other ILO Conventions and objectives and that there should be a balance of policy work in this area; (3) any ILO action should take into account these convergences; and (4) further fact-based research on different models of protection of workers in the event of termination would be valuable. He reiterated the serious concerns about the possibility of the Convention obtaining further ratifications. The abrogation of the Convention would be an option when the 1997 Constitutional Amendment entered into force. But ultimately the Employer experts called on the ILO to take a fresh look at the Convention, which could include a number of options and models, based on a holistic analysis of the subject.
- 125.** The Worker spokesperson indicated that the Worker experts agreed with the substance of the draft outcome proposed by the Chairperson and proposed a number of changes. He added that the difficulty was not that the Employer experts disagreed, but that they denied that the experts had identified problems and difficulties during the Meeting and tried to develop solutions. The problems did not relate to the Convention itself, but to its application in practice by both ratifying and non-ratifying countries. He said that if the Employer experts considered that the Convention caused problems, his group would respect their position. However, the Employer experts could not deny that analysis had been carried out that had resulted in conclusions that were different from those that the Employer experts were now suggesting.
- 126.** The Government experts agreed with the outcome proposed by the Chairperson, with the amendments suggested by the Worker experts.
- 127.** *The Way Forward of the Tripartite Meeting of Experts to Examine Convention No. 158 and Recommendation No. 166 was adopted by the Government and the Worker experts, as follows:*
1. The Government and Worker representatives noted that:
 - (1) the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166), recognizing the employer's right to dismiss a worker for a valid reason, aim to ensure the worker's right not to be deprived of work unfairly. The purpose therefore of the instruments is to provide a balance between the interests of the employer and those of the worker, and to promote the use of social dialogue as a means of achieving that balance;
 - (2) Convention No. 158 and Recommendation No. 166 are aligned with the ILO's Decent Work Agenda and, as such, with the ILO Declaration for Social Justice for a Fair Globalization of 2008 and the Global Jobs Pact of 2009, the latter of which acknowledges the relevance of these instruments as a support to recovery from crisis;
 - (3) Convention No. 158 provides a basis on which workers are to be afforded protection in the event of termination at the initiative of the employer and is able to be implemented by member States through a range of mechanisms including collective agreements, arbitration awards or court decisions, or in such other manner as may be consistent with national practice, as well as laws and regulations;

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- (4) the Convention contains a number of flexibility clauses and also provides for flexibility in its implementation, including through:
 - (a) exclusion from some or all provisions of the Convention for certain categories of employees either at any time (Article 2(2)) or as listed in the first report, due two years after ratification (Article 2(4) and (5));
 - (b) the determination of valid reasons for termination (Article 4);
 - (c) procedures to be undertaken prior to, or at the time of, termination (Article 7);
 - (d) procedures for appeal against termination (Articles 8 and 9);
 - (e) the possibility in the event of unjustified termination for either reinstatement or payment of adequate compensation or other relief as may be deemed appropriate (Article 10);
 - (f) the determination of a reasonable period of notice or compensation in lieu thereof (Article 11);
 - (g) options to choose the extent and nature of severance allowance or other income protection (Article 12); and
 - (h) the nature and form of consultation with workers' representatives, and notification to the competent authority, in the event of termination of employment for reasons of an economic, technological, structural or similar nature (Articles 13 and 14);
 - (5) Convention No. 158 does not promote a single model for implementation;
 - (6) member States should ratify and implement Convention No. 158 in full consultation with the social partners; and
 - (7) while many member States report compliance with most or all of the provisions of the Convention, the level of ratification is insufficient particularly considering the confirmation of its relevance by the 2009 Global Jobs Pact.
2. The Government and Worker representatives recommend to the Governing Body that:
- (1) the ILO promotes the ratification and implementation of Convention No. 158, clarifying the aims and content of the Convention, and in particular emphasize its flexibility provisions;
 - (2) the ILO provides technical assistance to member States that may request it, as well as to employers' and workers' organizations, in their preparations for the ratification and implementation of Convention No. 158;
 - (3) the ILO develops a programme of research on issues related to Convention No. 158, including the relation between employment creation and termination and the role of social dialogue and collective bargaining in the context of termination of employment. This should include case studies; and
 - (4) member States be encouraged to engage in full and regular consultation with the social partners on the ratification and implementation of the Convention.

128. The Chairperson thanked the spokespersons and the experts for their contribution. It was unfortunate that a consensus had not been reached on the outcome, particularly when there had been constructive discussion throughout the Meeting. He noted that the Employer experts' response to the draft outcome had raised issues which were not discussed during the Meeting and that it was unfortunate that these matters were not presented at an earlier time. The outcome was an attempt to also address the issues which had been raised by the Employer experts and debated during the Meeting. When two groups wished to promote the instruments, and the other suggested the possibility of abrogation with substantial review, it was difficult to find a compromise. As a way forward, he proposed that the Office should prepare a report of the discussions, recognizing the comments made on the value of these discussions. The problems identified did not resonate from the Convention per se, but from the way that it was implemented through legislation, judicial decisions, regulations or practice. More research and technical cooperation work was needed on some issues. While governments were representative in their regulatory capacities, they were

also employers in their own right, and the views they had expressed recognized that practical application from their perspective was the key to the success and acceptance of the Convention. Even with a lack of full consensus, it was still important to forward the outcome of this Meeting to the Governing Body, which would take the final decision. He concluded that the Meeting had been valuable and had led to a better tripartite understanding of the views and concerns of each of the parties.