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COMMITTEE ON APPLICATION OF STANDARDS DISPUTE

Tripartite consultations were held at the ILO in February 2013 with a view to seek solutions to the problems that arose in 2012. Employers reiterated their position on the right to strike and the mandate of the experts and stated that any solution had to start by acknowledging that the ILO supervisory system was in crisis. They did not express support for a referral of the dispute on the right to strike to the International Court of Justice (ICJ) and recalled that when the issue of the creation of an ILO Tribunal under article 37.2 of the ILO constitution was last discussed their group had pulled out of the consultations. For them, the issue of a mechanism or quasi-tribunal rather than a tribunal under article 37.2 was an option they could explore. They however qualified these statements by indicating that they were interested in looking at other options, notably those from an article written by a former ILO legal adviser.

In commenting on the options put forward in the document, workers did not rule out recourse to the ICJ and expressed their readiness to look at possible options to establish an ILO internal mechanism to settle disputes over interpretation.

Further to this meeting the Swiss Government offered to facilitate bilateral meetings between employers and workers to try and see if some consensus on the way forward could be reached between the social partners prior to resuming tripartite consultations.

Three meetings were held in May, June and September of 2013.

At the September meeting discussions with employers largely focused on the mandate of the experts taking into account the proposals made in an article from a former ILO legal adviser. Although employers maintain their criticism of the experts for having "interpreted" a right to strike within C87 bilateral discussions did not address this issue in details.

At the moment the work of the experts is based on an analysis of article 22 government reports as well as workers and employers article 23 comments. In analysing these reports, experts assess the conformity of national legislation and practice with a ratified convention. One of the article's proposals to address the excessive workload of the experts is to limit the article 22 reports and the work of the experts to the conformity of national legislation only and to shift the analysis of the conformity of national practice to a ratified Convention to article 24 of the ILO constitution. In this new format the

experts would be tasked with giving a preliminary opinion on article 24 cases, prior to their examination by the tripartite committee.

Article 24 allows workers' and employers' organisations to submit representations to the ILO alleging that a member state is not complying with a convention it has ratified. For each representation the Governing Body sets up a tripartite committee which is tasked with issuing conclusions on the case which are then adopted by the Governing Body. The Experts then assess the follow-up given by member states to these recommendations. Employers expressed an interest in the proposals made in the article related to article 24. They supported the proposal of reviewing the conditions of receivability in order to avoid a flood of representations and the setting up of a permanent tripartite committee (similar to what we have for the Freedom of Association Committee) to address these representations rather than ad hoc committees as we have now.

We did not support these proposals. We indicated that for workers it was essential to keep the experts' analysis at the level of national legislation and practice, especially because many of the problems faced by trade unions at national level have to do with problems of application of laws/legislation. We could therefore not support a limitation of workers' comments under article 23 to legislation only and loose the objective analysis of the experts on application. We also expressed concern at the so-called rebalancing of the system towards article 24. We opposed the proposed revision of the receivability criteria – notably the question of exhaustion of remedies available at national level. In many countries the judiciary system does not function for a variety of reasons and exhaustion of remedies even if not considered a sine qua non condition for receivability would at best delay the submission of the case and at worse prevent it.

We also stressed that few unions would be able to file representations, that deadlines for the issuance of conclusions would be long and that we would end up with a system where some regions would be more active than others. Such a system would also lead to much greater politicisation of the issues discussed by giving more weight to governments. It would equally entail the danger of the development of a parallel jurisprudence that would contradict and undermine the jurisprudence of the experts.

According to the article the rebalancing of the system would also have implications on the way the list would be elaborated. Instead of being a negotiation between workers and employers the list would be composed of:

- The follow-up to recommendations of articles 24 and complaints under article 26 (commission of inquiry)

- a discussion on legislative developments based on article 22 reports

- and a discussion of general surveys under article 19 of the ILO constitution (as per current practice)

Although there was no real discussion on these aspects of the article we did not express support for these proposals.

On the issue of interpretation, we reiterated our readiness to examine possible options to give effect to article 37.2 that is an ILO internal mechanism to settle dispute over interpretation. We stressed the importance of the separation of powers between the legislator and the judiciary: those negotiating and adopting standards (ILO

constituents) could not be the ones ruling on their meaning. We therefore favoured interpretation provided by a judicial organ and through a judicial/adversarial procedure. We also clarified that we were not ruling out referral to the International Court of Justice in the case of the right to strike. Employers indicated they could discuss the option of giving effect to article 37.2 but if changes were to be made to article 24 they saw less urgency in moving towards article 37.2.

At the end of the meeting it was agreed that the Swiss would try and draft a paper for submission to the October Governing Body that would enumerate the problems and the possible way forward taking into account the positions expressed during the consultations. We however could not agree with the document because it was too close to the proposals of the article and not taking into account the concerns we had expressed at the meeting. We subsequently rewrote a text which we submitted to employers in order to see if we could come up with a joint proposal that would be more modest in scope focusing on three issues: looking at the way the different articles of the constitution (22, 23, 24, 26, 33) are used; how to reduce the workload of the experts; and possible options to give effect to article 37.2. Employers amended the text reintroducing the issue of the disclaimer to be inserted in the experts' report as a short term solution to the problems pending a more global agreement. We answered that we could not agree to this and could envisage to discuss the issue of the disclaimer as part of a more global agreement which for us implies progress towards an ILO Tribunal to address interpretation disputes. We are currently still waiting to hear from employers.

At this stage it is not sure that we will be able to reach an agreement with employers. If this was the case we will have to look at other options including having the Office tabling a document to the October Governing Body.

In light of this we suggest three elements of a worker strategy to address the problems caused by employers in 2012:

- A lobbying strategy towards governments in defence of the ILO supervisory mechanism
- The consideration of referring the question of the right to strike under C87 to the International Court of Justice for an advisory opinion if no solution is found to the current dispute
- Giving consideration to the creation of an independent ILO Tribunal under article 37 or a mechanism based on that article to solve disputes related to the interpretation of Conventions

You will find these elements elaborated further in the resolution.

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