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**Report V(2A)**

# **The employment relationship**

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## LIST OF RECURRING ABBREVIATIONS

Argentina	UIA	Argentine Industrial Union
	CGT RA	General Confederation of Labour
Australia	ACTU	Australian Council of Trade Unions
Austria	VÖI	Federation of Austrian Industry
Bangladesh	BEA	Bangladesh Employers' Association
	BSSF	Bangladesh Sanjukta Sramik Federation
Barbados	BWU	Barbados Workers' Union
Belgium	CNT	National Labour Council
Brazil	CNI	National Confederation of Industry
	FS	Força Sindical
Bulgaria	BICA	Bulgarian Industrial Capital Association
	BIA	Bulgarian Industrial Association
	BCCI	Bulgarian Chamber of Commerce and Industry
	CITUB	Confederation of Independent Trade Unions in Bulgaria
Cameroon	GICAM	Inter-enterprise Group of Cameroon
Canada	CEC	Canadian Employers Council
	CLC	Canadian Labour Congress
China	CEC	China Enterprise Confederation
	ACFTU	All-China Federation of Trade Unions
Colombia	ANDI	National Association of Entrepreneurs

Costa Rica	UCCAEP	Costa Rican Union of Chambers and Associations of Private Enterprise
Côte d'Ivoire	CGECI	Confédération générale des entreprises de Côte d'Ivoire
Cyprus	CEIF	Cyprus Employers' and Industrialists' Federation
Czech Republic	ASO	Association of Independent Trade Unions
	CMKOS	Czech-Moravian Confederation of Trade Unions
	KZPS	Confederation of Employers' and Entrepreneurs' Unions
	SPD	Confederation of Industry and Transport
Denmark	DA	Danish Employers' Confederation
	LO	Danish Confederation of Trade Unions
Egypt	ETUF	Egyptian Trade Union Federation
Finland	EK	Confederation of Finnish Industries
	SAK	Central Organization of Finnish Trade Unions
	SY	Federation of Finnish Enterprises (Suomen Yrittäjät)
	VTML	State Employer's Office
	AKAVA	Confederation of Unions for Academic Professionals
	STTK	Finnish Confederation of Salaried Employees
France	CFDT	French Democratic Confederation of Labour
	CGT-FO	General Confederation of Labour-Force Ouvrière
	MEDEF	Movement of French Enterprises
Gabon	COSYGA	Gabonese Trade Union Confederation
Guatemala	CACIF	Coordinating Committee of Agricultural, Commercial, Industrial and Financial Associations
Hungary	MGYOSZ	Confederation of Hungarian Employers and Industrialists
	MTOSZ	National Federation of Workers' Councils
India	BMS	Bharatiya Mazdoor Sangh
	CIE	Council of Indian Employers

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	CITU	Centre of Indian Trade Unions
Ireland	IBEC	Irish Business and Employers' Confederation
Iceland	VSI	Confederation of Icelandic Employers
	ASI	Icelandic Federation of Labour
Italy	CGIL	Italian General Confederation of Labour
Jamaica	JEF	Jamaica Employers' Federation
Japan	NK	Japan Business Federation
	JTUC-RENGO	Japanese Trade Union Confederation
Republic of Korea	FKTU	Federation of Korean Trade Unions
	KCTU	Korean Confederation of Trade Unions
Lesotho	ALE	Association of Lesotho Employers
Lithuania	LDF	Lithuanian Labour Federation
	LPSK	Lithuanian Trade Union Confederation
Madagascar	USAM	Independent Trade Unions of Madagascar
Mauritania	CLTM	Free Confederation of Workers of Mauritania
Republic of Moldova	NCE	National Confederation of Employers
	Solidaritate	Confederation of Free Trade Unions
	CTU	Confederation of Trade Unions
Mozambique	CTA	Confederation of Business Associations of Mozambique
	OTM-CS	Workers' Organization of Mozambique
Nepal	GEFONT	General Federation of Nepalese Trade Unions
Netherlands	VNO-NCW	Confederation of Netherlands' Industry and Employers
	FNV	Netherlands Confederation of Trade Unions

Niger	CNPN	Syndicat Patronal des Entreprises et Industries du Niger
Norway	HSH	Federation of Norwegian Commercial and Service Enterprises
	NHO	Confederation of Norwegian Business and Industry
Panama	CONEP	National Council of Private Enterprise
Poland		Solidarnosc
Portugal	CCP	Confederation of Trade and Services of Portugal
	CIP	Confederation of Portuguese Industry
	CTP	Portuguese Confederation of Tourism
	CGTP-IN	General Confederation of Portuguese Workers
	UGT	General Union of Workers
Romania	PTUF	Petrom Trade Union Federation
Slovakia	KOZ SR	Confederation of Trade Unions of the Slovak Republic
Slovenia	ZDODS	Association of Employers of Craft Activities of Slovenia
	ZDS	Association of Employers of Slovenia
	ZSSS	Association of Free Trade Unions of Slovenia
South Africa	BUSA	Business Unity South Africa
	CONSAWU	Confederation of South African Workers' Unions
	COSATU	Congress of South African Trade Unions
Spain	CEOE	Spanish Employers' Confederation
	CC.OO.	Trade Union Confederation of Workers' Committees
Sri Lanka	EFC	Employers' Federation of Ceylon
	CWC	Ceylon Workers' Congress
	LJEWU	Lanka Jathika Estate Workers' Union
	NWC	National Workers' Congress
Sweden	SN	Confederation of Swedish Enterprise

	TCO	Swedish Confederation of Professional Employees
	LO	Swedish Trade Union Confederation
Switzerland	UPS	Confederation of Swiss Employers
	USS/SGB	Swiss Federation of Trade Unions
Thailand	ECOT	Employers' Confederation of Thailand
	NCTL	National Congress of Thai Labour
Togo	CSTT	Workers' Trade Union Confederation of Togo
Trinidad and Tobago	ECA	Employers' Consultative Association
	NATUC	National Trade Union Centre
Ukraine	FRU	Federation of Employers of Ukraine
	FPU	Federation of Trade Unions of Ukraine
United Kingdom	CBI	Confederation of British Industry
	TUC	Trades Union Congress
United States	USCIB	United States Council for International Business
	AFL-CIO	American Federation of Labor and Congress of Industrial Organizations

## INTRODUCTION

The item on the employment relationship will be dealt with in a single discussion at the 95th Session (2006) of the International Labour Conference with a view to the adoption of a Recommendation, in accordance with the single-discussion procedure under article 38 of the Standing Orders of the Conference, by a decision taken by the ILO Governing Body at its 289th Session (March 2004).<sup>1</sup>

To this end, the Office prepared a report on the legislation and practice of more than 60 ILO member States representing different regions and different legal systems and traditions. The report included a questionnaire designed with a view to preparing a Recommendation.<sup>2</sup> The questionnaire is based in essence on the conclusions adopted by the Conference during the general discussion on the scope of the employment relationship which took place at the 91st Session (2003).<sup>3</sup> The report was sent to the governments of the ILO's member States.

The Office had invited governments to send their replies by 1 July 2005 at the latest, or by 1 August 2005 in the case of federal States or States where it is necessary to translate the questionnaire into the national language.

At the time of drawing up the present report, the Office had received replies from the governments of the following 78 member States: Algeria, Argentina, Australia, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Italy, Japan, Kiribati, Republic of Korea, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro,<sup>4</sup> Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

In accordance with article 38, paragraph 1, of the Standing Orders of the Conference, governments were asked to consult the most representative organizations of employers and workers before drafting the final text of their replies and to indicate which organizations had been consulted. This consultation is obligatory for Members which have ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

<sup>1</sup> Document GB.289/2, para. 7, point V (paras. 56-69).

<sup>2</sup> ILO: *The employment relationship*, Report V(1), International Labour Conference, 95th Session, Geneva, 2006.

<sup>3</sup> These conclusions and the resolution by which they were adopted form Annex 2 of Report V(1) referred to in the previous note.

<sup>4</sup> The Government of Serbia and Montenegro sent only the reply of the Government of the Republic of Serbia.

The governments of the following member States indicated that the most representative employers' and workers' organizations had been consulted: Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, El Salvador, Eritrea, Finland, France, Gabon, Greece, Guatemala, Hungary, Iceland, India, Indonesia, Italy, Jamaica, Japan, Kiribati, Latvia, Mozambique, Netherlands, Norway, Panama, Philippines, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe. A number of these governments state that they prepared their replies in consultation with these organizations or in a tripartite commission, while others include in their replies the views expressed by these organizations on certain points.

The governments of the following member States sent the replies of employers' and workers' organizations separately; in some cases, these replies were received directly by the Office: Argentina, Australia, Barbados, Bangladesh, Belgium, Brazil, Cameroon, Canada, Costa Rica, Côte d'Ivoire, Egypt, France, Gabon, India, Ireland, Italy, Republic of Korea, Lesotho, Lithuania, Madagascar, Mauritania, Nepal, Netherlands, Niger, Romania, Slovenia, South Africa, Spain, Sri Lanka, Switzerland, Togo, Ukraine, United Kingdom, United States.

This volume, which has been drawn up on the basis of the replies received from governments and organizations of employers and workers, contains the substance of their observations together with the Office's commentaries on the replies and on the proposed text of the Recommendation.

It also reflects the conclusions of the general discussion on the employment relationship adopted by a resolution of the Conference at its 91st Session (2003)<sup>5</sup> and in particular the conclusion contained in paragraph 25.

Volume 2B of this Report V contains the French and English versions of the proposed text which, if the Conference so decides, will be the basis for discussion of the item on the employment relationship at its 95th Session (2006).

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<sup>5</sup> These conclusions are contained in Annex 2 of Report V(1) on the employment relationship referred to previously.

## **REPLIES RECEIVED**

This section contains the substance of the general observations of governments and their replies to the questionnaire reproduced in Report V(1), as well as the replies received from organizations of employers and workers. The text of each question is reproduced, followed by the list of respondents grouped according to the nature of the reply (affirmative, negative or other). In cases where a reply is qualified or clarified by comments, the substance of the comments is indicated in alphabetical order of countries, following the same pattern except in the case of the subsidiary questions under Question 6(2)(c) and Question 11(3). In some cases, similar replies have been grouped together. A summary of replies to each question and the relevant Office comments are reproduced at the end of each section.

Some replies, in particular relating to the preliminary questions, provided interesting and useful information on national law and practice with regard to the employment relationship. That information has not, however, been reproduced in this volume, except for some brief references to the national situation which can contribute to a better understanding of the reply.

The Office commentary on the replies to the questions and on the proposed text of the Recommendation are contained in the subsequent section.

### **General observations**

#### ARGENTINA

UIA: We do not support the idea of a Recommendation that might entail definitions of the employment relationship; these depend on actual circumstances which must be considered on a case-by-case basis and are not universal. We are against dealing with a topic on the basis of prejudices or preconceived ideas, such as the assumption that subcontracting and outsourcing must always be a disguised employment relationship or fraudulent in nature. Any formula that is intended to extend responsibility or introduce generic solidarity mechanisms seems to us to be inappropriate. Some relationships are clearly of a civil or commercial nature and more than adequately regulated at the financial level; they should not arbitrarily be defined as employment relationships, nor is it appropriate to establish legal presumptions concerning them, as this would go beyond the institutional framework of the ILO's standards-related activity.

#### BELGIUM

CNT: The ILO's aim to develop a Recommendation is of great interest and part of a very beneficial initiative, as the employment relationship is a far-reaching phenomenon which calls for an international response. Its double objective – protecting workers, without jeopardizing existing independent or commercial contractual relationships – is an important one. The adoption of a Recommendation will certainly help to prevent

competitive distortions in commercial relationships and to delimit correctly, with due regard to legal security and economic requirements, activities within an employment relationship from those undertaken on an independent basis. The basic framework created by the ILO is intended to respect the specific conditions of each member State, given that the future instrument calls only on member States to adopt the measures needed to identify the employment relationship, and does not define the substance of that relationship. Since this proposal leaves the member States with considerable discretion as regards implementation, without calling into question policies defined at the national level, the CNT supports the initiative, but does not consider it necessary to provide any detailed replies to the questionnaire.

#### BRAZIL

FS: Protection of workers is the basis at the national level of labour legislation and, at the international level, of ILO instruments. If the employment relationship is ambiguous or unclear, it is the workers who suffer because they may be totally deprived of protection. Obscuring the real legal relationships in order to cut costs is an unacceptable practice that harms workers, employers, the State and society at large. That is why it is important to adopt an international instrument that will clearly define the scope of the employment relationship. The instrument must be objective and concise, and must encompass all the elements of decent work. It must give indications as to determining precisely when such practices are occurring, in accordance with the legal principle of the primacy of fact. The specific situation of women workers needs to be addressed, as they are the worst affected by such practices in some sectors. The instrument should take the form of a Convention, but in view of the difficulty of obtaining tripartite commitment to this, the FS would support the adoption of a Recommendation.

#### NIGER

CNPN: The form and scope of the instrument continue to pose some difficult problems. It should draw the attention of member States to the importance of protecting workers in an “employment relationship”, call for the establishment of an ad hoc commission to deal with the issue within the framework of social dialogue, propose that the commission report on its investigations to the authorities, communicating its reports directly to the social partners, and demand that the commission hold periodic meetings. In Niger, employment relationships between the majority of “wage-earning workers” and their employers are informal, multifaceted, complex and poorly defined. These workers include domestic servants, gardeners, seasonal workers, guards, and many craft workers, all working in the informal labour market. Labour administrations in our countries deal mainly with the formal sector, where laws and regulations apply, while the informal sector is close to being marginalized. The instrument must clearly express a concern to reconcile these needs with the realities of an economy that is in fact quasi-informal, and must reflect the fact that there are two labour markets, the formal and the informal. In the latter, the employment relationship is based more on traditional social relationships than on laws and regulations. It is difficult for workers in that sector individually to obtain adequate legal protection. Trade unions still do not make the effort to establish links with workers, while employers are careful to avoid the minimal step of declaring workers to the social security authorities. Workers never have an official letter of employment. In the light of this situation, it is the duty of the trade unions and the public authorities to initiate, through social dialogue, a process of raising awareness among workers and employers. Employers should, in areas of concern to them, use the

same means with their informal sector colleagues by linking up with them and promoting training in this and other areas.

#### PORTUGAL

CCP: This Recommendations should focus on “disguised” employment relationships and the importance of having mechanisms that will provide people with means of access to the protection they have a right to expect of national legislation. It should provide guidance to member States without defining the substance of the employment relationship in binding and universal terms. It should also be sufficiently broad to take account of diverse economic, legal and industrial relations traditions, as well as the gender dimension. The instrument should be designed so as to prevent any conflict with genuinely independent and commercial contractual relationships and should promote collective bargaining and social dialogue as means of resolving problems at the national level. The Recommendation should also take into account recent developments in the employment relationship in different countries. Our position is based on what is the ILO’s most fundamental purpose, namely the protection of workers, and on the fact that all workers, whatever their legal status, are entitled to work in decent conditions.

CTP: The concept of employment relationship is in general use, as the ILO’s report indicates. An employment relationship exists where the worker concerned is legally subordinate. However, it is not necessarily an easy matter to establish this key element, either because the worker, even if dependent, receives no direct and systematic instructions from the employer, or because there is no technical dependence. Respect for rights, and in particular the legal aspects of the employment relationship, is considered fundamental by the CTP. One problem facing Portugal is the violation of labour legislation in the case of migrant workers who often find themselves in precarious situations.

UGT: The employment relationship is a key issue, because the effective protection of many workers depends on it. In many countries, informal economy workers have no protection at all, and the introduction of new technologies also tends to weaken the link between employer and worker because the relationship established between them is ambiguous or disguised, the employer being increasingly unable to give direction and is less accountable. This is why ILO action in this area is so important. The appropriate instrument would be a Convention. However, even though the text proposed does not address all the issues it should, a Recommendation could usefully prompt States to examine the question and provide an adequate level of protection for dependent workers who are not covered by the traditional scope of the employment relationship.

#### SWITZERLAND

UPS: In the light of the questionnaire, we consider that it will be difficult to deal with the question of the employment relationship and even more difficult to develop a clear Recommendation. In our opinion, a declaration setting out widely accepted principles would be more conducive to progress in this area.

## I. Form of the international instrument

**Qu. 1** *Should the International Labour Conference adopt an instrument concerning the employment relationship?*

### *Affirmative*

*Governments:* 68. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Indonesia, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); SY (Finland); JEF (Jamaica); NK (Japan); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); EFC (Sri Lanka); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

### *Negative*

*Governments:* 7. Australia, Colombia, Czech Republic, Hungary, India, Iraq, Poland.

*Employers' organizations:* VÖI (Austria); BEA (Bangladesh); CNI (Brazil); BIA, BCCI (Bulgaria); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); BUSA (South Africa); CEOE (Spain); SN (Sweden); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

### *Other*

*Governments:* 2. Canada, Spain.

*Employers' organization:* UCCAEP (Costa Rica).

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*Comments concerning affirmative replies*

*Argentina.* National practices and systems must be protected.

CGT RA: This is necessary to ensure protection of workers and to help governments in orienting and reorienting their national policies.

*Barbados.* BWU: New trends in employment relationships have created a need for legal and institutional strengthening to ensure continuous convergence between workers' legal entitlements and the realities of the new work relationships.

*Benin.* In order to take account of all the subtle differences in the associations that have the characteristics of an employment relationship and to ensure protection for a greater number of workers.

*Bulgaria.* CITUB: Because in reality, including in Bulgaria, there are other disguised legal relationships, or relationships closely akin to an employment relationship.

*China.* Given the major changes in the labour market, and the forms of organization of work prompted by economic globalization.

*Costa Rica.* Because of the new forms of production and employment in the new labour and economic environment.

*Côte d'Ivoire.* CGECI: In the interests of harmonizing legislation in the current context of globalization.

*Cuba.* In order to define general principles for combating the tangible loss of protection of workers in many countries.

*Denmark.* The Danish Government considers, however, that it is not necessary at the present time to adopt other international obligations or regulations regarding the employment relationship.

*Egypt.* Because of changes in the labour market and to new forms of employment.

*El Salvador.* An instrument of this kind will supplement existing national standards concerning the employment relationship.

*Eritrea.* Because, in the name of flexibility, many countries have excluded some categories of workers from the normal employment relationship, thus leaving them more vulnerable to abuses.

*Finland.* Because of the increasing variety of work arrangements which has led to greater number of people in marginal employment relationships without clarifying their position with regard to labour law, and because of the greater international mobility of labour. It is important to prevent certain types of employment from falling beyond the scope of labour law protection, and for this purpose the concept of "employment relationship" must be defined so as to be ambiguous.

*Gabon.* COSYGA: The International Labour Conference should adopt more than one instrument which would limit the deregulation of the employment relationship by multinationals.

*Germany.* The scope of the employment relationship is one of the most important and currently relevant issues in the field of labour law and social protection, given the major changes that have been taking place in the world of work. An ever-increasing number of employees are without protection in a context of internationalization and globalization of work, the role of multinationals and the growth in cross-border work, as

well as advances in information, communication, Internet and electronic mail technologies. New, more flexible forms of work, are proliferating. Many countries are faced with serious financial and social problems and high unemployment, in a climate of increasingly fierce international competition, with very serious social consequences for labour law and social protection. The absence of any protection for some workers is a worldwide problem. Any commitment on the part of States to pursue, with the ILO's help, a policy of clarification and adaptation of the scope of labour legislation would therefore be a very positive development. However, a single instrument encompassing the concept of the employment relationship, the disguised employment relationship, the ambiguous employment relationship (quasi-employment relationship), and triangular employment relationships (provision of labour), is not an appropriate solution. What is needed is an instrument allowing for different approaches for each of these very different categories.

*Guatemala.* As a basis or guide that would make it possible to overcome any doubts regarding an employment relationship.

*Honduras.* In order to prevent new trends and changes in the employment relationship blurring or changing its fundamental nature, without losing sight of the social purpose of labour law. The relationship between workers and employer must be protected, and must not be modified or disguised.

*Indonesia.* This instrument could be a useful reference for countries drawing up relevant legislation on this important issue.

*Japan.* Even if it is useful to develop an instrument on the employment relationship, it is important to take account of the particular situation of each country.

NK: Although we do not favour the adoption of such an instrument, we do not deny its importance. The diversity of national situations, however, makes it difficult to adopt a universal standard.

*Republic of Korea.* FKTU, KCTU: Differences and tension still exist between workers, employers and governments owing to the absence of relevant international standards. Atypical employment continues to increase in countries which lack effective protective legislation, while employment security and working conditions are deteriorating, undermining freedom of association, the right of collective bargaining and collective action. This has eroded the protective capacity of existing international labour standards. The rights and protection of workers in "dependent disguised self-employed relationships" and those indirectly in a "triangular employment relationship" are at the focus of recent developments and disputes. Certain governments are endeavouring to enact legislation which weakens the rights of irregular workers, which further erodes security of employment. The adoption of a clear universal international standard will serve as an important guideline for debates at the national level and efforts to find acceptable solutions.

*Latvia.* Adopting an instrument is the best means for achieving harmonization and avoiding common problems in the field of employment relationships.

*Lebanon.* In the labour legislation of certain countries, the traditional concept of the employment relationship fails to cover many categories of workers.

*Lithuania.* LDF: The instrument must be a useful juridical instrument, with provisions based on sound principles with regard to labour relations.

*Mauritius.* In response to the increasing lack of legal clarity with regard to the employment relationship in the informal sector and the new occupations in the formal

sector including home work and remote working. Also in order to clarify the employment relationship and independent work, and to extend protection for workers.

*Mexico.* Far-reaching changes now taking place in the world of work have created new situations which do not always fit the traditional parameters of the employment relationship. These new situations have increased labour market flexibility but have also tended to reduce transparency with regard to the situation of a growing number of workers who are still excluded from the protection normally associated with the employment relationship.

*Republic of Moldova.* Because the sphere of regulation of employment relationships does not correspond to the reality of industrial relations and some situations are outside the scope of legislation.

*Morocco.* A legal framework of this kind would be an important element in national legislation.

*Mozambique.* So that governments will know that all relationships between workers and employers must be covered by national legislation.

*Panama.* This instrument could serve as a means of information and for harmonizing national labour standards.

*Peru.* In order to counteract the trend noted in recent years to exclude services from the scope of labour legislation and to make use of new contractual arrangements, which have led to an increase in precarious employment and flagrant violations of legislation, and of civil and commercial contracts.

*Philippines.* The employment relationship is still the predominant legal framework for work in many countries including the Philippines.

*Poland.* Solidarnosc: It is important to improve protection of the worker as the “vulnerable” element in the employment relationship, as existing regulation is inadequate.

*Portugal.* In order to attain the objective of decent work, all workers, irrespective of their status, should enjoy the protection due to them within the framework of an employment relationship.

UGT: An international instrument in this (often controversial) area is urgently needed.

*Slovenia.* ZDS: In view of the diversity of national legislations, a common legal framework is required.

*South Africa.* This should take into account the integrated approaches in the labour sphere adopted by South Africa, which bring the labour movement, business, the Government and civil society into a form of social dialogue with a view to establishing consensus around a policy and its implementation.

*Spain.* CC.OO.: In order to fill the legislative vacuum in some countries regarding the definition of the employment relationship.

*Sri Lanka.* Because of the current challenges facing labour administrations in relation to employment relations.

EFC: However, this question must be dealt with in the context of national economies and social conditions.

LJEWU: The adoption of an instrument is desirable, at least for the purpose of defining the fundamental aspects of the employment relationship, the meaning or interpretation of which varies from one country to another.

*Sweden.* TCO, LO: This is important for the workers and employers of the world.

*Switzerland.* A new instrument is not absolutely necessary. A digest or handbook of good practices would be preferable, and would provide guidance for States facing specific problems in this area. In previous discussions, however, a large majority expressed the wish for an instrument, and the International Labour Conference at its 91st Session in 2003 reached a democratic consensus which Switzerland finally, after considerable hesitation, supported.

*Trinidad and Tobago.* In order to overcome the problems arising from the lack of a clear definition of the employment relationship.

ECA: An instrument on the employment relationship is needed. It should be promotional in nature and should encourage policy formation, rather than imposing obligations on States.

*Tunisia.* Because of the lack of an international instrument dealing with disguised or ambiguous employment relationships. The instrument should be a reference providing international support for member States in developing their own legislation.

*Ukraine.* FRU: Economic globalization is creating a need to formulate a strategy for regulating changes in the labour market, where new relationships, including new employment relationships, are emerging, not regulated by national legislation.

FPU: With a view to protecting the rights of workers who are trade union members.

*United Arab Emirates.* Such an international instrument will help States to enact their own legislation on the employment relationship.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), JTUC-RENGO (Japan), CLTM (Mauritania), FNV (Netherlands), CONSAWU, COSATU (South Africa), TUC (United Kingdom): The International Labour Conference should adopt one or more instruments on the employment relationship.

#### *Comments concerning negative replies*

*Australia.* The Government is concerned that such an instrument could impede business opportunities, economic progress and efficiencies and be counterproductive in terms of employment opportunities. The Government is currently considering the question in connection with the development of legislation intended to protect independent contracting and labour hire arrangements in the context of a more general reform of the Australian workplace relations system, in order to ensure that commercial relationships are not subject to inappropriately restrictive industrial regulation applied to the employment relationship.

*Austria.* VÖI: More in-depth studies of comparative law, studying different experiences in this area, and efforts to compile best practices, as well as other activities, are a good way of optimizing the legal framework for the provision of work and services. There should not, however, be any move to seek standard solutions which would restrict the desired labour market flexibility or encroach on tried and tested legal traditions.

*Bangladesh.* BEA: In a context of globalization, now is not the right time to adopt an international instrument on the “employment relationship”. While all efforts should be directed towards means of encouraging fair employment, a rigid definition imposed by an international instrument would not be appropriate, given existing economic, social, political and educational differences, and the diversity of employment in different countries especially developing countries. The imbalance between labour supply and demand, the high rate of growth of the labour force compared to new jobs, and the current moves to adjust development strategy in order to accelerate industrialization, which is necessary to create better job opportunities under any agreement, are among the aspects that need to be considered, not by following a legalistic approach but with an attitude that favours investment and growth in such a way as to combat poverty while also gradually improving conditions of employment.

*Brazil.* CNI: This issue should be dealt with in an international labour standard. However, a Recommendation could be accepted if it were based on a specific issue and provided guidance for member States without giving a universal definition of what the employment relationship should involve. It should be sufficiently flexible to take account of the diversity of traditions with regard to economic, social, legal and industrial relations.

*Canada.* CEC: This topic is not a suitable subject for international standards. The challenges faced by workers within or outside employment relationships cannot be dealt with in an effective practical and meaningful way by international standards on the “employment relationship” because of the vast range of causes and responses. These differences are driven by unique cultural, economic, social and industrial relations systems. A standardized response would not be appropriate, given the differences between countries and within countries as regards ways of dealing with the employment relationship, and also because of the diversity of possible solutions and possible needs among workers. A more appropriate response would be at the national level.

*Colombia.* The concept has not been worked out clearly enough at this stage for an international instrument to be envisaged. The concept of employment relationship refers to ideas such as subcontracting which poses significant legal difficulties in some countries. These are very ambiguous concepts.

*Denmark.* DA: This issue should not be dealt with in an instrument. However, we are willing to consider a Recommendation on the basis agreed at the Conference in 2003. The instrument should not aim to define the substance of the employment relationship. Overall, in view of the way in which the question is presented in the questionnaire, there is cause for concern that we might go back to the discussions of 1997 and 1998.

*Finland.* EK: The European Union directives on labour legislation leave it to the EU Member States to define the concept of employment relationship.

*Guatemala.* CACIF: The report shows the enormous difficulties involved in developing a universal standard in this area, as well as showing how countries are responding very positively in terms of legislation and jurisprudence, in the light of their differing situations.

*India.* India has no law on the employment relationship. We need to monitor the phenomenon. The global process of transformation of the nature of work, which is reducing costs and increasing productivity, has also made it possible to increase per capita income and improve income distribution.

*Iraq.* We do not need new instruments and Recommendations. The crucial thing is that the State respects its previous commitments and create the climate needed for genuine social partnership, without impeding decision-making.

*Poland.* Such an instrument will be ineffective because the legislator could seriously infringe the freedom of the parties to conclude contracts to restrict the extent of cooperation between employers' and workers' organizations. Given that our reply to this point is negative, we have not replied to the other questions.

*South Africa.* BUSA: An international instrument is not the appropriate means for dealing with this issue. It is important to take account of the considerable differences between countries (the result of national factors) in terms of the way in which the employment relationship is regulated, as well as the main focus of such regulations. It is also important to bear in mind the close link between labour and other types of legislation or collective bargaining. Furthermore, a Recommendation will have an impact on the flexibility to enter into different types of employment and other relationships. Flexibility and individual autonomy are prerequisites in today's world of work, because enterprises must be increasingly competitive in order to survive in a globalized economy, and employees want to be treated as individuals who are free to enter into relationships that suit their interests. A Recommendation restricting these freedoms must therefore be approached with great caution. This issue should be dealt with through national laws and practices, and the ILO should provide advice, information and guidance for any member State that requests it and wishes to develop policies of this kind.

*Switzerland.* UPS: The "employment relationship" is not an appropriate subject for an international labour standard, and this is confirmed by the failure of discussions on the topic of subcontracting at the International Labour Conference in 1998. In Switzerland, the question of defining the "employment relationship" is not a problem owing to the existence and application of the *Code des obligations*. An international instrument would therefore be of no benefit in Switzerland. The employment relationship cannot be defined universally, and differs from one country and one region to another. Viable solutions can only be found at the national level.

*United States.* USCIB: The report and Recommendation appear to have expanded the framework of the discussion as agreed at the 2003 session of the International Labour Conference, specifically in paragraph 25 of the Conclusions concerning the employment relationship, which specifically states that "the issue of triangular employment relationships was not resolved". It would not, in the view of the USCIB, be appropriate to adopt a Recommendation in the form advocated in the report and the questionnaire, and in view of the extension of the scope of the subject to include triangular employment relationships, the need for a Recommendation must be reconsidered. The best course would be to draw up a set of simple principles in Recommendation format, along the lines of certain elements indicated in paragraph 25. Using the Recommendation to broaden the definition of employee appears to be an attempt to regulate non-traditional working relationships in a way that imposes upon the need and desire among employees and employers for non-traditional arrangements. Any attempt to standardize the different types of employment relationship is too prescriptive.

