

Report of the discussion

Introduction

1. The 86th Session of the International Labour Conference (1998), having requested the meetings of experts to examine questions raised during the discussions of the Committee on Contract Labour of the International Labour Conference (hereafter “Committee”),¹ the Governing Body decided that preparatory documents had to be drafted to that end. These had to include, in particular, in collaboration with external consultants, a series of studies on precise situations identified by the Committee and cover different juridical systems as well as linguistic differences. They were to be followed by regional symposia asked to examine the results.²
2. In June 1999 the Governing Body approved the agenda and composition of the Meeting of Experts on Workers in Situations Needing Protection. The Meeting was held in Geneva from 15 to 19 May 2000.³

Agenda

3. The agenda of the Meeting, as adopted by the Governing Body in June 1999 and in conformity with the resolution of the International Labour Conference, includes the following themes:
 1. To examine the following questions which were raised during the Committee discussion in June 1998:
 - (a) which workers in situations that the Committee began to identify need protection;
 - (b) the appropriate means by which these workers could be protected and the possibility of examining separately the various situations;

¹ International Labour Conference (ILC), 86th Session, 1998, *Provisional Record* No. 16.

² See GB.275/9.

³ See GB.275/9, paras. 3-5.

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- (c) how to define these workers, taking account of different juridical systems in force and linguistic differences.
 2. To advise the ILO on measures to protect these workers, including the possible adoption of a Convention supplemented by a Recommendation if such adoption is in conformity with normal procedures considered necessary by the International Labour Conference.
 3. To advise the ILO on measures to be taken to complete the work begun by the Committee.

Participants

4. Thirty-six experts were invited to the Meeting, 12 of them appointed after consultation with the Governments, 12 experts appointed after consultation with the Employers' group of the Governing Body and, finally, 12 others after consultation with the Workers' group of the Governing Body. To obtain the governmental nominations by taking account of the instructions from the Governing Body, the Director-General consulted the governments of the following countries: Argentina, Cameroon, Canada, Chile, France, Germany, India, Japan, Netherlands, Philippines, South Africa and Sweden. The list of experts and representatives of non-governmental international organizations is attached to the present report.

Opening speech

5. The Executive-Director, Social Dialogue Sector, Ms. Katherine Hagen, welcomed the experts, representing 27 different nationalities, to this challenging Meeting. The Social Dialogue Sector welcomed this debate on workers in situations needing protection, since the ILO believed that it was only through dialogue that fresh ideas and innovative solutions could be arrived at. It was the expertise of the experts present and their hard work that would bring to fruition the work commenced in 1997 and 1998 by the Committee on Contract Labour of the International Labour Conference. The termination of the work of that Committee was a unique event in the annals of the International Labour Conference. It sounded a note of alarm for later meetings. Despite the enormous efforts made by the Office and by the Conference delegates, despite the rich tradition of tripartite activity within the ILO, it had not been possible at that time to adopt any standard-setting instrument. The reasons for this situation might have been the major difficulties represented by conceptual and terminology problems as well as the great distance that separated the positions that were held in the Committee. But the Committee was able to isolate aspects of the debate that merited further study and identified the varied situations of work around which further studies were to be undertaken. In addition, the delegates confirmed the importance and the universality of the notion of the employment relationship, which was the classic cornerstone in the protection given by labour law. It was recognized that the protection of workers, in favour of which the ILO has fought from its inception, was weakening. The Committee and the Conference as a whole adopted a resolution which arose out of the Committee's tripartite discussions, that unanimously protected the issue for future discussion. It

invited the Governing Body, through the Office and with the assistance of external collaborators and worldwide experts, to take up the conclusions of the work of the Committee. It was therefore up to this Meeting to discuss and develop approaches for a harmonious and balanced treatment of the subject, at the international level, which would give prominence to the common features rather than the differences, to see whether the international framework can help put “out-of-focus” situations back “in focus” for unprotected workers. The outcome of this Meeting was inextricably linked to the ILO’s standard-setting activity. Following the Conference resolution’s invitation to the Governing Body to place as an item on the agenda of a future session of the Conference the questions examined by the Committee on Contract Labour, with a view to the adoption of a Convention and an accompanying Recommendation, no later than 2002, the Governing Body, in March 2000, decided to postpone the agenda decision until its November 2000 session. This deferral was in itself a unique situation, given the requirements that existed regarding the time limits for preparation of items appearing on each Conference agenda, in particular as regards standard-setting items. But it reflected the willingness of the Governing Body to take action only after the requested review process had been completed. This explained the vital nature of this Meeting of Experts, and of the results arrived at using the basic technical document that had been prepared. That document laid out the various alternatives that were open to the ILO, i.e. from taking no action at this time to recommending a range of normative activity, and suggested points for discussion and elements to ponder. The Executive-Director recalled the 1999 Report of the Director-General, which stressed the ILO’s commitment to decent work, which, in his words, meant “productive work in which rights are protected, which generates an adequate income, with adequate social protection”. The protection of workers who were not covered by labour standards presented an opportunity to the ILO at the dawn of this new century for decent work to become a reality for all.

Election of the Officers of the Meeting

6. The experts elected Mr. P. Benjamin, expert appointed by the Government of South Africa, as Chairperson of the Meeting, as well as Messrs. A. Finlay (Canada), expert appointed by the Employers’ group of the Governing Body, and B. Garren (United States), expert appointed by the Workers’ group of the Governing Body as Vice-Chairpersons.

Documents before the Committee

7. As a background for the Meeting, the Office prepared a basic technical document⁴ which took into account, in particular, 29 country studies which had been prepared in advance. The Office’s document also reflected the discussions which had taken place during the six informal regional meetings in which most of the study authors participated, together with other specialists. Copies of the national studies were made available to the experts.

⁴ Meeting of Experts on Workers in Situations Needing Protection (The employment relationship: Scope). Basic technical document. ILO, Geneva, 2000 (MEWNP/2000).

Presentation of the basic technical document

8. The basic technical document prepared by the Office was based on two findings which had been stressed in the work of the Committee and which referred, on the one hand, to the absence of protection of some workers, and, on the other hand, to the scope of legislation concerning the employment relationship. As concerns the absence of protection for some workers, research undertaken since 1998 revealed that it was on the increase. Although it manifested itself in several facets, they all had in common the fact of being linked to the deep transformations that employment relationships had undergone. These changes could take place in fundamentally different societies and for various reasons. The repercussions of absence of protection were numerous. All sectors of activity were affected. The workers, their families, enterprises, government and society in general, felt this phenomenon. It appeared evident that the fact that workers were put in an insecure position could have negative repercussions on the productivity and the competitiveness of the enterprises concerned. Vocational training and social security systems, essential to healthy and competitive enterprise management, saw their future compromised in a context where workers did not pay contributions or changed status or left enterprises at any time. Concerning governments, it was unnecessary to recall that the Constitution of the ILO itself stated that social justice was indispensable to real and lasting peace. Even state competitiveness was fully affected if the workers did not benefit from adequate protection.
9. Another outcome of this absence of protection which was not evident at first, but which was identified in the national studies, was its effect on society and the environment. In this respect, the basic technical document referred to a traffic accident in which the truck driver concerned could be considered directly responsible. This example underlined, moreover, the public interest issue which attached to the question of absence of protection for some workers.
10. Replying to this situation, the national studies and regional meetings showed themselves favourable to a balanced treatment of the absence of protection which would take into consideration the various affected interests and would strike a balance between equity and adaptability or flexibility. Chapter II of the basic technical document concluded with this observation.
11. Concerning the scope of legislation on employment relationships, the preparatory documents confirmed that often there was a time-lag between those laws and the situations that they were meant to cover. In fact, in many cases, the person whom the legislation was intended to protect had been moved outside the scope so that he or she was no longer covered by it. This phenomenon had been observed in each country studied and created an erosion of social protection.
12. Nonetheless, identification of the loss of focus in legislation made it possible to propose an appropriate action to get back into focus, meaning action to clarify and specify the scope of legislation so as to cover effectively workers who in fact were no longer protected. In addition, the studies carried out demonstrated the necessity of ensuring basic protection for all workers in order to mitigate the gap between protected and non-protected workers. This basic protection referred, no more, no less, to that already existing in national legislation. Finally, the preparatory work also demonstrated a serious problem of lack of application of legislation or its very

incomplete implementation in numerous employment relationships existing in some countries.

13. The basic technical document then proposed various elements for a possible international standard-setting action. In this regard, Chapter IV of the document replied to the mandate of the International Labour Conference and the Governing Body. The basic technical document reached the conclusion that the abovementioned problems were serious and were ripe to be the subject of specific international action by the ILO. The proposals which were suggested aimed at requesting member States to formulate and implement a policy which would attempt to clarify and adapt the scope of regulation of the employment relationship, while taking account of developments in labour relations. This policy's aim was to guarantee protection of persons who, in certain circumstances and for wages, provided services. In order to translate such a policy into reality, it was natural to think of concrete measures which could be taken by the States, of a mechanism facilitating the establishment of these measures and of practical guidelines which might serve as an inspirational source. The proposal was formulated in schematic terms so that it could be completed by the experts if they thought it necessary. The document ended with points for discussion by the experts as set out below:

Points for discussion

I. General discussion

A. Protection

1. What have been the most significant factors and repercussions of the increasing lack of protection for many workers and limitations in labour legislation to prevent the phenomenon? In what way has the lack of workers' protection also affected the health and safety of the general population and damaged the environment?
2. What might be the bases for a balanced policy of equity and adaptability in which due account is taken of workers' protection, without compromising the viability and profitability of enterprises?

B. The employment relationship

3. What are the most important forms of concealed or disguised employment relationships and how might they be prevented by legislation?
4. How could labour legislation be adapted to the complex situations that arise, increasingly frequently, in which it is particularly difficult to determine whether or not there is an employment relationship, although there does exist a situation of dependency on work?
5. In employment relationships in which a worker has to deal with several parties, which kind of rules should be established that guarantee workers equitable treatment and the observance of their rights and to clearly define the responsibilities of the

employer? In addition, what would be the most appropriate mechanism to establish these rules in those complex cases, having in mind the lines of those which might exist to regulate the traditional employment relationship between a worker and an employer?

6. Reforming labour legislation may not in itself be sufficient to guarantee workers' protection, unless the problem of the ineffectiveness or non-application of such legislation is tackled. How could these questions be dealt with at the international level?

II. Discussion of specific points

7. Pursuant to the provisions of the Conference resolution adopted at the 86th Session of the Conference in 1998, would it be appropriate to consider the possibility that international standards might establish, as part of national policy, an undertaking by governments to review, clarify and adapt as and when required the scope of persons covered by labour legislation, in the light of changes in the employment relationship, with a view to providing effective and equal protection to persons who provide work services, in specific conditions, in exchange for the payment of remuneration, and to adopt measures for the effective application of this legislation? What other aspects should be incorporated into a principle such as that proposed in the report, to ensure that labour standards do not exclude from their scope dependent workers whose activity is carried out in non-traditional conditions?
8. A flexible principle concerning an appropriate periodical review of law and practice would require the adoption of specific measures to develop and apply it, such as those mentioned in the report. What other additional measures might be necessary or appropriate in this regard?
9. Would it be appropriate for the possible instrument(s) to provide for the creation of a mechanism to facilitate the formulation and application of the abovementioned national policy, made up of representatives of the interested sectors? What should be the function of such a mechanism?
10. Should the possible instrument(s) establish practical guidelines for governments on specific ways of developing and implementing the abovementioned policy? The guidelines suggested in the report refer to:
 - (a) the clear definition of the service-providing relationships which it is proposed to protect, the establishment or strengthening of simple and clear procedures for the application of labour legislation and, in particular, for identifying concealed or disguised employment relationships or the legal nature of new kinds of relationships; the adoption of standards guaranteeing access to the courts by workers; the promotion of

enterprise initiatives and collective bargaining to strengthen appropriate practices in the use of workers in accordance with the law and the principle of the social responsibility of the enterprise;

- (b) provisions, mechanisms and appropriate programmes to strengthen administrative action and facilitate compliance with the law;
- (c) standards relating to the establishment or adaptation of a mechanism to facilitate the elaboration and implementation of the abovementioned policy of the instrument, and the functioning of such a mechanism.