*Views shared by the following employers' organizations:* ANDI (Colombia), CEIF (Cyprus), MEDEF (France), VSI (Iceland), ALE (Lesotho), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), SN (Sweden): This issue should not be dealt with in an international standard. However, as the International Labour Conference decided in 2003, a Recommendation concerning the disguised employment

relationship might be acceptable provided that it focuses on this specific issue and on the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions. Above all, the instrument should not interfere with genuine commercial and independent contracting arrangements.

*Comments concerning other replies*

*Canada.* This issue is of great importance at the global level in labour markets, where a growing number of workers occupy “atypical” employment which might superficially appear not to have an “employer-employee” dynamics. The Government of Canada is not convinced of the need to adopt an instrument concerning the employment relationship. A digest of practice or a plan of action would be preferable. However, in the event of consensus in favour of adopting an instrument on the employment relationship, it should accurately reflect the consensus reached at the end of the discussions in 2003 and the compromise achieved with regard to the scope of the employment relationship, as reflected in paragraph 25 of the conclusions.

*Costa Rica.* UCCAEP: It is not necessary to have an instrument other than a Recommendation. This should be sufficiently balanced to ensure that it respects workers’ rights and does not become a straightjacket for employers.

*Spain.* It is difficult to express a view owing to the previous discussions on the issue at the ILO. The Preamble contains provisions that are to some extent contradictory and do not constitute a suitable basis for examining the employment relationship in atypical situations owing to the particular characteristics of a number of defining elements in the classical or typical employment relationship.

**Qu. 2** *If so, should the instrument take the form of a Recommendation?*

*Affirmative*

*Governments:* 67. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Fiji, Finland, France, Germany, Guatemala, Honduras, Hungary, Iceland, Indonesia, Italy, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers’ organizations:* CNI (Brazil); BICA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d’Ivoire); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP, CCP (Portugal); ZDODS, ZDS (Slovenia); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); BSSF (Bangladesh); CITUB (Bulgaria); CLC (Canada); ACFTU (China); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); FNV (Netherlands); UGT (Portugal); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 6. Eritrea, Greece, India, Iraq, Japan, Poland.

*Employers' organizations:* VÖI (Austria); BIA (Bulgaria); CEC (Canada); CEIF (Cyprus); CACIF (Guatemala); NK (Japan); HSH, NHO (Norway), BUSA (South Africa); USCIB (United States).

*Workers' organizations:* ACTU (Australia); BWU (Barbados); CMKOS (Czech Republic); CITU (India); GEFONT (Nepal); Solidarnosc (Poland); CGTP (Portugal); PTUF (Romania); ZSSS (Slovenia); CSTT (Togo); NATUC (Trinidad and Tobago).

*Other*

*Governments:* 2. Australia, Spain.

*Employers' organizations:* JEF (Jamaica); CBI (United Kingdom); UPS (Switzerland).

*Workers' organizations:* CGT-FO (France).

*Comments concerning affirmative replies*

*Germany.* Only a Recommendation can provide member States with the flexibility they need.

*Austria.* A Recommendation, which would provide suitable guidance for encouraging countries to extend the protection of the employment relationship to all persons who are de facto employees.

*Benin.* It is more flexible and States will be able to use it as a basis for their efforts to improve their practice and legislation in this area.

*Canada.* If there is consensus on the adoption of an instrument, in accordance with paragraph 25 of the conclusions of the general discussion in 2003, a Recommendation would be an appropriate international response.

*China.* In order to provide constructive guidance to member States in developing their national legislation on the employment relationship.

*Republic of Korea.* FKTU, KCTU: An instrument is urgently required, and this should preferably be a Convention supplemented by a Recommendation, as rapid changes in employment relations have created new forms of employment in all countries. These threaten the effectiveness of existing international standards, which have been predicated on the typical employment relationships prevalent in the past, and exclude many workers from the scope of protection. If it is not possible to adopt a

Convention, a Recommendation could provide constructive guidance to member States and help them to draw up legislation and collective agreements.

*Costa Rica.* A Recommendation would further facilitate the aim of gradually harmonizing the social and economic situation of all countries.

*Côte d'Ivoire.* CGECI: Because of its flexibility, with each State adapting it to the national context.

*Croatia.* The Recommendation should focus on the issue of the employment relationship and reflect the diversity of traditions in the area of economic, social, legal and industrial relations. It should provide guidelines for member States, without universally defining the substance of the employment relationship.

*Czech Republic.* KZPS: A Recommendation, in the sense that national legislation is supposed to regulate the employment relationship.

*Denmark.* A new ILO instrument should be capable of taking account of differences between national systems and economic sectors.

LO: A Convention would, however, be preferable.

*Egypt.* The Recommendation could be used by States as a basis when developing their legislation and economic policies. The new instrument will take into account recent economic developments which vary from one State to another according to social and economic conditions.

ETUF: The instrument will, in the interests of flexibility, address different forms of the employment relationship, some of which are new, disguised, vague, hidden or informal, but it will be difficult for it to determine the scope and definition. The proposed Recommendation will need to balance the tricky equation of protecting workers versus allowing flexibility in the labour market.

*El Salvador.* Because this will facilitate better implementation of national laws and regulations.

*Fiji.* A Recommendation would provide a basis and general guidelines that would allow member States to formulate national policy or establish a legal framework for amending their legislation.

*Finland.* It would not be possible to adopt a binding instrument because concepts of the employment relationship vary from one country to another and labour legislation must also take into account national requirements (such as the status of persons subject to labour market policy measures).

SAK, STTK, AKAVA, SY, VTREL: A Recommendation, at least, is needed.

*Guatemala.* The Recommendation would leave it to each member State to undertake the reforms needed for its application, including supervisory mechanisms and policies appropriate to the prevailing social and economic conditions.

CACIF: In the interests of getting our views across and respecting the decision taken by the International Labour Conference at its 91st Session in 2003, a Recommendation could be considered provided that it deals only with disguised employment relationships.

*Honduras.* Because of the flexibility, this instrument needed to be able to take account of national differences and to address problems of gender equality in member States.

*Indonesia.* This would be more flexible and appropriate to each country.

*Italy.* CGIL: Another option would be to adopt a Convention reflecting most of the discussions on these issues.

*Japan.* JTUC-RENGO: Even if legal systems and practices with regard to employment differ from one country to another, disguised employment is a problem common to all. A single standard, such as a Recommendation, is required.

*Lebanon.* The Recommendation must be flexible and not set binding provisions on the employment relationship but set out general principles.

*Lithuania.* LDF: A Recommendation would be the most widely accepted and the most practical.

*Mauritius.* The Recommendation will facilitate the adoption of international standards on this issue and provide guidelines for member States on redefining employment relationships in different ways, to reflect the diversity of national legislation, in the interest of promoting decent work. Furthermore a Recommendation appears to be the most suitable instrument, given the divergences in views with regard to the need to harmonize labour standards concerning the scope of labour relations. The Recommendation will make it possible to encourage a new definition of employment relationships in the context of globalization and changes in the organization of work.

*Mexico.* A Recommendation focusing on the issue of disguised employment relationships and the need for mechanisms to ensure that people in an employment relationship have access to the protection due to them at the national level. It should promote social dialogue as a means of solving problems at the national level, and should take account of recent developments in labour relations.

*Republic of Moldova.* The Recommendation is a promotional document intended to encourage member States to develop and apply progressively national policy aimed at a common objective, while taking into account specific national conditions.

*Morocco.* The Recommendation should take account of developments in the employment relationship.

*Netherlands.* In accordance with the approach advocated by the International Labour Conference in 2003. However, the possibility of a Convention should also be considered.

FNV: Endorses the Government's position. A Convention can contain programmatic or promotional provisions together with possible examples of measures which member States might consider. In accordance with article 19 of the ILO Constitution, the difference between a Convention and a Recommendation is limited, given that member States are in either case under the same reporting obligations.

*Panama.* The important thing is that the instrument be fully observed.

*Peru.* Because the problems relating to the employment relationship and the determination of the scope of labour laws and regulations are common to all member States.

*Philippines.* Given the diversity of employment relationships throughout the world, the instrument should take the form of a Recommendation.

*Portugal.* This was the unanimous conclusion of the Committee on the Employment Relationship at the 91st Session of the Conference in 2003.

CCP: The Recommendation should focus on the disguised employment relationship and on the need for mechanisms to ensure that persons in an employment relationship have access to the protection they are due at the national level. It should provide guidance to member States without defining universally the substance of the employment relationship.

*Qatar.* A Recommendation first; a Convention can be developed later.

*Slovakia.* This is more appropriate in the light of the differences between national legal systems.

*Slovenia.* Government, ZDS, ZDODS: A Recommendation would be a good thing, given the wide range of definitions.

*South Africa.* In order to clarify and adapt employment relationships to emerging labour market trends.

*Sri Lanka.* EFC, CWC: A Recommendation would provide the parties with the necessary guidance.

LJEWU: The instrument should not take the form of a Convention, which is binding once ratified. The Recommendation sets out guiding principles which can be applied flexibly and in accordance with requirements.

NWC: We prefer a Recommendation on disguised employment relationships, taking into account the range of problems faced by countries in the sphere of economic, social, legal and labour relations.

*Sweden.* LO, TCO: A Convention or a Recommendation.

*Switzerland.* In view of the conclusions of the general discussion in 2003 and the mandate of the ILO, only a Recommendation can offer the necessary flexibility while also providing the promotional elements demanded by the Conference, although the Government would have preferred a digest or handbook of good practices.

USS/SGB: Although the issues in question could be addressed in a Convention, we support the adoption of a Recommendation, following discussions at the Conference in 2006.

*Trinidad and Tobago.* A Recommendation is preferable at the moment because of the complexities of the issues involved.

ECA: Recommendations are not binding and therefore ideal for giving guidance to countries on the questions that should be included in a Convention but on which there is no consensus.

*Tunisia.* In order to address the issue of disguised or ambiguous employment relationships, with guidance for member States but without defining universally the substance of the employment relationship. The Recommendation should be sufficiently flexible to take account of the diversity of traditions regarding labour relations.

*Ukraine.* FRU. Each country must be free to choose independently the way in which it regulates employment relationships in the light of its own particular conditions.

FPU: This would facilitate better use of legal systems for the protection of workers.

*United Arab Emirates.* Because the Recommendation sets out general principles in accordance with which States can develop legislation.

*United Kingdom.* TUC: Supports the adoption in 2006 of a Convention together with a meaningful Recommendation.

*United States.* AFL-CIO: A Convention would deal more forcefully with the issues, but we would also support the adoption of a Recommendation.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CITUB (Bulgaria), CLC (Canada); ETUF (Egypt); CFDT (France); CLTM (Mauritania); CONSAWU, COSATU (South Africa), TUC (United Kingdom): Although a Convention might be considered, we support the adoption of a meaningful Recommendation during the discussions in 2006.

*Comments concerning negative replies*

*Australia.* ACTU: The instrument should be a Convention, but consideration should also be given to the adoption of a supplementing Recommendation.

*Barbados.* BWU: A meaningful Recommendation would provide the necessary guidance on enactment while providing a degree of flexibility for member States to apply it in accordance with their own national laws and policies. However, as regards the employment relationship, a Convention would be more appropriate as a means of establishing a strong and legally binding policy so as to combat the abuses that have been occurring in the new global economy.

*Canada.* CEC: The issue should not be dealt with in any instrument, even a Recommendation. However, given that the International Labour Conference in 2003 decided to consider a Recommendation, the CEC is ready to contribute constructively to discussions on this on condition that the instrument focuses exclusively on disguised employment relationships and the need for mechanisms to ensure that persons with an employment relationship have access to the protection they are due at the national level. It should provide guidance to member States without defining universally the substance of the employment relationship. The Recommendation should be flexible enough to take account of different economic, social, legal and industrial relations traditions and should not interfere with genuine commercial and independent contracting arrangements.

*Eritrea.* Given that the instrument will concern workers' fundamental rights in employment relationships, a Convention would be more appropriate and would have more weight.

*Greece.* A Convention and a Recommendation should be adopted.

*India.* It is important to keep under constant review the growth and limitations of new employment relationships, rather than create new constraints with corrective measures based on ambiguous trends in those relationships.

*Japan.* Given that forms of work differ from one country to another, it is difficult to imagine a single standard like a Recommendation.

NK: If an instrument has to be adopted, it must be flexible enough not to prevent States from adopting the measures needed. A Recommendation is not the appropriate form.

*South Africa.* BUSA: If an instrument is to be adopted, it must be crafted very carefully so as not to undermine or constrain collective bargaining.

*Views shared by the following workers' organizations:* CMKOS (Czech Republic), CITU (India), Solidarnosc (Poland), CGTP (Portugal), ZSSS (Slovenia), CSTT (Togo), NATUC (Trinidad and Tobago): A Convention would be preferable.

*Comments concerning other replies*

*Australia.* The Government is opposed to this instrument, but if it is to be adopted, it must be concise, contemporary, flexible and non-prescriptive, in order to take account of the dynamics of a modern labour market, and it must provide member States with guidance that will help them to develop strategies adapted to their own national circumstances.

*Colombia.* ANDI: In 2003, the Conference decided to consider a possible Recommendation, and this decision must take into account the views expressed in the previous reply.

*France.* CGT-FO: A Convention imposing obligations appears necessary, as it is important to take into account the scale of so-called “informal” work in a number of countries.

*Jamaica.* JEF: The issue of disguised employment only should be dealt with, as agreed by the employers.

*Spain.* It is difficult to specify in concrete terms how the work of the Conference should be done. The proposed instrument, a Recommendation, should be very flexible and confine itself to setting the basic principles on the basis of various practices in member States, as it is very difficult to establish general guidelines valid for every country.

*Switzerland.* UPS: This is understandable, as the Conference in 2003 considered that a Recommendation focusing on the issue of disguised employment relationships would be the appropriate response, although a simple declaration could also easily be envisaged.

## II. Preamble

### GENERAL OBSERVATIONS ON THE PREAMBLE

**Qu. 3** *Should the Preamble of the instrument:*

- (1) *consider that, in view of ongoing and extensive changes in the labour market and in the organization of work, it is sometimes difficult to establish whether or not an employment relationship exists because of one or a combination of the following reasons:*
- (a) *the legal framework is unclear, the legislation is too narrow in scope or otherwise inadequate;*
  - (b) *the employment relationship is ambiguous;*
  - (c) *the employment relationship is disguised?*

*Austria.* The Preamble needs to indicate that, taking into account the evolution of the labour market and the organization of work, it may be difficult to establish whether or not an employment relationship exists. As the reasons may vary broadly from one country to another, examples should be given. By way of illustration, the examples could be cited of the existence of disguised employment relationships (false self-employed workers), the incapacity to ensure full compliance with the legislation and the inadequacy of the legislation in relation to current realities.

*Canada.* The Preamble as proposed is not sufficiently general. Care should be taken to avoid using terminology or adopting a tone that is accusatory or suggests that bad faith is the rationale behind problems surrounding the employment relationship. It should recognize that in many countries the employment relationship brings with it labour and social protections, but that changes in the labour market have blurred the line between those considered to be in an employment relationship with these concomitant protections and those who fall outside this definition. The Preamble should not attempt to identify the reasons, but should simply note that member States should have appropriate mechanisms in place at the national level to determine these issues. In view of the mandate of the ILO and the thrust of the ILO Declaration on Fundamental Principles and Rights at Work, this is an appropriate subject to address through the adoption of a promotional instrument.

*Germany.* In view of the comment relating to Question 1, the Preamble should be more general in orientation and should read as follows: the question of what should be understood by the employment relationship is a long-standing issue which, in view of the changes in the world of work, is more topical than ever. More and more employees are devoid of protection in an environment characterized by the internationalization and the globalization of work, the role of multinationals and the development of transborder work, particularly in transport and construction, as well as the progression of information and communication technologies, the Internet and electronic mail, which allow communication beyond frontiers. New and more flexible forms of work are emerging almost everywhere. Furthermore, many countries are facing serious financial and social problems and a high unemployment rate. In the context of increasingly fierce international competition, all of this has very heavy social consequences for the protection of labour and social rights. The absence of protection for certain workers is a global problem. It will only be possible to avoid distortions in competition and to preserve a humane society taking into account the interests of employers and of workers through international action. The verification and adaptation of the scope of labour law are therefore necessary.

*Hungary.* The rationale of the Preamble is to outline general principles and the purpose of the regulation, without dwelling on details or substantive rules. Our answers above are predicated on this rule.

*Japan.* NK: It is not appropriate to list proposals (1) and (2) as the reasons for difficulties in establishing whether or not an employment relationship exists. In particular, disguised employment and problems relating to the legal framework/scope of legislation should not be treated as issues in the same category. The Preamble should briefly touch upon the problems caused by disguised employment.

*Views shared by Croatia and the following employers' organizations:* BEA (Bangladesh); CNI (Brazil); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); CEOE (Spain); SN (Sweden); UPS (Switzerland); USCIB (United States): The Preamble of any instrument should be clear and concise and limited to addressing the problems caused by fraud being used to disguise an employment relationship. Certain of these organizations consider that if the Preamble is to contain any other element, it should be to reinforce the need to respect legitimate commercial and other legal relationships. Two of these organizations consider that a Preamble is not necessary at this stage (Bangladesh, BEA) or would be redundant (Canada, CEC).

**Qu. 3(1)(a)** *Should the Preamble of the instrument:*

- (1) *consider that, in view of ongoing and extensive changes in the labour market and in the organization of work, it is sometimes difficult to establish whether or not an employment relationship exists because of one or a combination of the following reasons:*
- (a) *the legal framework is unclear, the legislation is too narrow in scope or otherwise inadequate;*

*Affirmative*

*Governments:* 55. Algeria, Argentina, Austria, Barbados, Belarus, Benin, Brazil, Cameroon, China, Costa Rica, Cuba, Cyprus, Denmark, Dominica, Egypt, Eritrea, Fiji, Finland, France, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Kiribati, Latvia, Lebanon, Mauritius, Republic of Moldova, Mozambique, Netherlands, Niger, Norway, Panama, Philippines, Portugal, Qatar, Romania, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* GICAM (Cameroon); CEC (China); SY (Finland); MGYOSZ (Hungary); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); EFC (Sri Lanka); SN (Sweden); ECA (Trinidad and Tobago).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 18. Australia, Belgium, Canada, Croatia, El Salvador, Germany, Greece, India, Japan, Kuwait, Lithuania, Mexico, Morocco, Peru, Saudi Arabia, Serbia and Montenegro, Spain, United Kingdom.

*Employers' organizations:* CNI (Brazil); BIA, BCCI (Bulgaria); CEC (Canada); ANDI (Colombia); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); HSH, NHO (Norway); CONEP (Panama); VNO-NCW (Netherlands); CIP (Portugal); BUSA (South Africa); CEOE (Spain); UPS (Switzerland); ECOT (Thailand); CBI (United Kingdom); USCIB (United States).

*Other*

*Employers' organizations:* UCCAEP (Costa Rica); FRU (Ukraine).

*Comments concerning affirmative replies*

*Argentina.* In some cases, the legislation does not envisage new forms of employment relationships.

CGT RA: In Argentina, the legislation is clear and addresses the protection of workers, which is perhaps not true in other cases.

*Barbados.* BWU: In view of the changes in the employment relationship, the national legislation is too narrow, limited in scope and ambiguous, as it has not been amended to reflect the current work realities. Where possible, workers should be protected by a legal framework which clearly delineates their rights in accordance with the principles of decent work.

*Benin.* Employment relationships are multifaceted and not always clearly established.

*China.* The existence of a disguised or ambiguous employment relationship is principally caused by legislation that is narrow in scope and by imprecise regulation.

*Czech Republic.* CMKOS: In the Czech Republic, experts are discussing the meaning of dependent work and its elements, which are not defined by the current legislation.

*Egypt.* The legislation in many countries excludes broad categories of workers and is not accompanied by precise supervisory measures for the various forms of employment.

*Eritrea.* In many countries, the legal framework for the employment relationship is unclear and inadequate. Certain workers are excluded from the legal framework.

*Fiji.* Legislation should be simple and easily understood, without the use of legal jargon and terminology that is subject to further interpretation before its true meaning is construed. Case law and current practice in industrialized and developing countries should be examined as a basis for any change.

*Finland.* Because of the plurality of situations that would have to be covered, it would be difficult in practice to draft a provision applicable in all cases.

*Guatemala.* This phrase will help in addressing disguised employment relationships and those in the informal sector, which are nonetheless employment relationships, with all the corresponding rights and obligations. The legislation in Guatemala is sufficiently clear in this regard. The problem is one of implementation.

*Honduras.* In order to establish clear rules enabling States to develop equitable labour market regulation.

*India.* BMS: The words “and vague” should be added after the word “unclear”, and the words “or absent” after the word “inadequate”.

CITU: The legal framework should be more clear and wider to embrace all direct and indirect workers (deployed through individual job contracts apparently of a commercial nature, or through a contractor).

*Indonesia.* The implementation of the legal framework of the employment relationship and its legislation is sometimes influenced by cultural and traditional considerations.

*Iraq.* The employment contract must contain elements relating to the performance of work by the worker, under the direction and management of the employer, and the wage paid to the worker by common agreement.

*Italy.* CGIL. In many situations, the distinction between subordinate and non-subordinate activity is difficult to establish, given that autonomy and responsibility are often the characteristics of both subordinate and non-subordinate work.

*Japan.* JTUC-RENGO: The employment contract, under civil law, and the labour contract, under the Labour Standards Act, have almost the same scope. It is therefore necessary to interpret article 9 of the Labour Standards Law, which defines the concept of a worker, to determine whether or not the person has the legal status of worker. The name given to the contract and its form are irrelevant to this interpretation, which is based on the manner in which the person provides labour to the other party. However, article 9 is overly abstract and unclear, and does not establish firm and clear criteria to guide this determination. Furthermore, when determining whether or not a person is legally a worker, emphasis is placed on whether the person provides labour under control or supervision, which limits the scope of the legislation.

*Republic of Korea.* FKTU, KCTU: In the Republic of Korea, the question of whether an employment relationship exists is determined on the basis of the Labour Standards Act and the Civil Code. However, there exist some areas that remain unclear in the law, although the authorities disagree, and in practice they view the formal aspects of the issue as being more important than the substance. An excessively narrow interpretation of the laws has resulted in the exclusion of workers who should be covered by protection of the law.

*Lebanon.* The scope of some laws in this field is narrow or unclear. The proposed instrument should ensure protection for the largest number of workers by establishing clear and flexible frameworks relating to the new and evolving concept of the employment relationship.

*Lithuania.* LDF: Furthermore, court decisions have not yet clarified all aspects of employment relationships.

*Mauritius.* In many countries, the definition of employment relations is usually confined to the traditional master/servant relationship characterized by dependency, subordination and direct control on the site of work. This definition does not capture the evolution of work organization, which tends to give more autonomy to the worker.

*Mozambique.* The national legislation does not cover domestic work, people with physical disabilities, workers in mines and the maritime sector, etc.

*Nepal.* GEFONT: The definition of the employment relationship should cover all kinds of working relationships, including in the informal economy.

*Panama.* It is important to define each type of employment relationship.

*Philippines.* There is no adequate law to address these issues, particularly for the determination of employment relationships established by recruitment through electronic media or the Internet.

*Portugal.* The growing dynamism of employment relationships may give rise to problems for the legislation intended to regulate them.

UGT: Many situations are very close to an employment relationship and it may be difficult to make the distinction.

*Qatar.* In some laws, the concept is not clear or well established. It would therefore be necessary to determine and indicate the scope of the employment relationship.

*Slovakia.* Moreover, legislation is missing in relation to illegal work and illegal employment. The Preamble should refer to the principle that “labour is not a commodity”, but should add that the “labour force (inter alia) is a commodity in the light of the competitive action of the labour market”.

*South Africa.* Certain member States have not adapted the scope of their labour legislation to respond to new forms of employment relationships; therefore, certain employees do not enjoy protection under these conditions.

*Spain.* CC.OO.: In Spain, problems do not arise in determining the existence of an employment relationship, although it is sometimes difficult to identify the recipient of the services provided, particularly in cases of enterprise chains. It is necessary to take into account the expansion of triangular relationships and new forms of organization of enterprises which have consequences on industrial relations as a whole, and on aspects such as working conditions, the quality of employment, stability and security of employment, collective bargaining, the representation of workers and trade union organizations.

*Sri Lanka:* LJEWU: The subject matter is very complex and of a dynamic nature, which should be emphasized.

*Sweden.* TCO, LO: The number of workers in the world without protection is growing. Legislation is not keeping up.

*Switzerland.* The proposed wording is too ambiguous and could lead to differing interpretations. Proposal: the legal framework and its scope are not sufficiently clear.

*Trinidad and Tobago.* Because for many categories of workers, their status in this regard is unclear.

ECA: The legislation/national policy governing the employment relationship in most countries is not flexible enough given the pace of global changes. Greater flexibility is therefore needed.

*Tunisia.* Such shortcomings in the legislation could lead to difficulties in proving the existence of an employment relationship as defined by the law respecting employment relationships.

*Ukraine.* FPU: Particularly in the case of the conclusion of contracts with individuals.

*United Kingdom.* TUC: This is a particular problem in the United Kingdom, where difficulties in the legal definition of “employee” and “worker” and the consequent uncertainty around employment status mean that workers are unable to enforce basic rights accorded to them by statute.

*Views shared by the following workers’ organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania), CONSAWU (South Africa): Moreover, court decisions have not yet clarified all aspects relating to the employment relationship.

#### *Comments concerning negative replies*

*Australia.* The Australian Workplace Relations Act 1996 (the WR Act) relies on the common law definition of “employee”. The courts have to pay attention to the individual circumstances of a case while giving appropriate recognition to the key characteristics of the employment relationship. The benefit of this approach is that no

single issue relating to control, economic independence or the description of the relationship is determining, which ensures that the definition of employee can evolve as the labour market and the organization of work change. The courts are well placed to oversee this evolution.

*Canada.* The Preamble as proposed is too detailed and should be more overarching. Care should be taken in the drafting of the Preamble to avoid using terminology or adopting a tone that could be considered accusatory or that suggests that bad faith is the rationale behind problems surrounding the employment relationship.

*Côte d'Ivoire.* CGECI: These criticisms do not apply to the legislation in Côte d'Ivoire.

*Croatia.* No. The preamble should mention the problems related to the existence of disguised employment relationships, rather than unclear regulations.

*Denmark.* DA: In general, the Preamble should be short and narrow in scope. As a general comment, the sentence does not make sense in a Preamble and would not apply to all the member States and jurisdictions.

*El Salvador.* The labour legislation is protectionist and clearly establishes parameters for determining the employment relationship; however, new forms of employment contracts may not all be covered by the relevant regulation.

*Germany.* This question is only relevant for an instrument concerning the scope of the employment relationship.

*Greece.* The national legal framework is clear.

*Iceland.* VSI: This is a misleading question. There is no model legal standard against which to compare. The problem, when it exists, is based on the existence of disguised employment relationships, rather than unclear regulations.

*India.* No Preamble is needed. The employment relationship is too fluid at the present time to be examined or defined through parameters which do not reveal any scientific relationship or trend.

*Jamaica.* JEF: According to the definition of the employment relationship contained in Report V(1), either the worker is an employee or not, and there is no intermediary situation. However, doubtful cases may arise, which should lead to an investigation intended to reveal the existence of a disguised employment relationship, which should not be condoned. However, this aspect cannot and should not be covered by international stipulations, but by national legal and judicial systems.

*Japan.* Cases in which a legal framework is itself unclear are probably rare. At least, the situation referred to in this question does not apply to Japan.

*Lesotho.* ALE: This is an inappropriate question and should not be contained in the Preamble. It would be preferable for national courts and tribunals to decide based on the facts and circumstances of each case. If greater clarity is necessary at the national level, existing tripartite structures could address the issue.

*Mexico.* The Federal Labour Act is precise and comprehensive in this regard.

*Morocco.* The national legislation must clearly define the scope.

*Peru.* In Peruvian legislation, the element distinguishing the employment relationship is subordination.

*Portugal.* CIP: The clarity and scope of legislation is the exclusive responsibility of member States.

*South Africa.* BUSA: In certain circumstances it may be difficult to establish the nature of an employment relationship. However, this is not the case in South Africa, where the legislation in this regard is already adequate and aligned to its socio-economic circumstances. The legal definitions and regulations are clear and accessible, and are narrowly tailored to the particular challenges faced in South Africa. For example, there is a rebuttal presumption, agreed upon by the social partners and rooted in the national history, which makes it easier to prove an employment relationship for employees who are low-income earners. An instrument that includes recommendations on the legal framework will in all likelihood result in pressure to amend legislation.

*Trinidad and Tobago.* NATUC: A clear litmus test must be established to determine the nature of the employment relationship.

*United Kingdom.* The most appropriate answer to this question would be “The legal framework may be difficult to understand, or may need to be reviewed”.

CBI: The Preamble should be concise and to the point. The question is unhelpful and will lead to much dispute.

*Views shared by the following employers’ organizations:* CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain), USCIB (United States): This should not be included in a Preamble. This is a misleading and inappropriate formulation, since it assumes that there is a model legal standard against which to compare. Legislative authorities have to make the choice between what should be determined by the regulations and what should be left to the judicial authorities to determine on the basis of the facts of each case. Where the lack of clarity is due to poor drafting, it is the responsibility of national authorities to address the matter. Scope is an unhelpful concept, as is the expression “otherwise inadequate”. Neither helps to clarify the objectives being sought.

#### *Comments concerning other replies*

*Costa Rica.* UCCAEP: All employers are under the obligation to comply with labour laws. Practices which contravene this obligation should be condemned. However, it is necessary to make modifications to meet current needs so that employers can make use of new forms of labour contracts and workers can find jobs, as is the case at the present time.