11. What title could be adopted to identify the subject of this Meeting in view of a possible standard-setting activity?

14. Other alternatives could have been retained. For example, the basic technical document could have suggested to delay any international action in this field to take account of the diversity of national situations. Such an approach would not take account of the fact that the problem linked to the legislative time-lag appeared nearly universal from reading the national studies. Furthermore, to deal with such a problem presented a challenge worth being raised in the context of the idea of decent work for everyone, developed by the Director-General of the ILO. The ILO could certainly play a role as the driving force behind such proposed changes. Another alternative could have been to give priority to detailed international regulation on these questions which could have, in particular, defined the basic issues, rights and obligations as well as responsibilities and procedures. However, it was not certain that such an alternative would have been able to take into consideration the diversity of national situations.
15. The option finally retained defined uniform rules of the game concerning a procedure to be followed in order to establish national policies, adopted in accordance with national conditions, in a context where benefit could be gained from the effects that the ILO's encouragement could bring. It was in this precise context – or technical meaning from the point of view of ILO instruments – that the action proposed should be understood as promotional.

General discussion (points 1 to 6)

16. The Vice-Chairperson of the Employer experts, while congratulating the Office on the time and effort in preparing the technical document, expressed disappointment that it had been received so close to the Meeting. Being a voluminous paper – itself a tribute to the work of the authors – it required close attention by the experts and the late receipt made that difficult. Likewise, the non-availability in advance of the various country papers meant that the Employer experts' contribution here suffered. The document showed that national experiences of workers in situations needing protection varied greatly; the issue was not a universal one by any definition. The scope of the matters discussed in the 1997 and 1998 sessions of the International Labour Conference were broadened in the document, and one might ask after reading it whether there were any workers not in need of protection. The

Employer experts were keen to listen to other experts so that all present could understand the issues. The Meeting should not be fixated on twentieth-century solutions to a twenty-first century issue. Nor should it stifle legitimate, innovative and new ways of working. Employers would not support situations where workers were in concealed or fraudulent employment relationships, which ought to be covered by existing legislation. In addition, they were interested in the lack of enforcement of already existing laws that might be a reason behind various situations.

- 17.** The Vice-Chairperson of the Worker experts congratulated the Office on the basic technical document, but shared the Employer experts' regret at its late distribution, since it required a lot of study. Noting that that was the third meeting to discuss the issue, they stressed one central point: solutions had to be developed so as to maintain the relevance of the ILO and the notion of international labour standards. If there were Conventions and Recommendations on labour rights and also on specific situations of workers in need of protection, but millions of workers were left out of the scope of national labour law, not to mention that of the ILO standards, then all the ILO's work was called into question. They agreed that it would be difficult to reach solutions but the challenge had to be taken up, or else enormous social harm would ensue. The Vice-Chairperson cited various examples current in his country of workers in situations needing protection – the garment industry, building and construction sector and taxi drivers – in order to demonstrate the large number of workers toiling without the protection of the labour law. The Worker experts concluded with the call to start this Meeting with a commitment to save such workers. Both the document and the Meeting's report should be a significant contribution to finding a solution and would provide a sound footing on which action in this area could move forward.
- 18.** The Employer experts stated that some of the questions proposed in Appendix II of the basic technical document were problematic since they were based on presumptions with which they were not necessarily in agreement. It was not evident to them that unprotected workers were always placed in a more unfavourable and precarious position. Some of these workers may have wished to be in such a situation. Therefore, assurances had to be given to take these interests into consideration in any action envisaged to widen the scope of protection. Furthermore, the Employer experts observed that some of the aspects of the question of protection had not been examined or fleshed out in the basic technical document. For example, they would have liked to know the scope of "protection", the costs resulting from its widening, as well as its impact on employment as such. They were happy with specific examples mentioned, coming from the national studies, but regretted that these examples did not allow them to have an overall view of the problem.
- 19.** The Employer expert of Australia said that it was a good document which underlined the diversity of situations which had to be dealt with. He insisted on the importance of adopting a balanced and flexible approach which had turned out, moreover, to be quite beneficial in the case of his country at the time of the Asian crisis. He felt, as a result, that the case-by-case approach should be given priority.
- 20.** The Employer expert of France noted that, as he had not been able to study the French country report, he was unable to judge its description of his country's

situation. He was not contesting that many abnormal situations existed, but noted that many interventions had not yet spoken of the factors explaining this diversity of situations, which were numerous. He regretted the wording of point 1 as being too general, and not representative of the French situation. The change in status of workers not only gave flexibility to enterprises, but also was to the advantage of personnel since governments were left to adopt policies for enterprise creation. Moreover, he considered that many cases demonstrated that there was not an increase in the lack of protection for workers. Regarding point 3 for discussion, it was true that disguised employment existed everywhere, even in France. It was a problem of legislation. French law was well developed and binding, so the problem there arose from its implementation. Regarding the problem of defining the employment relationship or labour contract, France had a legal definition of salaried employee. In ambiguous cases of independent workers, the courts had paid careful attention to the reclassification of such relationships and followed the reality of the situation. So the French solution was one response, but it might not work for all countries. He considered that the document gave too general a presentation of the situation overall.

21. Another Employer expert stated that: (i) he was empathetic with the examples given of the sins of the few employers, but thought that these were not the practices of many; (ii) his country (the United States) had well-developed employment and labour laws with good enforcement and a policy that favoured flexibility over over-regulation. This had resulted in a growing economy, abundance of jobs and shortage of manpower (for example, it was estimated that by 2006 there would be 155 million jobs but only 145 million workers in the country); (iii) governments had to remedy problems by adopting and enforcing laws where bad practices were widespread.
22. Several Worker experts provided information on situations found in their respective countries from which it was clear that dependent workers had been “thrown out” of the scope of the employment relationship. The Worker expert of South Africa mentioned subcontractors, supposedly independent or, in other words, the situation of externalization of services. He underlined, moreover, that the problem was common to several States. Although the motives could be different, the consequences observed were always the same: absence or lack of protection for the workers concerned. He referred, in particular, to a service being given by consultants in his country with a view to avoiding the application of the Act on Labour Relations. This service particularly advertised “How to avoid the Industrial Council” and suggested “changing your workers to contractors”. According to certain estimates, 1 million former employees had thus become contractors or self-employed workers since 1994. Without being able to confirm the correctness of these figures, the expert stressed that these manoeuvres necessarily had a negative effect on the employment relationship.
23. The Worker expert of the Netherlands, insisted on the universality of the problem identified in the basic technical document in so far as it concerned erosion of protection for some workers. She personally wanted to refer to the example of people in her country who worked on call. These, mostly women, would be working in shops, hotels and restaurants, hospitals, food factories, etc. This had been a growing phenomenon in the seventies and the eighties. They would be doing the same work as normal employees, only they would not be treated as

normal employees. Either they would get no employment contract at all, because employers would say that – as they were only working on call – they were free not to accept the call and therefore no subordinate employment relationship existed. Or they would get a so-called “zero-hour” contract, which would have the effect of a labour contract void of any content. Most of these women worked regular hours on a continuous basis, although mostly part time, but they did not enjoy the same protection as normal part-time workers. Although it was obvious that these were situations that concerned “employees”, recognition of employee status and labour protection were very hard to achieve. Even if the rare few who had been able to go to court would be given employee status in the end, most of them had lost their jobs in the meantime and did not get them back. After ten years of dispute a legislative solution was finally found. Since January 1999, if the employment was regular and continual, the burden of proof was reversed, and it was up to the employer to demonstrate that a person was not an employee. What was introduced in law were two refutable legal presumptions; one with regard to the existence of an employment contract when work had been carried out weekly for payment, or for at least 20 hours per month during three consecutive months. The second legal presumption concerned the volume of the work agreed upon and was specifically aimed at the abuse of “zero-hour” contracts: when an employment contract had lasted for at least three months, the work agreed upon was presumed in a given month to be of a volume equal to the average size of the work in the three preceding months. She stressed that both legal presumptions could be contested by the employer in court, and were open to disproval. These changes, although very recent, seemed to help a great deal in overcoming at least part of the problem of disguised employment. They were part of a much broader package deal, which had been made in 1996, after a national committee of economic experts had issued a report in which strong concerns were voiced with regard to growing flexibility and insecurity of workers. The concern was that this would harm economic growth and the innovative power of the Dutch economy. The package deal was made in a bipartite agreement at the national level between workers’ and employers’ organizations, called “Flexibility and security”, to make it very clear that enhancing flexibility did not have to lead automatically to the weakening of worker protection and indeed the opposite was claimed.

24. A third Worker expert recognized the diversity of situations but underlined nonetheless that they had a common thread: the labour legislation and the ILO instruments were not being applied. With reference to the situation in his country (Australia) he felt that more and more workers effectively found themselves outside the employment relationship. He gave as examples the transport and construction sectors. In the former case, the drivers were owners of their trucks and a good number of them accepted working for pay below the statutory minimum wage rates. They worked long hours which could have a negative effect on highway safety. With respect to construction, manpower was often subcontracted and the minimum safety standards not respected. He insisted on the fact that these situations also had an impact on public authorities’ fiscal revenues. In fact, the latter were losing annually important amounts due to the classification of these workers as independents. Finally, he gave two examples of legislative action: New Zealand and the Australian State of Queensland, which deemed a much larger number of independent workers to be employees.

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25. A fourth Worker expert stressed that all the Scandinavian countries shared the same problems as those described in the basic technical document which, in her opinion, confirmed their universal character. It was incontestable that more and more workers did not enjoy a stable job. The situations described by the previous speakers also existed in Finland. Other cases of exclusion from the scope of the employment relationship could be added, for example, in sectors like health and information technology. She also referred to cases where a worker could have multiple employers, which made it often difficult, even impossible, to identify the real employer of the wage earner. In addition, workers were informed that their elected shop stewards would not be recognized by the employer because they were employed by another company even though they worked in the same place under the same supervision and conditions as the others.
26. A fifth Worker expert, of the Philippines, described two situations in his country: (i) taxi drivers in the “boundary” system (where the driver pays the operator a fixed amount as rental each time he drives the taxi unit and pays for fuel, the net income being the amount earned above this) had been suffering adverse effects such as long hours, leading to poor health for the drivers and danger for the community in general by undisciplined speeding and accidents; and (ii) labour-only contracting, which was illegal but still continued (where the contractor supplied workers to the true employer), meant that no labour standards were applied and the workers were afraid to join trade unions. Organized labour had complained against this system and tried to lobby Congress so that it be declared punishable by imprisonment as a strong deterrent.
27. Several Government experts welcomed the quality of the Office document. They shared a large number of the situations and concerns described in that document, as well as the approach proposed by the Office to deal with this question. They were of the opinion that the issues raised in the document concerned a majority of countries and resulted in problems that would be best tackled through international action in the framework of the ILO.
28. The Government expert of Canada pointed out that, from the State’s viewpoint, it was at times difficult to improve the minimum protection available to workers. For example, it might be feared that the improvement, particularly in fragile economic sectors facing international competition, might carry in its wake consequences for employment itself. Moreover, one could imagine that the addition of new standards could incite the development of new evasion mechanisms to avoid their costs. Also, it might be the case that, after a certain threshold, the accumulation of protective standards would incite an enterprise to have recourse to external manpower. The impact of state measures could therefore be felt both on the workers covered themselves and on the workers who were not so covered.
29. The Government expert of Chile observed that the increasing absence of protection could be explained in part by two phenomena: on the one hand, it was without question that the movement of the economy towards service sectors had contributed to the shrinking of protection given that labour legislation had always been less involved in that sector. In his opinion, it was a worldwide trend. On the other hand, just as the Worker experts had stated, he considered that recourse to subcontracting or outsourcing was not unrelated to the weakening of protection. He

insisted on the importance for any standard-setting action to be followed up by a more efficient control and a sound administration of justice.