#### **Qu. 3(1)(b) Should the Preamble of the instrument:**

- (1) *consider that, in view of ongoing and extensive changes in the labour market and in the organization of work, it is sometimes difficult to establish whether or not an employment relationship exists because of one or a combination of the following reasons:*
  - (b) *the employment relationship is ambiguous;*

#### *Affirmative*

*Governments:* 52. Algeria, Argentina, Belarus, Belgium, Benin, Brazil, Cameroon, China, Costa Rica, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Honduras, Indonesia, Iceland, Iraq, Italy, Kiribati, Kuwait, Latvia,

Lebanon, Mauritius, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Portugal, Qatar, Slovakia, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* GICAM (Cameroon); CEC (China); SY (Finland); CTA (Mozambique); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); OTM-CS (Mozambique); FNV (Netherlands); Solidarnosc (Poland); CGTP, UGT (Portugal); PTUF (Romania); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 20. Australia, Austria, Barbados, Canada, Croatia, Germany, Greece, Guatemala, India, Japan, Lithuania, Mexico, Republic of Moldova, Morocco, Panama, Romania, Saudi Arabia, Serbia and Montenegro, Spain, Ukraine.

*Employers' organizations:* CNI (Brazil); BIA, BCCI (Bulgaria); CEC (Canada); ANDI (Colombia); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CIE (India); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* FKTU, KCTU (Republic of Korea); Solidaritate, CTU (Republic of Moldova); GEFONT (Nepal); ZSSS (Slovenia); LJEWU (Sri Lanka).

#### *Other*

*Employers' organizations:* UCCAEP (Costa Rica).

#### *Comments concerning affirmative replies*

*Argentina.* Atypical forms of work have appeared in recent years.

CGT RA: In Argentina, judges have to apply the provisions which are most favourable to workers and to consider in cases of doubt that an employment relationship exists. However, they have a certain discretion and plenary decisions, reached by all the members of a court, are often required to be able to unify the criteria used.

*Barbados.* BWU: Situations in which there is a question of whether a person is employed under a contract for service with enterprises or a contract of employment are becoming increasingly widespread, which has implications for the liability of the parties, for example in terms of work injury and social benefits. There must be clarity in the law and practice with clear benchmarks being set out to gauge the nature of the relationship.

*Benin.* In certain situations, the principal elements characterizing labour relations are unclear.

*Belgium.* The criteria for determining subordination, which is the determining element of the employment contract, are more difficult to apply to new forms of work, which are characterized by the broader autonomy of workers.

*China.* The employment relationship and civil contractual relations show common traits which allow the employer latitude to avoid the obligations set out in labour legislation.

*Czech Republic.* CMKOS: Although the Czech labour law contains detailed regulation of the employment relationship, in practice it is often problematic to determine whether or not the work is performed within the context of such a relationship.

*Egypt.* The employment relationship is ambiguous, particularly in the informal sector, home work, telework and the other new forms of work. In such cases, the relationship is neither clear nor well defined.

*El Salvador.* In certain cases, consultants or technicians are employed in the context of professional services, with the relationship being considered to be of a civil nature, even though in certain cases these contracts have certain characteristics of an individual employment contract.

*Eritrea.* Certain workers are semi-autonomous and have the characteristics of self-employed and traditional workers, such as e-lancers (electronic freelancers) and economically dependent workers.

*Fiji.* Some employers are taking advantage of these changes to introduce new forms of employment relationships in which workers are subject to exploitation and the legislation does not clearly stipulate the coverage of employment contracts.

*Finland.* In certain borderline cases, the nature of the legal relationship is difficult to interpret.

*Gabon.* COSYGA: Due to the regulations advocated by multinationals, the employment relationship is disguised in various forms.

*Honduras.* Confronted with an ambiguous employment relationship, member States need rules to define the employment relationship and protect the rights of all the parties concerned.

*India.* CITU: The employment relationship does not become ambiguous or disguised automatically. It is made ambiguous by the principal employers, contractors and other intermediary agencies to avoid their obligations under the labour legislation. This situation is created and promoted to garner the maximum profit and to remain competitive by economizing on labour costs.

*Indonesia.* Because of the different interests of the concerned parties.

*Japan.* JTUC-RENGO: With the increasing diversification of employment relationships and work arrangements, a growing number of people are finding themselves ineligible for legal protection because they are not recognized as workers. There are many instances where lower courts and upper courts rule differently on whether the same individual should have the status of a worker or not. It is difficult to predict whether a person will be classified in legal terms as a worker and the criteria for such judgements are ambiguous.

*Lebanon.* The instrument should clarify cases in which the employment relationship is considered to be ambiguous in reality.

*Lithuania.* LDF: This is very topical for Lithuania, where the Labour Code does not contain specific provisions on the regulation of labour matters. These are envisaged in the Civil Code, but some provisions of the Civil Code are contrary to those of the Labour Code.

*Mauritius.* The ambiguity arises mainly in cases where the demarcation line between employment relationship and self-employment is unclear. A worker who should normally fall under the definition of an employee may therefore be considered to be on a contract of service and as such deprived of her or his labour rights.

*Mozambique.* This occurs in our legislation and the Ministry therefore sometimes has to clarify certain situations.

*Niger.* Certain employers emphasize family relations with workers to deprive them of certain rights.

*Peru.* The greater flexibility of labour provisions and the transformation of the traditional organization of production are making it more difficult to identify subordination, which is the reason why the traditional characteristics which served as indicators previously are undergoing change. It is therefore necessary to define new indicators.

*Philippines.* There are situations in which the main factors characterizing the employment relationship are not readily manifested or noticeable.

*Portugal.* It may sometimes be difficult to determine the nature of the employment relationship in view of the diversity of national legal systems and practices, but also in view of the emergence of new forms of work, such as telework, which are giving rise to more relationships of para-subordination than of traditional legal subordination and economic dependence.

CGTP: There are practical situations of employment at relationships which are difficult to classify as either dependent work or self-employment.

*Qatar.* It is necessary to clarify the employment relationship to protect the worker and the employer.

*Slovakia.* In practice, problems occur from the incorrect application of the provisions of the legislation in respect of self-employed persons who gradually enter a permanent relationship with a specific client.

*South Africa.* Employment relationships in certain countries are still defined in terms of common law. Some countries have advanced beyond that and have also made ministerial amendments to give their labour ministries powers to deem any category of persons as employees for the purposes of labour legislation.

BUSA: Sometimes. In the majority of cases, the employment relationship is clearly apparent. It is therefore frequently clearly apparent from the legislation whether the person is an employee or not. However, where the relationship is not a traditional employment relationship and aspects of employment and independence are evident, the nature of the relationship may be less clear.

*Spain.* CC.OO.: The employment relationship is defined precisely in Spain, and the ambiguity lies more in the attitude of the various entrepreneurs using services in relation to their obligations towards the worker.

*Sweden.* LO and TCO: Contracts of service create the illusion of having been entered into by equal parties.

*Switzerland.* But once again it would be necessary to avoid many kinds of new interpretations of the concept of ambiguity.

*Tunisia.* The ambiguity arises from the lack of factors and indicators on the basis of which the existence or not of an employment relationship can be proved.

*Ukraine.* FRU: In Ukraine, the relations between individuals, entrepreneurs and employees, which are in practice employment relationships, are not taken into account by the labour legislation.

FPU: To avoid disputes when a worker performs work without having concluded a labour contract in writing.

*United Kingdom.* TUC: Case law shows that less scrupulous employers have sought to exploit ambiguities in employment status to deny workers “core” rights under legislation such as the National Minimum Wage Act.

*Views shared by the following workers’ organizations:* BSSS (Bangladesh), USAM (Madagascar), CLTM (Mauritania), CONSAWU (South Africa): Certain provisions of the Civil Code are in contradiction with those of the Labour Code.

#### *Comments concerning negative replies*

*Austria.* In certain cases, there are real doubts as to whether or not an employment relationship exists. What is at issue is to establish a delineation between the employment relationship and other contractual relations. The discussions at the 86th and 91st Sessions of the Conference (in 1998 and 2003, respectively) however show the enormous divergences in this field. Certain countries acknowledge the problem of “economically dependent” workers and propose that it should be addressed at the international level, while others fear that this would result in the creation of a third category of workers. It is therefore proposed not to refer to this reason in the Preamble.

*Côte d’Ivoire.* CGECI: Employment relationships are not in theory ambiguous.

*Croatia.* This may create unnecessary confusion on the issue. The existence or not of a recognized employment relationship between the parties has to be determined on the basis of the facts.

*Denmark.* DA: The Preamble should not broaden the topic further. The facts may be “ambiguous”, but the legal consequences must be determined by the courts or the authorities.

*Greece.* In the case of an ambiguous employment relationship, the worker can appeal to the labour inspectorate or the courts.

*Guatemala.* The definition is not ambiguous.

*Iceland.* VSI: The issue is not ambiguous employment relationships, but cases in which the facts and circumstances need to be clarified. If there is a dispute, the courts or relevant authorities will determine whether or not an employment relationship exists based on the circumstances of the case.

*Jamaica.* JEF: There should be no difficulty in determining whether or not the employment relationship exists. Either the worker is an employee or not. The presence of uncertainty in this respect is one that is easily verified and clarified by national jurisdiction.

*Japan.* Employment relationships are generally determined with ease and situations in which the relationship is ambiguous are probably rare. At least, they do not apply to Japan.

*Republic of Korea.* FKTU, KCTU: In substantive terms, leaving aside the formal aspects, there is virtually no case in which the employment relationship is ambiguous. What is found is that the employment relationship is disguised, in its form, as contract relations under the Civil Code or the Commercial Code. While there are rare cases where it is unclear whether it is an employment relationship or a commercial contract relationship, these exceptional cases should not be taken as grounds for stating in the Preamble of the instrument that the employment relationship is ambiguous.

*Lesotho.* ALE: The issues are not necessarily related to the law, but the facts on the ground, and tribunals, courts and other jurisdictions and mediation bodies can and must determine the truth based on the facts and circumstances of each case.

*Morocco.* The employment relationship must be determined in accordance with the legal framework and as soon as there is an employment relationship the law applies.

*Mexico.* An employment relationship is established between the employer and the person offering her or his services under certain conditions, and must be determined on the basis of the facts. The Recommendation needs to focus on the issue of disguised employment relationships and on the need for measures to guarantee that persons engaged in an employment relationship enjoyed access to the necessary protection at the national level.

*Panama.* The national legislation is very clear and very precise.

*Sri Lanka.* LJEWU: In general, the problem does not arise in Sri Lanka at present, except in certain specific fields such as telework, the supply of labour through contractors or agents and fixed-term employment.

*Switzerland.* UPS: This concept would add unnecessary confusion. Knowing whether or not there is an acknowledged employment relationship between the parties is a question of fact. The proposed concept is inappropriate in the Preamble.

*Trinidad and Tobago.* ECA: The employment relationship is not ambiguous, it is just that the relevant legal framework and law are not keeping pace with the current changes.

*United Kingdom.* CBI: "Ambiguous relationships" are decided on the basis of the facts by national courts. This question is inappropriate in a Preamble.

*United States.* USCIB: To assume as fact, through inclusion in the Preamble, that it is sometimes difficult to determine the existence of an employment relationship because it is ambiguous runs contrary to the agreement that the Recommendation should be flexible and to take into account the variety of existing systems. This would imply that at least some systems cannot clearly define the employment relationship. Under some United States statutory and regulatory schemes, an individual may be considered an employee in one situation and not an employee in another. This distinction is not a question of ambiguity, but rather the result of considerations taken into account by the legislative and regulatory authorities to achieve different policy goals.

*Views shared by the following employers' organizations:* CNI (Brazil), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain): The concept of

ambiguity has no place in the Preamble or substantive provisions of the instrument. It does not contribute to a better understanding of the matters at issue or the instrument itself and only adds to the confusion. The existence or otherwise of an acknowledged employment relationship between the parties has to be established on the basis of the facts. In the event of dispute, it is for the courts to decide based on consideration of the facts of the case. It is not the issue of ambiguity which needs to be resolved. Moreover, the concept of ambiguity cannot be taken out of context and has to be related to the issue that is considered to be ambiguous.

*Comments concerning other replies*

*Costa Rica.* UCCAEP: The employment relationship has to be based on concrete facts and not pure speculation; it is therefore necessary to be vigilant in its determination.

**Qu. 3(1)(c)** *Should the Preamble of the instrument:*

(1) *consider that, in view of ongoing and extensive changes in the labour market and in the organization of work, it is sometimes difficult to establish whether or not an employment relationship exists because of one or a combination of the following reasons:*

(c) *the employment relationship is disguised?*

*Affirmative*

*Governments:* 54. Argentina, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, China, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Finland, France, Guatemala, Honduras, Indonesia, Iceland, Iraq, Italy, Kiribati, Latvia, Lebanon, Mauritius, Republic of Moldova, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Slovakia, Slovenia, Spain, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BCCI, BIA, BICA (Bulgaria); GICAM (Cameroon); CEC (China); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); MEDEF (France); NCE (Republic of Moldova); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 15. Australia, Barbados, Cameroon, Canada, Fiji, Germany, Greece, India, Japan, Kuwait, Lithuania, Mexico, Morocco, Romania, Serbia and Montenegro.

*Employers' organizations:* CNI (Brazil); CEC (Canada); ANDI (Colombia); CGECI (Côte d'Ivoire); CEIF (Cyprus); EK (Finland); CIE (India); VSI (Iceland); IBEC (Ireland); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); USCIB (United States).

*Workers' organizations:* PTUF (Romania); ZSSS (Slovenia); LJEWU (Sri Lanka).

*Other*

*Governments:* 2. Costa Rica, Saudi Arabia.

*Employers' organizations:* UCCAEP (Costa Rica); JEF (Jamaica); ECA (Trinidad and Tobago).

*Workers' organization:* CGTP (Portugal).

*Comments concerning affirmative replies*

*Argentina.* In certain cases, employers avoid labour legislation through subcontracting and/or triangular employment relationships, which makes it possible to deny the existence of an employment relationship.

*CGT RA:* In Argentina, enterprises sometimes conclude contracts with workers under the specific *monotributo* scheme, which is similar to self-employment, to simulate a subcontracting relationship, whereas there is in effect an employment relationship and so that they can therefore avoid their responsibilities. The cooperative system is also used to disguise an employment relationship.

*Barbados. BWU:* The employment relationship can easily be disguised, especially where migrant labour is concerned, and this must not be permitted in this area, which already has abuses, or in any others. These abuses have implications for the social protection of workers.

*Belgium.* The difference in costs and the greater flexibility of self-employment in relation to conditions of employment give rise to choices of status which do not correspond to the actual conditions under which the work is performed.

*Bulgaria. CITUB:* The organization considers that employers very often deliberately use other legal schemes in order to hide the real employment relationship.

*China.* In activities relating to workers employed by an individual and on piecework, as well as other commercial activities, the employment relationship is sometimes disguised.

*Croatia.* This amounts to evasion of the legislation, which presupposes the clear intent to mislead and/or violate national laws, which constitutes fraud with the intent to evade legal obligations.

*Czech Republic. CMKOS:* The employment relationship is often disguised by other types of contractual relationships.

*KZPS:* Yes, on condition that the term is defined.

*Denmark. DA:* In this sense, it must be clear that the scope relates to "evasion".

*Egypt.* Sometimes it is the worker who denies the existence of the employment relationship to avoid paying tax and social security contributions in industry and small-scale worksites, small enterprises, and even in the formal sector.

*Eritrea.* Because this is a serious problem in many countries. Many employers, in order to escape their duties in relation to social security and severance pay, mask their identity or give the employment relationship a different legal nature, such as a cooperative or a family enterprise, or by signing a fixed-term contract which is repeatedly renewed.

*Finland.* Especially with the international mobility of labour, it is important to prevent contractual relationships from being disguised as something that they are not (false entrepreneurship).

*Guatemala.* In practice, this has given rise to disguised employment relationships, in public and private enterprises providing services.

*Honduras.* This would make it possible to prevent abuses which have harmful consequences for decent work.

*Iceland.* ASI: This must not refer to cases of avoidance (structuring arrangements within the law which can be instigated by either the worker or the employer or both), but evasion (a clear issue of intent to mislead and/or violate national laws).

*Indonesia.* Especially in the informal economy.

*Iraq.* It is difficult to find a universal definition covering all cases of employment as elements relating to labour are not applicable in all cases.

*Italy.* CGIL: Employers often tend to take advantage of the difference in welfare contributions relating to subordinate and non-subordinate employment in order to increase their revenue to the detriment of the rights of employees and the equilibrium of the welfare system.

*Japan.* JTUC-RENGO: As employment relationships and work arrangements are becoming diversified at an accelerated tempo, there is a growing number of workers, including personal contractors and commissioned workers, who are not protected by the labour legislation. These developments have been aggravated by cuts in personnel costs by businesses, including some malicious and unlawful practices.

*Republic of Korea.* FKTU, KCTU: Employers resort to setting up various different forms of engagement, such as parcelling out work to separate contractors or commissioned contractors, taking the forms of a civil or commercial contract in order to avoid the various legal obligations which arise from an employment relationship; in reality, in these arrangements employers exercise virtually all the authority and powers of employers. These need to be deemed to be disguised employment relationships.

*Lebanon.* To afford protection to workers in a disguised employment relationship, through provisions which prevent such relationships, and then to determine the type of protection required and its scope.

*Lithuania.* LDF: In Lithuania, disguised employment relationships are mostly observable in author agreements, contracts for self-employment and contracts for services.

*Mauritius.* This is most common in family owned businesses. Sometimes the distinction is not clear whether the member of the family is an employee or not. It happens also in the informal sector, where workers are presented as members of the

family that is running the business to circumvent the application of the labour legislation and deprive workers of their labour rights.

*Niger.* Under the pretext of family relations or friendship or so-called humanitarian considerations.

*Peru.* Attempts are made to evade the labour legislation to reduce production costs, which involves the non-payment of benefits due to workers, the violation of tax obligations and those relating to social security. This is achieved through the conclusion of civil or commercial contracts, taking advantage of the difficulty for a worker to prove a relation of subordination or through the conclusion of more sophisticated forms of contracts that are lawful, such as fraudulent recourse to atypical contracts with lower benefits and training contracts which do not legally come within the scope of the labour legislation, systems for the subcontracting of labour which make it possible to evade the establishment of a direct employment relationship with the workers providing services to the user enterprise; or more evident forms of evasion, such as flagrant non-compliance with labour legislation in cases where the probability of the violation being detected is very low or the cost of such detection and the penalty is lower than the cost of complying with the labour legislation.

*Philippines.* Disguised employment relationships are widely perceived as being the most radical way of denying workers certain rights and benefits.

*Portugal.* A real employment relationship can be disguised through contracts of different types, such as for the provision of services.

*Qatar.* Disguised employment relationships can affect the acquired rights of workers and have an influence on and be harmful for production, without specifying who is responsible for paying taxes and social security.

*Slovakia.* The employment relationship is disguised where the intention of the actors is to evade the employment relationship legislation and carry out illegal work and illegal employment, whatever the motivation for doing so, and where the nature of the relationship is intentionally incorrectly described so as to deprive certain workers of their rights and benefits.

*Spain.* CC.OO.: The subordinated employment relationship is often disguised; this is the case of the provision of illegal labour or false self-employment, or self-employed workers who are in fact dependent.

*South Africa.* BUSA: Sometimes. National legislation is not always effective in combating attempts by some parties to avoid the obligations of an employment relationship. The challenge in this regard should be more focused on creating awareness and on strong enforcement of legislation, rather than the actual wording of the legislation.

*Switzerland.* Yes, but with the same reservations expressed previously.

UPS: The concept of a disguised employment relationship implies that one or more parties structure the employment relationship with a view to disguising it to avoid legal obligations. What is meant here is fraud, which is unacceptable in all legal systems. This must not be confused with the fundamental freedom of the parties to conduct their affairs legally as they so wish. No provision should impinge upon this freedom. In this respect, an affirmative reply can be given.

*Syrian Arab Republic.* The employment relationship can be disguised under the conditions of an enterprise contract or other similar types of contract.

*Thailand.* ECOT: In the informal economy.

*Tunisia.* The employment relationship is disguised in certain cases in which there is an enterprise or subcontracting contract or a civil contract with a disguised self-employed worker.

*Ukraine.* FRU: In the Ukraine, certain workers are in practice excluded from the scope of the labour legislation. It would be necessary to formulate and apply at the national level, through social dialogue, a policy to afford protection to these workers.

FPU: To avoid cases of workers not being paid during a so-called trial period.

*United Kingdom.* CBI: Yes, if there is to be focused consideration by the Recommendation on disguised employment relationships.

TUC: In the United Kingdom, employers can modify a worker's status by simply inserting a clause in a contract to the effect that the company is not obliged to provide work and the worker is not obliged to accept work. The existence of such a clause will usually be enough to satisfy a court or tribunal that there is no mutuality of obligation and therefore no employment relationship, even where there is strong evidence to the contrary (including length of service, economic dependence, payment of maternity, holiday and sick pay, deduction of tax at source and the workers' own belief that they are employees). Courts and tribunals rarely look behind the wording of the contract to the circumstances in which the contract was entered into, or to the actual reality of the employment relationship.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania), CONSAWU (South Africa): Particularly in the case of contracts for self-employment and service contracts.

#### *Comments concerning negative replies*

*Australia.* The inclusion in the Preamble of provisions to address concerns about disguised employment relationships would not be desirable. In particular, it is necessary to avoid any provisions which would deem workers who are independent contractors in common law to be employees. Such provisions would limit individual choice and flexibility in choosing working arrangements. Where an employment relationship is disguised, workers have legal remedies, mostly before informal tribunals, which examine how their "true" work relationship should be classified. This approach enables the competent courts and tribunals to look beyond the contract to determine the true nature of the working arrangement and ensures protection against employers using sham arrangements to avoid their obligations. The label put on a working relationship is rarely determinative and the WR Act establishes remedies for workers engaged under sham arrangements which are in fact employment relationships to recover unpaid wages and other entitlements.

*Côte d'Ivoire.* CGECI: No, except for certain unscrupulous employers who disguise the real nature of work.

*Greece.* In such cases the employment relationship is defined by a court decision.

*India.* The case of disguised employment relationships does not necessarily have to be referred to in the Preamble of an ILO instrument clearly intended to protect workers and not employers.

*Japan.* Disguised employment relationships are surely undeniable, but probably rare; they do not apply to Japan.

*Lesotho.* ALE: We are referring here to fraud by one party which is hiding the truth, to which we are opposed as employers as the clear intent is to evade legal obligations. A clear distinction must be made between avoidance and evasion, as it is important not to stifle innovation.

*Mexico.* Irrespective of the objectives that are set, Mexico is also confronted by the consequences of ambiguous and disguised employment relationships.

*Morocco.* The employment relationship has to be determined in a legal framework and, once an employment relationship exists, the law is applicable.

*Panama.* CONEP: The question is controversial and intended to assume that an interpretation is already accepted.

*Portugal.* CIP: A disguised employment relationship is fraudulent, which is unacceptable. However, it is important not to prevent the parties from arranging their affairs in accordance with the law.

*Sri Lanka.* LJEWU: Generally employment relationships are not disguised except, as indicated above, in certain sectors, which leads to complications.

*United States.* USCIB: It would be inappropriate and misleading to refer to the case of “disguised” relationships in the Preamble without a clear explanation that the Recommendation seeks to respond to fraud intended to avoid legal obligations arising out of the employment relationship. Moreover, a vague definition of the term runs contrary to several of the elements in paragraph 25 of the report. It implies that the Recommendation would not be applicable to triangular employment relationships and there is a substantial risk that it would interfere with genuine commercial and independent contracting arrangements. A Recommendation intended to outlaw fraud would in any case interfere with the national and local legal mechanisms of member States.

*Views shared by the following employers’ organizations:* CNI (Brazil), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CEOE (Spain): Disguised employment involves one or more parties seeking to disguise the employment relationship so as to evade legal obligations. It consists of fraud, which is unacceptable in all jurisdictions. Employers do not deliberately support disguised employment. It is not avoidance (the worker, the employer or both can require matters to be arranged legally), but evasion (which raises the clear issue of the intent to disguise the relationship and/or to violate the national legislation). Mature parties structure their affairs in a manner that suits their needs, while taking fully into account and complying in full with the law. The ILO should take great care to ensure that any guidance does not encroach on the fundamental freedom to conduct affairs in a legal manner. CEC (Canada) adds: it is premature at this time to agree to the inclusion of a statement of this type in the Preamble before the issue of disguised employment is appropriately addressed by the Conference. If an instrument is developed that adequately addresses “disguised employment”, reference in the Preamble would be unnecessary.

#### *Comments concerning other replies*

*Costa Rica.* By means of many types of contracts of various kinds: commercial, civil, etc.

UCCAEP: We do not approve of employment relationships on the margins of the law, but within the law the parties must enjoy the greatest possible freedom to conclude contracts.

*Jamaica.* JEF: The employment relationship may be compromised by the presence of disguised employment, which exists where one or more individuals establish covert relationships primarily for the evasion of legal requirements. This practice, which is an outright violation of the law, cannot be condoned. Business operations must be carried out in a manner that is consistent with legal requirements.

*Portugal.* CGTP: In most cases, the employment relationship is disguised as a civil or commercial contract.

*Trinidad and Tobago.* ECA: The employment relationship becomes disguised when the law intended to provide protection to workers and employers becomes obsolete and does not fulfil its originally intended purpose.

**Qu. 3(2)** *Should the Preamble of the instrument:*

- (2) *consider that it is possible that the employment relationship exists but it is sometimes difficult to determine who the employer is, what rights the worker has and who is responsible for them?*

*Affirmative*

*Governments:* 58. Algeria, Argentina, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, France, Guatemala, Honduras, Iceland, India, Indonesia, Iraq, Italy, Kiribati, Lebanon, Mauritius, Mexico, Republic of Moldova, Mozambique, Netherlands, Niger, Peru, Philippines, Portugal, Qatar, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); SY (Finland); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); EFC (Sri Lanka); SN (Sweden); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CGTP, UGT (Portugal); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 16. Australia, Barbados, Croatia, Finland, Germany, Greece, Hungary, Japan, Kuwait, Latvia, Lithuania, Morocco, Norway, Panama, Romania, Serbia and Montenegro.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BCCI, BIA (Bulgaria); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); BUSA (South Africa); CEOE (Spain); ECOT (Thailand); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* FKTU, KCTU (Republic of Korea); PTUF (Romania); ZSSS (Slovenia); CSTT (Togo).

*Other*

*Employers' organizations:* UCCAEP (Costa Rica); JEF (Jamaica); UPS (Switzerland).

*Comments concerning affirmative replies*

*Argentina.* CGT RA: Certain cases are too vague and several combined sources of proof are necessary to establish the existence of the employment relationship.

*Barbados.* BWU: There must also be an emphasis on finding out who the employer is and what rights and obligations obtain in the employment relationship, especially in the case of subcontracting and where the liability, entitlements and responsibilities of the parties are unclear.

*Benin.* It is not always easy to determine employment relationships, particularly in the case of triangular relationships.

*Canada.* This aspect should be addressed in accordance with the principles indicated above.

*China.* When work is organized in different forms, it is difficult to determine who the employer is, and therefore who is responsible for complying with labour law obligations in relation to workers.

*Côte d'Ivoire.* CGECI: This is the case, especially, for temporary work, the provision or loaning of labour, piecework and certain imprecisely worded fixed-term contracts.

*Czech Republic.* CMKOS: It is uncertain whether a legally concluded relationship is in fact disguised as another type of contract or not, and because workers are often employed illegally without any evidence to prove who is/was their employer.

*Egypt.* This generally exists in the informal sector where the activity itself is not declared. The employer is often at an unknown address and the worker experiences difficulties in proving the existence of the employment relationship as there is no direct link with the employer. Sometimes this is due to a change in the workplace and the worker does not have information on the employer.

*El Salvador.* Because as a result of the new forms of contracting work through outsourcing, it is sometimes difficult to know who the employer is and to define the

nature of the responsibility conferred upon her or him by the law in relation to the worker.

*Eritrea.* This is a problem in many countries.

*Fiji.* The legislation and policies are too broad, which makes it difficult to determine specific details of the coverage of the employment relationship. While contract of service has been succinctly described and backed by case law, contracts for services by enterprises need to be defined in simple terms and their application clarified. The Employment Relations Bill makes it obligatory for the parties to enter into a written contract after the first month of employment and enumerates the basic matters that will constitute the contract of service.

*France.* This is particularly the case in relation to triangular employment arrangements.

CGT-FO: The cases of subcontracting and contracting out, which are often intended to replace the guarantees by which the employer is bound (in particular under the terms of collective agreements that he is required to apply) with inferior guarantees, the employer not being bound or covered by the same scope of the collective agreements. It should also affirm the need to ensure the responsibility of the principal, in particular with regard to occupational safety and health, concerning workers employed by subcontractors (extension of the employer's obligations to the principal).

*Gabon.* COSYGA: As the system for the provision of labour is not regulated, it is difficult to determine the real employer. This is compounded by subcontracting.

*Guatemala.* When enterprises act as intermediaries, workers tend to believe that they have no rights, that they do not have a contract or an employment relationship, even though the national legislation is clear.

*Honduras.* Confronted with this type of employment relationship, it is important for there to be a means of clarifying the employment relationship between the parties.

*Hungary.* MTOSZ: In Hungary, it is especially difficult to identify the employer accurately in the public sphere (public servant status) and in state-owned companies. In both cases, the difficulty arises because it is the public institution or company that is the employer, while the actual decision-making power resides with the State, which is the owner. This circumstance creates a considerable obstacle to collective bargaining, consultation with the employer and, in practice, to discussions between individual public servants or workers and their employer.

*India.* Such situations do not exist especially in triangular relationships.

ITU: The Government has a role to play in determining responsibility by providing an all-encompassing regulatory mechanism and enforcing the regulations strictly.

*Iraq.* Because the worker works with the employer and under his direction, which is not specified in certain employment contracts.