- 30.** The Government expert of India expressed his appreciation at the excellent work done by the Office and by the authors of the country studies which would help unravel the truth as to how and why workers were finding themselves in vulnerable situations without national or international protection. Having chaired the 1997 and 1998 Conference Committee, he had been optimistic that the discussions would lead to standards on contract labour, but that had not been possible. The 1998 discussion demonstrated the mind-boggling nature of the problem, with its serious conceptual, definitional, nomenclatural and legal problems. However, it was heartening to recall the Conference resolution which invited the Governing Body to keep the issue under study for the possible adoption of a Convention supplemented by a Recommendation not later than 2002. This Meeting of Experts had a clear mandate and could use the basic technical document to give guidance to the Governing Body. The spirit of tripartite discussions had, since the ILO's inception, resulted in the adoption of 182 Conventions and 190 Recommendations. On the issue of the universality of the topic, he pointed out that many contentious issues in the past, with conditions varying widely within regions and from region to region, had nevertheless been covered by international labour standards. While it was difficult to speak of total commonality of workers in situations needing protection, consensus was needed to recognize that at least some common features existed. An honest and dispassionate search for the truth, for example, regarding which workers lack protection, in what employment situation, what is the role of law and the role of the social partners, would lead to this. Regarding point 1 for discussion, he noted that laws reflected the point in time of their adoption and might need adaptation in the wake of new circumstances such as globalization, privatization, outsourcing and other new types of work perceived by governments as genuinely needed. He described the situation of India's 1970 law abolishing contract labour which, after 25 years of implementation, had resulted in contract workers suffering massive retrenchments, and had necessitated an intervention by the Supreme Court. The current approach was that rather than attempt to abolish contract labour, it was better to regulate it by protecting equality of wages, workers' health, safety and welfare, and access to various other amenities at the workplace. Regarding point 2 for discussion, he stressed that while protection was needed because workers found themselves in a variety of situations without a direct employee/employer relationship, at the same time governments were opening up their domestic economies and trying to integrate the domestic economy into the global economy, thereby making the workers more vulnerable to exploitation. Some basic elements of protection – such as hours of work spread over overtime payment of wages on time without deduction or fine, weekly day of rest, etc. – should be regulated and such protection would boost productivity in favour of economic growth. While protection was urgent and inevitable, a balance could be struck between equity and adaptability.
- 31.** The Government expert of Argentina stated that although his country had some adequate legal protection, economic processes were leading to calls for certain changes. Workers were facing inadequate protection because of the economic restructuring over the last ten years, the opening up of the economy, privatization of state companies and a high level (40 per cent) of work that was not registered. There was also a weak labour administration which led to considerable delays in

adapting labour laws for the protection of workers. With this process of economic change the laws, especially on subcontracting, needed to be revisited; this was commencing for workers in situations of economic dependency who had lost their jobs such as truck drivers, taxi owners and “fleteros”. Although it was clear that such workers depended exclusively on one employer, they had no social security protection. A case-by-case approach through court remedies was not adequate today so the topic was ripe for ILO action. Regarding point 3 for discussion, he considered that governments, through their labour administrations, needed to tackle fraudulent relationships, but could not do so without genuine social dialogue. For example, the Argentinian Government had started work on revamping the Ministry of Labour so that the labour inspectorate would be really effective. Regarding point 5, the tertiarization of employment relationships had given rise to companies in the form of cooperatives, but the reality was that the workers continued to work for an employer. Seasonal and temporary work was also on the increase and governments could not keep up with their role of providing protection, so again, it was for the ILO to tackle the non-application of legislation.

- 32.** The Government expert of Germany commended the Office for the excellent report and agreed with many other speakers, such as the Canadian Government expert, that situations where workers found themselves without protection could adversely affect the situation of workers covered by the law. The case of low wages of unprotected workers spilling over to wages protected by collective agreements was in point. He also agreed with other speakers that society as a whole could suffer, for example, where independent workers did not contribute to the state insurance scheme, the pension protection for everyone was reduced. The Chilean Government expert had highlighted the lowering of work conditions in situations of outsourcing to subcontractors. All these cases raised the importance of the international context, where work more and more took place across borders especially in the construction and distribution industries. Changes in the IT industry meant that there were no borders at all, and new, more flexible, forms of work had emerged. He welcomed the United States Employer expert’s statement on the lack of available workers, but pointed out that there was a worldwide increase in unemployment. He noted that it was a global phenomenon of the transformation of the nature of work and it caused a problem for international competition. Repercussions flowing from international competition could lead to social dumping. Therefore it was clear that international action was needed to prevent distortions, and to promote a humane society with equal protection for all workers.
- 33.** The Government expert of France thanked the Office for the work done, which showed the universality of the phenomenon. In France, evasion of protection was at a peak and although not worse than most countries, it was certainly not better than them. He suggested that a solution could be in the role of the State and of the courts, and noted that the Employer experts had also spoken out in favour of combating fraudulent relationships. Labour administrations needed a clear role in order to fight such disguised situations. Their role in turn depended on the parties being able to turn to the courts, and the courts being willing to promote worker protection. However, court proceedings were lengthy and slow, and courts could not check on all systems. He considered that the diversity of situations under discussion was linked to the different sectors involved. Therefore, since each branch of activity had collective bargaining procedures, another solution could be

to persuade the social partners, in negotiations, to examine such situations with a view to eradicating them.

- 34.** Several Employer experts commented on the national studies concerning their countries with a view to demonstrating that a case-by-case approach of national-level interventions was solving whatever problems were arising. The Employer expert of the United States repeated that he recognized that some situations existed in which workers were not treated in an equitable manner. Concerning the case of one large American IT company, he pointed out that the Circuit Court of Appeals had resolved the matter in favour of the workers who had been denied employment benefits. Although the IT company had classified the workers as “temporary”, the Court focused on the nature of the employment link. However, the court did not pronounce itself on the concept of temporary employment or on the consequences of such a type of employment in terms of the rights and privileges of the workers concerned. According to this expert, appropriate laws should be drawn up at the national level and measures should be taken to ensure their effective application. The Employer experts of Australia and the United Kingdom observed that the question of inadequacy of national legislation raised during the discussions appeared, far from being the rule, rather to be the exception. In Australia, for example, solutions, which took the form of legislative or other measures, had been drawn up by the public authorities in the transport, clothing and construction sectors. These initiatives served to answer specific problems encountered at the national level. Moreover, that expert insisted on the structural changes affecting the labour market which were directly linked to economic growth. These changes encouraged, in particular, the development of new types of work, which had in many cases a much greater flexibility. Finally, he was happy to support the proposal of the French Government expert, according to which the social partners examine the question of disguised employment in the framework of their negotiations and on all levels, enterprise, sectoral and national. The Employer expert of the United Kingdom likewise gave examples of the legislative measures which had been taken at the national level in the United Kingdom, especially since 1997, in order to remedy the problem. In the United Kingdom, privileged action by public authorities had permitted much greater flexibility in work, an increase in the standard of living and economic growth, while allowing protection of workers through effective application of national measures. He emphasized the importance of case-by-case action at the national level.
- 35.** The Employer experts of Lesotho and France were of the opinion that most of the examples mentioned in the basic technical document which underlined a lack of protection reflected exceptions. The former expert noted that it was undeniable that the nature of work was changing and it was impossible to reverse this trend, but the bad examples did not lead to the conclusion that the principles were erroneous. In that respect, he cited the example of bus drivers who, after the company for which they worked had ceased to exist, purchased their vehicles and saw their working conditions improve. The solution was certainly not to be found in the drafting of a new international instrument, but rather in effective application of the appropriate national laws. It was, moreover, under this umbrella that the ILO could offer technical assistance. Likewise the Employer expert of France considered that the question of traffic accidents had nothing to do with the nature of employment of truck drivers, but rather with the rules of the road. This question should no longer be considered important in the framework of the Meeting’s discussions.

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36. The Employer expert of South Africa referred to his country's national study, observing that it painted a declining economy with adverse effects on employment and the most vulnerable workers. He pointed out that the national study mainly examined the illegitimate aspects of alternative forms of work and their negative aspects without stating that these forms of work may have and usually do have legitimate forms. He felt that the study illustrated, but did not articulate, that South African employers have had to make enormous adjustments to remain viable. A positive consequence for remaining competitive had been the development of a focus on core business, and the outsourcing of non-core aspects to those who focused on their core business. He regretted that the documents did not supply any statistics about the extent of non-protection but illustrated the problems of non-enforcement graphically. The Employer expert of Malta pointed out that a number of programmes had been developed in his country in order to offer incentives to unemployed persons to become independent workers. These programmes were organized by the Employment and Training Corporation. Official statistics revealed that these trained persons rarely returned to being dependent workers. This initiative of the Employment Training Corporation had created a number of jobs in the private sector.
37. The Government expert of Chile emphasized the need to consider various assumptions for which it would be necessary to plan for the improvement of legislation with rapid and efficient solutions for workers' problems. First, the legislation should include mechanisms to avoid shams and fraudulent concealments. Second, some more complex, special situations should be considered, namely triangular relationships. Subcontracted work was inside these triangular relationships, for which the ILO had already adopted Convention No. 181. Another situation of this type was work subcontracted in the strict sense of the term, where the owner of the firm contracted with another enterprise (subcontractor) which, in its turn, employed workers and was their direct sub-employer. The owner of the firm had, with respect to the subcontractors' workers, responsibility which varied according to legislation. Third, there were forms of work associated with the subcontracting work system in the strict sense of the term, as would be the case of independent workers who had a dependent relationship. These workers required employment protection and social security if the general system could be extended, or decided to have a special contract, as was the case with home work, in which subordination was limited to a mere accounting. However, there was the common characteristic of doing the work at home, today using modern systems like telework. With reference to situations of dependent work undertaken independently, recourse should be made to legal definitions in various countries for the adoption of specific solutions.
38. The Government expert of the Netherlands noted that the danger of having outdated solutions for modern problems had arisen in his ministry when it had examined reports of two projects, one on self-employment and one on new forms of work organizations and their effects on labour relations. It was discovered that some sectors, such as construction and meat, still had traditional approaches. In the hairdressing sector, hairdressers were being required to rent a chair in salons with the worker shouldering all the risks. There was also a problem in transport, linked to the new work form of the linked "chain" where one enterprise used several linked smaller own-account workers for services. Even in situations where modern laws apply, like in European Union countries, excessive hours were still worked.

Likewise the Government expert of France noted that the French Government's reaction was comparable to that of the Netherlands in that they wished to avoid outdated solutions. The current text against labour trafficking dated back to 1848 and permitted finding relevant solutions to cases of illicit triangular relationships. In recent years, French safety and health law in the construction field had been extended to independent workers working on a site covered by the Labour Code. Even on sites of the large construction companies, independent workers had often replaced the wage earners. In such circumstances, there was a need to extend the scope of protective provisions so as to reduce the unequal treatment. This could be dealt with by national laws and by international instruments. Regarding the Dutch meat industry and workers in chain relationships, international instruments would be the best answer since enterprises could avoid varying international contexts. Transport was a difficult case since the activity crossed borders and a request for governments to adopt road safety regulations is only a partial response. Where various national laws undermine the level of protection, there would be a need for a higher level of international regulation. Whatever importance the Meeting attached to national laws and better enforcement, this latter response was still needed.

39. The Government expert of the Philippines complimented the comprehensiveness of the basic technical document but corrected some impressions given in footnotes on pages 29 and 32 concerning his country: the Philippines Supreme Court had in recent cases upheld the status of regular employees and "work pools" did not necessarily undermine security of tenure but rather offered the persons involved preference for future work from the pool. He pointed out that developing countries faced special problems of workers in situations needing protection. His country had well-developed labour laws and the State was under a constitutional obligation to protect all persons but, out of a labour force of 32 million, only 48 per cent were in formal jobs, in a bilateral employee/employer relationship, paid wages and enjoyed statutory protection. The other 52 per cent went generally unprotected. But, even those working in a formal employment relationship could be exposed to vulnerable situations, such as through flexible work forms like outsourcing. Other grey areas included trilateral and multilateral relationships, independent contractors, temporary workers and workers in micro and small enterprises who could not effectively be reached by the labour inspectorate. Even when there was a formal employment relationship, some employers might find themselves less protected than others. Security guards for example, might find themselves unable to enjoy protection through the retirement law. The law governing the operation of security agencies limited the issuance of licences for persons seeking to work as security guards to those 50 years or under, while the retirement law generally set an optional retirement age at 60 years. The Government was aware of this problem and was trying to tackle it by laws and other methods. Another source of lack of protection concerned workers in multinational companies, as the recent Asian crisis had shown with the many retrenchments of such workers. The Government's responses to these situations have been somewhat limited: there was, since 1974, a presumption of regularity of employment and the concept of "end-user" had been developed so as to ensure liability for the obligations attaching to an employer. But, since national standards are only a minimum – and the minimum wage demonstrated that – further protection was needed. However, he recognized that a balance was needed since, in countries with a high incidence of non-formal work arrangements, too much protection could push workers into unprotected work.