*Japan.* JTUC-RENGO: The law respecting workers in temporary employment agencies provides that these institutions have the status of employer and sets out the obligations of employers and the rights of workers. In the case of disguised employment, workers can obtain the same protection and rights as ordinary workers if they are able to establish their real situation, although in practice this is a fairly difficult and long process. In cases of subcontracting and commissioned labour, workers are in a difficult situation in Japan if they work under systems which are similar but not identical to those of ordinary workers. In their case, it is the civil law that is applicable, but which provides

inadequate protection. The civil law does not contain precise provisions which can provide a basis for determining the employer, the employer's obligations and the rights of workers.

*Lebanon.* The proposed instrument must examine who is responsible for the rights of the employee and indicate whether it is necessary to organize the relationship between the provider, the establishment and the user.

*Mauritius.* This may happen in a triangular employment relationship where there is a job contractor, a principal and a worker. If liability is not clearly defined, there may be uncertainty about the identification of the employer.

*Mexico.* Mexico intends to regulate this type of situation, which is becoming more widespread and in which intermediaries and labour suppliers are used to avoid the obligations set out in labour law or to deny workers certain rights in relation to labour and social security.

*Mozambique.* This situation exists in practice. It is necessary for the legislation to clarify and determine precisely the rights of workers and the entities which are liable for these rights.

*Niger.* This is the case in BTB and labour-intensive works, now managed by the Nigerian Agency for Work of Public Interest (NIGETI), as well as the provision of labour disguised as subcontracting.

*Peru.* The significant changes that are occurring in the productive organization of work have modified the profile of those covered by employment contracts: the decentralized organization of production favours the autonomy of the worker, while making the identification of the employer more complex and difficult, even though that does not negate the existence of an employment relationship.

*Philippines.* There is case law which assists in determining who the employer is, particularly in triangular employment relationships.

*Portugal.* It is important to address this hypothesis as in certain situations successive contracts of service make it difficult to identify the real employer.

CGTP: Particularly in the case of subcontracting.

UGT: Certain employment relationships today are very unstructured, or disguised under parallel forms of contracts, which makes the protection of workers difficult to ensure.

*Qatar.* It is necessary to clarify this matter in a transparent manner.

*Slovakia.* The instrument should mention that the interested parties may, through their acts, create opportunities and conditions for illegal labour and employment, and that it is therefore necessary to impose sanctions when such situations are detected.

*South Africa.* The situation is well documented in the report. The main focus of the Recommendation should be to address difficulties in the determination of employment relationships.

*Spain.* This would theoretically be possible.

CC.OO.: To guarantee the rights of workers, it should be presumed until proven otherwise that collaboration constitutes an employment relationship. The generalized application of strategies for the subcontracting of activities and services, and the possibility that responsibilities may be passed around between user and subcontracting

enterprises can result in the creation of networks of enterprises and a certain confusion as to the status of partner enterprises and the identity of the employer.

*Sri Lanka.* CWC: As a consequence of globalization and the changing labour market situation, the employment relationship between workers and employers is becoming increasingly blurred through contract work, casualization and irregular employment patterns, that is by the expansion of the informal sector.

LJEWU: Although difficult, it is necessary for the competent authority or the courts to identify the employer in all cases.

NWC: The direct employer or user company should be held liable for: (a) minimum wages; (b) superannuation benefits, such as a provident fund; and (c) service gratuity payments.

*Switzerland.* But this is a question to which an implicit reply has already been given under 1(a) in so far as it is an issue of the definition of the scope of the legislation. The maintenance of this reference in the Preamble would not therefore appear to be absolutely necessary.

*Syrian Arab Republic.* Because the relationship is sometimes unclear and not based on documents.

*Trinidad and Tobago.* Very often employees are not sure of their rights as workers.

ECA: It is important that the mechanism developed to determine who is the employer and who is the worker is flexible and can be revised when necessary.

*Tunisia.* This difficulty could emerge in the context of subcontracting under which secondary enterprises provide labour or workers employed by an enterprise (the service provider) perform work for a third party (the user enterprise) to which their employer provides labour or services.

*Ukraine.* FRU: It is currently difficult to determine in such cases who the employer is, which has given rise to disputes that are difficult to resolve relating to the rights of workers and of the persons responsible, as the legislation is inadequate and the interpretation of existing provisions is ambiguous.

FPU: As the scope of the liability of the founder, the director-general, the executive director, etc., are still not clear for workers.

*United Kingdom.* This question combines concepts relating to a number of separate, potentially difficult issues which may not necessarily be related.

*Zimbabwe.* The instrument should indicate that this type of situation exists. To avoid ambiguity, all employment contracts must clearly spell out the name of the employer and the rights of the employee.

#### *Comments concerning negative replies*

*Australia.* The rights and duties attached to the employment relationship are clearly set out in the relevant legislation. Where a triangular working relationship exists, it is established in common law that the labour provider is the employer. However, where this is part of a sham arrangement, courts and tribunals look behind the formal relationship to determine the true nature of the arrangements of the parties, applying the well-established common law tests.

*Bangladesh.* BEA: It is not necessary to include such details in the Preamble. This may lead to legal complications.

*Barbados.* Sometimes, even where the employment relationship exists, it may be difficult to establish that it in fact exists or to determine who the employer is, what rights the worker may have and who may be responsible for these rights.

*Colombia.* ANDI: More precisely, the employment relationship presupposes the existence and identification of the component parties. National legislation establishes suitable mechanisms for determining the existence of an employment relationship and identifying the parties in cases of doubt.

*Croatia.* There cannot be a situation where an employment relationship exists, but the identity of the employer is not known. An employment relationship presumes the existence and identification of the parties to the relationship, if need be through a judicial process. If there is no employer or employee, there is no employment relationship.

*Denmark.* DA: This does not make sense. Where an employment relationship exists, there is also an employer, the rights can be determined, etc.

*Finland.* In long subcontracting chains, it may be difficult to determine who the employer is. However, such cases are the exception rather than the rule.

*France.* MEDEF: In long subcontracting chains, it may be difficult to determine who the employer is. However, such cases are the exception, rather than the rule.

*Germany.* It is sufficient to address this issue under the heading “Content of the instrument”.

*Greece.* This can only occur in cases of subcontracting and the employment relationship is also defined by court decisions.

*Guatemala.* CACIF: It is impossible to mention a situation in which an employment relationship exists with the employer being unknown. It has to be possible to determine the existence of such a relationship, even if a court decision is necessary.

*Iceland.* VSI: Establishing that there is an employment relationship has to be based on the existence and identification of the parties to the relationship, if necessary through a judicial process. If there is no employer or employee, there is no employment relationship. Furthermore, normally all regulations provide obligations for the employer to inform the worker of the elements of the contract, including the regulation which applies to the employment relationship.

*Japan.* In general, if an employment relationship exists, then an employer has been determined. This situation does not concern Japan.

*Republic of Korea.* FKTU and KCTU: It would not be necessary to state in the Preamble of an ILO instrument that there are difficulties in ascertaining the responsibility and rights of employers and workers. Workers who are involved in a triangular employment relationship may be engaged apparently in disguised indirect employment by the employer in an attempt to avoid the obligations of the employer, or in a genuine triangular employment relationship. Secondly, where a triangular relationship exists in substance, it is nevertheless possible to divide the employers’ responsibility among the persons involved, or to call on all of them to take joint responsibility.

*Kuwait.* The employment relationship can be demonstrated through all types of evidence, including statements by witnesses. Furthermore, it is not admissible for an employment relationship to exist without the employer being known. If there is no employer or employee, the employment relationship cannot in any case exist.

*Latvia.* According to the Labour Code, there is a clear definition and a distinction is made between the employer and the worker; case law does not raise problems in this regard.

*Lesotho.* ALE: It is not acceptable that there should be a situation in which the identity of the employer can be said to be unknown and so far the dispute resolution mechanism in Lesotho has handled such cases adequately based on the facts and the law. There is therefore no need to refer to this problem in the Preamble. There can only be one employer in a single employment relationship, and the rights and duties flow from such a relationship.

*Lithuania.* Under the Labour Code of Lithuania, an employment contract shall be deemed to be concluded where the parties have agreed on the conditions of such a contract. It is clear who an employee is.

*Morocco.* The rights and obligations of the two parties must be clearly determined in the national legislation.

*Panama.* The law is clear and provides for appropriate procedures in each case.

*Portugal.* CIP: It is impossible for an employment relationship to exist in the absence of an identified employer. Furthermore, national legislation normally obliges employers to inform workers of the elements of the contract.

*South Africa.* BUSA: It is legally clear as to who the employer is. In rare circumstances, however, it may be factually difficult to trace the employer in order to enforce worker rights.

*Switzerland.* UPS: It is difficult to refer to an employment relationship where the identity of the employer is unknown. Such a provision would not contribute to clarifying the situation and should not be included in the Preamble.

*Togo.* CSTT: The employment relationship needs to be clearly defined.

*United Kingdom.* CBI: Difficulties in establishing the employer are resolved by national courts. It is not necessary to cover this issue in the Preamble.

*United States.* USCIB: This proposal contradicts the decision in 2003 not to define in the Recommendation the substantive elements of the employment relationship so that it does not interfere with national systems, contracts and commercial arrangements and does not address the concept of the triangular employment relationship. Such a text would give an overly broad scope to the Recommendation by assuming that an employment relationship needs to be found in every situation and that someone must be responsible for the “employees” in that expanded definition. This appears once again to be an attempt to develop the Recommendation into an instrument on the triangular employment relationship.

*Views shared by the following employers’ organizations:* CNI (Brazil), BCCI, BIA (Bulgaria), CEC (Canada), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): There cannot be a situation that an employment relationship exists but the identity of the employer is not known. Establishing that there is an employment relationship has to be based on the existence and identification of the parties to the relationship; if need be, through a judicial process. If there is no employer or employee, there is no employment relationship. There can only be one employer in a single employment relationship and any rights the worker has arising from that employment relationship are that employer’s responsibility. There may also be cases where a worker is in more than one employment relationship, each of which has

associated obligations and expectations. The existence of more than one employment relationship, involving a legal relationship between the two parties in each case, does not affect the nature of the obligations and expectations of each party. In addition, CEIF (Cyprus), IBEC (Ireland), CONEP (Panama) and CEOE (Spain) add: furthermore, normally all regulations provide obligations on the employer to inform the worker of the elements of the contract, including the regulations which apply to the employment relationship.

*Comments concerning other replies*

*Costa Rica.* UCCAEP: The identity of the employer must always be known and the employer has to comply with the legislation. Without an employer or an employee, what employment relationship would there be?

*Jamaica.* JEF: Difficulty in determining the existence of an employment relationship may arise where there is not enough understanding of the relationship. As such, clarity is required on the relationship. In addition, employment relationships are guided by national legislation as they relate to workers' rights and, while being similar, are not necessarily identical in all entities in a particular area.

*Switzerland.* UPS: It is difficult to talk about employment relationships when the employer's identity is not known. Such wording would not help to clarify matters and should not figure in the Preamble.

**Qu. 3(3) Should the Preamble of the instrument:**

- (3) *consider that, as a result of these difficulties, workers who should be protected within the framework of an employment relationship may in practice be excluded from the scope of the labour legislation and consequently deprived of protection?*

*Affirmative*

*Governments:* 62. Algeria, Argentina, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Fiji, Finland, France, Guatemala, Honduras, Iceland, India, Indonesia, Iraq, Italy, Kiribati, Latvia, Lebanon, Mauritius, Mexico, Republic of Moldova, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BCCI, BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); SY (Finland); MEDEF (France); CACIF (Guatemala); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); EFC (Sri Lanka); SN (Sweden); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS

(Mozambique); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 12. Australia, Barbados, Eritrea, Germany, Greece, Hungary, Japan, Kuwait, Lithuania, Morocco, Panama, Serbia and Montenegro.

*Employers' organizations:* CNI (Brazil); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); BUSA (South Africa); CEOE (Spain); ECOT (Thailand); USCIB (United States).

*Workers' organizations:* ASI (Iceland); GEFONT (Nepal); ZSSS (Slovenia); CWC, LJEWU (Sri Lanka); CSTT (Togo).

*Other*

*Employers' organizations:* BEA (Bangladesh); UCCAEP (Costa Rica); UPS (Switzerland).

*Comments concerning affirmative replies*

*Argentina.* CGT RA: Case law today indicates the criteria to be used in determining the existence of an employment relationship.

*Bulgaria.* BCCI: It may be preferable to indicate that workers who are deprived of the protection of an employment relationship because of fraud should be entitled to have that relationship recognized and thus benefit from the rights arising therefrom.

*BICA:* This statement should be included as the court procedures are too long and implement poorly the legislation that has been developed.

*Canada.* The phrase should however be reworded in a less negative manner, such as “recognizing that there are protections tied to the employment relationship”.

*China.* In China, it has not been clarified whether the labour legislation is applicable to women domestic workers, insurance representatives, etc.

*Côte d'Ivoire.* CGECI: This is the objective of the proposed instrument.

*Croatia.* The text should indicate that workers who are denied the protection of an employment relationship through fraud should be entitled to have that relationship recognized and to benefit from the rights arising therefrom.

*Czech Republic.* CMKOS: This provision fully corresponds to the situation in the Czech Republic.

*Egypt.* Legislation often excludes certain categories from the scope of its application and supervision is therefore not carried out of the employment relationship covering these categories.

*Finland.* In Finland, the concept of the employment relationship is by its nature a compulsory provision. In practice, it can lead to a legal relationship being construed as an employment relationship by the courts even if the parties have styled their contract as something other than an employment contract.

*France.* MEDEF: Yes, if it is only a disguised employment relationship.

*Guatemala.* It is for this reason, among others, that it is necessary to review national law and practice so as to prevent workers being denied the legal protection through which they can claim their rights.

CACIF: Workers engaged in a relation of dependence are entitled to establish the existence of such a relationship and benefit from the related rights.

*Honduras.* Such a wording would help States to gain the necessary political will to ensure compliance with the law and would strengthen the various means used for this purpose, with the participation of the social partners.

*India.* CITU: The current neo-liberal economic regime tends to promote informal economic activities with a view to pursuing profits. As a result, vast sections of workers are excluded from any protective legislation due to deliberate ambiguity in the employment relationship. However, all categories of workers must be protected.

*Italy.* CGIL: This is the case in Italy of so-called project workers, who are not covered by collective agreements, in contrast with ordinary employees who are in a subordinate relationship with the employer; project workers are provided with a lower level of social benefits even though in general they perform the same work.

*Japan.* JTUC-RENGO: As employment relationships and work arrangements are diversified, personal contractors and commissioned labour are on the rise. As a result, a growing number of workers do not receive appropriate protection under the Labour Standards Law and the Occupational Health and Safety Law.

*Republic of Korea.* FKTU, KCTU: In this respect, the Private Employment Agencies Convention, 1997 (No. 181), which addresses the minimum rights of workers engaged in indirect employment, has not been sufficient to extend this protection to workers indirectly employed under various disguised arrangements in triangular relationships, such as dependent workers disguised as self-employed workers, separate contractors or service providers, and who are therefore denied the protection afforded by the labour legislation.

*Latvia.* Such a reference would be relevant in the case of illegal employment, where it is difficult to prove the existence of the employment relationship.

*Lebanon.* The legal protection concerned is regulated by national law in each country, which determines the framework for the employment relationship and the nature of the protection which could be afforded for such relationships.

*Lithuania.* LDF: Recourse to civil and commercial agreements deprives workers of any social protection.

*Mauritius.* This is why it is important for member States to refocus on the scope of the employment relationship.

*Mexico.* In a globalized world, the trend for less protection for employees is regulated by several factors, including the rapid changes on the labour market itself, which are modifying the structure of employment.

*Mozambique.* Such cases exist in Mozambique and tend to give rise to labour disputes, which could be prevented by a clear and precise instrument.

*Netherlands.* FNV: Apart from the difficulties mentioned under 3(1) and 3(2), the Preamble should consider that, in view of the ongoing and extensive changes in the labour market and in the organization of work, it is desirable not only to evaluate and, if

necessary, adjust the legal scope of the employment relationship, but all other laws establishing rights for workers as well.

*Philippines.* While the Labour Code contains certain provisions for the protection and welfare of domestic workers, there is still a clamour to push for the adoption of new legislation, particularly for the protection of this category of workers.

*Portugal.* The autonomy of labour law in relation to civil law is rightly based on the protection of the most vulnerable element of the contractual relationship, which tends to be inequitable.

*Qatar.* Failing to address the rights of disguised workers and their protection harms the process of production and development.

*Romania.* In practice there are situations where the employer concludes civil agreements for activities which involve work for over two hours a day, instead of individual labour contracts.

*South Africa.* In view of the importance of the intended protection, this framework may be meaningless if it can be circumvented and it would be hollow if it were not enforceable by law. To prevent such a situation, it is fairly essential to investigate this protection in practice.

*Sri Lanka.* EFC: A Recommendation should provide for equal coverage in law and practice for all employees and employers.

*Switzerland.* But this is an issue which has already been implicitly addressed under (1)(a) as the issue relates to the definition of the scope of application of the law. The maintenance of this text in the Preamble does not therefore appear to be absolutely necessary.

USS/SGB: It is essential for the ILO to adopt international labour standards which offer guidance to national policy-makers on how to afford real protection to workers who are victims of such common situations, as described above, involving the lack of protection for workers under the labour legislation and social security.

*Trinidad and Tobago.* It is essential to guard against the possibility of workers falling through the safety net provided.

ECA: The mechanisms used to determine who is a worker and who is the employer are not as efficient as they should be and as a result many are deprived of protection. There is a need to improve the efficiency of these mechanisms (collective bargaining, conciliation and arbitration).

*Tunisia.* The difficulties referred to are such as to exclude from the scope of the labour legislation certain categories of workers, and particularly those who cannot prove the existence of an employment relationship and who are consequently denied the protection afforded by the labour legislation.

*Ukraine.* FPU: To secure the application of the national legislation.

*United Kingdom.* CBI: All workers are entitled to have the employment relationship recognized and be afforded certain protection.

*Zimbabwe.* The instrument should cover this aspect and emphasize the importance of labour inspection in ensuring that the workers concerned are protected in practice.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), BWU (Barbados), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), UGT (Portugal), COSATU (South Africa), TUC

(United Kingdom): Unfortunately, the situations described in questions 3(1)(a), (b) and (c) are fairly widespread and expanding rapidly. It is therefore critical for the ILO to adopt international labour standards which provide clear guidance to national policy-makers on how to extend protection to workers in all these various situations.

*Comments concerning negative replies*

*Australia.* Where the courts determine that the employment relationship exists, the entitlements and protections provided under the WR Act apply. Workers are entitled to seek such a declaration from the courts at any time.

*Barbados.* They may in practice be excluded from the scope of such employment relationships and consequently deprived of protection.

*Denmark.* DA: This sentence seems to broaden the topic beyond the issue of disguised employment and to promote employment relationships instead of other legal contractual relationships.

*Eritrea.* The Preamble does not need to mention this aspect. Once it is established that it is difficult to define who workers are, it is natural to face problems in protecting their rights.

*Germany.* This issue should be addressed under “Content of the instrument”. It should clearly be ensured that with such regulations it is not possible to circumvent the law, for example by formulating the contract in a certain manner, thereby preventing the application of labour law to a particular category of workers in view of the definition of the concept of employee.

*Greece.* Workers are protected by the labour inspectorate and the civil courts.

*Japan.* Although it is true that determining the status of workers may involve some complications, workers who are finally identified as such are entitled to protection under the labour legislation. Consequently, this question may not be applicable.

*Kuwait.* The Labour Code in the private sector applies to all categories of employees on the labour market, with the exception of private domestic workers and similar workers.

*Morocco.* The labour legislation must apply to persons bound by an employment contract.

*Nepal.* GEFONT: Such difficulties may arise, but the workers concerned must be protected collectively through unions.

*Panama.* In Panama, this situation is addressed by section 737 of the Labour Code.

*Serbia and Montenegro.* Member States should ensure that the concept of the employment relationship is clearly defined and unambiguous so that employees can benefit from adequate rights and protection.

*South Africa.* BUSA: The answer is a qualified no, as difficulties do exist and workers must be protected by national laws and policies. However, South African legislation, because it was negotiated with the social partners, is tailored to address these concerns.

*Sri Lanka.* CWC: The law covers a broad range of employment relationships and the protection concerned is established, even though certain ambiguities remain.

LJEWU: The worker should not be deprived of protection, but instead the authorities (government) should strive to link employment relations with prevailing possibilities.

*Thailand.* ECOT: With the exception of those in the informal economy.

*Togo.* CSTT: All categories of workers must be taken into account.

*Views shared by the following employers' organizations:* CNI (Brazil), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), VSI (Iceland), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain): This viewpoint is too conclusive for all the reasons presented above. Nevertheless, it may be appropriate to state that workers who are denied the protection of an employment relationship through fraud should be entitled to have that relationship recognized and thus benefit from the rights arising therefrom.

#### *Comments concerning other replies*

*Bangladesh.* BEA: The protection of workers' rights should usually be a major part of the instrument. Such protection can be provided through labour legislation.

*Costa Rica.* UCCAEP: All workers should be aware of their rights. If they cannot assert them, they should have access to appropriate remedies.

*Spain.* Such a reference could be envisaged.

*Switzerland.* UPS: Such a provision would result in more confusion than clarification and should not be included in the Preamble.

#### **Qu. 3(4) Should the Preamble of the instrument:**

- (4) *consider that Members should develop and implement a national policy of reviewing the application of labour legislation periodically, in order to ensure that the workers referred to above enjoy adequate protection, taking also into account the gender dimension?*

#### *Affirmative*

*Governments:* 66. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, China, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Sudan, Suriname, Sweden, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BEA (Bangladesh); BCCI, BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); CACIF (Guatemala); CIE (India); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 6. Australia, Canada, Costa Rica, Hungary, India, Switzerland.

*Employers' organizations:* CNI (Brazil); BIA (Bulgaria); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); DA (Denmark); EK, SY (Finland); MEDEF (France); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); USCIB (United States).

*Workers' organization:* VTML (Finland).

#### *Other*

*Employers' organizations:* CEIF (Cyprus); UCCAEP (Costa Rica); JEF (Jamaica).

#### *Comments concerning affirmative replies*

*Argentina.* However, in view of the lack of resources in many States, the adoption of such a policy should only be encouraged, and should not be obligatory.

*CGT RA:* The possibility to appeal to a specialized judicial body should be guaranteed in all cases.

*Bangladesh.* BEA: National policy may be formulated to review the application of labour legislation periodically. The term "adequate", which is subjective and as such may create confusion, should be avoided.

*Belgium.* The national policy should cover both the adaptation of the concept of workers to the real social and economic situation and supervision of its application, for example by the labour inspectorate, as well as by social security institutions.

*Bulgaria.* BCCI: It may be appropriate to indicate that it would be useful to periodically review the application of labour legislation to ensure that workers enjoy in practice the protection provided by the law.

*China.* The implementation of a national policy of reviewing the application of labour legislation periodically would allow member States to fulfil their duties on the basis of their respective situations.

*Côte d'Ivoire.* CGECI: It would also be necessary to establish intervals which are not an additional constraint and which might therefore discourage investors.

*Croatia.* It would certainly be useful to review at appropriate intervals the application of labour legislation to ensure adequate protection for workers. However, the

concept of “adequate protection”, which is subjective and could create confusion, should not be used in the Preamble. Reference should instead be made to the need for access to mechanisms to discover, adjudicate and remedy cases of fraud.

*Czech Republic.* CMKOS: This would certainly be in the interest of member States, as informal work and dependent work in an arrangement other than an employment relationship have a negative impact on fiscal policy and insurance systems.

*Egypt.* That should be undertaken by the labour inspection services, which supervise the application of labour legislation regularly, as well as through the continued updating of ministerial orders.

ETUF: Subject to consultation and coordination between the social partners.

*El Salvador.* It is essential to defend the principle of equality of opportunity by taking into account compliance with labour rights, and particularly the rights of women workers.

*Eritrea.* The rapid changes in the international labour market and the development of communication technologies are resulting in a gap that States have to overcome by periodically reviewing their labour legislation.

*Finland.* SAK, STTK, AKAVA: The spirit of genuine tripartism means that the discussions should be continuous.

*Gabon.* COSYGA: The most vulnerable categories of the population are very frequently women and young persons.

*Germany.* In its present wording, the question is acceptable if it consists of a general statement. However, it is still necessary for each of the instruments to find a wording which could also be used in a lasting manner in the national labour legislation. In view of the uncertainties to which they may give rise, frequent changes in the law would do more harm than good to the categories concerned.

*Greece.* Greece already has such a national policy, which also takes into account the gender dimension.

*Guatemala.* Such a reference would provide a basis for opening the debate on the forms of discrimination in employment encountered by women, young persons, indigenous persons and persons with disabilities, and it would promote the adoption of measures intended to guarantee the access of these categories of persons to decent work and to bring an end to such discrimination definitively. It would also provide a basis for reviewing the extent to which the legislation that is in force is applied and the effectiveness of the means of supervising this application.

CACIF: It is appropriate to review periodically the application of labour legislation. However, the term “adequate protection” is ambiguous and subjective. Reference should instead be made to the need for access to procedures for the denunciation, investigation and repression of fraud.

*Honduras.* Member States are under the obligation to formulate a policy to monitor the application of labour legislation with a view to the implementation of ILO Conventions Nos. 100, 111 and 183.

*Iraq.* By emphasizing the establishment of supervisory machinery by the ILO to ensure that these policies are appropriately applied.

*Japan.* Labour legislation should always be reviewed as the need arises, and the importance of gender issues must also be taken into account in the process. However, the frequency of reviewing must depend on the situation of each country.

*JTUC-RENGO:* Labour laws should be reviewed in order to ensure adequate protection for workers. In reviewing labour laws, not only their applicability, but also their coverage and the gender dimension should be adequately taken into account.

*Republic of Korea. FKTU, KCTU:* Disguised employment relationships are continuing to increase. Even if a Convention or a Recommendation is adopted and protective laws are introduced in countries based on the new instrument, there is a need for a regular survey of the situation with regard to the effectiveness of the law. On the basis of these efforts, States should develop and implement a range of policies aimed at improving the situation and taking into account, among others, the gender dimension.

*Kuwait.* There is no objection to including this point in the Preamble or in the text of the instrument. However, the term “adequate protection” could cause confusion and should therefore be modified during the discussion.

*Latvia.* The national policy of equal treatment and protection of the various categories of workers should be reviewed periodically, particularly taking into account the effects of globalization on employment in the modern world.

*Lebanon.* In view of the continued progress in the concept of the employment relationship, it is natural to formulate and implement labour legislation periodically so as to ensure adequate protection, in accordance with national conditions, for the categories who do not have adequate protection or any protection at all, taking into consideration the gender dimension.

*Lesotho. ALE:* The application of labour legislation should be reviewed periodically to ensure that workers enjoy the protection provided for in law, that this should be for all workers and not only those in disguised employment relationships. Hence there is no need for it to be singled out in the Preamble.

*Mauritius.* The world of work is changing fast and this should not be addressed in isolation on a sectoral basis. There is need for a national policy to reflect on the changes to be able to adjust labour legislation to the work environment in a global manner.

*Mexico.* It is vitally important to review labour legislation, particularly with regard to complex situations in which the worker is not able to assert her or his rights effectively, namely where the employment relationship is ambiguous or disguised. Any solution should be based on a balance between the parties, which implies recourse to social dialogue to obtain a basic consensus.

*Morocco.* The gender issue must be taken into consideration in the protection of workers.

*Netherlands. FNV:* Consideration should be given to reviewing not only the application of labour legislation, but also its scope. The gender dimension is crucial given the high percentage of women engaged in flexible and/or atypical work arrangements and in categories of work dominated by such arrangements (such as domestic work, cleaning services).

*Panama.* Such an indication would be very welcome in the interests of the workers.

*Peru.* Such a periodic review would make it possible to adapt labour legislation to the new reality of productive entities, in accordance with the specific characteristics of

the country, and to review the characteristics of women's employment and determine whether a specific problem concerns women more particularly.

*Philippines.* As employment relationships are shaped by internal and external factors, such as the effects of globalization, labour laws become vulnerable to reforms. Where labour market trends and developments know the proper enforcement of laws, then legislative review is inevitably necessary to address issues such as the ambiguity of employment relationships.

*Portugal.* In view of the constant changes in the economic situation and that of enterprises, and the impact of these changes on the employment relationship, such a periodic review could be useful in the present context, as indicated in point 5 of the common statement of the experts participating in the Meeting of Experts on Workers in Situations Needing Protection (May 2000). In this context, Portugal will endeavour to systematically promote equality and combat discrimination, particularly against women, also taking into account the Community provisions for the Member States of the European Union.

UGT: In view of the continuing changes on the labour market and the new forms of work organization, it is clearly important to review labour legislation, although without prejudicing certain principles, such as stability and the acquired rights of workers.

*South Africa.* As the employment relationship evolves over time, in order to ensure maximum protection for workers there is a serious need for a regular, well-structured and planned legislative review process.

BUSA: Members should conduct periodic reviews of their national policies in order to take account of changing circumstances and priorities in a globalized economy. However, these reviews should not just focus on protection for workers, and women workers in particular.

*Spain.* CC.OO.: In view of the rapid changes in the labour market and the organization of work and the increasing complexity of the strategies adopted to circumvent the obligations that are in force, such a periodic examination appears to be necessary. It should reveal the means adopted to circumvent the duties and rights of enterprises and workers so that the scope of the legislation can be adapted.

*Sri Lanka.* EFC: It is necessary to take into account the ongoing and extensive changes in the employment relationship in the context of social and economic change.

CWC: This point is important given the high percentage of women engaged in the active population.

LJEWU: Any national policy on employment relations in the context of Sri Lanka has to be in the form of a law which can be implemented in the event of a breach for as long as the law is in operation.

*Switzerland.* USS/SGB: Adequate protection should include the rights contained in international labour standards and in labour and social protection legislation. The review should not be limited to the application of labour legislation, but should also analyse its scope, with a view to affording better protection by taking into account the constant changes in the nature of work. The gender dimension is essential in view of the high proportion of women engaged in flexible and atypical work arrangements.

*Thailand.* ECOT: It should be ensured that the law is strictly enforced; the number of labour inspectors is inadequate.

*Togo.* CSTT: Such a measure would make it possible for member States to adapt labour legislation constantly to changes in the world of work.

*Trinidad and Tobago.* Periodic review is needed to take into account new developments in the employer/employee relationship, as well as the emerging ramifications of the gender dimension.

ECA: Such a policy should be prescriptive rather than dictatorial and should allow countries freedom in its design to take into account their own particular needs and circumstances.

*Tunisia.* The formulation and implementation of such a national policy is necessary to ensure greater coverage of workers by the labour legislation.

*Ukraine.* FPU: Taking into account the continuing changes in market relations.

*Zimbabwe.* The instrument should encourage Members to develop and implement a national policy that strengthens labour inspection, with particular emphasis on the gender dimension.

*Views shared by the following workers' organizations:* ACTU (Australia) BSSF (Bangladesh), CITUB (Bulgaria), CLC (Canada), ETUF (Egypt), CGT-FO, CFDT (France), USAM (Madagascar), CLTM (Mauritania), COSATU (South Africa), TUC (United Kingdom): Adequate protection should include the rights provided for in international labour standards, national labour legislation and social protection. Serious consideration should be given to reviewing not only the application of labour legislation, but also its scope, since this will allow better protection through the accommodation of changes in the nature of work and work arrangements and will respond to attempts to disguise the employment relationship. The gender dimension is crucial given the high percentage of women engaged in flexible and atypical work arrangements.

#### *Comments concerning negative replies*

*Australia.* It would not appear appropriate to add further obligations to review labour regulation. The WR Act already requires the President of the Australian Industrial Relations Commission to issue an annual report which must be placed before Parliament. This report includes significant cases in which the application of the Act and the protection that it provides are considered. There is a similar obligation on the President of the Human Rights and Equal Opportunity Commission and a number of consultative committees periodically review the application of labour legislation with the participation or chaired by the Federal Minister for Employment and Workplace Relations.

*Bulgaria.* BIA: This viewpoint is too conclusive for all the reasons set out previously.

*Canada.* This point should be addressed within the body of the instrument and rewritten as follows: "Members should review the application of labour legislation periodically in order to ensure that workers with employment relationships are provided with, and receive, adequate protections."

*Costa Rica.* Other instruments already provide for this possibility.

*Denmark.* DA: This could be possible only in regard to disguised employment relationships.

*France.* MEDEF: It is not the review of labour legislation which needs to be provided for, but compliance with its application. The gender dimension is totally foreign to the issue.

*Japan.* NK: Generally speaking, the review of labour legislation and social dialogue as a means of developing and implementing a national policy should be conducted from time to time in line with changes in the national situation. However, it is not necessary to review the application of labour legislation periodically, nor to reaffirm the importance and utility of social dialogue only for the purpose of a particular category of workers.

*India.* The national policy of reviewing labour laws is a continuous process.

*Portugal.* CIP: This issue is highly subjective and could create confusion.

*Switzerland.* The other elements referred to are material factors which play a central role in this issue. However, the establishment of a national policy is certainly not useful and in any case, with regard to Switzerland, would have the result of circumventing the legislative and democratic process and it would be beyond its capacities in personnel terms to establish and ensure the application of such a policy. The principles of a national policy have been established in the Code of Obligations and the labour legislation. This policy can be adapted at the parliamentary level, in consultation with the social partners.

UPS: Such a procedure, which would go well beyond the intended objective, would be extremely burdensome and offer dubious results. At the national level, such an approach is not compatible with our legislative process.

*United States.* USCIB: Such a provision would not be inappropriate, but it would appear to be overly prescriptive to qualify or otherwise define the degree of protection. Furthermore, the term “adequate protection” is subjective and could add confusion, rather than clarifying the issue.

*Views shared by the following employers’ organizations:* CNI (Brazil), VSI (Iceland): The term “adequate protection” is subjective and could create confusion. It would be better to refer to the need for access to and mechanisms to discover, adjudicate and remedy cases of fraud.

*Views shared by the following employers’ organizations:* CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama): It may be appropriate to state, either in the Preamble or the text of the instrument, or a document produced by the Conference, that there is merit in periodically reviewing the application of labour legislation in order to ensure that workers enjoy adequate protection. The term “adequate protection” is subjective and could add confusion. Reference should be made instead to the need for access to mechanisms to discover, adjudicate and remedy cases of fraud. Workers adversely affected by fraudulent initiatives are merely one type of worker at issue. There is no unique value in singling those workers out and thereby limiting any periodic review to those workers, disregarding other workers and parties affected in the world of work, including employers and commercial establishments generally. It is therefore recommended that this notion be excluded from the Preamble, but it may be presented for discussion to the Conference.

*Comments concerning other replies*

*Costa Rica.* UCCAEP: Ministries of labour are under the obligation to ensure, through inspections, that labour legislation is duly applied and that the protection afforded is provided in practice. The notion of “adequate” protection is subjective and should not be retained.

*Jamaica.* JEF: This question makes the assumption that such review mechanisms are not in place, and is therefore too general in its assumptions.

**Qu. 3(5)** *Should the Preamble of the instrument:*

- (5) *reaffirm the importance and the utility of social dialogue as a means of developing and implementing a national policy to protect such workers?*

*Affirmative*

*Governments:* 67. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BCCI, BIA, BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); EK (Finland); CACIF (Guatemala); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); KOZ SR (Slovakia); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 6. Croatia, Hungary, India, Kuwait, Slovakia, Switzerland.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CEIF (Cyprus); MEDEF (France); SY (Finland); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK

(Japan); ALE (Lesotho); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); CBI (United Kingdom).

*Other*

*Government: 1. Australia.*

*Employers' organization: DA (Denmark).*

*Comments concerning affirmative replies*

*Argentina.* CGT RA: Social dialogue is essential to address and resolve problems in the world of work.

*Australia.* ACTU: In view of the current conditions, it is becoming more difficult in Australia to have meaningful input into policy development in a tripartite setting.

*Benin.* Taking into account the importance of social dialogue and its essential nature in bargaining in labour matters.

*Belgium.* Social dialogue is also essential in appropriately determining the nature of the employment relationship in specific sectors in view of the practical knowledge of the social partners in the sectors concerned.

*Bulgaria.* CITUB: Yes, because these are issues concerning tripartite cooperation between the parties.

*China.* The consultative process of tripartite dialogue is an important means of harmonizing the employment relationship.

*Costa Rica.* All social sectors, both political and economic, should be able to participate in social dialogue, which should however be aimed at the formulation of a labour culture and should not merely amount to a succession of demonstrations.

*Côte d'Ivoire.* CGECI: This is beneficial for the world of work.

*Czech Republic.* CMKOS: History shows that non-functioning or non-existent social dialogue leads to social conflict and can also jeopardize democratic systems. Taking into account the negative effects of a globalized economy, the pursuit of profit and the growing pauperization of the middle class in Europe, it is necessary to recall and ceaselessly promote the importance and need for the existence of social dialogue.

*Egypt.* It is essential to consult employers and workers in all fields related to work and to adopt tripartite dialogue for the formulation of all national policies for the protection of the social partners, in accordance with the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

ETUF: Provided that consultation and coordination occurs between the social partners and social dialogue is strengthened to clarify these policies, so that they can be implemented on a realistic and flexible basis.

*El Salvador.* To be effective and adapted to the needs of the country, any policy for the protection of workers has to be formulated on the basis of active and tripartite social dialogue.

*Eritrea.* Any change in labour policy or legislation affects employers, workers and the government, and their participation in dialogue is therefore important.

*France.* The effective participation of the social partners is a prerequisite for the implementation of measures relating to the employment relationship.

*Greece.* In Greece, social dialogue is developed and implemented through collective bargaining and the National Committee for Employment, with the participation of representatives of the Government, workers and employers.

*Guatemala.* It should be ensured that all measures intended to promote cooperation and agreement are genuine.

CACIF: Social dialogue should be mentioned as the principal instrument for the discussion of policies on this issue.

*Honduras.* Problems at the national level can be resolved through social dialogue.

*India.* CITU: Social dialogue is undoubtedly a useful instrument, but the formulation and implementation of appropriate national policies for the protection of workers depends more on the political will of the government. In a neo-liberal world, governments, in collusion with employers, are seeking to circumvent labour law through the dismantling of inspection machinery as a policy of so-called investment friendliness.

*Indonesia.* Through social dialogue, policies for the protection of both workers and employers can be concluded on a basis of tripartite agreement.

*Japan.* Social dialogue is important and effective for developing and implementing a national policy. In Japan, councils composed of members representing employers, workers and the public interest advise the Government in planning and making policy decisions for the protection of workers.

JTUC-RENGO: Social dialogue is important for the formulation and implementation of a national policy to protect workers, and this requires the presence of strong, representative and independent trade unions or national centres. In countries where these conditions are not in place, action should be initiated to ensure such a national policy. In Japan, dialogue between employers and labour organizations should be broadly extended beyond collaboration in the consultative councils composed of members representing employers, workers and the public interest.

*Republic of Korea.* FKTU, KCTU: As it is possible for disagreements and clashes of interests to arise between governments, employers and workers in developing laws related to the employment relationship, a democratic decision-making process in the framework of social dialogue would be vital. Also important is the application of the standard on the basis of a consensus and/or agreement between employers and labour.

*Lebanon.* Social dialogue is a means and a basis for sound and stable industrial relations. Collective labour contracts are concluded for this purpose.

*Lithuania.* A social partnership may be achieved through bargaining and agreements. This is of great importance in the development of workers' protection.

*Mauritius.* There is a need to develop a broad consensus so as to be able to identify objectively the shortcomings of the system and propose corrective measures in a balanced way.

*Mexico.* The parties need to achieve balance through dialogue so as to reach consensus on essential issues.

*Morocco.* Social dialogue is an important means of implementing national policy.

*Nepal.* GEFONT: Social dialogue is important in implementing and developing national policy provided that genuine trade unions participate in the process.

*Peru.* Such a policy will gain in terms of legitimacy, adaptation and facility of implementation if the participation of the social partners is ensured, provided that the actors are well informed and trained to participate in dialogue.

*Philippines.* Social dialogue is recognized as an effective mechanism for developing and implementing a national policy for the protection of workers. It has been a common practice to ensure the participation in a tripartite body of the labour sectors concerned in policy- and decision-making processes affecting their rights and welfare.

*Portugal.* In Portugal, it is the role of the Standing Social Dialogue Commission, a tripartite body, to promote social dialogue and concerted action between the social partners.

UGT: Social dialogue is an essential mechanism for the regulation of industrial relations, and its importance needs to be reaffirmed.

*Qatar.* Social dialogue sets the rules to determine the employment relationship and the related benefits.

*Serbia and Montenegro.* Social dialogue is extremely important and essential for all issues concerning labour relations.

*Slovakia.* KOZ SR: Social dialogue is an important and useful means of developing and implementing a national policy to protect these workers.

*South Africa.* Experience from certain countries suggests that social dialogue is a good foundation for consensus building. In South Africa, it was and still is an essential basis for the development and implementation of national policies.

BUSA: However, national policies should be designed to protect the rights of all parties in the social dialogue process, not just workers. Economic and individual freedoms have to be protected. The appropriate balance between the different interests of the social partners at the national level can best be achieved through collective bargaining and individual agreement.

*Spain.* CC.OO.: This is how Spain has implemented the necessary reforms in the field of labour.

*Sri Lanka.* EFC: Social dialogue paves the way for formulating national policy and its effective implementation.

CWC: Social dialogue plays an important role in awareness raising and capacity building.

LJEWU: In this regard, social dialogue will facilitate awareness raising and the dissemination of the relevant provisions on the subject under consideration.

*Switzerland.* USS/SGB: Social dialogue is indeed the most appropriate means of developing and implementing a national policy for the protection of workers, but only if the country concerned has independent and representative trade unions. Furthermore, social dialogue cannot be a panacea in a country in which the determination of the employment relationship has not been appropriately addressed by the labour legislation and/or if its application leaves much to be desired. In cases where there is not an adequate basis for action by the social partners under objective conditions, an instrument which only proposed a mechanism based exclusively on social dialogue would be an illusion. In such cases, the State itself has to implement the policy advocated by the instrument.

*Togo.* CSTT: Social dialogue allows the point of view and aspirations of each party to be taken into account.

*Trinidad and Tobago.* Social dialogue is a necessary prerequisite for ensuring acceptance of the national policy.

ECA: The involvement of representatives of labour, government, employers and other civil society groups is critical to ensure the success of any national policy on the employment relationship.

*Tunisia.* Social dialogue is the most appropriate means for the implementation of this national policy.

*Ukraine.* FRU: The inclusion of provisions on the need for social dialogue as a means of developing and implementing this national policy would contribute to the adoption of considered, balanced and constructive decisions on issues relating to the development of socio-economic and labour relations.

FPU: To contribute to social partnership.

*United Kingdom.* TUC: However, the determination of employment relationships first needs to be adequately addressed in both the law and its application. An instrument which provided a mechanism based exclusively on social dialogue would have serious limitations in a country such as the United Kingdom where collective agreements are not legally binding.

*United States.* USCIB: To the extent that social dialogue is employed to enable the national systems to implement their own response to the issues addressed in the Recommendation.

*Zimbabwe.* The instrument should reaffirm the importance of social dialogue in formulating the national policy to ensure collective responsibility for the policy and effective participation.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLTM (Mauritania): Social dialogue must be firmly encouraged as it is an important means of developing and implementing a national policy to protect workers.

*Views shared by the following workers' organizations:* ACTU (Australia), CLC (Canada), ETUF (Egypt), CGT-FO, CFDT (France), FNV (Netherlands), CONSAWU, COSATU (South Africa): Social dialogue is an important means of developing and implementing a national policy to protect workers, provided that there are strong, representative and independent trade unions operating in the country. Unfortunately, this is not the case in all countries. Therefore, an instrument that only provided a mechanism based exclusively on social dialogue would have limitations. Social dialogue should be fully utilized where the necessary prerequisites for sound dialogue exist. In countries where these conditions are not met, the State should take action to implement the policy envisaged in this instrument.

#### *Comments concerning negative replies*

*Croatia.* It is not useful to include such a statement in the Preamble, which would isolate social dialogue to the context of "such workers".

*France.* MEDEF: Social dialogue should not be mentioned specifically in this context.

*Japan.* NK: Generally speaking, a review of labour legislation and social dialogue as a means of developing and implementing a national policy should be conducted from

time to time in line with changes in the national situation. However, it is not necessary to review the application of labour legislation periodically, nor to reaffirm the importance and utility of social dialogue only for the purposes of a particular type of worker.

*Kuwait.* In general, social dialogue could be a very useful mechanism for developing and formulating a national policy on labour standards. However, this may not be sufficient for its inclusion in the Preamble. Reference to social dialogue may be useful elsewhere in the text, but not in the Preamble.

*Switzerland.* However, recourse to social dialogue and collective bargaining could be mentioned within the meaning of the conclusions of the general discussion in 2003, as a useful mechanism for seeking practical solutions.

UPS: Reference to social dialogue is not appropriate in this context.

*Views shared by the following employers' organizations:* BEA (Bangladesh), CNI (Brazil), BCCI (Bulgaria), CEC (Canada), ANDI (Colombia), UCCAEP (Costa Rica), CEIF (Cyprus), VSI (Iceland), IBEC (Ireland), JEF (Jamaica), ALE (Lesotho), CIS (Portugal), CEOE (Spain), CBI (United Kingdom): Social dialogue may be a useful mechanism for developing national policy on labour standards generally, but it is not helpful to include such a statement in the Preamble nor to isolate it to the context of "such workers".

#### *Comments concerning other replies*

*Australia.* The Australian Government consults widely with stakeholders on workplace relations issues and therefore does not feel that it is necessary to adopt an instrument that reaffirms the utility of social dialogue as a means of developing and implementing a national policy to protect workers.

*Denmark. DA:* Social dialogue is important as a general mechanism on the labour market.

#### **Qu. 3(6) Should the Preamble of the instrument:**

- (6) *refer to the ILO Declaration on Fundamental Principles and Rights at Work and other relevant ILO instruments (to be specified)?*

#### *Affirmative*

*Governments:* 58. Argentina, Australia, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, China, Costa Rica, Cuba, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Iceland, India, Indonesia, Iraq, Italy, Kiribati, Latvia, Mauritius, Mexico, Republic of Moldova, Morocco, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BIA, BICA (Bulgaria); CEC (China); CGECI (Côte d'Ivoire); SY (Finland); CIE (India); NCE (Republic of Moldova); ZDODS, ZDS (Slovenia); BUSA (South Africa); SN (Sweden); ECA (Trinidad and Tobago).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland);

CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CGTP, UGT (Portugal); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 12. Austria, Cameroon, Croatia, Cyprus, Hungary, Germany, Japan, Kuwait, Lebanon, Lithuania, Switzerland, Ukraine.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BCCI (Bulgaria); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); EFC (Sri Lanka); UPS (Switzerland); ECOT (Thailand); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Other*

*Government:* 1. Canada.

*Employers' organizations:* GICAM (Cameroon); CEIF (Cyprus); CTA (Mozambique).

*Comments concerning affirmative replies*

*Australia.* To the ILO Declaration on Fundamental Principles and Rights at Work and Convention No. 155.

*Benin, Honduras, Morocco.* To the principles and rights set forth in the eight fundamental Conventions, namely the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105), the Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182), the Equal Remuneration Convention, 1951 (No. 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

*China.* The reaffirmation of the fundamental rights of the government, employers and workers and provisions on the employment relationship in international labour Conventions and Recommendations.

*Cuba.* To the Declaration and to Convention No. 122.

*Czech Republic.* CMKOS: To the ILO's fundamental instruments relating to the protection of workers, such as the Conventions on paid leave, working time, the protection of wages, termination of employment, collective bargaining and freedom of association.

*Egypt.* To the ILO Declaration and to international Conventions, such as Conventions Nos. 64, 86, 175, 177 and 122.

ETUF: To the fundamental Conventions and to the Employment Policy Convention, 1964 (No. 122).

*Eritrea.* To ILO instruments, such as the Employment Policy Convention, 1964 (No. 122), the Part-Time Work Convention, 1994 (No. 175), the Home Work Convention, 1996 (No. 177), the Maintenance of Social Security Rights Convention, 1982 (No. 157), and the ILO Declaration on Fundamental Principles and Rights at Work.

*Finland, Greece and Indonesia.* To the ILO's fundamental Conventions.

*Finland.* SAK, STTK, AKAVA: To the instruments referred to in the Declaration and the following Conventions: the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), the Asbestos Convention, 1986 (No. 162), the Safety and Health in Construction Convention, 1988 (No. 167), the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), the Occupational Safety and Health (Dock Work) Convention, 1979 (No. 152), the Occupational Safety and Health Convention, 1981 (No. 155), the Safety and Health in Mines Convention, 1995 (No. 176), the Home Work Convention, 1996 (No. 177), and the Private Employment Agencies Convention, 1997 (No. 181).

*France.* To the Private Employment Agencies Convention, 1997 (No. 181), and the Worst Forms of Child Labour Convention, 1999 (No. 182).

*Guatemala.* To fundamental rights at work and other instruments on elements relating to the employment relationship so as to address fully the issue of discrimination on grounds of sex, ethnic origin, age and disability, as well as occupational safety and health measures.

*Hungary.* MTOSZ: To the ILO Conventions on fundamental rights at work, Nos. 100, 111, 138 and 182, and to those covering minimum wages, the protection of wages, safety and health and working time.

*Iceland.* Only to the ILO Declaration on Fundamental Principles and Rights at Work.

*India.* To ILO Conventions on minimum wages, maternity protection and workmen's compensation. So long as the nature of the employment relationship is not clearly established, any ILO Preamble may be premature.

CITU: To the Conventions and Recommendations on freedom of association, the right to collective bargaining, labour inspection, working time, etc.

*Iraq.* To social security, decent work, informal work, protection.

*Japan.* JTUC-RENGO: To Conventions Nos. 87, 98, 111, 181 and 177, and to Recommendations Nos. 184, 188 and 193.

*Republic of Korea.* FKTU, KCTU: To Conventions Nos. 87, 98, 100, 122, 26, 131, 102, 157 and 181.

*Latvia.* To Conventions Nos. 100, 122, 135, 150, 151, etc.

*Mauritius.* To Conventions Nos. 168, 175 and 181.

*Nepal.* GEFONT: To Conventions Nos. 87, 98 and 102.

*Netherlands.* To all relevant ILO instruments, and particularly the ILO Declaration on Fundamental Principles and Rights at Work, to all the eight fundamental labour standards, which should be explicitly cited, to the Private Employment Agencies Convention, 1997 (No. 181), and the corresponding Recommendation No. 188, to the

Labour Inspection Convention, 1947 (No. 81), to the Labour Administration Convention, 1978 (No. 150), to the Equal Remuneration Convention, 1951 (No. 100), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Maternity Protection Convention, 2000 (No. 183).

*FNV*: In addition to those contained in the Government's statement, reference should also be made to Conventions Nos. 87 and 98 as collective agreements can contribute to extending the scope of protection for persons whose activity is not covered by an established employment relationship or contract.

*Niger*. To the Abolition of Forced Labour Convention, 1957 (No. 105), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equal Remuneration Convention, 1951 (No. 100).

*Peru*. To the Declaration as the set of principles which should inspire any political or standards-related decision relating to the employment relationship, even if, from another point of view, fundamental principles and rights at work cover any provision of services, whether or not they may be assimilated to an employment relationship.

*Philippines*. To the relevant provisions of the ILO Declaration on Fundamental Principles and Rights at Work, and particularly those directly relating to the needs to afford adequate protection to workers, particularly in social matters, in the context of a clearly established employment relationship.

*Portugal*. To the ILO Declaration and the Labour Administration Convention, 1978 (No. 150), Article 7 of which provides for the extension of the functions of the system of labour administration to include appropriate categories of workers who are not, in law, employed persons.

*CGTP*: To Conventions Nos. 81 and 150.

*UGT*: To all ILO instruments relating to this issue.

*Qatar*. To the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), which is closely related to this subject as collective bargaining has an impact on the determination of the scope of the employment relationship.

*South Africa*. *BUSA*: To the Declaration where this is relevant.

*CONSAWU*: To the ILO fundamental and priority Conventions, the Declaration of Philadelphia and the Private Employment Agencies Convention, 1997 (No. 181).

*Spain*. To human rights at work.

*CC.OO.*: To the protection of workers in employment.

*Sri Lanka*. *CWC*: To Conventions Nos. 87 and 98.

*Suriname*. To Conventions Nos. 86, 94 and 181.

*Switzerland*. *USS/SGB*: To the ILO Declaration on Fundamental Principles and Rights at Work, and to all ILO instruments which presuppose or establish the existence of an employment relationship when determining the rights and responsibilities of employers and workers.

*Togo*. *CSTT*: To the Weekly Rest (Industry) Convention, 1921 (No. 14), and the Maternity Protection Convention, 2000 (No. 183).

*Trinidad and Tobago*. To the Labour Clauses (Public Contracts) Convention, 1949 (No. 94), the Conventions on occupational safety and health (Nos. 152, 155 and 176), and the Private Employment Agencies Convention, 1997 (No. 181).

ECA: Integral to the ILO's Decent Work Agenda is that workers' rights are protected. However, the reality is that more and more workers are moving outside the scope of this protection, due to inflexible labour laws. The ILO's Declaration on Fundamental Principles and Rights at Work will not be effective if it cannot be applied to the majority of workers. It is very necessary to have a mechanism which guarantees protection to workers even when their employment situation changes.

*Tunisia.* To other relevant ILO instruments on the work of particular categories of workers, including Convention No. 177 on home work and Convention No. 181 (with Recommendation No. 188 on private employment agencies), which address from a particular perspective the triangular employment relationship concerning the provision of work or services through a temporary work agency, and Recommendation No. 193 on the promotion of cooperatives.

*United Arab Emirates.* To Conventions Nos. 144 and 122.

*United Kingdom.* On the assumption that the instruments are agreed on a tripartite basis.

TUC: To all ILO instruments that presuppose or provide for the existence of an employment relationship when defining the rights and responsibilities to be accorded between employers and workers, as well as those instruments which proclaim rights of all workers regardless of their de facto employment status (for example, the eight fundamental Conventions, which should be listed fully). The Preamble should also refer to Conventions Nos. 81 and 129 (labour inspection); No. 181, and Recommendation No. 188 (private employment agencies); No. 177, and Recommendation No. 184 (home work); and finally Recommendation No. 193 (cooperatives). The ILO has also developed a substantial body of standards related to employment rights and protections which should be referenced by member States in seeking to determine the nature and content of "adequate protection" (in fields such as termination of employment, human resources development, social security, occupational safety and health, labour inspection, etc.). The instrument should also refer to the conclusions concerning the employment relationship (2003).

*Zimbabwe.* To the ILO Declaration on Fundamental Principles and Rights at Work and to Conventions Nos. 81, 87, 98, 100, 111, 140, 144, 150, 156 and 183. These Conventions are important for a sound employment relationship.

*Views shared by the following workers' organizations:* CGT RA (Argentina), BIA (Bulgaria), CGECI (Côte d'Ivoire), LPSK (Lithuania), LO, TCO (Sweden), NATUC (Trinidad and Tobago), FPU (Ukraine): To the ILO Declaration.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), COSATU (South Africa), CGT-FO (France): (1) to Conventions Nos. 87 (freedom of association); 98 (right to organize and collective bargaining); 181 and Recommendation No. 188 (private employment agencies); and 177 and Recommendation No. 184 (home work); and, finally, to Recommendation No. 193 (cooperatives); (2) to a whole series of ILO standards related to employment rights and the protection of workers which should be referenced by member States in seeking to determine the nature and content of "adequate protection" (in fields such as termination of employment, human resources development, social security, occupational safety and health, labour inspection, etc.); and (3) to the conclusions concerning the employment relationship (2003).

*Views shared by the following workers' organizations:* CFDT (France), ETUF (Egypt): The instrument should specifically identify all ILO instruments which

presuppose or establish the existence of an employment relationship when defining the rights and responsibilities of employers and workers.

*Views shared by the following workers' organizations:* USAM (Madagascar), CLTM (Mauritania), AFL-CIO (United States): To the Declaration of Philadelphia, the ILO fundamental Conventions, the ILO priority Conventions, and to Conventions Nos. 81 (labour inspection); 122 (employment policy); and 144 (tripartite consultation); as well as to Conventions Nos. 14 (weekly rest); 181, with Recommendation No. 188 (private employment agencies); 177, with Recommendation No. 184 (home work); Recommendation No. 193 (cooperatives); and Convention No. 183 (maternity protection). It would also be particularly appropriate to refer to the Conventions on termination of employment and human resources development.

*Comments concerning negative replies*

*Bangladesh.* BEA: It would not be appropriate to refer to the Declaration in the Preamble, although other instruments which could clarify the issue could be mentioned.

*Denmark.* DA: It would not appear to add anything.

*France.* MEDEF: An inappropriate reference in an international labour standard.

*Germany.* If it is necessary and not already understood, reference should be made to the relevant parts of the Declaration and other ILO instruments.

*Guatemala.* CACIF: The Declaration is not directly related to the subject under consideration.

*Jamaica.* JEF: There is no direct correlation between the ILO Declaration on Fundamental Principles and Rights at Work and the employment relationship, and the Declaration should not therefore be mentioned in the Preamble.

*Kuwait.* The ILO Declaration is not an appropriate text to be mentioned among international labour standards. It would not assist in an understanding of the issue under discussion.

*Lebanon.* Reference should only be made in the Preamble to Conventions Nos. 175 and 177 on part-time work and home work for the purposes of guidance.

*Sri Lanka.* EFC: The Recommendation should be based on the ILO's fundamental principles and guidelines.

*Switzerland.* UPS: No. The reference to the text of the Declaration is not appropriate in an international labour standard. Its direct relevance to this difficult subject is questionable.

*United States.* USCIB: The Declaration is not an appropriate text to mention in an international labour standard and the direct relevance is questionable. As to "other relevant ILO instruments", we do not see any as being directly relevant, nor are they, or the Declaration, helpful in contributing to an understanding of the matters at issues. Lastly, "other" instruments includes those that have not been ratified by many ILO member States, and as such, would preclude adoption of any recommendation.

*Views shared by the following employers' organizations:* BCCI (Bulgaria), CEC (Canada), ANDI (Colombia), VSI (Iceland), IBEC (Ireland), ALE (Lesotho), VNO-NCW (Netherlands), CONEP (Panama), CIS (Portugal), CEOE (Spain): It would not appear to be appropriate to refer to the Declaration in an international labour standard, and the content of the Declaration does not appear to be directly relevant. As to the other ILO instruments, none of them appear to be directly relevant, and neither they

nor the Declaration are helpful in contributing to an understanding of the matters at issue.

*Comments concerning other replies*

*Canada.* See the first comment on the Preamble concerning the reference to the ILO Declaration on Fundamental Principles and Rights at Work. However, it is not appropriate to include reference to other ILO instruments in an instrument that is promotional in nature.

### III. Content of the instrument

#### NATIONAL POLICY OF PROTECTION FOR WORKERS IN AN EMPLOYMENT RELATIONSHIP

**Qu. 4** *Should the instrument provide that Members should develop and implement, or continue, a national policy which would aim to review at appropriate intervals and, if necessary, clarify and adapt the scope of legislation in order to guarantee adequate protection to workers within the framework of an employment relationship?*

*Affirmative*

*Governments:* 68. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); CACIF (Guatemala); MGYOSZ (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); KOZ SR (Slovakia); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 5. Australia, Germany, India, Slovakia, Switzerland.

*Employers' organizations:* BEA (Bangladesh); CEC (Canada); ANDI (Colombia); CEIF (Cyprus); DA (Denmark); EK, SY (Finland); MEDEF (France); VSI (Iceland); IBEC (Ireland); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); ECOT (Thailand); CBI (United Kingdom); USCIB (United States).