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40. The Government expert of Germany noted that the Meeting appeared to have reached consensus on point 4 concerning the grey zone, with many relationships being characterized as “independent” whether by error or by intention. From all the examples discussed so far, it was clear that labour law, social security and costs were being avoided because of this characterization. Five criteria appeared to be agreed upon in judging apparent independence: where workers worked without any employer; where workers worked in reality for a single employer; where certain work in specific branches of activity was normally based on an employment relationship; where workers were the risk takers but did not have the advantages of independence or freedom of decision; and when workers were doing the same job in self-employment after leaving a dependent job, such as the truck driver/owners.

Summary of the general discussion

41. The Chairperson summarized the Meeting’s discussion on points 1 to 6, noting that the opening discussion – as was often the case – had focused on diversities between country situations and within sectors of countries. However, there was a common underlying theme similar to that reflected in the 1998 Conference resolution, namely the need for protection, even in the absence of agreement about its forms and the subjects of that protection. Secondly, protection by an international instrument would inevitably involve generality as that form of instrument was different from national laws. A key issue to be tackled next was the notion of a promotional instrument and the secretariat would have to articulate this notion for the Meeting.
42. The Worker experts noted that the Government experts already had a broad consensus in support of the basic thrust of the document, mainly that a crisis existed and international action was needed to solve it. They were happy that the Employer experts shared this consensus at least as regarded concealed or disguised employment relationships. While the Worker experts wanted more than the Employer experts, this common ground meant that the Meeting could move forward on these points. With regard to point 5 for discussion, they noted: (i) there were workers who had no employer because they related to several institutions (for example, in California, home-care workers visited care receivers at home and received directions from them, but the courts had concluded that there was no employer therefore no protection and special laws had been passed to create an agency situation to remedy this; (ii) there were user enterprises using transient intermediaries – individuals or micro-enterprises – in the garment, agriculture and other low-wage industries, which left workers attached to the intermediaries without protection; and (iii) employers outsourced the most dangerous kinds of work so as to avoid health and safety responsibilities. These experts noted that governments all over the world were looking at these issues and many had taken a legislative response: Argentina, New Zealand and the United States (where several proposals existed concerning the status of independent contractors). It was indisputable that this was a universal phenomenon, since many countries even used the same terminology, for example, the Netherlands “presumption of employment relationship”. There was thus a clear platform for international action.
43. The Employer experts wished to make some observations on the questions raised in the general discussion. To begin with, they felt it important to reiterate their

position during the 1997 and 1998 discussions from which they had not changed. The subject in question covered such a very considerable number of situations that an international instrument was not appropriate. Moreover, the Employer experts had noted, during the discussion, that the question of the focus of the subject had not been clarified. They therefore did not want to propose to the Governing Body an approach which would be so limited as to cover only very restricted situations or so wide that, in the end, little usefulness would be served since the subject would remain too imprecise. They regretted that the document had concentrated almost solely on one avenue without taking into consideration or examining questions which were fundamental for workers in so far as they concerned, in particular, the implied costs and repercussions on employment. Furthermore, the Employer experts noted that a number of interventions by Employer and Government experts had considered the option of national action so as to ensure effective application of protection. Several governments were involved in that respect, in particular through adopting appropriate legislative measures, and these initiatives had been taken without the benefit of an international instrument. Finally, they insisted on the diversity of situations which were occurring, a diversity which should not be limited by searching for a single solution.

44. The Employer experts added that the issue was very complex, for the expression “workers in need of protection” covered a wide variety of situations and forms of organization of work. Such situations differed widely from country to country, and also from one industry to other industry or sector within the same country. Some issues were actually not so universal as it had been suggested in the basic technical document. Doubts persisted concerning certain core legal concepts, such as the definition of the employer, or of contract of employment. They considered that such concepts could not be defined in an international instrument, nor could they be applicable worldwide. The Employer experts added that cost/efficiency considerations, national and international commercial competition, as well as the emerging forms of organization of work should also be taken into account. Certain solutions consisting in expanding the protection might result in unbearable costs. Consideration should also be given to the fact that many workers actually did prefer to be in independent employment rather than in an employment relationship. The Employer experts concluded that the best protection for workers was perhaps a labour market where the employers had to compete for their employees, and they observed that one cannot look into twentieth-century solutions to respond to twenty-first century challenges. However, certain issues could be addressed with the support of the employers. For example, they did not support fraudulent or disguised employment, which they felt should be tackled by streamlining and strengthening the existing law-enforcement machineries and procedures in States where these were problems in this regard.
45. Many experts coming from government circles agreed that the situations addressed in the basic technical document were cause for concern in their respective countries. An important issue related to safety and health, for many workers excluded from the scope of labour laws were especially vulnerable to safety hazards. Also, recourse to non-wage employment made it easier for certain fraudulent practices such as tax evasion and non-payment of social security contributions. Increasing exclusion from the scope of labour laws and social protection also had a bearing on the protection of those who remained protected. Furthermore, there was a need to assess and to revise the law-enforcement

procedures and machineries, for in general they were slow, and their efficiency left much to be desired. In general, workers were now less protected than they had been, say, some ten to 20 years ago. The Government experts recognized that in some countries the existing legal solutions and approaches were perhaps sufficient to address many of the problems. Yet, there were still many grey zones which called for further legal elaboration. In any event it should be recognized that disguised and fraudulent forms of employment were on the increase and there was a need for governments to combat fraud. Various Government experts recognized that many practices, for example outsourcing, were legitimate in principle. Yet a basic principle was that workers under outsourcing arrangements should be protected. The Government experts considered that the trends addressed in the basic technical document had a bearing on international competitiveness. This was why there was a need that they be dealt with through international action within the mandate of the ILO. International action should of course be followed up by national action, where possible to be worked out in consultation with both social partners.

Discussion of specific points – point 7

46. The Employer experts wanted clarification about the nature and obligations arising from promotional instruments, as well as on other language used in this point for discussion such as the “undertaking” required of governments. A second concern was that the document proposed the adoption of standards without offering other alternatives, although a number could have been expounded. Why was there no analysis of, for example, the usefulness of further research and dialogue, alternative enforcement models, best practices, technical cooperation in particular regarding enforcement difficulties, methods of support for workers outside the legislative context (such as business support in the United States for independent workers in attaining pension plans, and so on), small and medium-size enterprise development (where there was already a strong ILO mandate) or promotion of microcredit for micro-enterprises (which would touch persons really needing protection, namely the unemployed)?
47. The Worker experts recalled that the mandate of the current Meeting was set out in the document. The Employer experts’ position that improved enforcement would solve the problems facing workers in situations needing protection was not the answer. Given the enormous changes in the world, a worldwide solution was required. Point 7 proposed that each member State review its laws and practice so as to identify exactly who required protection. The Worker experts agreed with the Government experts’ position that, when there was an international problem, it was necessary to have an international response. Replying to the comments made by the Australian and the British Employer experts that national responses were working, they welcomed the fact that both Governments in question were reviewing their policies, laws and practice, and were thus trying to solve the problem while, at the same time, increasing productivity. But, that was one of the very reasons why international standards were needed because many reactions were coming into play and an international response could distil what was working and what was failing in the area and share that with all countries. They were pleased to hear the Employer experts state that they condemned disguised employment and agreed with them on that point. But, which situations could be characterized as

“disguised”? The abovementioned example of employers marketing ideas on how to avoid the labour law? Another example was that of home work sewing-machine operators forced to buy their machines on credit, then doing the same work but no longer considered as employees? Also, in Guatemala, employers divided their enterprises into formally separate enterprises so as to avoid meeting the threshold of 20 employees, which was the minimum number required by law for the right to unionize. They were therefore in support of an international instrument to face up to these new forms of work where workers were denied the protection of the labour law. Such international action was required, not only because it would help member States learn from experiences but also because it would deter transnational companies from seeking out weak standards. The ILO was the only body that could call on countries to raise their standards together.

48. In reply to the request made by the Employer experts, a member of the secretariat indicated that the focus adopted in the basic technical document was directly based on the discussions which had taken place at the Conference in 1997 and 1998, on the resolution adopted by the Conference in 1998 as well as on the agenda of the Meeting as decided by the Governing Body. With respect to some of the questions raised by the Employer experts, there were various ILO programmes, however, none was mentioned in the basic technical document which had been elaborated in keeping with the wording of the Conference resolution and the agenda. With reference to the statement made about a promotional instrument, the Secretary-General pointed out that for this purpose several different types of instruments could be used, such as resolutions or expert recommendations. In this specific case, however, the mandate would appear to refer to the preparation of a Convention or of a Recommendation or of a Convention supplemented by a Recommendation. In the case of these two types of instruments, the obligations incumbent on member States were established in the ILO's Constitution. In the case of a Recommendation there was an obligation to submit it for information to the competent authorities and to inform the ILO about what had been done in this respect. In the case of a Convention, whether promotional or not, if it was ratified there was an obligation to apply it and to inform the ILO of the fulfilment of this obligation. In the case of the subject under discussion, the obligation would be in relation to the methods adopted to carry out the policy on which the instrument was based. ILO instruments might contain operative or promotional standards. The operative standards had precise requirements directed to the member States. The promotional standards established features mainly of policy that the States were to follow and presupposed the adoption of measures – to be taken in light of national law and conditions – to put them into practice as demonstrated by the obligation to inform the ILO about their implementation. This was the case, for example, of Convention No. 122 on employment policy. Another member of the secretariat pointed out that the Office proposal was centred on drafting a juridical basis for international action. However, that action would not exclude, indeed the contrary, the possibility of undertaking other activities like those mentioned by an expert (an investigation and an international exchange on specific themes from the Conference in 1997 and 1998, or the revision and periodical discussion on good practices or assistance to States on the practical application of legislation).

49. The Government expert of Argentina pointed out that the countries had sought to reply to the new requirements of the economy through use of flexible methods. However, these responses were not uniform in so far as effective and equal

protection of the affected workers was concerned. He therefore felt that it was necessary and pertinent to think about adopting an ILO instrument which foresaw a policy like the one suggested in the basic technical document.

- 50.** The Government expert of India pointed out that to reply correctly to point 7 it was essential to revise national legislation in order to identify, in particular, obstacles to protection of workers and to adopt measures to remove those obstacles. In his country such protection was offered by precise constitutional and legislative provisions and was completed by action programmes and jurisprudence. In that connection, when there were two possible constructions or interpretations of the law, the highest national authorities including the courts were always inclined to accept that construction or interpretation which favoured protection of workers. Therefore, there was no discrimination between workers regardless of the form of their employment, whether it was full-time, part-time contract, casual or temporary, in terms of the application of the statutory protective provisions. Initiatives were also being taken to reinforce the mechanisms foreseen at the central and state level in order to ensure respect for this protection. This rapid review led the expert from India to answer in the affirmative to point 7 and support the idea of an international promotional instrument.
- 51.** Another Government expert reviewed the differences in viewpoint of various experts with respect to the scope of protection and the persons who should be covered. However, she insisted on the importance of discussing mainly the elements which converged and the instrument or mechanism which could be envisaged.
- 52.** A third Government expert underlined the antagonism between, on the one hand, national legislative action limited to a territory and, on the other hand, multinational companies which acted without consideration of borders. It was thus appropriate to imagine transnational management of workers. In concentrating on national legislative action there was a risk of creating a vacuum with respect to those able to act beyond borders. According to this expert of Cameroon, an international instrument offered a general framework of protection which would certainly take part in the war on poverty. In Cameroon, the legislature had enacted a legislative framework (in the 1992 Labour Code and its 1993 and 1995 regulations) which provided for the protection of workers in triangular employment relationships (“tacherons” and temporary employment agencies) and of casual, temporary and day-task workers. But these texts were only partly applied because of the poor understanding of them by those responsible for their implementation; because of the effects of globalization (precarious employment leading to a larger informal sector; poor labour relations within multinationals; and because of fraudulent employment relationships.
- 53.** The Worker expert of Australia disagreed with the opinion that national legislation already covered satisfactorily the question being studied. He was unaware of any legislation, national or international, which treated the question adequately. Certainly, it was true that certain national action and measures had been taken. However, in the majority of cases the public authorities hesitated or were not sufficiently equipped to reply to the requirements of certain problems, especially in sectors which were undergoing constant transformation. With regard to the transport and construction sectors, he recognized that legislative measures had been

taken in his country but pointed out that they sought to control specific problems without directly addressing the question of the absence of protection for these workers. For example, concerning the truck drivers it is certain that a decrease in driving time could have a positive effect on highway accidents. However, studies revealed that independent truck drivers' salary conditions remained insufficient. With respect to the construction sector, the measures taken were aimed, in particular, at resolving fiscal problems without dwelling on the fact that only by avoiding payment of fiscal charges were the workers able to survive. Finally, the speaker dwelled on situations in which companies obliged their workers to become independent under the threat of losing their employment. It involved, in complex and sophisticated situations, creating a juridical intermediary between the employee and the company so the latter escaped the appropriate restraints. In several but rare cases in the common law countries, the courts agreed to "lift the corporate veil", thereby addressing the artificial character of the legal device being used. In the same manner, he pointed out that the public authorities of Queensland, Australia, indicated that they wanted to include the possibility of raising this veil in draft legislation presently being discussed. In order to know if other aspects should be included in the proposed international instrument, he indicated his support for what had already been proposed and suggested that workers in non-traditional activities could, in particular, be added. In closing, he asked how this fundamental protection could hinder the spirit of enterprise, as the Employers had suggested.

54. The Worker expert of Finland wished to refer to the home healthcare personnel to demonstrate the usefulness of an international instrument in the field. This question had already been raised by the Worker expert of the United States. The Finnish law provided that sick and old people should have the possibility of living at home so as to reduce the costs of care. She foresaw that those workers did not have an employment relationship. Some kinds of exceptions created by the law also aimed at defeating unemployment, but they were not in conformity with labour legislation. Therefore, a solution had to be found, and it was in this context that an international instrument proved useful since it permitted exchanges, use of information and the possibility of learning from the mistakes of others.
55. The Worker expert of the Netherlands disputed the contention that the question was mainly one of application. It appeared evident that structural changes were universal and they had, as a consequence, put many workers beyond the field of protection provided for by the law. The global nature of the problem called for international action and it was in this context that the ILO should act to modernize the applicable standards.
56. The Government expert of the Netherlands, for his part, pointed out that the measures proposed in the basic technical document took account of the various situations prevailing at the national level. He was also happy with the fact that the Employers wanted to declare war on disguised employment. He said he favoured the mechanism proposed in the document. Nonetheless, he made clear that it could be useless to create new mechanisms if, at the national level, there were already some which might be appropriate. Also, the proposed policy could become part of a more global general policy.
57. The Government expert of Canada gave his support to the proposal presented in point 7 of Appendix II of the basic technical document. It appeared very clearly

that one of the fundamental duties of the State was to follow the development of laws and modify them where appropriate. In this respect, he referred to three mechanisms which were planned for Quebec Province which permitted precisely for public authorities to be informed about developments in the world of work and to re-evaluate periodically the adequateness of all legislative texts in force. According to this expert it was essential that national action be supported by an international instrument which permitted guaranteeing adaptation and follow-up of situations, as well as contributing thus to a war against illegal competition between States.

58. The Government expert of Germany supported the proposal of the Government expert of Canada in underlining the importance of planning for an international instrument in that field. The problem, being international and global, required an international response which could only be, in so far as labour law was concerned, an instrument of the ILO. He considered the proposal made in the basic technical document as modern and intelligent by planning for a flexible instrument, capable of being adapted to national situations. However, he would have preferred that it would be more detailed with respect to some important questions such as definition of the employment relationship. He also insisted on the fact that the planned instrument should clearly establish the principle – for which a consensus already existed in 1998 – that any person who was only an independent worker for the form should be considered as a protected worker. This was a basic principle on which the instrument had to insist.
59. Another Government expert reiterated the necessity first to distinguish between types of juridical “images” or situations. There were complex juridical labour situations: the doubtful, the grey, the triangular and the atypical. These were real, not necessarily bad in themselves, except that these juridical images appeared for various reasons. Now faced with these realities, there was no alternative except to opt for clarification through standards, either by legislation or through jurisprudence, although the latter was slower. In this sense, the basic technical document was emphatic and interesting, suggesting in paragraph 202 the necessity for drafting international standards for the refocusing of the personal scope of labour law with measures tending to:
- (a) clarify the extent to which the employment relationship should be regulated, improve enforcement machinery and facilitate workers’ access to the courts;
 - (b) fine-tune, if necessary, the legislation as employment relationships evolve in practice without jeopardizing commercial or other kinds of activities; and
 - (c) ensure basic protection for all workers.

Second, account had to be taken of the partial “de-labourization” of certain employment relationships. If indeed the genuine independence of a worker was such that it required encouragement and which could result in very favourable consequences, there was, however, a series of worrisome side effects that were connected to legal fraud, infringement of the labour standards and disguised employment. On this first point, naturally it was not admissible that labour legislation could be evaded, since it was of public importance and had the protection of the worker, the community and social peace as its subject. In this

sense, a crack opened in the juridical order if for the autonomy of the parties an employment contract was transferred into a contract having a different face. With respect to disguised employment, many more serious things had taken place in his country (Chile) and elsewhere. On the one hand, there was pure and simple disguised employment as in the case of a civil law contract for the provision of services or fees aimed at concealing a classic employment relationship. On the other hand, there were complex, more serious situations. That was the case, for example, of phantom enterprises, which existed in name only, imposed by the employer for subcontracting personnel, with which the relationship between the real employer and the workers was separated by use of a civil and a commercial contract. In reality, these were only disguised employment situations, which were serious because they discredited the law and resulted in grave problems between employers and workers.

- 60.** The Employer expert of Australia questioned the wording of point 7, in particular the breadth of “scope of persons” since it implicitly assumed that investigation would have to go beyond the employment relationship and outside the realm of industrial relations, with no stated limit. Such an undertaking would take a very long time. And yet other, equally important issues, like the economic impact of changing the employment relationship and the applicable laws, were not even up for discussion. Would point 7 require governments to look into the costs angle? This was important information to have, because if an international instrument became an eventuality, and that instrument led to job losses, it would have been preferable to have no instrument at all.
- 61.** Another Employer expert explained that calls for “all workers to have protection” were laudable but were too vague, especially when the Meeting had not explored the concepts of “employee”, or “worker” or even “person”. He stressed again the need for an economic analysis, and posed the question of who pays for the protection: the worker, the government or the employer? He gave some details from his country: while the United States Government had decided against picking up the burden of additional costs, voluntary protection – such as in the areas of health insurance and pension plans – was available and used by some workers. But if the choice in general were to be to force the employers to shoulder the burden of protection, there would be far-reaching consequences, such as increased costs carried over to the consumer and job losses. Given this difficulty, he repeated that this Meeting would do better to focus on the fraudulent employment relationship and on accepting flexibility, since it created jobs and that was the best protection for workers. He also repeated his concerns, noted during the Committee on Contract Labour’s debates, that by pushing for a regulation of this situation, the downsides were being ignored.
- 62.** The Worker expert of Senegal fully supported other experts who had stressed that realities differed from country to country, noting that the lack of protection was particularly hard on workers in developing countries. In his country, one sector had witnessed the persistent abuse of the use of casual employees, hired one day at a time. This type of contract, which was meant to be for a short period, could be abused, even for long periods (such as ten years) with no medical or pension rights for the workers all that time. The workers had requested their trade unions to seize the labour inspectorate and the courts for the correct application of the law. The courts decided that certain aspects of the law permitted abuses and excesses. These

situations led to calls for revision of the 1997 Labour Code which urgently needed to address such anomalies. The disappearance of the public transport sector company in Dakar had seen the emergence of an informal urban passenger sector, employing thousands of workers, left to the mercy of employers who cared little for the statutory wage and social protections (medical coverage, pensions, etc.). The trade unions had started to exert pressure for a revision, thanks to the help of NGOs and the ILO, so that the workers could exercise their rights to protection in a sector where injustices were manifest. International instruments would be of great importance. They would push governments to respect and to ensure respect for standards.

- 63.** The Worker expert of the Philippines stressed that the traditional old work patterns had been reversed in recent times, with trilateral relationships expanding and regular employment relationships shrinking. In situations such as this, protection becomes a farce, but workers made few complaints because of fears for their job security. He welcomed the agreement that this was a worldwide problem, the fact that many governments were reacting by calling on the ILO to adopt standards in this area, and that some employers were aware of the problem, but regretted that the latter saw national level action as the only solution.
- 64.** A Worker expert replied to queries about the wording of point 7, stressing that the context of the paragraph made it clear. The examples given by Employer experts of workers absorbing the costs of their social protection might be appropriate for developed countries but would not work elsewhere. The South African country study showed clearly that there was a need for international measures, since so many sectors faced lack of protection: the examples of the hospitality industry's outsourcing and "insourcing" methods to reduce enterprise costs, but at the expense of working conditions. The Meeting was, despite a certain polarity, arriving at some common positions.
- 65.** The Worker expert, representing the International Federation of Building and Wood Workers, declared that the answer to point 7 was yes, since only international instruments could force governments to take national-level action, as had happened over the life of the ILO's 182 Conventions. The current suggestion of a promotional instrument was, in fact, less prescriptive than a number of previous Conventions and as such would permit member States to find meaningful and effective solutions in accordance with national circumstances and national law and practice. This flexibility should address many concerns already raised by the employers in this Meeting, and during the course of the debates in 1997 and 1998. There were several important reasons for international standard-setting and these were well summarized in the technical document. In particular, at the national level, an international standard would create an on-going framework that would review and update the scope of the employment relationship despite the particular political tendencies of individual governments. In the United Kingdom, for example, the situation had improved under the current government; this was positive but might not continue under a different government. An ILO Convention would help provide continuity in such cases. A second reason for international standard-setting was to bring into play the ILO's development assistance role whereby the ILO instrument could assist in the collection of analytical data and experiences and thus assist all member States facing the problem.

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66. Two Employer experts (South Africa and France) came back to the cost issue involved in having an international standard. The Meeting should look more at a promotional instrument setting out definitions and possible strategies; but international labour standards were not always the only answer to local problems, and there was not necessarily a correlation between global problems and global solutions. National approaches through collective bargaining, sectoral agreements and enterprise agreements, or a regional approach could work just as well. Moreover, vaguely worded Conventions in turn elicited few ratifications thus further diminishing the usefulness of an international norm. The Employer expert of France stressed the multiplicity and the disparity of the situations alluded to, making illusory a single efficient solution in an international framework. He also questioned the possibility and the justification of a distinction between, on the one hand, independent workers who benefited from all or part of the guarantees of dependent workers and, on the other hand, independent workers (such as merchants, handicraft workers and farmers, etc.), whose situation was in fact often similar and who did not benefit from such guarantees. He also raised the technical question of the financing of these guarantees.
67. The Employer expert of Spain denied that everywhere there was an increasing loss of protection for the workers. On the contrary, in reality there had been considerable legislative progress. With reference to the suggested redefinition and widening of the employment relationship, what was happening in some countries was simply a problem of application of legislation, as was shown by disguised employment. Otherwise, externalization of activities did not necessarily imply the separation of workers from protection as many had standards which regulated these assumptions and established solid responsibilities on the part of the contracting party and the person providing the work, for example. Finally, he undertook to show that situations varied widely from one country to another.