*Other*

*Government:* 1. Sweden.

*Employers' organization:* JEF (Jamaica).

*Comments concerning affirmative replies*

*Austria.* New legislation should be assessed and existing ones reviewed, since the world of work is constantly changing.

*Benin.* This policy should be transparent and based on tripartite consultation. The scope of application of the legislation will depend on linkages in the employment relationship and the realities of the labour market.

*Brazil.* CNI: The appropriate approach would be a review at appropriate intervals to verify the effectiveness of protection, without broadening the scope or introducing new elements.

*Bulgaria.* BCCI: A review of legislation at appropriate intervals to ensure that it remains effective would be a step in the right direction, but it should not necessarily aim to broaden the scope or add new elements. If an instrument refers to the scope, the intention must be made clear, and the instrument should obviously not refer to commercial relationships outside the employment relationship.

BICA: It would be more appropriate to adjust national policies in the light of the provisions of the instrument than to apply all the principles set out in the instrument as a whole.

*Canada.* Provided that it is limited to labour legislation. Members should review labour legislation at appropriate intervals and, if necessary, clarify and adapt the scope of legislation to provide adequate protection to workers in an employment relationship. Using the word "legislation" in the instrument without a qualifier such as "labour" is far too broad and such a review would be unworkable.

*China.* The adoption of this international labour Recommendation will facilitate efforts to promote the establishment, modification or abolition of national policies in this area.

*Costa Rica.* On condition that possible options are provided for reviewing prevailing work dynamics as part of a transparent dialogue policy.

UCCAEP: It is always a good thing to review existing texts in order to ensure that they are still adapted to the needs of the parties concerned.

*Côte d'Ivoire.* CGECI: It is also important to ensure that legislation can be adapted.

*Croatia.* However, if the instrument must refer to the scope, the intention must be made clear.

*Cuba.* Depending on national conditions, when an adequate level of protection is reached, the intervals may vary.

*Czech Republic.* CMKOS: The State must assume responsibility in this area. It must accordingly enact the necessary legislation and raise public awareness of the fact that it is not acceptable to make profits and raise competitiveness at the expense of workers.

*Egypt.* To ensure that national legislation and policy are in step with changes and developments in the labour market.

*El Salvador.* A policy of effective protection for workers with regard to the employment relationship, which will guarantee the effective application of labour standards and can be reformulated in accordance with the ILO Declaration on Fundamental Principles and Rights at Work.

*Eritrea.* In order to ensure that this policy is better adapted to new conditions which can change as a result of social and economic developments.

*Finland.* Systematic monitoring and collection of statistics on the nature of employment relationships is important. This monitoring must be carried out in accordance with nationally approved practices and traditions.

*Greece.* In Greece, national labour legislation gives workers adequate protection, and the scope of legislation is reviewed annually.

*Guatemala.* Labour law provisions must be brought into line with historical realities. National policy will provide long-, medium- and short-term guidance on measures needed to ensure compliance with legislation.

CACIF: This periodic review of the effectiveness of worker protection does not mean that the scope of the instrument should be broadened or that new elements should be introduced. The suggestion that the scope should be adapted serves no purpose, given that this can refer to many aspects of labour standards, including the physical scope. If therefore an instrument refers to the scope of application, the exact intention must be made clear. The suggestion would not be acceptable if scope referred to commercial relationships.

*Honduras.* Because this would oblige member States to formulate or implement a policy along the lines proposed.

*Italy.* CGIL: Given the speed of the changes in the organization of work, it is prudent to provide for such a review of existing legislation.

*Japan.* However, the intervals between reviews must depend on the conditions in each country.

*Republic of Korea.* FKTU, KCTU: Necessary to ensure the effectiveness of legislation and policies and their relevance to the realities of the labour market, changes in industrial relations, and overall economic realities. Where necessary, this should be followed up by revisions and supplementary measures.

*Lesotho.* ALE: It is important periodically to review the application of labour legislation in order to ensure that workers enjoy the protection provided by law, but this should benefit all workers, not just those with disguised employment relationships. Referring specifically to this category of worker in the Preamble therefore serves no purpose.

*Mauritius.* With a view to following developments in policy regarding the employment relationship and to promote decent work and tripartism.

*Mexico.* The proposed review should be transparent, involve the social partners and be designed on the basis of national circumstances.

*Mozambique.* This review should take place at intervals depending on prevalent conditions in a country, rather than at fixed intervals.

*Netherlands.* FNV: However, the instrument should also provide that national policy would aim as well at considering whether the existence of an employment relationship continues to be an adequate criterion for setting the scope of application of any act of labour legislation, given the aim and substance matter of that act of legislation on the one hand and the problems of recognizing and proving an employment relationship on the other.

*Nepal.* GEFONT: Ensure all the parties are consulted before policy and legislation are formulated or changed, and allow them to participate in the process of implementation. In the event of contraventions of such a provision, the national authorities or the ILO should ensure implementation.

*Philippines.* There have been recent calls and efforts to amend the Labor Code, including changes to labour-only contracting provisions and other related issues affecting employment relationships.

*Portugal.* Rapid changes in labour relations often make it difficult to determine whether a relationship is of a subordinate, parasubordinate or independent nature. Moreover, simulating the contract of employment or ambiguity in the contract may be detrimental to the rights of workers in relationships which should protect them.

UGT: Given the continual evolution of the labour market and the new forms of work organization, it may be important to review labour legislation but without detriment to certain principles such as stability and workers' acquired rights.

*Qatar.* Encouragement to implement a national policy will ensure adequate legal protection for workers.

*Slovakia.* KOZ SR: The national policy must also be effective, take account of changing labour market conditions, workers' organizations and developments in relations between workers and the law.

*Slovenia.* ZSSS: The transparency of the employment relationship must be guaranteed.

*South Africa.* There is a general consensus concerning the evolution of employment relationships. Many workers appear to be threatened by unscrupulous labour practices. That is why an agreement needs to be reached on a periodic review of employee protection to ensure that no one falls outside the scope of the protection afforded by legislation.

BUSA: Only if the stability and consistency of the legislative framework is not disturbed by excessively frequent changes. In addition, all the social partners should be protected.

*Spain.* The assumption which underlies this questionnaire, that existing legislation on the employment relationship is not clear, should not be generalized.

*Sri Lanka.* EFC: In addition, it is important to provide adequate protection for employers in the employment relationship.

LJEWU: It is worth reviewing the scope of national policy on employment relations even if it is in statute form, as the subject matter is dynamic and changing.

NWC: The Recommendation should provide guidance to countries without interfering in legitimate existing arrangements for commercial contracts, nor should it ever pose an obstacle to job creation.

*Sweden.* SN: In general, there is little point in prescribing that member States frame a national policy for successively reassessing the scope of legislation. As regards determining the existence of an employment relationship, in general this depends on the facts, although the views of the parties may also be important or even decisive. Adequate protection for workers must be framed in accordance with national law and practice and provide clear guidelines for determining the existence of an employment relationship; however, for reasons of legal security, transparency and predictability are important with regard to the legal form of service contracts. Measures are needed to prevent disguised employment relationships, but there is no need for special rules on “triangular relationships”, as this would adversely affect commercial relations and create an unfair burden of responsibility on clients. Member States should instead make available to the social partners an effective dispute settlement procedure and methods of establishing a true employment relationship and providing effective enforcement. An international instrument must not set out general definitions or methods of establishing the existence of an employment relationship, given the considerable differences between Members with regard to a number of factors. The instrument must stipulate that no provision may restrict the employer’s right to enter into a commercial or civil contractual arrangement.

LO, TCO: The text must clearly state that it is to be given effect through national legislation.

*Trinidad and Tobago.* Given the changes that have taken place in the nature of work and consequent changes in the employment relationship, this policy is necessary.

ECA: In order to enable countries to develop their own policies in this area on the basis of information on unprotected workers, the reasons for that lack of protection, and what is needed.

*Tunisia.* This should enable member States to address the employment relationship in a manner that is dynamic and adapted to specific national conditions, and to ensure adequate protection for workers who are in actual fact in an employment relationship.

*Ukraine.* FRU: Various relationships not covered by labour legislation are emerging in the labour market, and as a result of this some workers lack protection. A national policy aimed at modifying national legislation in cases where employment relationships are not covered will clarify the scope of labour legislation and thus ensure adequate protection for workers with an employment relationship.

FPU: Taking account of economic growth, intensity and productivity of work, scientific development and technical progress.

*United Arab Emirates.* Because labour legislation is dynamic and can be modified from time to time to ensure its conformity with economic and social conditions.

*Views shared by the following workers’ organizations:* BSSF (Bangladesh), CITUB (Bulgaria), CLC (Canada), ETUF (Egypt), CGT-FO, CFDT (France), JTUC-RENGO (Japan), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), TUC (United Kingdom): National policies should be developed with a dual aim: to ensure protection to workers currently excluded from it and to prevent future abuse or new changes in work arrangements that have the effect of denying employment protection to workers who are in condition of dependency or subordination.

*Comments concerning negative replies*

*Australia.* It does not appear appropriate to add new obligations to review labour legislation. See reply to Question 3.4.

*Denmark.* DA: This point clearly points in the direction of promoting employment relationships beyond disguised employment relationships, which we cannot support.

*Finland.* EK and SY: This should be left to the discretion of ILO Members to examine at the national level.

*France.* MEDEF: Providing for a review process would mean extending the scope of the employment relationship, for which there is no reason if it has been well thought out.

*Iceland.* VSI: The phrase “adequate protection” is subjective. It would be better to refer instead to access to mechanisms for lodging complaints, assessing cases of fraud and deciding compensation.

*Germany.* Each country must decide whether or not to review legislation in force and, if it decides to do so, when. Such rigid prescriptions have no place in an ILO instrument.

*India.* Reviewing of labour laws is a continuous sovereign exercise.

*Portugal.* CPI: Legislation should be reviewed at appropriate intervals in order to assess its effectiveness, but not for the purpose of extending it.

*Switzerland.* See reply to question 3.4 and our introductory remarks. In addition, depending on national practices, such a policy can be extremely difficult to apply. As the report emphasizes, there are many different possible solutions. Such a policy may mean something in States that have legally defined the employment relationship but not in States that have instead defined the characteristics of the employment contract and leave it to executive bodies (above all the civil courts) to apply these principles and determine whether or not the conditions are met.

UPS: Such an approach is extremely cumbersome (see our reply to II.4).

*United Kingdom.* CBI: Review – yes, although the suggestion regarding the “scope” goes too far. “Scope” needs to be defined. The focus should be on eliminating fraud.

*United States.* USCIB: Such requirements are inherent in the 1998 Declaration and are thus redundant here. See comments on question 3(1)(c). To the extent that this provision encourages interference with contractual relationships or the ability of individuals to become self-employed or develop their own micro-enterprise, it is inappropriate and interferes with the rights of workers to create opportunities outside the traditional employment relationship.

*Views shared by the following employers’ organizations:* BEA (Bangladesh), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), VSI (Iceland), IBEC (Ireland), NK (Japan), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): Legislation should be reviewed at appropriate intervals to ensure its effectiveness, but not necessarily to extend the scope or add new elements. It is not helpful to suggest extending the scope, which can concern many aspects of labour standards including the physical jurisdiction, without also clarifying the underlying intention. In particular, a reference to commercial relationships outside the employment relationship would be out of the question, since it is contrary to the necessary integrity of commercial relationships

and jeopardizes the inviolability of contracts. An instrument is not necessary to encourage governments to examine the effectiveness of their legislation at regular intervals.

*Comments concerning other replies*

*Jamaica.* JEF: Whereas the JEF supports the need for evaluative measures of the instrument as a means of determining its effectiveness, relevance and fit, it is not necessarily for the purpose of altering or expanding the scope of the instrument. Owing to the myriad possibilities of “scope” within the context of labour legislation, it is prudent not to attempt to address issues with such diverse possibilities, some of which may be affected by cultural norms.

*Sweden.* The Government of Sweden prefers not to reply to this question. It is not clear what this policy would imply. It would not be appropriate for the instrument to fix the intervals for reviewing the adequacy of the employee concept at the national level.

CONTENT OF NATIONAL POLICY

**Qu. 5** *Should the instrument provide that, for the purposes of the national policy referred to in Question 4, the determination of the existence of an employment relationship should be guided by the facts, irrespective of the arrangement, contractual or otherwise, agreed between the parties?*

*Affirmative*

*Governments:* 65. Argentina, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom.

*Employers' organizations:* BICA, BIA, BCCI (Bulgaria); CEC (China); UCCAEP (Costa Rica); DA (Denmark); SY (Finland); MEDEF (France); MGYOSZ (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); ZDODS (Slovenia); BUSA (South Africa); SN (Sweden); UPS (Switzerland); ECOT (Thailand); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); ALE (Lesotho); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 8. Algeria, Australia, Barbados, India, Morocco, Panama, Sri Lanka, Zimbabwe.

*Employers' organizations:* CNI (Brazil); CEC (Canada); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); EK (Finland); CACIF (Guatemala); VSI (Iceland); IVEC (Iceland); JEF (Jamaica); NK (Japan); VNO-NCW (Netherlands) HSH, NHO (Norway); CONEP (Panama); ZDS (Slovenia); CEOE (Spain); EFC (Sri Lanka); ECA (Trinidad and Tobago); CBI (United Kingdom); USCIB (United States).

*Workers' organization:* FPU (Ukraine).

*Other*

*Government:* 1. Serbia and Montenegro.

*Employers' organizations:* BEA (Bangladesh); ANDI (Colombia); CIP (Portugal).

*Comments concerning affirmative replies*

*Argentina.* CGT RA: Since even if it is assumed that the parties are “free” to conclude a contract, employment situations and workers’ needs limit that freedom.

*Australia.* ACTU: This is critical to the ongoing proper operation of employment rights and protections.

*Austria.* Yes, in principle, but the point should come under “Determination of the existence of an employment relationship” (Question 12), rather than under “Content of national policy”.

*Benin.* Either inadvertently or by design, contractual relationships are not always clear in agreements between parties, and many workers can have a status that is not clear.

*Bulgaria.* CITUB: What matters is not the contract but the nature of the fact of employment relationship. The nature of the employment relationship is revealed through its facts but not through the form, i.e. the contract.

*China.* Realities should be considered first and foremost, and this principle should be followed in all legislative and executive actions.

*Costa Rica.* Any employment relationship is defined within what is known as a real contract, since it is the facts that matter, not the terms of a document.

UCCAEP: It is a fundamental principle that the facts, not the form, must determine the nature of a relationship.

*Croatia.* It is important to ensure that the instrument respects all relevant legal principles and any jurisprudence established in the national context.

*Cuba.* In Cuba, contracts must be written in all but a few cases. Where an oral contract is allowed, it cannot be for longer than 90 days. If there is no written contract, it is assumed that there is an employment contract if the worker is performing a task with the full knowledge of the labour service and that there is no objection.

*Cyprus.* It is important to be guided by the facts. In Cyprus, many cases are resolved in this way on the basis of the relevant facts and the inspector’s conclusions.

*Czech Republic.* CMKOS: If it is to be effective, the instrument must specify the facts which determine the relationship between the parties.

*Denmark.* DA: However, the phrase is too narrow and cannot cover all jurisdictions. In certain cases, the arrangement is important, as well as other factors.

*Egypt.* According to the Labour Code, the employer is required to produce a written contract. However, in the absence of a written labour contract, the worker must establish the existence of the employment relationship by any possible means.

*El Salvador.* Under the terms of national legislation, the very fact of subordinate provision of services presupposes the existence of a contract of employment.

*Eritrea.* Courts should consider the contractual agreement first, and respect the intention of the parties. However, if there is deception or abuse, they must determine the existence of the employment relationship on the basis of the facts.

*Finland.* This is compatible with Finnish legislation.

*France.* Giving precedence to the facts of the agreement between the parties is the only way of preventing attempts to circumvent the law with regard to the employment relationship.

MEDEF: It is the actual facts that define the nature of the relationship, but the instrument must respect the national principles of interpretation.

*Germany.* It is important to state clearly that the existence of an employment relationship does not depend on the form of the contract, be it written or oral, but on the actual conditions in which the work is done. However, this question has nothing to do with that of revision of national legislation by member States. The phrase “for the purposes of the national policy referred to in Question 4”, which introduces a restriction, should accordingly be deleted.

*Greece.* This is what occurs in Greece when workers appeal to the labour inspectorate or the courts.

*Guatemala.* In accordance with the principle of the reality and inalienability of workers’ rights enshrined in Guatemalan legislation. However, the instrument must state this explicitly in order to ensure effective application of national legislation.

*Honduras.* It is the facts that determine the nature of the employment relationship (principle of the primacy of fact).

*Hungary.* If this were not the case, the Recommendation would be devoid of meaning. In Hungary, it is the content of a contract, not the title given to it, which defines and determines the nature of that contract.

*Italy.* CGIL: In Italy, the Constitutional Court has reaffirmed this principle in a number of rulings.

*Japan.* In Japan, it is a person’s actual status that determines whether he or she is a “worker”, irrespective of the form of the employment contract or agreement.

JTUC-RENGO: The existence of an employment relationship must be determined in the light of the actual conditions in which the activity in question is carried out, irrespective of the form of the contract. Applying the principle of the primacy of fact is helpful in cases of ambiguity.

*Kuwait.* The principle of being guided by the facts in determining the existence of an employment relationship is applied in most legislative systems, but it is also important for the relationship between the parties to be regulated by a contract. Under the terms of section 94 of the Labour Code, it is permitted in the private sector to depart from the letter of the law by mutual consent where this is favourable to the worker.

*Lebanon.* The precise nature of the facts or of what has been agreed between the parties is the basis for determining the existence of the employment relationship, whether that relationship is determined orally or in writing.

*Lithuania.* It is very important to protect the worker, for example, where there is effectively an employment relationship but this is not formalized because of the employer.

LPSK: However, the arrangements should also be taken into account.

*Mauritius.* Applying the principle of the reality of the facts to determine the existence of the employment relationship will help to clarify the concept and reduce burden of proof on the worker.

*Mexico.* It is important to be guided by the facts, since the employment relationship may be disguised or objectively ambiguous. Mexican law defines the employment relationship and provides that it is presumed to exist between the provider of a personal service and the person receiving that service.

*Nepal.* GEFONT: In order to protect workers who are obliged to sign other types of contract, for example, in cases where unemployment is widespread in least developed countries like Nepal.

*Republic of Korea.* FKTU, KCTU: Because of the employer's stronger position, a genuine dependent employment relationship is often "disguised" as independent employment. In the case of workers employed indirectly, there is often a disguised subcontracting agreement between the provider (labour lease temporary agency, service contractor, subcontractor) and the user employer. That is why the existence of an employment relationship must be determined on the basis of the facts, irrespective of the form of contract which the parties may have concluded.

*Peru.* Peruvian legislation and jurisprudence have adapted the principle of the "primacy of fact".

*Philippines.* The principle of the primacy of fact is the best basis for determining the existence of the employment relationship.

*Portugal.* The concrete nature of the relationship, the criteria on which it is based and its form are the elements which should determine whether or not it exists, since in many cases, including that of Portugal, no particular formality is required for the employment contract. The law thus presumes the existence of an employment contract when a certain set of criteria are met.

UGT: The real situation has to be taken into account. Many relationships that should be considered employment relationships are not deemed to be so.

*Qatar.* National policy is one criterion with regard to the existence of an employment relationship. There are on occasions contractual agreements which are not valid and contrary to the facts.

*South Africa.* Given that the employers, by virtue of their position in the employment relationship, often have greater power and thus more control over that relationship, it should not be left to the parties concerned to determine whether or not such a relationship exists, but should instead be decided on the basis of facts.

BUSA: Contractual arrangements intended to disguise the employment relationship are not acceptable, but the issue should be governed by national legislation.

*Spain.* It is essential to take account of the principle of the actual facts, which means that the legal relationship between the parties does not depend on the name they have chosen to give it but on the totality of rights and obligations which that relationship comprises.

CC.OO.: The determination whether or not the relationship between the parties is an employment relationship is based on the actual content of the services agreed between them and whether the requirements legally defining the type of contract are met; it is not left to the discretion of the parties.

*Sri Lanka.* LJEWU: Essentially, such facts should be considered to grant relief or redress to the worker on just and equitable grounds.

NCW: It is not enough to “label” the employment relationship. Courts must decide on the basis of the facts in each case and determine whether or not there exists an employment nexus.

*Sweden.* It is important, however, to take into account the intentions of the parties in cases where it is not possible to determine on the basis of the actual circumstances whether or not there is an employment relationship.

LO, TCO: The parties should not be able to get around the minimum provisions of legislation of member States or the regulations that have been incorporated in national law.

*Switzerland.* This corresponds to Swiss law and practice, and would appear to be necessary for dealing with, for example, disguised relationships. On the other hand, there is no need to refer to national policy.

UPS: It is a well-established principle in most legal systems that the facts, rather than interpretation, determine the nature of the proposed relationship. However, it is also essential to add that the wishes expressed by the parties is an essential element of the contract and must be respected. Furthermore, any instrument must respect national legal principles, including the principles of interpretation.

USS/SGB: The primacy of fact is still helpful as a guiding principle where there is a lack of clarity as regards the existence of an employment relationship. In general terms, an employment relationship should be presumed to exist in situations where the facts are disputed, thus leaving it to the employer to prove that a worker is not an employee.

*Togo.* CSTT: The facts can determine the real nature of the employment relationship between the parties.

*Trinidad and Tobago.* The principle of the primacy of fact must be applied.

*Tunisia.* The determination of the existence of an employment relationship should be guided by the facts, not by the name or form agreed on by the parties.

*Ukraine.* FRU: Since in terms of judicial practice, proof of the employment relationship is required to confirm that it actually exists.

*United Kingdom.* TUC: However, it is important first of all to address the problem of defining the employment relationship, in law and in practice. An instrument providing a mechanism based exclusively on social dialogue would have serious limitations in a country like the United Kingdom, where collective agreements are not legally binding.

*United States.* AFL-CIO: Employees may be forced to enter into “contractual” arrangements, either as a condition of employment or continued employment. The

instrument should not allow such arrangements to dictate the existence of the employment relationship.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT, CGT-FO (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), TUC (United Kingdom): Primacy of fact is a helpful guiding principle, which could certainly target many situations where the employment relationship is deliberately disguised. There should be a general presumption of an employment relationship in situations where the facts are disputed, leaving to the employer to prove that a worker is not an employee. CLC (Canada) and COSATU (South Africa) add: the purpose of employment law as a distinct body of law, namely to provide protection in situations where there is an inherent disparity in power between parties, should also provide a reference point.

*Comments concerning negative replies*

*Algeria.* The provision is too restrictive. Moreover, it would challenge the fundamental principle of the law of the parties. The provisions of laws or regulations should therefore specify and define the employment relationship.

*Australia.* The Australian Government is confident that the common law test for employment, which is incorporated in the WR Act, and applied by courts and tribunals, provides adequate consideration of the range of factors applying to working relationships. When applying this test, the court looks to the substance of the relationship, not simply the form. The Australian Government sees no practical benefit in this common law test being repeated in the proposed national policy.

*Brazil.* CNI: It is important to ensure that any instrument respects existing legal principles in the national context, without losing sight of the fact that the intention of the contracting parties must be respected, since this is an important element of the law of contracts.

*Côte d'Ivoire.* CGECI: It is important not to disregard the agreement of the parties which has force of law for them.

*Japan.* NK: The existence of an employment relationship should, except in clear cases of illegality, be determined by the nature of the contract. In cases of doubt, the matter must be decided on the basis of a reasonable interpretation of the intentions of the parties, not by the facts.

*Morocco.* The agreement or contract concluded between the parties must be respected.

*Sri Lanka.* The facts should be considered where the arrangement between the parties cannot be clearly identified.

EFC: The facts should be taken into account only where there is no contractual arrangement.

*Trinidad and Tobago.* ECA: The principle of the primacy of fact determines the existence of an employment relationship, guided by the facts of what has actually been agreed and carried out by the parties, not the way in which one or other of the parties describe the relationship. However, some credence should be given to the latter in the event that what has been agreed or carried out by the parties is not clear.

*Ukraine.* FPU: The employment relationship must be based on clearly defined legal provisions.

*United Kingdom.* CBI: The legal and interpretive practice of each country must be respected.

*United States.* USCIB: To include a provision that speaks in any way to the substance of the employment relationship is an attempt to define it substantively and therefore, beyond the agreed-upon scope of the Recommendation. Although many determinations of the employment relationship are fact based, to establish the existence of an employment relationship irrespective of arrangements, contractual or otherwise agreed between the parties would interfere with the methodologies used to define an employment relationship by member States.

*Zimbabwe.* The existence of an employment relationship should be determined in the light of national legislation and policy.

*Views shared by the following workers' organizations:* BCCI (Bulgaria), CEC (Canada), CEIF (Cyprus), CACIF (Guatemala), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): It is a principle enshrined in most legal systems that it is the facts, rather than the outward form, that characterize and define a relationship. Nevertheless, the law of contracts in most cases also stipulates that the intention of the parties must be respected. Any instrument must therefore take account of all relevant principles of national law and jurisprudence.

#### *Comments concerning other replies*

*Bangladesh.* BEA: The relevant facts and contractual agreement should be combined. The intention of the parties to the contract should not be disregarded. The wording should be such as to protect the legal system in the national context.

*Colombia.* ANDI: In Colombia, the existence of the employment relationship is determined on the basis of the facts, not of legal formalities. It is, however, for national legislation to define this point without interference from the instrument.

*Portugal.* CPI: The question raises certain reservations, since it is important to take into account all the relevant principles of national law and jurisprudence, in addition to the relevant facts.

**Qu. 6(1)** *Should the instrument provide that the nature and extent of the protection referred to in Question 4 should be determined in accordance with national law and practice, but that in any event the relevant policy should be conducted in a transparent manner with the participation of the most representative organizations of employers and workers?*

#### *Affirmative*

*Governments:* 70. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); BMS, CITU (India); CGIL (Italy); JTUC-RENGO (Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom).

#### *Negative*

*Governments:* 4. Australia, Canada, Hungary, India.

*Employers' organizations:* MGYOSZ (Hungary); HSH, NHO (Norway); USCIB (United States).

*Workers' organizations:* CMKOS (Czech Republic); FKTU, KCTU (Republic of Korea); AFL-CIO (United States).

#### *Other*

*Employers' organization:* CEC (Canada).

*Workers' organization:* CGT-FO (France).

#### *Comments concerning affirmative replies*

*Bangladesh.* BEA: This system should be ensured, because ILO instruments advocate it.

*Barbados.* BWU: The instrument should set out the minimum standards by which the nature and extent of the protection should be benchmarked, and then national law and collective practices should be guided accordingly. These guidelines may then be modified to the national approach after consultation with the most representative organizations of workers and employers.

*Benin.* The policy must be transparent and therefore drawn up on the basis of tripartite consultations.

*China.* The employment relationship is one of the cornerstones of labour policy and thus affects the vital interests of employers and workers. It must be defined in a law, following consultation of the various parties concerned.

*Côte d'Ivoire.* CGECI: The promotion of transparency is beneficial for the world of work.

*Cyprus.* Social dialogue, through which the social partners play an active part in the policy-setting and implementation stages, is a necessary precondition to achieving consensus-based results.

*Egypt.* As we said earlier, the Egyptian Labour Code guarantees such protection. The Code was drafted following consultations with Egyptian workers' and employers' organizations (ETUF and Federation of Egyptian Industries).

*El Salvador.* The provisions of Article 5(1)(a) of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), should take precedence.

*Eritrea.* Because any policy that affects labour is of great interest to employers, workers and the government. The policy in question should balance the interests of all three.

*Germany.* If the national lawmakers deem it necessary to modify the law, they should do so with the participation of the social partners. There is no call for further regulation on this point.

*Guatemala.* It is important for the various sectors to participate because that way unmet needs in terms of the law's application are brought to light.

*Honduras.* Inadequate worker protection is detrimental to the various sectors and a matter of concern for the State and the social partners; it therefore requires effective, balanced and harmonious solutions that take due account of the interests involved, the extent of which should be determined at the national level in the light of the member State's law and practice.

*India.* CITU: Protection of all workers should be the goal of the instrument, which should direct retuning of national laws and policies in that direction.

*Italy.* CGIL: In accordance with each country's system, in order to avoid disputes over the powers conferred on Parliament versus those conferred on the social partners.

*Japan.* In examining labour policy, dialogue with labour organizations is crucial. However, the method of dialogue should depend on the situation in each country.

JTUC-RENGO: We agree with the Government that dialogue is essential. In particular, regarding the protection that workers should be afforded, extra talks should be conducted between labour and employers' organizations.

*Kuwait.* We agree with this principle, because transparency instils greater trust in the parties and makes them more willing to help implement the policies concerned.

*Lebanon.* The policy of protection and its scope are determined by national law and practice, as we pointed out earlier. It must be implemented transparently and by promoting social dialogue between the social partners.

*Mauritius.* Such participation is crucial so as to take into account the interests of the social partners and to facilitate the preparation of national policy and the eventual adoption of relevant legislation in a consensual manner.

*Morocco.* The participation of the most representative professional organizations is a fundamental principle.

*Mozambique.* The Recommendation must be implemented taking account of each country's practice and with the guaranteed participation of the social partners.

*Philippines.* Labour and employment policy preparation is open to tripartite consultation, thus ensuring the active participation of workers' and employers' groups.

*Portugal.* Each country may have different legal and economic systems, and different levels of development and regulation of social and industrial relations. This requires differentiated policies.

CIP: The protection must be determined in accordance with national law and practice and the corresponding policy must be conducted transparently and with the participation of the social partners.

*Qatar.* The legal protection of workers is based essentially on national law and policy. It is appropriate to consult the representative workers' and employers' organizations.

*South Africa.* Any protection accorded workers should enjoy the confidence and approval of the national laws if it is to be implemented. Democratic processes towards formulation of policy will ensure that the national law enjoys the confidence of the parties or stakeholders affected by the law.

BUSA: Provided that there are representative organizations of employers and workers and the right to freedom of association is protected. It would not be fair to insist on representation where the individual worker or employer is not associated with a representative organization.