Summary of discussions of point 7

68. The Worker experts stated they were disappointed because the Employers had not departed from their position in 1997 and 1998. However, they felt that most people now did agree that the problem addressed by the Meeting was a very real one, for an increasing number of dependent employees were now being denied employee status and social and labour protection. Of course they would not challenge that labour standards imposed costs on employers. Yet, these were socially and morally acceptable, and necessary costs. They felt that international action was necessary to prevent unfair international competition, on the basis of substandard levels of social protection. They further insisted that international action was indispensable to orientate and to support national efforts to address this problem. They recognized that many countries had already implemented policies and measures to limit abuses; yet they felt that international action was indispensable to avoid that certain countries do away with the existing protection. In view of the increasing international competition, the setting up of a common international framework for social policies was needed more than ever.
69. The Employer experts reaffirmed their position of 1997 and 1998, namely that the issues under discussion by the Meeting of Experts were not proper for international action. The approach proposed by the Office was either too much focused on certain secondary questions, or not enough focused on certain other issues which

deserved consideration. For example, the proposed approach did not pay enough attention to the impact of the envisaged international activity on legitimate commercial arrangements. They were afraid that new international standards overburdened the employers, and resulted in lack of competitiveness and job losses. Certain situations described in the Office document were actually exceptions rather than widespread practices. They did recognize that there were certain problems which could raise concern, especially those relating to law enforcement; nonetheless, such problems called for national rather than international action. Furthermore, most of the other issues addressed in the Office document were very specific, and so called for specific responses on a case-by-case basis. In their opinion, some of the problems addressed in the technical document had already been settled within the respective national boundaries, which demonstrated that there was no need at all for an international response, especially if it were to take the form of an international labour standard. They suggested other means to address the issue, which could include the regular examination of enforcement problems, gathering of data on best practices, alternative methods for protecting workers, such as the promotion of self-employment and support to micro-enterprises, and technical assistance.

- 70.** Some Government experts, noting that the increase in non-wage employment led to public security risks, also stressed that it could not be accepted that workers facing the same hazards be protected differently, depending upon their employee or non-employee status. Another Government expert referred to the legal approach in his country where a person is deemed to be an employee when he or she performs work under conditions of effective subordination with respect to a third person, whatever the label that the parties may wish to put on such relationship. Another Government expert agreed, and spelled out the criteria which were used in his own country to determine when and how an apparent independent worker was to be granted employee status. Yet another Government expert insisted on the need to grant equal treatment to workers performing work for the same entrepreneur, and under similar conditions, whether or not they enjoyed employee status. The Government experts considered that many of the situations addressed in the technical document occurred in most countries, which were therefore facing similar problems. Whereas each country could work out its own response to such problems, it would be better to elaborate a common approach. They consequently supported the undertaking of international action, and wished to put on record their positive and affirmative reply to point 7.
- 71.** The Chairperson summarized the debate: (a) as it had been pointed out by the Employer experts, it was true that there was a wide variety of national situations and approaches which could make it difficult to undertake international action; (b) however, it was also true that most of these different situations shared certain patterns, and in all cases the workers concerned by such situations were in want of protection; and (c) in the opinion of many Government experts, not to mention the Worker experts, definitely there was room and a need for undertaking international action, especially if it were to take the form of a promotional instrument, as it had been suggested in the Office document.
- 72.** The Worker experts wished to take stock of progress in the Meeting's work by indicating that the discussions appeared to reveal the possibility of drafting instruments about the two fields they considered appropriate to distinguish. The

first concerned the re-centring of the employment relationship and the extension of basic protection to all workers. The second referred to the loss of protection because of relationships built up between enterprises or, in other words, because of employment relationships called “triangular”. According to the Worker experts, the first field identified seemed to be the one which had the greatest agreement and it was therefore by this last that the workers hoped international action would begin. In that respect, they had recognized that problems existed, especially with regard to workers obliged to convert to independent status or who found themselves in disguised employment relationships. The Worker experts agreed that an international measure should not prejudice workers who had voluntarily chosen the status of independence. Concerning the second field, the Worker experts were of the opinion that studies and additional research should be carried out to identify clearly the extent and the nature of problems linked to subcontracting. They insisted on the fact that this splitting did not indicate any lesser importance for the second field. This way of proceeding permitted, or rather it was hoped to permit a consensus to be reached more rapidly on this question.

73. The Employer experts expressed once again their reticence with respect to any international standard-setting action in this field which could, in their view, endanger even the tripartite nature of the ILO. The multiplication of international standards did not appear to be a priority solution and even less the only possible avenue to explore. The Governing Body should be informed of all possible means. They recognized that some points of agreement stood out with respect to a number of questions raised during the discussions. They also evaluated the progress of the Meeting and were worried about the vague character of the discussions which depended in part on the nature of the subject under discussion itself. They therefore suggested an alternative approach, based on the first page of paragraph 206 of the basic technical document and according to which a principle would be drafted to lead to the preparation of a national policy aimed at detailing and adapting the scope of labour legislation, following the development of employment relationships. This policy should also permit the adoption of appropriate provisions in order to apply the law adequately. The Employer experts noted that this approach fitted perfectly within the framework of the proposal suggested by the author who had studied the national situation prevailing in the United Kingdom. The Employer experts, therefore, insisted on the importance of the Governing Body receiving the whole panoply of possible methods which would permit respect for the principle mentioned above. Other than standard-setting action, these methods could involve resolutions, technical assistance guidelines or recommendations. The Employer experts considered that the standard-setting approach did not offer the flexibility necessary to tackle the question adequately. In this respect, they felt that replying to points 8 to 10 of Appendix II of the document would confirm an approach that they did not support.
74. The Government expert of the Philippines explained that the discussions since 1997 had concentrated on the need to give protection to workers who required it, but more particularly to those in trilateral relationships or situations involving intermediaries. These workers were divided into two groups: on the one hand, those who were originally protected but who had changed status; and, on the other hand, those who were involved in new types of employment that were not covered by any provision of the applicable laws. National governments should have the primary responsibility in identifying, in the context of their national situation, the

groups which required protection. It was, therefore, equally desirable to envisage the preparation of an international instrument which would complete national action taken on this question because some of the factors which have led to an erosion of protection were of global magnitude. Further discussions could concentrate on a type of instrument which could encourage the exchange of information on specific themes and offer a framework for technical assistance which could be provided by the ILO. A rigid and restrictive uniform instrument would not be, according to this expert, the best of solutions. He preferred a flexible promotional instrument which would permit, finally, protection for workers who needed it and assist them in improving their own situation.

75. The Worker expert of Belgium stressed that the extension of protection to workers who needed it did not in any way represent a wish to affect the truly independent worker. Genuine freedom of enterprise should be respected. She insisted, however, on the importance of there being a deliberate choice by the worker concerned, a choice based in full knowledge of the social protection to which he or she was entitled. A real choice to become a genuine independent worker was also linked to the right to freedom of association with a view to calling on governments to provide minimum social protection. In Belgium, for example, independent workers benefited from social protection in terms of replacement income which was agreed on in consultation with the public authorities. She further insisted on the importance of mechanisms, such as the granting to trade unions the right to file complaints (*locus standi*) before the labour enforcement bodies in order to protect the workers who had been obliged to become independent. She pointed out that the law could also provide for, as in Belgium, a system with respect to various sectors of activity (taxis, transporters, homeworkers and commercial representatives, etc.). In addition, the Worker expert of Australia, stressed the two points related to point 7 which referred to employers' and workers' rights. As for the rights to good employers, he insisted on the fact that several of them, far from opposing any legislative action for that question, precisely wanted action to be taken by the public authorities. They suffered, in fact, from the unfair competition of employers who did not provide their workers with the protection called for by the law. As for workers' rights, he was worried by the fact that in his country it had often been impossible to obtain work in certain branches of activity without accepting renunciation of social protection. This situation was certainly common to several States and justified the taking of international action.
76. The Government expert of India, referring to point 8, considered that a close and constant review of law and practice was needed to take account of all new realities and to keep the legislative framework up to date. For example, India's law on subcontracting was silent about subcontractors' responsibility, a shortcoming which had tragic consequences when major accidents struck worksites and left workers working for subcontractors without recourse. His Government had taken one such case to the courts, which had found the principal employer responsible. Likewise, the law concerning Beedi manufacturing excluded homeworkers from the definition of employees, but since the contractors supplying the raw materials to them and collecting the finished products from them were not concerned about the workers' welfare, a separate welfare fund, financed by both had to be set up to take care of their welfare. He wondered whether all governments tried to plug loopholes that permitted exploitative conditions. There was thus a need for an external standard. Secondly, such a standard would respond to the role of the State

in providing social protection, including job security which in turn led to other benefits like paid wages. A third reason for having an international standard arose from the need to ensure competitiveness: as the Office document pointed out, a failure by any one nation to adopt humane conditions of labour was an obstacle in the way of other nations which desired to improve working conditions in their own countries.

77. Another Government expert, quoting his country's privatization exercise following the German reunification, agreed with previous speakers that good employers should not find themselves pushed out of the competitive race. During the privatization of the German post parcel service, the Parliament had decided to maintain social protection and implement minimum standards for all the workers in the sector respecting the fact that the parcel service had to compete with large international parcel delivery companies.
78. Yet another Government expert (Chile) argued in favour of an international instrument referring to a national policy, and which would be promotional in nature. If it was an operational instrument, the State would have to adapt its legal system to that instrument and that adaptation would not be valid since the national realities were affected by the same problems already mentioned, but in distinctive forms. As had occurred in other countries, Chile had also regularly revised its legislation.
79. The Employer expert of Lesotho had difficulties with the questions posed under the points for discussion because they already presupposed answers along the lines of an instrument as set in the Office document. The Meeting should have looked at the root causes of why new methods of work had emerged, before trying to find solutions. In today's reality of globalization good employers were forced to cut costs to remain in business. Some did this by hiving off non-core segments of their business, but the proposals in the document appeared to deny employers this option in the future. All experts agreed that a problem existed, but there was no consensus on how to solve it and the adoption of a Convention was certainly not the answer. A Worker expert had mentioned that in his country his trade union had been approached by good employers who felt that other employers were undermining the competitive playing field by denying protection to their employees by referring to them as independent workers. What that Worker expert ought to have told this Meeting was why the union had been unsuccessful in redressing the problem at the national level. The speaker therefore failed to see how a standard at the international level could redress that situation. Given the long list of ILO Conventions that remained unratified because there was a lack of agreement between the social partners at the national level, one had to question the wisdom of moving for another Convention on an issue where the social partners were so divided at the international level. There were many other ways in which the ILO could advise governments on how to solve the problem.
80. The Worker expert of the Netherlands wanted to comment on the observations which the Employer expert of Lesotho had made, because she underlined the importance for the public authorities, in any search for a balanced solution, to look out for the welfare of the population in general. Any economic development policy which was based on conditions unacceptable to the population should be rejected outright by governments. It was true that this would imply costs, but such costs

would turn out to be much less than those that would have had to be paid over the long term if no measures had been taken. She referred once again to the new Dutch legislation which had recently come into force. It aimed precisely to refocus labour legislation and did not interfere with commercial law. She drew attention to the fact that in the Netherlands, like in Belgium, there existed in several areas basic protection for self-employed workers such as freedom of association, basic social security with regard to invalidity benefit, and old-age benefits. Also within her own union, there had recently been formed special associations for self-employed workers, to collectively defend their interests. Finally, she insisted on the importance of ILO instruments as a source of inspiration in the context of action and initiatives at the national level even in cases where States had not ratified them. In this respect she gave examples of self-employed women workers and their unions in India and South Africa who had certainly been helped by ILO Conventions – even in cases where they had not been ratified – to achieve good results for national action, especially in the informal sector. She explained that what was meant by the term “informal sector” was either that the women concerned would not be covered by labour law, or that this law was in reality not applied to them. So, a number of these self-employed workers were in fact working in disguised employment relationships, either directly working for an employer, or working through intermediaries. But also a great number of them would not be able to identify a particular employer on whom they depended such as street vendors, women carrying bundles of textiles in market places, paper pickers, etc. These unions had shown that, even when one could not achieve employee status for all these self-employed women, it was possible to organize them to improve their situation by collective action and to achieve basic protection with regard to health care, basic welfare arrangements and old-age provisions, all of which would help to combat poverty. This meant that the issue of providing all workers with basic protection in addition to instruments with regard to the scope of the employment relationship was a very important one.

- 81.** The Government expert of Argentina stated that the following aspects had now become clear: (i) the changes taking place in the world made it necessary to combat fraudulent employment relationships because they prejudiced the social aspects of work without taking costs into consideration; (ii) involuntary independent work was a novelty, a sequel of change, which generated unusual forms of associations, like those called “work cooperatives”; in Argentine ports, as in other sectors, these cooperatives were imposed by the employers as intermediaries with the workers so as to reduce costs but in fact did not achieve cost reductions in non-core activities and furthermore jeopardized trade union and collective bargaining rights, made the employment relationship precarious and invented an additional form of social security evasion; (iii) the involuntary independent worker came into being when the salaried worker left the previous status because the economic situation obliged him or her to become “independent” without any preparation for this change, and led to a form of continued job seeking (this was the case of the “hired” local transport operators who did obtain a salary, but did not have sufficient resources to pay social security protection, a phenomenon common with other countries). If the ILO could adopt an international instrument which covered such situations, it would provide an important contribution to member States.

Discussion of specific points – points 8 to 10

- 82.** The Government expert of Germany encouraged the taking of concrete measures of the same kind as those mentioned in the basic technical document in order to launch a principle of flexibility through frequent revisions of the legislation. In his opinion, it was important that the line to be drawn between salaried and independent workers be reflected. He recalled that, in his country, the laws established criteria whereby a line could be drawn to separate genuine independent workers from those who were not. On point 9, the expert pointed out that the proposed mechanism should be extended to all sectors so that they could all participate in the preparation and application of the proposed national policy.
- 83.** The Government expert of Chile agreed with the idea of flexibility included in point 8 and in paragraphs 205 and following of the basic technical document. On point 9, he shared the view of the Government expert of the Netherlands that it was sufficient to use existing mechanisms, such as the social dialogue systems currently in use in Chile, without the need to create new bodies. On point 10, referring to the practical indications that would be useful to include in the instrument, he underlined the necessity of encouraging access to the courts because many of the questions considered at this Meeting, concerning employment relationships, could be contested and could be resolved by the labour inspectorate and the justice system. Structural reforms of the system for administering justice, including expeditious and short procedures for solving disputes, were needed to guarantee access to the courts.
- 84.** The Employer experts, with regard to points 8 to 10, stated once again that they were based on an initial hypothesis with which they did not necessarily agree, namely the preparation and adoption of an international instrument. Moreover, even if they agreed to discuss the preparation of a flexible instrument, they noted that the totality of elements included in these points (especially in point 10) only reduced such flexibility. They recalled that the adoption of an instrument was not the only possible avenue and that several other approaches could be explored and prioritized. They mentioned in particular the possibility of recourse to guidelines or recommendations which could be adjusted more easily to the employment relationships which were in perpetual transformation. They insisted on the importance that some academic debates continue. On point 9, they considered it was a question for action at the national level, and observed that the discussions had revealed that several States had already set up such mechanisms.
- 85.** With reference to point 8, the Worker expert of Finland referred to the need to modify Finnish pension law because certain workers were deprived – by law – of benefits that were due to them because they had multiple employers. On point 9, she was worried about the creation of new mechanisms for the simple reason that many already existed at the national level and were capable of carrying out these tasks. Finally on point 10, she observed that the majority of issues referred to paragraphs 21-31 of the basic technical document. They ought to be included in any international instrument in order to allow the social partners to reflect, in a coordinated manner, on the questions raised.
- 86.** The Worker expert of the Netherlands stressed that it was important for a minimum protection to be assured to all workers. She warned against putting too much

emphasis on any measure that would require defining the employment relationship, a concept that was broad and variable in itself. It was more appropriate to foresee mechanisms which would place the burden of proof on the party which was the best equipped to prove or disprove the existence of such a relationship.

87. The Worker expert of Australia was worried about developments in the work of the Meeting and, in particular, noted that the support expressed by the Worker experts for paragraph 206 of the basic technical document appeared at first sight contrary to the Employers' concerns on points 8 to 10 since the questions were very closely related.
88. The Worker experts recalled that the 1998 Conference resolution invited the Governing Body to place the questions tackled by the Committee on the agenda of a future session of the Conference "with a view to the possible adoption of a Convention supplemented by a Recommendation". It was in this context that the Meeting had been called. On their side, they felt that points 8 to 10 were valid questions and provided a solid basis for the preparation of an international instrument. It was essential, in this context, to work from the points of convergence already expressed during the discussions. They stressed that the rest of the promotional document proposed in the basic technical document appeared to reply to the flexibility required by the Employer experts.
89. The Worker expert of South Africa referred to the proceedings of the 1998 Committee and recalled that a consensus had been reached there in so far as regarding the need for preparing an international instrument. In this regard, he quoted a passage of the statement made by the then Employer Vice-Chairperson. Only the question of clarifying what form this instrument would take remained to be decided.
90. The Government expert of Canada stated that he was in favour of the proposals listed in points 8 and 9. On point 10, he wanted to hear some details on subparagraph (a) regarding the question of indications suggested to governments regarding the clear and precise definition of the employment relationship, it being understood that the international instrument should not include a definition per se, but that States would be encouraged to do so knowing that such action would vary depending on the labour law involved.
91. The Government expert of India, referring to points 9 and 10, noted that they flowed from paragraphs 213 to 215 of the basic technical document, principles which he supported. Public authorities ought to follow the developments and changes which took place in the employment relationship. Points 9 and 10 explained certain mechanisms to which the State could turn when dealing with the problem. There could be others. The establishment of a mechanism permitted trends to be tracked and identified. He considered that the role of the ILO, as foreseen in paragraph 15 of the basic technical document, had to be a detailed and thorough one.
92. The Employer expert of Ecuador, while expressing the same reservations as the Employer experts, suggested – as part of the practical actions – the holding of a special session of labour ministers attending the Conference, which would be dedicated to analysing the subject, exchanging experiences and negotiating

compromises in this regard. On point 9, he did not consider it indispensable to create special mechanisms, since it appeared preferable to use existing ones, which were generally tripartite and vested with consultation functions and policy advice functions. On point 10(a), he noted the need to establish measures to guarantee expeditious access to the courts, as well as the need to provide enterprise initiatives and collective bargaining, as suggested in the basic technical document.

93. The Worker experts clarified that they were open to all of the suggestions that were being made – such as ministerial conferences and other measures – which would be helpful in addition to the drafting of instruments.
94. The Employer experts stated that any contention purporting to represent their position as one of endorsing flexible guidelines was not correct; they were completely opposed to the consideration of a Convention because no one knew what it would deal with.
95. The Worker expert of Belgium responded to the criticism of points 8 and 9 by pointing out that they were not a threat of rigidity, but on the contrary could accommodate and respect the interests of all. On the issue of creating a mechanism to facilitate a national policy, she pointed out that current bipartite bodies served the Belgium situation well. Collective bargaining could take place at three levels and responded to the need for flexibility in enterprises and new challenges; Belgium employers were very satisfied with that arrangement.
96. The Worker experts, with reference to their earlier proposal, suggested, in the interest of moving the discussions further, that consideration be given to the adoption of two instruments: one which would focus on workers who had been removed from the employment relationship, and the other which would concentrate on other, less clear, situations such as commercial contractors, intermediaries and triangular relationships. This would meet the concerns of some experts about protecting the truly independent contractors, who used the market-place bargaining power and therefore did not require the protection of labour law and its consequent benefits. At the same time such an option would propose protection for workers who were the unequal partners in bargaining.
97. Several Government experts (Netherlands, Germany, Argentina and Sweden) shared the above approach, however with certain qualifications. The Government expert of the Netherlands, however, made the point that there should be no obligation to create new institutions where current bodies responsible for social dialogue worked well. The Dutch experience with a “deeming” provision in the law could be useful as the instruments would allow a great deal of flexibility in order that countries could arrive at a tailor-made policy. The Government expert of Germany considered that the first text could identify the target group, define the employment relationship and recommend a national policy, whereas the other text would take up the issue of triangular relationships by defining clearly who constituted genuine entrepreneurs and without impinging on their status. The Government expert of Argentina added that the proposal of the Worker experts to consider the possibility of drawing up separate instruments was an interesting one to explore. It could be seen afterwards whether, from now on, this technical point of view could or would not lead to the creation of a third category of workers. He could see that the main difficulty was to be found in the case of the involuntary

independents and not in triangular relationships. He considered that the creation of a mechanism, called for in point 9, and the formulation of practical implications, as suggested in point 10, would not create a rigid situation. He agreed with the Government expert of the Netherlands in so far as it was not necessary to create a new mechanism if one was already functioning adequately.

98. The Government experts of Canada and France, on the other hand, considered, on reflection, that the Worker experts' proposal was potentially dangerous for two reasons: first, it might engender different levels of treatment for different persons, a point which had been at the origin of controversy during the 1997 and 1998 debates concerning the so-called "third category" of workers. And, secondly, it risked obliging governments to adopt several laws at the national level in order to conform to the obligations arising from the international instruments whereas it was clearly better to broaden the scope of already existing laws. To treat in different instruments, specific situations such as false independent work and triangular relationships should not lead to omitting coverage of situations where these two phenomena coincided. The Worker expert of the Netherlands responded to these concerns by explaining that the proposal was meant not to introduce different levels of treatment for different persons, but to address the most urgent problem first: that of the deficient labour protection for increasing numbers of workers. This would be an instrument on the scope and application of labour protection and labour legislation, in other words an instrument of a very general nature. This instrument would also cover questions arising from triangular relationships, to the extent of defining the employment relationship: for example, whether a worker in a triangular relationship was an employee at all, and if so, whether he or she was the employee of the user-enterprise or of the intermediary. But this first, most urgent, instrument would not address the more specific, but also very urgent problems arising from triangular and multiple employer relationships. These more specific problems included: how health and safety regulations would apply to workers, who were employed by an intermediary or subcontractor, but carry out work at the premises of a user-enterprise; or how freedom of association and trade union rights would apply. For instance could a worker employed by a subcontractor be chosen as a shop steward in the user firm; and which collective agreement would apply to that worker? This more specific instrument could also deal with the allocation and the sharing of responsibilities between user-enterprise and intermediary or subcontractor. This then would be an instrument of the same nature as the Private Employment Agencies Convention, 1997 (No. 181), and the Private Employment Agencies Recommendation, 1997 (No. 188), which did not go into the employment status of temporary agency workers, but dealt with specific problems with regard to the functioning of private employment agencies. It was important to note that Convention No. 181 did not deal with all varieties of triangular and multilateral employment relationships. Finally, she pointed out that all points 8, 9 and 10 were asking for was that there be a process of review, monitoring of law and practice, basic protection of marginalized workers, and the utilization of the information that could be collected under such instruments by other member States which wished to take action in such situations.
99. The Government expert of the Philippines agreed with other speakers that no new separate structures would be needed, since many countries including his own already had bodies that had the responsibility of discussing national policies, particularly those countries that had ratified Convention No. 144, like the

Philippines. He considered that a clarification of point 10(a)'s reference to collective bargaining was needed so that any confusion about duplicating the provisions of Convention No. 98 would be avoided. He pointed out that point 10(b) covered some of the concerns made by the Employer experts when it referred to options such as technical cooperation programmes.

- 100.** The Government expert of Cameroon pointed out that the discussions demonstrated that the use of the expression in French "*relation d'emploi*" did not appear to reflect the subject under discussion. Referring to paragraph 19 of the basic technical document, he noted that it was the organization of work and its scope that were being studied. In French the expression "*relation de travail*" would be more appropriate. In addition, he emphasized the importance of having the envisaged instrument recognize the existence of the grey zone in labour law where some workers found themselves and consequently enjoyed no protection. Instead of trying to define situations of non-protection (which would be difficult given the variety of situations) and instead of trying to find a solution to the problem of the borderline between employment relationships and commercial relations, this instrument could provide for a commitment from governments to adapt on a continuous basis their legislation so as to cover these workers, taking account of the national situations and the experience already acquired by other countries. It was on this last point that the ILO's technical assistance could be useful.
- 101.** A member of the secretariat, in reply to a request for clarification from the Government expert of the Philippines, explained that the reference to collective bargaining in point 10(a) of Appendix II of the technical document prepared by the Office did not intend to create obligations under the envisaged instrument additional to those set out in the Constitution of the ILO. In his opinion, entrepreneurial measures or collective bargaining might well be part of possible actions under the envisaged instrument, but they were not mandatory. Finally, he clarified that the reference to the creation of a mechanism, in point 9, would in no way mean that new bodies should be created; the use of already existing bodies of such a nature could be clearly satisfactory.
- 102.** With regard to the proposal of the Worker experts aimed at splitting the subject under discussion for a possible international action, the Employer experts stated their opposition to it, for the reasons already mentioned in the meeting and during the discussions in 1997 and 1998.