*Spain.* It is vital for the social partners to participate at all levels of the employment relationship.

CC.OO.: Yes, it is vital for the social partners to take part in the policy's formulation and application.

*Sri Lanka.* For effective implementation, the policy should be acceptable to all the parties.

EFC: This makes it easier to give effect to the policy.

*Sweden.* It is important that the parties to employment contracts at national level be given guidance through legislation or case-law and that they have the possibility of judging whether or not a given relationship is an employment relationship.

*Switzerland.* Should the Conference nevertheless agree to discuss this controversial point, there must be great flexibility given the wide range of national realities. It therefore seems not only appropriate but also necessary to include a reference to national law and practice. Moreover, given the importance of the role played by the social partners, it should also be stipulated that they must be consulted.

USS/SGB: Where the protection afforded by the employment relationship is at least consistent with international labour standards, the protection granted to workers and falling within the scope of the employment relationship by virtue of the policies referred to in Question 4 should be in keeping with national law and practice. However, in countries in which national law and practice are not consistent with international labour standards, for example regarding freedom of association or the right to collective bargaining, it would be inappropriate to perpetuate or exacerbate the problem by making an unsuitable reference to national law and practice.

*Trinidad and Tobago.* National law and practice should ensure transparency of process and the participation of workers' and employers' representatives.

ECA: Lack of protection affects the worker, the government and the employers. Social dialogue is needed to ensure that the solution developed takes into account the interests of the wider society, not just those of workers.

*Tunisia.* Associating the most representative employers' and workers' organizations in the preparation of this national policy, especially in the determination of the nature and extent of the protection, will facilitate the implementation of the legislative or practical measures adopted for the benefit of workers with no protection.

*Ukraine.* FRU: Each country's legislation and practice has peculiarities. In order adequately to protect the workers and to balance the socio-economic interests in respect of employment relationships, account must be taken of those peculiarities and a transparent social policy conducted with the participation of the social partners.

FPU: By taking account of national law.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), FNV (Netherlands), COSATU, CONSAWU (South Africa): In countries where national law, and in particular national practice, does not accord with international labour standards such as freedom of association and the right to collective bargaining, it would be inappropriate to perpetuate or exacerbate such problems through a reference to "national law and practice" in the instrument. Consequently the reference to "national law and practice" should be replaced with a reference to "the relevant international labour standards". This comment applies throughout the text. However, the instrument should provide that the relevant policy should be conducted in a transparent manner, with the participation of the most representative organizations of workers and employers.

*Views shared by the following workers' organizations:* FNV (Netherlands), TUC (United Kingdom): It being understood that national law and practice are at least consistent with the ILO Declaration on Fundamental Principles and Rights at Work and the relevant ratified ILO Conventions.

#### *Comments concerning negative replies*

*Australia.* The Australian Government does not support the adoption of such a policy.

*Canada.* The nature and extent of the protection should be determined in accordance with national law and practice, and the relevant policy review should be conducted in a transparent manner in consultation with employers' and workers' organizations.

*Czech Republic.* CMKOS: The international instrument should unify the concept of dependent work, not conserve national differences, which could lead to social dumping and inequality in a globalized economy.

*Hungary.* The Recommendation should stipulate the minimum level of protection that, regardless of national law and practice, would be recommended to all member States. This would ensure the implementation and day-to-day observation of such provisions.

*Republic of Korea.* FKTU and KCTU: The scope of the protection must be determined with the participation of the most representative employers' and workers' organizations. This can be a problem if the international standards are to be developed in a manner that accords with national law and practice and the latter are misguided. The purpose of adopting a new international standard is to correct or upgrade national legislation and practice which stray from the principle of worker protection. National law and practice should therefore be aligned with international standards on the basis of

a commitment to extend protection to workers whose employment relationship is denied. National laws and practices that are sufficiently in accordance with the principle of protection or are more specific in the provision of protection should not be required to be scaled down to meet the international standard.

*United States.* AFL-CIO: National law and policy may fall below international labour standards and in such cases would fail to provide adequate protection.

USCIB: It is a commonly accepted position of all ILO constituents that national policies should be developed in consultation with employers and workers. It would be redundant to reiterate this position.

*Comments concerning other replies*

*Canada.* CEC: It is a commonly accepted position of parties at the ILO that national law and policy be developed in consultation with employers and workers. It would be redundant to reiterate this position.

*France.* CGT-FO: It should be borne in mind that in some countries, laws, and especially practice, are not in conformity with international labour standards such as freedom of association and the right to collective bargaining. Such a reference in the instrument to “national law and practice” could thus contribute to perpetuating or even exacerbating problems.

**Qu. 6(2)(a)** *Should such a national policy include at least the following measures to:*

- (a) *provide for those concerned, in particular employers and workers, guidance on how to determine the existence of an employment relationship?*

*Affirmative*

*Governments:* 68. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); ASI

(Iceland); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 5. Australia, Germany, India, Slovakia, Ukraine.

*Employers' organizations:* EK (Finland); HSH, NHO (Norway); USCIB (United States).

*Other*

*Government:* 1. Spain.

*Workers' organization:* CGT-FO (France).

*Comments concerning affirmative replies*

*Algeria.* This might be easier to achieve if the ILO were to publish guidelines for determining the existence of an employment relationship in a variety of situations.

*Austria.* The instrument should do no more than give a few examples of the content of a national policy; in no case should a minimum content be imposed. Suffice it to provide benchmarks for the formulation of the national policy. In addition, it would be better to speak about triangular contractual relationships or multiparty relationships than triangular employment relationships. In Austrian law, an employment relationship is binding only between two people: the wage earner and the employer.

*Benin.* The establishment and clarification of the employment relationship are fundamental because mistaken qualification of the relationship can give rise to tension during the contract's execution or when it is broken.

*Canada.* The law should contain appropriate criteria to allow for the determination of an employment relationship and should provide for accessible neutral tribunals, courts or other appropriate adjudicative mechanisms to make determinations where the parties disagree. Such bodies should have the mandate to order remedies.

*China.* It should be clearly stipulated that the existence of the employment relationship will be determined in the form of an employment contract.

*Costa Rica.* UCCAEP: Information is key for those concerned.

*Côte d'Ivoire.* CGECI: This is part of the transparency to be promoted.

*Croatia.* This should be done at national level, i.e. according to national law and jurisprudence.

*Cyprus.* Clear guidance that clarifies when an employment relationship exists is a necessary precondition for the effective enforcement of labour legislation. Consequently, the provision of guidance to employers and workers should be considered as a necessity.

*Denmark.* DA: Any such measure should respect national law and practice.

*Egypt.* The employment relationship offices in human resources administrations in Egypt provide the social partners with the necessary advice for proving their rights when needed.

*El Salvador.* A national campaign to heighten awareness of labour standards in this area would be very useful.

*Eritrea.* With such guidance, the parties could determine their status when they sign the employment contract and thus avoid any conflict on that point.

*France.* This is an essential point for guaranteeing the legal certainty of the players on the labour market.

MEDEF: But in accordance with national laws and jurisprudence.

*Honduras.* Give guidance to employers and workers on how to determine the existence of an employment relationship.

*Hungary.* Yes, although we have some reservations concerning the definition of the concept of employment relationship. However, similarly to the solution in the Hungarian Labour Code, it may be necessary to define the criteria for characterizing a legal relationship to ensure uniform legal practice.

*India.* CITU: The national policy should not push a sizeable section of workers outside the purview of legislative protection, as is the case with workers in the informal economy, on the grounds that it is difficult to determine the nature of the employment relationship. Rather, the national policy should aim to ensure coverage of all workers or those selling their labour; from this point of view, it should define the scope of the employment relationship in order to avoid the possibility of misinterpretation and evasion of responsibility by the employers.

*Italy.* CGIL: However, this should not limit or undermine the scope and role of the judicial system.

*Jamaica.* JEF: We recognize that this may differ in accordance with national legislations.

*Japan.* In Japan, determining whether someone is a worker or not is judged comprehensively, taking into consideration a number of important factors such as the right to decide, the right to control or supervise work, etc. However, the guidance proposed should depend on the situation in each country.

JTUC-RENGO: In Japan, whether or not a person is a worker under the Labour Standards Law is determined by consulting a government instruction, which is in effect only a form of administrative guidance. The criteria for determining whether a person is a worker or not should be based on law or the equivalent of a law.

*Republic of Korea.* FKTU and KCTU: Sufficient guidelines must be provided to distinguish between disguised dependent workers who are excluded from protection and those who are genuinely self-employed.

*Kuwait.* On condition that this is done in accordance with the national laws of each country. In this case, the government plays a key role in properly informing the social partners about the national and international laws and Conventions governing the employment relationship.

*Lebanon.* Guidance is usually provided by the laws and decrees in force and by the jurisprudence of the industrial courts; it is also provided by the specialized institutions of the Labour Ministry. It is in the interests of both parties that guidance be provided.

*Lesotho.* ALE: It is nevertheless important to emphasize that such a policy should be designed and adopted in consultation with the most representative organizations of employers and workers.

*Mauritius.* To avoid ambiguity and conflict in the interpretation of the definition of a worker.

*Mexico.* Employers and workers must know what an employment relationship is and national policies must give them the means of obtaining that knowledge. In Mexico there are public institutions, on which the workers and trade unions are represented, that offer advisory services.

*Morocco.* Dialogue with the social partners is essential.

*Mozambique.* It must be established how the employment relationship is to be determined. This must be done by means of written contracts, collective agreements or company by-laws.

*Philippines.* The transparency of the employment relationship between workers and employers is key to a harmonious and productive environment. The national policy should provide guidance to those concerned on how to determine the existence of an employment relationship.

*Portugal.* It is an advantage to have criteria for determining whether or not there exists an employment relationship. This is the only way of applying the legislation with certainty and security, and of ensuring effective protection for workers and fair competition between employers.

UGT: It is very important to include guiding principles on this aspect.

*Qatar.* This will further the application of the national policy on labour legislation.

*South Africa.* Inasmuch as the determination of the existence of an employment relationship cannot be left to the parties concerned, it is imperative to provide them with guidance in this area.

BUSA: The definition of an employment relationship is often complex, and therefore guidance should be provided. At best in an international instrument, however, such guidelines would have to be broadly expressed and should not override existing protections and legislation in member countries.

*Spain.* CC.OO.: Guidance alone does not suffice; it would be better to regulate the criteria used to determine the existence of an employment relationship.

*Sri Lanka.* EFC: Such guidance will be useful.

LJEWU: The method proposed for making national policy should aim only to draft the national policy, not to spell it out in the statute or relevant law.

*Switzerland.* USS/SGB: Since the state representatives have a responsibility in terms of labour administration, the industrial courts and bodies in charge of conciliation and arbitration should also figure among the parties concerned.

*Trinidad and Tobago.* ECA: This should be a major component of the national policy, but care must be taken to ensure the guidance is flexible.

*Tunisia.* Guidance on the means of determining the existence of an employment relationship is useful both to the employers, to avoid cases of abuse, and to workers, who are thus able to assert their rights.

*Ukraine.* FRU: This will make it possible to know what criteria are used to define the employment relationship and thus avoid unsolvable labour disputes.

FPU: As a guarantee of the determination of the employment relationship and its protection at the level of the state authorities.

*Zimbabwe.* It is important that workers and employers know how to determine the existence of an employment relationship.

*Views shared by the following employers' organizations:* BCCI (Bulgaria), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), MEDEF (France), CACIF (Guatemala), VSI (Iceland), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), CBI (United Kingdom): Yes, but according to national law and jurisprudence. The role of the government is to promote clarity and understanding of the law, and we encourage appropriate efforts to communicate accurate and helpful information to all stakeholders.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), FNV (Netherlands), COSATU (South Africa), TUC (United Kingdom): The instrument is aimed chiefly at state representatives with responsibility for labour administration, labour courts and bodies responsible for conciliation and arbitration.

#### *Comments concerning negative replies*

*Australia.* The Australian Government already provides information to workers regarding the distinction between employment and contracting arrangements, and the rights and obligations attached to them. The determination of this question is ultimately a matter for courts and tribunals to decide.

*Germany.* In theory, it is of course desirable to provide guidance to those concerned; however, in view of the general definition of the concept of wage earner and given the diversity and flexibility of forms of employment relationships, it is in practice impossible to provide guidance that is valid in all cases. It is more important for each worker to be able to ask an appropriate body (labour courts) to rule on his or her status.

*Finland.* EK: It should be left to the States to decide at the national level.

*India.* The existing instruments are sufficient.

*United States.* USCIB: Because this provision does not limit the scope of the guidance to employment relationships disguised by fraud, it is now broadened beyond what is appropriate and assumes as a premise that providers and users want to establish a traditional employer/employee relationship. It may nevertheless be appropriate to provide employers and workers with guidance on the international response to this issue.

#### *Comments concerning other replies*

*France.* CGT-FO: State officials and public servants responsible for labour administration and the labour jurisdictions, and hence their effective means of action, have a determining role, which should be recalled by referring to the applicable Conventions.

*Spain.* Rather than providing guidance, legal measures must be adopted to make the employment relationship more secure and prevent acts that fall outside the scope of the law.

**Qu. 6(2)(b)** *Should such a national policy include at least the following measures to:*

(b) *combat disguised employment relationships?*

*Affirmative*

*Governments:* 71. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 3. Australia, India, Iraq.

*Employers' organizations:* EK (Finland); HSH, NHO (Norway); ECA (Trinidad and Tobago); USCIB (United States).

*Comments concerning affirmative replies*

*Algeria.* Yes, on condition that such relationships are identified and that state control in situations liable to foster them is reinforced.

*Benin.* Because it marginalizes the worker and deprives him of the protection to which he is entitled.

*Belgium.* It would be apposite to emphasize the potential role of labour inspection not only as a supervisory body but also as a source of advice.

*Canada.* CEC: Yes, subject to the characterization of “disguised employment”. If the characterization leads to interference with (or demonization of) legitimate commercial relationships, we will oppose it. If it leads to an appropriate recognition of the need to avoid fraudulent activity, we will support it.

*China.* It must be clearly provided that the employer who has not discharged his duties under labour legislation must take legal responsibility.

*Colombia.* ANDI: Yes, in that disguised relationships run counter to the law.

*Costa Rica.* UCCAEP. Action must be taken in accordance with the law and recourse had to complaint mechanisms if required.

*Côte d’Ivoire.* CGECI: Transparency must be promoted and compliance with the law ensured.

*Czech Republic.* KZPS: Presuming the term would be defined.

*Egypt.* This is done by ongoing inspection in the workplace and by monitoring employment contracts and the conditions of work in companies to follow up the application of the provisions of the Code.

*El Salvador.* Yes, for this is one of the aspects on which more work is needed to guarantee maximum protection for workers in employment relationships.

*Eritrea.* Disguising the employment relationship is one way employers use to escape their duties towards workers. National policies should therefore address the issue properly.

*Germany.* Suffice it to make sure that it is the de facto conditions in which the work is performed that are decisive, not the form of the agreement between the parties, and that any worker wishing to establish his status through an appropriate independent body has the possibility to do so.

*Guatemala.* Urgent steps must be taken to detect and combat disguised employment relationships.

*Honduras.* A Recommendation that must focus on disguised employment relationships and on the need to establish mechanisms guaranteeing that the parties to the employment relationship have the right to adequate protection, but that does not interfere with commercial contracts and legitimate contractual arrangements.

*Hungary.* The definition of characterization criteria and the characterization itself are intended to meet this objective.

*India.* CITU: This can only be done by expanding the definition of workers in all occupations. Under neoliberalism, the trend is to squeeze the scope and coverage of such definitions in order to impart “flexibility” and remove “rigidity”. Both are deceptive concepts.

*Italy.* CGIL: It should be written that, as a general rule, the typical employment relationship is full (or part) time with no term of termination; therefore any disguised employment relationship should be converted into a typical one from the start.

*Japan.* In the case of a disguised employment relationship, the employer should be penalized for having violated labour legislation; in this way, the worker can be protected.

NK: Disguised employment should be cracked down in accordance with national laws and regulations on labour protection. In addition, the relevant penal rules should be applied with as much restraint as possible.

**JTUC-RENGO:** In order to ensure the application of appropriate laws and social security programmes for workers, national policy must provide criteria for how to apply and expand the scope of employment relationships within those laws and programmes.

*Republic of Korea.* FKTU and KCTU: Protection of workers would not be possible if disguised employment is allowed to persist on the basis of a civil or commercial code. In cases in which an employment relationship is determined to exist, there should be measures to restore the rights of workers (automatic recognition of the employment relationship) and to prosecute (or punish) employers who have wilfully attempted to exclude workers from protection.

*Kuwait.* Disguised employment relationships must be combated if they allow for conditions of obedience that are prejudicial to the workers.

*Lebanon.* It may be that the disguised employment relationship cannot be fully combated, which is why the policy must be reviewed as needed.

*Lesotho.* ALE: This is the core of the proposed instrument.

*Mauritius.* Yes, to recognize the existence of “disguised employment” and to allow member States to define a policy to address the issue.

*Mexico.* Yes, because in having recourse to such practices some people try to disguise employment relationships. The most common case is to pass them off as relationships of another kind: civil, commercial, cooperative, family, etc.

*Morocco.* The employment relationship must be clear in national legislation.

*Mozambique.* It is hard to resolve disputes between parties when their employment relationship is disguised.

*Netherlands.* FNV: National policy should include measures either to combat disguised employment relationships or to overcome them by broadening the scope of application of a specific act of labour legislation to other work relationships fulfilling specified factual criteria, or by introducing into the legislation irrefutable presumptions (based on such criteria) of the existence of an employment relationship.

*Philippines.* This is important because the labour sector wants a mandatory requirement for establishments to employ a large proportion of regular workers.

*Portugal.* Worker protection is effective only when all the standards governing the employment relationship are applied. Employers that have recourse to disguised labour make the worker’s situation more difficult and penalize employers that comply with the law.

*Qatar.* Disguised employment relationships are prejudicial to the national economy, in particular in terms of retirement, social security and taxes due.

*South Africa.* Any form of employment relationship that directly or indirectly threatens or distorts the protection accorded to the employees must be regarded as depriving the employees of their right to protection and must be combated.

**BUSA:** It would be helpful if Members had broad scope to combat particular methods used to disguise employment relationships. No attempt should be made, however, to prevent workers and employers from entering into legitimate contractual arrangements that satisfy both parties. Labour market policies must permit flexible arrangements so as to keep up with the demands and rapid changes that characterize the modern world of work. The key is to balance this need for flexibility with suitable protections for vulnerable workers.

*Spain.* CC.OO.: To this end, the employment relationship needs to be properly regulated and effective systems of control and sanction set in place, thereby giving the authorities that have jurisdiction in labour matters, such as labour inspectors, a fundamental role in detecting fraudulent relationships.

*Sri Lanka.* This needs to be done through statutory provisions after framing the national policy.

*LJEWU:* Again, this needs to be done through statutory provisions after the national policy has been framed.

*Tunisia.* This could be done by establishing criteria for determining the employment relationship and thus the problem of interpretation that might be prejudicial to one of the parties.

*Ukraine.* FPU: The national policy must aim to combat disguised forms of employment.

*United Arab Emirates.* Because disguised employment relationships undermine workers' rights in that they do not result in proper employment contracts.

*Zimbabwe.* Yes, to protect workers.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh) CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), COSATU (South Africa), USS/SGB (Switzerland), TUC (United Kingdom): The national policy should also provide guidance on how to adjust and broaden the scope of the employment relationship in order to ensure that all dependent workers receive the protection of labour legislation and social security.

#### *Comments concerning negative replies*

*Australia.* The Workplace Relations Act (WR Act) makes provision for combating "sham" arrangements. Inspectors under the WR Act are responsible for enforcing employer obligations to employees. In addition, workers are able to make an application for the recovery of unpaid entitlements where they have been engaged under a "sham" arrangement. The Australian Government considers that there is no benefit in reproducing these provisions in the proposed national policy.

*India.* Since the employment relationship is developing and fluid, we should review the matter periodically.

*Iraq.* Legal remedies must be established for that situation.

*Trinidad and Tobago.* ECA: The national policy should not aim to combat disguised employment relationships but to identify them when circumstances in the work environment change.

*United States.* USCIB: Without a clear and unambiguous definition of the term "disguised", i.e. one that takes account only of employment relationships fraudulently disguised, the scope of the term and the coverage of the recommendation will go well beyond that to which the parties agreed because they will encroach on issues arising out of the triangular employment relationship.

**Qu. 6(2)(c)** *Should such a national policy include at least the following measures to:*

- (c) *establish clear rules for situations where employees of a person (“the provider”) work for another person (“the user”)?*

*Affirmative*

*Governments:* 58. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Indonesia, Japan, Kuwait, Lebanon, Mauritius, Mexico, Morocco, Netherlands, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers’ organizations:* BEA (Bangladesh); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); UCCAEP (Costa Rica); CGECI (Côte d’Ivoire); KZPS, SPD (Czech Republic); MEDEF (France); CACIF (Guatemala); ALE (Lesotho); ZDODS, ZDS (Slovenia); BUSA (South Africa); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers’ organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); GEFONT (Nepal); FNV (Netherlands); UGT (Portugal); Solidarnosc (Poland); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 12. Australia, Cyprus, Eritrea, Fiji, Hungary, Italy, Kiribati, Lithuania, Republic of Moldova, Mozambique, Niger, Panama.

*Employers’ organizations:* CNI (Brazil); CEC (Canada); CEIF (Cyprus); ANDI (Colombia); DA (Denmark); EK (Finland); MGYOSZ (Hungary); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NWC (Netherlands); CONEP (Panama); CIP (Portugal); CEOE (Spain); EFC (Sri Lanka); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

*Workers’ organizations:* ASI (Iceland); CITU, BMS (India); LDF (Lithuania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique).

*Other*

*Governments:* 5. Denmark, India, Iraq, Latvia, Norway.

*Employers’ organizations:* UCCAEP (Costa Rica); VSI (Iceland); HSH, NHO (Norway).

*Comments concerning affirmative replies*

*Austria.* An effort must be made to make the rules clearer, along the lines of the Austrian law on the provision of labour (AÜG), which contains detailed definitions of the rights and obligations of the parties to this triangular relationship, while ensuring that the workers provided and the permanent staff of the user company benefit from equal treatment so that neither one nor the other – they all generally do the same work – suffers. According to the AÜG, the user is liable for all the payments due to the workers provided while they work in his company, and for the corresponding employer and employee social contributions. If it is established that the user has already met his obligations to the provider company, he provides only counter security.

*Bangladesh.* BEA: Care must be taken to ensure there is no interference in commercial agreements between a provider and user and that there is no allocation of obligations arising from the employment relationship to the user, such that the user becomes liable for the obligations of the provider employer.

*Barbados.* These rules should include the requirement that a clear statement exists as to who gives the orders to the worker and who pays the worker.

BWU: As many parameters as can make the relationship clear should be used.

*Belgium.* A distinction must be made between situations in which the “user” has authority over the provider’s workers and mere subcontracting in which there is no connection between the worker and the “user”, the worker remaining subordinate to the employer (in this case the “provider”). The replies that follow are valid only in cases in which there has been a transfer of authority.

*Benin.* These rules should serve clearly to identify the parties to an employment relationship and any misunderstanding.

*Canada.* Where the parties cannot agree, disputes should be settled by an appropriate adjudicative mechanism. These determinations would be based on national law and practice and the facts of each case.

*China.* Provision must be made for activities concerning the employees of a person.

*Côte d’Ivoire.* CGECI: This is how to prevent disputes and clarify the relationship between the parties.

*Croatia.* There should be no interference in commercial agreements between a provider and user and no allocation of obligations arising from the employment relationship to the user, such that the user becomes liable for the obligations of the providing employer.

*Czech Republic.* CMKOS: We support this proposal as a means of clarifying the provisions of ILO Convention No. 181.

*Egypt.* This system is nevertheless not in force in Egypt. The Labour Code prohibits the employment of workers through the intermediary of a foreman or an employer “providing” workers.

*Finland.* Drafting such a provision with a view to EU regulations, for instance, is by no means an easy task. Any such provision must in any case allow scope for national practices.

SAK, STTK and AKAVA: Workers are obliged to follow the employer’s instructions, for example in regard to the place where the work will be done.

*France.* These are complex situations that call into play issues of legal security for employers and protection for employees.

*CGT-FO:* It is important to ensure that the actual principal (user) bears responsibility, without relieving intermediaries of responsibility.

*MEDEF:* Taking care not to impose the existence of an employment relationship with the user when there is one with the provider.

*Germany.* Triangular relationships should be covered in a specific instrument dealing only with the specificities of those relationships.

*Guatemala.* In order not to put up with disguised employment relationships.

*Honduras.* This would allow workers to identify who the employer is, what their rights are and who is responsible for them.

*Hungary. NFWC:* Hungarian law recognizes lending of labour and other forms of transfer of an employee by the “service provider” employer to the “user” employer, such as secondment and instances where the service provider employer is temporarily unable to provide its own employees with work. The ILO instrument should refer to these cases as well and state that the fundamental rights of an employee working for a service provider employer must not be prejudicial to the user employer.

*Iceland.* Where there is an employment relationship, existing frameworks for employment standards will apply.

*Indonesia.* In the process of a working agreement, each party should understand clearly their respective rights and obligations.

*Italy. CGIL:* There should also be a clear distinction between interim work and other entrepreneurial relationships between employers (i.e. activities in outsourcing).

*Japan.* In situations where employees of a “provider” work for a “user”, it is likely that a lack of labour protection, such as intermediate exploitation and forced labour, will occur. It is important that the national policy establishes and implements clear rules for such situations in each country.

*JTUC-RENGO:* In order to eliminate intermediate exploitation and forced labour, the “business of providing workers” is prohibited in Japan, although the practice survives in the guise of service contracts and labour subcontracts. To remedy this situation, a clear rule is needed to secure jobs and reasonable working conditions for workers.

*Republic of Korea. FKTU and KCTU:* “Providers” refers to parties which provide labour (labour lease temporary agencies, labour service provider contractors, subcontractors) and “users” refers to the company which actually makes use of the labour (services) or contracts the subcontractor or service provider. In such a case, worker protection may be weakened by the employer’s failure to meet his obligations. Clear guidelines are therefore needed that outline the employer’s responsibility in respect of the user establishment.

*Kuwait.* This is the situation that regulates labour legislation in each country.

*Lebanon.* Such clear rules will make it possible to determine who is responsible for ensuring protection and assuming responsibility.

*Lesotho. ALE:* We agree on the clear understanding that commercial relationships are not going to be compromised. There can only be one employer, who must not be

disguised, but the facts and the circumstances must be gone into taking into account national law and jurisprudence.

*Mauritius.* To clarify the employment relationship in triangular situations and to ensure wider protection to workers.

*Mexico.* Clear rules should be included for regulating this kind of situation.

*Morocco.* The situation must be well defined in the national legislation.

*Mozambique.* It is always desirable and reasonable to have clear standards because they lower the risk of conflict.

*Nepal.* GEFONT: It is necessary to make provision for employees who, because of the nature of the job, work for a person other than the employer.

*Peru.* For the legal security of workers and employers and enhanced control on the part of the State, so as to prevent fraudulent recourse to subcontracting.

*Philippines.* The national policy should also include measures to establish rules for determining the extent of the employment relationship, especially in a triangular set-up. In this respect, the Department is in the process of consolidating the proposed amendments to the rules governing private recruitment agencies for local employment.

*Portugal.* Whether the workers are provided temporarily or whether they are the employees of an employer, the increase in these forms of employment warrants that particular attention be paid to them.

UGT: Portugal has specific legislation on this point.

*Qatar.* To guarantee justice and prevent labour legislation from being circumvented.

*South Africa.* Employees need to know who their employer is and who has responsibility for protecting them. The instrument should correct almost all the flaws in the employment relationship, which are often used by employers to exonerate themselves from the responsibility of protecting their employees.

BUSA: It might not be possible to define “clear rules” in the international context.

CONSAWU: The definition should be as broad as possible in all political systems.

*Spain.* If reference is made to the activities of temporary employment agencies. The existence of clear legislation must be the prior condition for the establishment of such a reality.

CC.OO.: The provision of workers should be prohibited, or authorized only in clearly defined cases. Although it is easy in some kinds of employment relationships, such as contractual and subcontracted relationships, to have recourse to the illegal provision of workers, when the contract covers the provision of services within the framework of the main enterprise or user, it is hard to distinguish on the basis of the elements of each case between the simple provision of labour and unlawful decentralized production. This can arise not only in the case of affiliates with no assets or productive structures of note, but also in the case of two genuine companies. In Spain, only temporary employment agencies are authorized to provide workers.

*Sri Lanka.* LJEWU: These rules may be embodied in statutory provisions or in basic interpretations.

NWC: Sri Lankan legislation provides that the user company is liable for minimum wages if the “provider” defaults.

*Switzerland.* USS/SGB: Responsibility should be allocated between the “user” and the “provider” in a transparent manner that is accessible to the employees concerned. Employees should be able to know their rights, to know who is responsible for ensuring they are met, and hence to whom they can complain if those rights are not met.

*Trinidad and Tobago.* ECA: The rules must be clear but also subject to change.

*Tunisia.* This would allow such situations to be clarified and would therefore facilitate the determination of the rights and obligations of the parties to the employment relationship.

*Ukraine.* FRU: It is at present not clear what relationship exists when the workers of one employer work for another employer. Sometimes the employment relationship between the workers and the second employer gives rise to inextricable issues of employment relationship and social protection.

FPU: For some employees’ employment relationships when the employment contracts are agreed.

*Zimbabwe.* The employee has the right to know who the employer is and what obligations the employer has towards the employee.

*Views shared by the following workers’ organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania): The terms used, “provider” and “user”, are not appropriate. We prefer to stick to the whole definition, rather than to terms that are not legal as such.

#### *Comments concerning negative replies*

*Brazil.* CNI: In an employment relationship, the existing legislation must be applied in the light of national specificities. See the answer to Question 3(2).