Discussion of specific points – point 11

- 103.** The following seven suggestions to identify the title of the subject of this Meeting were proposed:
- (i) "The scope of labour protection" (Worker expert, Netherlands);
 - (ii) "Evolution of the legal description of the employment relationship" (Government expert, France);
 - (iii) "Labour protection of work-performing persons" (Government expert, Sweden);

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- (iv) “Promotion of clarification and adaptation of the scope of labour legislation with a view to providing effective and equal protection to all workers: The personal scope of the employment relationship” (Worker expert, Netherlands);
 - (v) “Assuring worker protection in view of the changing nature of work relations” (Worker expert, United States);
 - (vi) “Instrument for the promotion of effective application, follow-up and adaptation of labour legislation to the changing realities of work with a view to protecting workers” (Government expert, Canada);
 - (vii) “Instrument for the protection of workers in concealed employment relationships and under new forms of providing services” (Government expert, Argentina).

104. Certain experts commented on these proposals: the Employer expert of Canada stressed that any title to an instrument ought to emphasize the promotional aspect; the Government expert of South Africa noted difficulties in the use of the expressions “labour” or “employment” in some Commonwealth countries since the former generally referred to aspects of labour relations whereas the second covered conditions of employment. Finally, the Government expert of Germany, noting the terminology difficulties, hoped that the secretariat would propose certain suggestions in this regard; and the Employer experts, in general, stressed that, first, the title should not in any way suggest an interference in valid commercial relations, and, secondly, one of them wondered whether it was necessary to come up with a title at this stage.

105. Referring to the suggestion of the French Government expert, the Worker experts noted that the use of the phrase “employment relationship” in the title of an instrument could give the impression that one was limited its scope and that it did not apply to all workers. In reply, the French Government expert indicated that for countries with a civil law tradition, the labour relationship depended on the idea of providing services, which could be provided by both dependent workers and genuinely independent entrepreneurs. He considered that the use of the expression in French “*relation de travail*” correctly reflected the subject under discussion.

106. In reply to a number of questions, the secretariat gave the following explanations: first, regarding the title of a possible instrument, ILO instruments were known by their official titles which encapsulated the complete notion of the text they covered, as well as a short title the aim of which was to allow for a rapid reference. Secondly, there obviously had to be a rigorous concurrence between the various linguistic versions of an instrument regarding both language and legal systems, and this was the responsibility of the Conference Drafting Committee. As to the question of whether the Meeting was obliged to give a reply to the Governing Body concerning a possible title, the Meeting had a clear mandate and the basic technical document as well as the points suggested for discussion had been prepared in the spirit of that mandate; so if the Meeting was in a position to respond to point 11 that would represent a very valuable contribution for the Governing Body. If, however, it found itself unable to do so, the Meeting could not be forced to do so.

Common statement of the experts

107. The Chairperson introduced a draft common statement to which the experts had contributed throughout the Meeting. The text was adopted unanimously and reads as follows:

**Common statement by the experts participating in the Meeting of
Experts on Workers in Situations Needing Protection
(Geneva 15-19 May 2000)**

1. The Meeting of Experts has considered the technical report prepared by the ILO which draws on the various country reports.
2. The reports and the debate at the Meeting demonstrate that the global phenomenon of transformation in the nature of work has resulted in situations in which the legal scope of the employment relationship (which determines whether or not workers are entitled to be protected by labour legislation) does not accord with the realities of working relationships. This has resulted in a tendency whereby workers who should be protected by labour and employment law are not receiving that protection in fact or in law. (The Worker and Government experts believe that this is a growing tendency but the employers do not feel that the extent of this tendency has been proven.)
3. The reports and the debate at the meeting indicate that the extent to which the scope of regulation of the employment relations do not accord with reality varies from country to country and, within countries, from sector to sector. It is also evident that while some countries have responded by adjusting the scope of the legal regulation of the employment relationship, this has not occurred in all countries.
4. The Meeting notes that various country studies have greatly increased the pool of available information concerning the employment relationship and the extent to which dependent workers have ceased to be protected by labour and employment legislation. In order to enhance the understanding of the issues outlined in the previous paragraphs, the Office should be authorized to:
 - (a) conduct additional appropriate studies;
 - (b) synthesize the studies;
 - (c) promote exchanges between the authors of the country reports and other experts and the representatives of the social partners, including the holding of an ILO Conference.
5. The Meeting agreed that countries should adopt or continue a national policy in terms of which they would, at appropriate intervals review and, if appropriate, clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities. The review should be conducted in a transparent manner with participation by the social partners.

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6. The Meeting further agreed that elements of a national policy might include but not be limited to:
 - (a) providing workers and employers with clear guidance concerning employment relationships, in particular the distinction between dependent workers and self-employed persons;
 - (b) providing effective appropriate protection for workers;
 - (c) combating disguised employment which has the effect of depriving dependent workers of proper legal protection;
 - (d) not interfering with genuine commercial or genuine independent contracting;
 - (e) providing access to appropriate resolution mechanisms to determine the status of workers.
 7. The Meeting agrees that the ILO can play a major role in assisting countries to develop policies to ensure that laws regulating the employment relationship cover workers needing protection.
 8. The actions taken by the ILO could include:
 - (a) the adoption of instruments by the Conference including the adoption of a Convention and/or supplementary Recommendation;
 - (b) providing technical cooperation and assistance and guidance to member countries concerning the development of appropriate national policies;
 - (c) facilitating the collation and exchange of information concerning changes in employment relationships.

Adoption of the draft report

- 108.** Subject to amendments handed in to the secretariat and the inclusion of the final session's proceedings, the experts adopted unanimously the report presented to them.

Final remarks

- 109.** The Government expert of Chile welcomed the quality of the report which the experts had just adopted and stressed that it faithfully reflected the content and spirit of the Meeting.
- 110.** The Government expert of India, for his part, appreciated the quality of the debate, which had permitted in-depth exchanges on this subject of vital importance. It was necessary at this stage to proceed to a level of introspection concerning both the mandate given to the experts by the International Labour Conference and the

Governing Body and on whether that mandate had been duly fulfilled. What was important was that workers who found themselves in very different situations were protected. In this respect actions had to be taken at national and international levels. We seemed to agree on the measures that were required to be taken at the national level; however, agreement was harder to achieve at the international level. The common statement could certainly be of use to this end. He stressed the fact that economic growth had to go hand in hand with social protection, and the importance of plugging the loopholes that exist in national laws and which consequently deprive certain workers of protection. Finally he hoped that English and French translations or at least summaries of the country reports which had been written in Spanish be made available because they contained very precious information.

111. The Government expert of Germany also welcomed the adoption by the experts of the common statement, which would provide a solid basis for the Governing Body for future decisions in this area.
112. The Worker experts observed that the discussion and the documents examined during the Meeting had highlighted the various common points that emerged in the national situations as regards the protection of workers, in particular the defocusing between the realities of the employment relationship and the applicable law. This was a phenomenon which was being aggravated by the modern worldwide context. Although the manifestations of the problems were not identical, it had been possible to observe, through the examples that had been given, that large numbers of workers on all continents found themselves without protection. The same existed at the sectoral level in construction, in transport and in those occupations which involved health risks. In certain circumstances, persons were forced into independent status although they did not acquire any of the benefits arising from such status. The lack of protection of these workers in turn gave rise to negative effects not only for the individuals, but also for the employers who respected the law but who saw their competitiveness drained by others' use of unprotected workers; there were also repercussions for the public authorities who lost major fiscal revenues. The Worker experts recognized that a major part of the problem was achieving better implementation of the national legislation. However, it went beyond this simple framework because it was vital to adapt labour laws to the realities of employment. Moreover, it was necessary to review and repeal the exemptions that existed in many legislative texts and which, in full legality, created loopholes for those employers who did care about giving the necessary protection to workers. Interesting examples had been given during the meeting regarding access to the courts and other bodies with a view to proving relationships (introducing the principle of refutable and irrefutable presumptions, shifting the burden of proof, legal aid). In this context the Worker experts wondered what the role of the ILO was to be. In their opinion, the ILO should be used because it was the forum which allowed international treatment of a worldwide problem. The treatment of the problem of the situation through the adoption of a Convention supplemented by a Recommendation appeared to be necessary and timely. They welcomed the support given by the Government experts regarding the adoption of a promotional instrument such as suggested in the technical document to which they also gave their support. Given that the document and the discussion which had taken place during the Meeting gave the issues fresh treatment, the Worker experts were of the opinion that the item should be included in the agenda of a forthcoming

session of the International Labour Conference, and be dealt with under the double-discussion procedure foreseen in the ILO's Constitution.

- 113.** The Employer experts noted that the comments by the Government expert of India and the Worker experts, highlighted the variety and diversity of situations, experiences and responses to the issues raised. The Employers' group held the view that nothing had been said this week that justified the need for an instrument, promotional or otherwise. The vagueness and diversity of the issues suggested that an instrument was an inappropriate response. The report presupposes an instrument as the only alternative, and the discussion points have directed the debate in that direction. As a result, progress has been limited in responding to the three fundamental questions put forward by the Conference in 1998. The first of those three questions was the identification of workers needing protection. Part of the difficulty in making progress in this direction was partly due to the unfortunate lateness in the presentation of the report, and the lack of availability of the country studies. Some progress was made in identifying some situations where worker protection is a problem. However, there is no singular or common issue. Despite some progress, the situations identified have not been as well developed as might have been. There were some useful observations made with respect to the many positive aspects of new forms of work; the flexibility they offer enterprises and workers; the job and enterprise creation or promotion that can be encouraged; the higher levels of satisfaction among independent workers in Canada at least. The second question asks about appropriate ways such workers can be protected. Some interesting examples were given like the situation of home-care workers in California, where authorities have taken action and resolved the problems; and negotiated solutions in other jurisdictions, in response to the unique issues. In the context of this question, there has been an unfortunate focus on the role of an international instrument as a means in itself. However, there were some suggestions of possible alternatives to an instrument, some of which focused on developing a better grasp of the issues and the range of possible solutions. Others pointed to non-legislative solutions. There had also been some useful comments about the need for flexibility and need to consider the unique circumstances, involved with respect to particular workers, particular protections, sectoral features and economic and legal contexts. They reiterated our concern that any solutions, instrument or otherwise, not interfere with legitimate commercial activities, and not negatively affect jobs and enterprise development. The third question was how to define such workers. This was a continuing problem due to the vagueness and diversity of issues, which were aggravated by the range of linguistic and legal system differences between jurisdictions, even with national systems such as Canada's with 11 different enforcement jurisdictions, divergence was found. They supported suitable ongoing review of employment legislation to ensure adequate protection for employees, in appropriate circumstances, and to ensure adequate flexibility to encourage and promote new ways of working. Such reviews should reflect the needs of enterprises and workers, and reflect the needs for enterprise development. Such reviews had to be sensitive to the need for flexibility, competitiveness, and the cost consequences of all elements on the economy. While it was important that employers continued to innovate in carrying on business, they did not support using fraudulent as disguised employment relationships as a response to competitive pressures. Employers supported reasonable and balanced measures to deal with fraudulent or disguised employment relationships. They supported proper application of employment standards law to employees, and the

effective enforcement of such measures. Having expressed these concerns and views, the Employer experts were pleased to support the common statement, which constructively captured the views of the Meeting.

- 114.** The Executive-Director of the Social Dialogue Sector, Ms. Katherine Hagen, noted that this Meeting had been mandated to reflect on the meaning and evolution of the employment relationship and that the ILO could facilitate participants in the process of give and take, and help them move forward in the area of these complex issues. The work achieved by this Meeting was an example of true social dialogue, including exchanging points of view and learning from various experiences. The experts present had demonstrated their capacity for dialogue to arrive at progress. This was what the ILO was all about. On the issue itself, beyond the process of dialogue, she considered that the question focused on how to advance towards work with social protection. This concerned job creation and respect for workers, not only the individuals, but their families, their communities, enterprises and society as a whole. The common statement represented a challenge for the Office, to follow it up, within the Organization's programme and budget possibilities, with serious action, depending on what the Governing Body would decide for future action. The Executive-Director concluded by congratulating the experts on their constructive and rich week-long work, which had been so masterly chaired and moved along by the Chairperson.
- 115.** Closing the Meeting, the Chairperson expressed his thanks for the spirit of dialogue shown by the experts, in particular the Employer Vice-Chairperson and the Worker Vice-Chairperson, and manifested in the common statement, which would be a great help to the Governing Body.

Geneva, 19 May 2000.