*Cyprus.* It is very difficult to establish “clear rules” since each case may have different particular circumstances. Consequently, this issue should be regulated by each individual State. These issues could be examined under the section dealing with the determination of the existence of an employment relationship, under which general rules could be established as to who is the employer.

*Denmark.* DA: This must be determined according to national law and jurisprudence. The sentence is too narrow to fit all.

*Eritrea.* If clear rules are legislated for such situations, they may affect the freedom of the contracting parties. The laws should therefore only serve as general guidelines and should not be exhaustive.

*Finland.* EK: This refers to the European Commission’s proposed directive on temporary agencies; any harmonization at ILO level would be impossible.

*Hungary.* Although the Hungarian Labour Code regulates temporary agencies and includes a special chapter on this atypical legal relationship and on private employment agency activity, if the ILO wishes to formulate a standard concerning such agencies, it is advised to do so in a separate, independent document, in view of the significance of the issue.

*Jamaica.* JEF: The establishment of clear rules for situations where employees of a person work for another person can and may in fact impede commercial agreements and contracts. We are mindful of the fact that within the context of employment relationships, parties are guided by employment standards. As such, the proposed establishment of clear rules can in fact have negative implications.

*Japan.* NK: We are concerned about the possibility that the employer's obligations would be transferred to the user, even though there is no employment relationship between the employees of a provider and the user.

*Sri Lanka.* EFC: The rule should not be prescriptive; what is required are guidelines.

*Switzerland.* UPS: The fact that questions (i) to (iii) are asked in the event of an affirmative reply – and the fact that the answer to them must also be no – illustrates how difficult it is to identify the problem clearly and simply.

*United Kingdom.* CBI: This is unrealistic. What about commercial factors?

*United States.* USCIB: The concept of seeking to have a national system with clear rules that exist to determine where employees of a person work for another goes beyond the scope of the agreement in Paragraph 25 that provides that the Recommendation be flexible.

*Views shared by the following employers' organizations:* BCCI (Bulgaria), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain): In an employment relationship, existing frameworks for employment standards must apply. Care must be taken to ensure that there is no interference in commercial agreements between a provider and a user, and that there is no allocation of obligations arising from the employment relationship to the user, such that the user becomes liable for the obligations of the provider employer. CEC (Canada) adds: We should not demonize subcontracting or other legitimate ways of structuring work. Interference in well-established commercial arrangements will lead to uncertainty and labour market rigidity. It will discourage investment and innovation.

#### *Comments concerning other replies*

*Costa Rica.* UCCAEP: What has precedence as a normative framework must be applied.

*Denmark.* The Danish Government finds that the instrument should not deal with the field of employment service companies and temporary employment agencies. See the discussions and conclusions of the 2003 International Labour Conference.

**Qu. 6(2)(c)(i)** *Should such a national policy include at least the following measures to:*

- (c) *establish clear rules for situations where employees of a person ("the provider") work for another person ("the user")?*

*If yes (to Question 6(2)(c), 6 should such rules address, inter alia, the following:*

- (i) *who is the employer?*

*Benin.* This would remove all ambiguity, especially in triangular employment relationships.

<sup>6</sup> Although sub-questions (i), (ii) and (iii) are addressed only to those who replied in the *affirmative* to 6(c), this report also contains the observations of those who, although they answered differently, wished to express themselves on one or the other of the sub-questions.

*Canada.* The policy should provide guidance but disputes should be determined by an appropriate adjudicative mechanism.

*China.* The provider is the employer.

*Costa Rica.* UCCAEP: Why, if the relationship is recognized?

*Côte d'Ivoire.* CGECI: To prevent disputes and clarify the relationships between the parties.

*Croatia.* No, since there are only two possible situations: either the relationship is recognized, or there is a dispute which a court should settle based on the facts and established jurisprudence at national level.

*Denmark.* DA: No. Questions (i) to (iii) are not relevant to the “clear rules for situations”, but only to established employment relationships.

*Egypt.* Identifying the employer makes it easier to guarantee the workers’ rights and to determine who is responsible for providing that guarantee.

*Guatemala.* Also those who act on the employer’s behalf and their joint and several responsibility.

CACIF: No. A general definition could produce more problems than solutions; each case must be determined on the basis of the facts submitted to the courts.

*Honduras.* Yes, because workers engaged in a disguised employment relationship will be perfectly able to identify their employer and know from whom to demand their rights as workers. The workers thus benefit from the same level of protection as that traditionally conferred by the law on those engaged in a purely bilateral employment relationship.

*India.* CITU: Identifying the employer or the employers should be governed by the facts as to who are the ultimate beneficiaries or gainers of a worker’s labour, and that should include the principal employer and intermediaries. The responsibility of the employer may be divided between the principal employer and intermediaries (contractor or labour supplier), but the principal employer should have to shoulder the main responsibility in the event of defaults by the intermediaries.

*Italy.* CGIL: There should also an indication of a “comprehensive responsibility” for the principal employer in case the other companies involved default.

*Japan.* In situations such as (c), it is likely that labour protection will not be ensured. Therefore, it is important to make clear who the employer is in the national policy of each nation. In Japan, a provider cannot dispatch a worker if it is not the employer.

JTUC-RENGO: In order to avoid situations in which workers are not protected, it is important for the national policy clearly to define who the employer is. In Japan, too, there are practices that fall under the “business of providing workers” prohibited by law, so it is necessary to make clear who the real employer is.

*Republic of Korea.* FKTU and KCTU: If the triangular employment relationship is adopted to avoid employer responsibility, the actual user establishment must be recognized as the employer. In the case of a substantial triangular employment relationship, regulations must be put in place to establish shared employer responsibility, through an arrangement of allocation of responsibilities or through specific individual responsibility.

*Kuwait.* Because in the event of a dispute, the courts will have to determine the relationships and the parties to the dispute. The employer is any physical person or body corporate whose occupation or profession is the employment of workers to whom he pays a salary.

*Lebanon.* Because in the triangular relationship, the service in charge of controlling and supervising the employees is not the same as that engaged in the contractual relationship and which undertook to provide them with benefits.

*Mauritius.* To situate liability between the job contractor and the principal in triangular employment relationships.

*Mexico.* Workers must know who their employer is. Mexican law defines who the employer is.

*Morocco.* The obligations of the employer and the employee must be set down in the law.

*Mozambique.* It is important for each worker to know who the employer is, i.e. who is directly concerned under the law by the employment relationship.

*Nepal.* GEFONT: It is sometimes difficult to identify the employer. In that case, a group of workers or their union should take collective action. They can work with the employer's organization or another social organization concerned about the workers' protection and interests.

*Peru.* This is important because of the specific nature of "triangular" relationships.

*Philippines.* In identifying the employer, the rules immediately address the issue of on whom the joint and several liability may be imposed. Therefore, the best safeguard is explicitly to provide for the joint and several liability of the employer.

*Portugal.* Identifying the employer is a crucial condition for any employment relationship, essentially, as in this case, when the labour can be provided to someone who is not the employer. This is why, in Portugal, temporary employment relationships must be agreed in writing and the ad hoc provision of a company employee must also be agreed in writing by the provider and the user and approved by the employee.

CIP: No, these rules must be established by the member States' legislation and jurisprudence.

*Qatar.* The aim is to know who is responsible in terms of the costs of the employment relationship and for social security contributions.

*South Africa.* To avoid or mitigate any ambiguity. Rules must be very explicit in order that they can achieve the intended goals. There must be a common interpretation of the rules in order to ensure consistency in their application.

BUSA: This would have to be broadly expressed, taking due cognizance of the difference that may exist in national laws and policies.

*Spain.* The employer is clearly the key component of the employment relationship. If the employer is not identified, there is in fact no legal relationship.

CC.OO.: For reasons of legal security, it is necessary to know who is liable vis-à-vis the worker.

*Sri Lanka.* In view of the fact that different countries have different definitions of "employer", the national policy should have definitions to suit national conditions.

*Trinidad and Tobago.* ECA: Definitions should be cognizant of the national situation and reality.

*Tunisia.* This would make it possible to close the legal or treaty-based loopholes in respect of the parties' responsibilities and to avoid problems of interpretation of each party's legal status.

*Ukraine.* FRU: Determining who the employer is serves to clarify who must ensure the workers' conditions of work.

FPU: Yes. Clearly, one of the parties to the employment contract must be a tangible employer.

*United States.* USCIB: No. The question suggests that the Recommendation seeks to encroach on the definition of the substance of the employment relationship, which is not what was agreed, and fails to consider the wide variety of other types of relationships that provide opportunities for workers outside the employment relationship.

*Zimbabwe.* So that the employer knows who to bargain with.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania): The definition must be as wide as possible irrespective of the political system. It is thus universal and must cover all political systems, including where the State is considered the only employer.

*Views shared by the following employers' organizations:* BEA (Bangladesh), BCCI, BIA (Bulgaria), CEC (Canada), CEIF (Cyprus), ANDI (Colombia), MEDEF (France), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): No, because there is either an acknowledged relationship or there is a dispute which the courts should resolve on the basis of the facts and established jurisprudence in the country. If there is no employer, there can be no employment relationship.

**Qu. 6(2)(c)(ii)** *Should such a national policy include at least the following measures to:*

(c) *establish clear rules for situations where employees of a person ("the provider") work for another person ("the user")?*

*If yes (to Question 6(2)(c),<sup>7</sup> should such rules address, inter alia, the following:*

(ii) *what are the conditions of work, including remuneration, taking into account the principles of equal opportunity and treatment?*

*Benin.* The question is worth considering, and special emphasis should be placed on part-time work.

*Canada.* No. It is difficult to outline all possible permutations related to the conditions of work. This risks being either too prescriptive or incomplete.

CEC: No. This is dependent on other processes (contract, collective bargaining) and not on the determination of who is the employer. To speak of imposing equal terms on various mechanisms for performing work ignores the reasons parties elect alternate mechanisms, and will result in imposing concepts on commercial relationships that are

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<sup>7</sup> Although sub-questions (i), (ii) and (iii) are addressed only to those who replied in the *affirmative* to 6(c), this report also contains the observations of those who, although they answered differently, wished to express themselves on one or the other of the sub-questions.

not logical or practical. The authorities must respect the capacity of the parties to negotiate appropriate terms.

*China.* The employees of a person and their user's other employees should benefit from equal treatment.

*Côte d'Ivoire.* CGECI: No. It is the task of labour inspection to ensure respect for the conditions of work.

*Croatia.* No, this does not depend on the determination of who is the employer, but on another process, such as a contract or collective bargaining.

*Czech Republic.* CMKOS: Without equal treatment, agency employment would only make it easier to supersede regular employment relationships and facilitate social dumping against regular employees.

*Egypt.* Clearly defining the conditions of work helps clarify the contractual relationship. At the same time, it facilitates the determination of rights and obligations and ensures justice and equality.

*Germany.* It would be wise to add that in that case labour legislation must also be respected. The employees provided are wage earners like any others who work for a third party (the user).

*Guatemala.* This will make it possible to determine who is offering their services, to avoid disguised employment relationships and to harmonize legislation in terms of gender, ethnicity and age.

*Indonesia.* To confirm that there is no discrimination in employment and occupation under the prevailing wage policy and to ensure equal opportunity in the workplace.

*Italy.* CGIL: In particular, it should be reaffirmed that no employment relationship should be valid if its only scope is social dumping referred to in collective agreements.

*Jamaica.* JEF: No, this would be impractical as factors such as conditions of work and remuneration depend on a number of factors such as type of employment, qualification and experience, and possibilities of profit, most of which are for the most part already included in the contract and collective agreement and as such are not necessarily determined by the employer. The JEF, however, advocates the principles of equal opportunity, non-discrimination and treatment.

*Japan.* No. In Japan, it is common for conditions of work such as wages to be decided by negotiation between labour and management (workers and an employer) within the enterprise. The system is not designed to set unified wages by occupation in a cross-enterprise manner. Therefore, it is difficult to set rules including the "conditions of work, taking into account the principles of equal opportunity and treatment" that create a standard for the conditions of work between temporary workers and the user's employees.

JTUC-RENGO: Equal treatment provisions for temporary workers should assure them of at least the same treatment as that afforded to workers employed by a "user" and engaged in the same job. Specifically, they should be guaranteed the legal minimum wage adopted at their user's workplace and be provided with the same compensation, occupational health and safety protection, compensation under the Worker Accident Compensation Insurance Law, social insurance, vocational training and skills development.

*Republic of Korea.* FKTU and KCTU: In order to ensure that indirectly employed workers are not subjected to unfair discrimination, in terms of wages, working conditions, education and training and social security, a group of workers needs to be designated for the purposes of effecting a comparison.

*Kuwait.* No, because the question must be regulated by the employment contract and collective bargaining. The latter determine those questions which differ from one country to another on a case-by-case basis.

*Lebanon.* The contract must be between the employee and the provider and remain subject to the laws and regulations in force.

*Mauritius.* To make explicit the rights and entitlements of workers in contracts of employment and to enhance their protection.

*Morocco.* National legislation must determine the employees' conditions of work and salary, taking account of the principle of equal opportunity.

*Peru.* Criteria must be established for defining the cases in which the conditions of work of those employed by the user should apply to the provider's employees, especially when they do similar work.

*Portugal.* This reference is important. In the Portuguese system, whether in the case of ad hoc provision of labour or temporary work, even if the system of labour services taken into account is that of the user, the remuneration due may be that which the provider would be obliged to pay as an employer, if it is higher.

CGTP-IN: Yes, but only as an example.

CIP: No, these matters must be the jurisdiction of the member States.

*Qatar.* Many countries oblige the employer to explain the conditions of work and his requirements to the employees.

*South Africa.* In situations where there are no bargaining councils, employees are vulnerable. It is therefore important to set minimum standards and/or minimum wages in order to protect vulnerable employees.

BUSA: No. This is not relevant in the context of the main objective, which is to provide guidance in clarifying the employment relationship. Conditions of work cannot be prescribed at the international level.

*Spain.* The conditions of work (duration, working day and hours, positions, duties, system of leave, public holidays, authorized absences and vacation, and salary) are basic components of the contract.

CC.OO.: In Spain, the conditions of work and the rights of workers employed by temporary employment agencies are regulated.

*Trinidad and Tobago.* ECA: No. Only conditions and standards of work concerning occupational safety and health should be included here. Working conditions, remuneration and so on should be determined by free negotiations between the parties.

*Tunisia.* The conditions of work, including pay, are the key elements for proving whether or not an employment relationship exists.

*Ukraine.* FRU: These are the principles required to help guarantee that workers can realize their labour potential; this is to the advantage of the employer, who obtains revenue from the work performed by the employees.

FPU: All work must be remunerated in the form of wages.

*United States.* USCIB: No. This is not within the agreed scope of Paragraph 25 and clearly calls for the Recommendation to define the substance of the employment relationship, and that should be left to national systems.

*Zimbabwe.* This has a great impact on the employment relationship.

*Views shared by the following employers' organizations:* BEA (Bangladesh), BCCI, BIA (Bulgaria), ANDI (Colombia), CEIF (Cyprus), MEDEF (France), CACIF (Guatemala), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): No, this sentence should not be included because the conditions of work depend on another process (contract, collective bargaining, etc.) and not on the determination of who is the employer.

*Views shared by the following trade union organizations:* BSSF (Bangladesh), CLTM (Mauritania): It is of paramount importance for the workers to feel protected, to know their rights are respected and defended, and to have adequate tools and means of production to accomplish their job.

**Qu. 6(2)(c)(iii)** *Should such a national policy include at least the following measures to:*

(c) *establish clear rules for situations where employees of a person ("the provider") work for another person ("the user")?*

*If yes (to Question 6(2)(c),<sup>8</sup> should such rules address, inter alia, the following:*

(iii) *the joint and several liability of the provider and the user in such a manner that the employees are effectively protected?*

*Barbados.* No. This may be desirable; however, in the practical environment with providers and users of varying degrees of competence and resources this seems potentially burdensome.

*Benin.* Each party to the contract knows what to abide by in the event of a problem, especially when the provider or the user defaults on his contractual obligations.

*Bulgaria.* CITUB: The employment relationship requires complete clearness for the parties and for its implementation.

*Canada.* No. Based on national law and practice.

*CEC:* No. We strongly oppose the allocation of responsibilities from a bona fide employer to a user enterprise. Few businesses today do not benefit from the output of workers from other companies. There is a broad spectrum of involvement of workers in enterprises that are not their employer. To attempt to draw lines that extend obligations to users would be impossible, impractical and contrary to well-established principles of law.

*China.* The provider must fulfil his duties under labour legislation towards the employees. When he cannot do so, the user should assume joint and several responsibility.

<sup>8</sup> Although sub-questions (i), (ii) and (iii) are addressed only to those who replied in the *affirmative* to 6(c), this report also contains the observations of those who, although they answered differently, wished to express themselves on one or the other of the sub-questions.

*Costa Rica.* This is a crucial point today because triangular employment relationships are very common and the protection afforded the workers engaged in this kind of relationship is gradually being weakened.

UCCAEP: There is only one liability, and it must be codified by the law.

*Côte d'Ivoire.* CGECI: No. Obligations are determined by the contract. Liability is the jurisdiction of the courts.

*Croatia.* No, there should be no question of joint and several liability for rights and obligations arising from the employment relationship, as opposed to responsibility for safe premises, insurance, etc. There can be only one employer in any employment relationship.

*Czech Republic.* CMKOS: These triangular relationships must not be prejudicial to the worker.

*Egypt.* This relationship must be clear in the legislation so as not to divide liability and make the workers lose their rights between the provider and the user. In this case, the provider and the user must have joint and several liability.

*El Salvador.* Salvadoran legislation establishes joint and several liability between the contractors and the subcontractor in terms of the obligations arising from the provision of services by the subcontractor's workers.

*Finland.* SAK, STTK and AKAVA: Because the worker is obliged to do the work in the place determined by the employer, it makes no difference who gets the benefit of it.

*Germany.* No, it is not necessary to provide for joint and several liability. Suffice it to ensure that the employees provided can claim against their employer. There is no reason to give them more advantages in this area than "normal" employees.

*Guatemala.* For the sake of security, within a specific time frame.

*Honduras.* If such liability is established, neither the provider nor the user can escape liability for workers' rights, thereby guaranteeing the protection of those rights.

*India.* CITU: The responsibility of the employer may be divided between the principal employer and intermediaries (contractor or labour supplier), but the principal employer should have to shoulder the main responsibility in the event of defaults by the intermediaries.

*Indonesia.* It would make it clear who the employer is.

*Jamaica.* JEF: No. This is redundant as there is essentially only one employer in the employment relationship, hence there cannot be a case of joint liability.

*Japan.* In situations of this kind, it is likely that the employer's liability will not be clearly defined, which will have negative consequences on the level of protection. Therefore, from the standpoint of labour protection, it is important that each country's national policy clarify the liability of the provider, the liability of the user and the joint liability of the provider and the user, as stated in the Law for Securing the Proper Operation of Worker-Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, some of the rules of which, as for example those on safety and work time management, apply to the user.

JTUC-RENGO: While it shares the Government's view on this point overall, this organization feels that, under the Worker Dispatch Law, the user does not bear heavy liability, and that the user's liability and the joint liability of the provider and the user

should be made more stringent. In cases other than those covered by the Law, the liabilities remain unclear, and joint liability should be established to provide effective protection for the workers concerned.

*Republic of Korea.* FKTU and KCTU: It is necessary to stipulate the joint (solidarity) responsibility of the provider and the user or the specific individual responsibility of each of the parties for specific areas of concern.

*Kuwait.* No, no employment relationship creates joint and several liability between the provider and the user in favour of the worker. There tends to be only one employer in any employment relationship, which is why this question should be deleted.

*Lebanon.* In so far as the provider is the employee's true employer, the result will be to limit liability to that person. In order to guarantee effective protection, that liability should be spelled out in the text of the contract.

*Mauritius.* To reinforce the protection of workers.

*Morocco.* The national legislation must protect the employees and safeguard the employer's interests.

*Mozambique.* It is important for this to be clearly stated so that no one escapes liability.

*Netherlands.* In the Netherlands, in triangular employment relationships, the provider is the employer and is responsible for fulfilling the conditions of employment. In respect of matters relating to safety and health, in case of industrial accidents and in respect of social security contributions, the user can also be held responsible.

*Panama.* No. In our legislation, these are two different things. There is an employer and a worker.

*Peru.* A mechanism should be established for the joint and several liability of the provider and the user as concerns the economic benefits provided for in labour legislation and the legal guarantees for occupational safety and health.

*Philippines.* The instrument should equally refer to the joint and several liability of both the "provider" and the "user", which are both referred to as employers.

*Portugal.* The instrument should affirm the principle that national legislation should describe the form of effective protection to which the worker is entitled from the provider and the user. Should this not be the case, the instrument will have to be more specific and indicate in what circumstances there is joint and several liability and in what circumstances responsibility is divided, although this would make the negotiations more difficult. In Portugal, for example, the system of benefits that applies in temporary work is that of the user, but the provider is responsible for compliance with the legal obligations relating to social security and compensation for occupational accidents.

*Qatar.* Joint and several liability by the provider and the employer would guarantee enhanced protection.

*South Africa.* It is important for the rules to bind both the provider and the user jointly and severally with the protection of employees, to ensure that employees are effectively protected.

*Spain.* This is necessary when two companies are engaged in an employment relationship, one being the enterprise in the legal and labour sense because it pays the worker, the other with which a relationship has been established by virtue of the fact that it directs and supervises the employee's work.

CC.OO.: Because both the provider and the users benefit from the employment relationship, i.e. from the services provided by the worker.

*Switzerland.* No. Under our legislation, we could not agree to the establishment of joint and several liability between the provider and the user. Such an amendment would have no hope of being agreed by our Parliament.

*Syrian Arab Republic.* Because the instruments must clearly protect the employees.

*Trinidad and Tobago.* ECA: No. An accurate and efficient mechanism must be developed to determine who the employer is, and only the employer should be liable when employees are not effectively protected. Where occupational health and safety issues are concerned, however, the user should have some responsibility.

*Tunisia.* This would enable the workers to know their rights and who their true employer is.

*Ukraine.* FRU: This would prevent inextricable situations from arising when the employees of one person work for another person.

FPU: The principle of joint and several liability will guarantee to the workers that their rights at work will be upheld in disputes.

*United States.* USCIB: No. This provision does not belong in this Recommendation because it directly addresses the issue of triangular employment relationships, which are not to be addressed in this Recommendation. Such a provision would also interfere with existing United States laws, which is also beyond the agreed scope of the response.

*Zimbabwe.* As long as workers know the responsibilities of the provider and the user, either jointly or separately, they will be in a position to collectively bargain for the protection of their rights.

*Views shared by the following employers' organizations:* BEA (Bangladesh), BCCI, BIA (Bulgaria), ANDI (Colombia), CEIF (Cyprus), CACIF (Guatemala), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): No, there should be no question of joint and several liability for rights and obligations arising from the employment relationship, since there can be only one employer in any employment relationship.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CITUB (Bulgaria), CLC (Canada), ETUF (Egypt), CFDT, CGT-FO (France), USAM (Madagascar), CLTM (Mauritania), UGT (Portugal), CONSAWU, COSATU (South Africa), TUC (United Kingdom): The apportionment of liability between "the user" and "the provider" should be made in a transparent manner and should be available to the workers concerned. The workers have to be able to know their rights, who is responsible for ensuring them and therefore who to claim against when they are not upheld.

**Qu. 6(2)(d)** *Should such a national policy include at least the following measures to:*

(d) *avoid interfering with civil or commercial contractual relationships?*

*Affirmative*

*Governments:* 62. Algeria, Argentina, Barbados, Belgium, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of

Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CGIL (Italy); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); Solidarnosc (Poland); CGTP, CTP, UGT (Portugal); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom).

#### *Negative*

*Governments:* 6. Austria, Benin, Germany, India, Japan, South Africa.

*Employers' organizations:* KZPS, SPD (Czech Republic); CACIF (Guatemala); NK (Japan); HSH, NHO (Norway); ECOT (Thailand).

*Workers' organizations:* BWU (Barbados); AKAVA, AK, STTK (Finland); CGT-FO (France); CITU, BMS (India); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); GEFONT (Nepal); FNV (Netherlands); PTUF (Romania); CC.OO. (Spain).

#### *Other*

*Governments:* 2. Australia, Spain.

*Employers' organization:* CIE (India).

*Workers' organizations:* CWC (Sri Lanka); AFL-CIO (United States).

#### *Comments concerning affirmative replies*

*Algeria.* On condition that provisions are adopted protecting employees and those considered to be employees.

*Bangladesh.* BEA: But the instrument must be clearly written and there should not be any scope given for any other consequences.

*Bulgaria.* CITUB: This is a substantial issue that should be tackled by the Recommendation.

*China.* Employment relationship legislation must be well defined so as to distinguish that relationship from civil or commercial contractual relationships.

*Costa Rica.* UCCAEP: All interference is to be avoided. There is nothing to justify it.

*Côte d'Ivoire.* CGECI: Because of the principle of privity of contract.

*Czech Republic.* CMKOS: Dependent work must be governed exclusively by labour law. Nevertheless, it has to be admitted that the factual situation is more important than the law when deciding whether there is dependent work or not.

*Egypt.* Because the nature of the employment contract is different from that of other contractual relationships when it comes to the conditions of work and the nature of the relationship between the employee, the user and the provider.

*Eritrea.* The national policy must respect the freedom of the contracting parties, but that freedom must not be unlimited or prevent the workers from securing their rights.

*Fiji.* The guide or code should clarify that.

*France.* MEDEF: Because what this point covers are employment relationships and not bona fide civil or commercial relationships.

*Guatemala.* Employment relationships can exist alongside civil and commercial relationships within a company; it is for the law to determine when one or the other exists, without prejudice to the freedom to contract.

*Honduras.* Because independent work carried out under a commercial or civil contract does not fall within the scope of the employment relationship.

*Hungary.* The aim of the regulation is to ensure that, if the parties' original intent was to establish an employment relationship, then their legal relationship should be in accordance with that intent, and the employer should assume all the legal consequences which accrue under such a relationship.

*Iceland.* Any instrument or outcome relating to this subject matter must clearly state that its application is to employment relationships and that no consequences should occur with respect to bona fide civil or commercial contractual relationships.

*Jamaica.* JEF: The employment relationship instrument should not in any way interfere with civil or commercial contractual relationships.

*Lebanon.* The employment relationship must be determined with some degree of flexibility in view of the changes in the employment relationship concept, but the criteria used must be clear and distinguish between the employment relationship and civil and commercial relationships.

*Mauritius.* So as to distinguish between employment relationships and self-employment and not to hinder economic activities unduly.

*Mexico.* Companies can, using civil or commercial contracts, hire independent workers in the context of contracts and conditions that are not employment contracts. In lack of that, the instrument can indicate the difference between an employment contract and civil or commercial contracts.

*Mozambique.* The legislation must only deal with matters relating to employment; civil and commercial contracts must be dealt with by the relevant legislation.

*Peru.* Subcontracting of services or tasks by means of civil or commercial contracts and subcontracting of labour are in most cases the result of manufacturing decentralization and an expression of the employer's freedom to conduct a business. Restrictions must be aimed only at the unlawful exercise of that freedom.

*Philippines.* By avoiding interference with civil or commercial contractual relationships, the instrument seeks to minimize the ambiguity of employment relationships.

*Portugal.* It appears that this is one of the aims of adopting an instrument in this field: to make it possible to identify an employment relationship on the basis of the factors that characterize it. Were it otherwise, other kinds of relationships, such as self-employment, would be excluded.

CGTP: So long as the employee is economically subordinate to the employer.

*Qatar.* A distinction must be made between civil and commercial contractual relationships. Each has its own legal foundation.

*South Africa.* BUSA: Users and providers must be free to enter into proper contractual relationships. Independent contractors and service providers must remain distinct from conditions pertaining to employment relationships.

*Sri Lanka.* LJEWU: This would prejudice real employment relationships.

NWC: Genuine commercial contractual relationships should not be impeded provided the workers are guaranteed minimum terms and conditions, e.g. minimum wages, superannuation benefits, etc.

*Sweden.* LO and TCO: But it should not be possible to disguise an employee-employer relationship in a civil or commercial contract. It must be established who is in a position of dependence.

*Switzerland.* Although it is important to ensure effective protection for the workers in an employment relationship, it is equally important to allow full expression of the principle of economic freedom and not to interfere in relationships that are not true employment relationships.

*Thailand.* NCTL: Interference is possible if necessary to protect workers who are under the minimum standard.

*Trinidad and Tobago.* It is important to recognize the significance of civil and commercial contractual relationships to a country's economic development.

ECA: This is important so long as the civil or commercial contractual relationship is not a sham. A systematic process has to be formulated so that intervention in civil and commercial contractual relationships is justifiable.

*Tunisia.* This is done by determining criteria for the specific nature of the employment relationship as opposed to other civil and commercial contractual relationships.

*Ukraine.* FRU: When regulating the employment relationship, care must be taken not to interfere in civil or commercial contractual relationships, as doing so would infringe on the foundations of civil and commercial law.

FPU: Various legal relationships must be regulated within the legal field.

*United Kingdom.* CBI: Definitely! Commercial relationships vested lawfully and in good faith must be respected.

*United States.* USCIB: This provision is consistent with the agreed scope of paragraph 25. However, use of the term "avoid" contemplates situations in which the national policy on the subject may in fact interfere with this type of relationship. All interference with civil and commercial relationships should be prohibited.

*Zimbabwe.* The national policy should only focus on protection of workers with an employment relationship, without interfering with civil or commercial contractual relationships.

*Views shared by the following employers' organizations:* CEC (Canada), ANDI (Colombia), CEIF (Cyprus), CACIF (Guatemala), IBEC (Ireland), CONEP (Panama), CEOE (Spain), UPS (Switzerland): Any instrument or outcome related to this subject matter must clearly state that its application is to employment relationships and that no consequences should occur with respect to bona fide civil or commercial contractual relationships.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), USS/SGB (Switzerland), TUC (United Kingdom): The national policy should eliminate the use of bogus civil or commercial contractual relationships which lead to disguised employment relationships or otherwise prevent genuine dependent workers from obtaining labour and social protection. BSSF (Bangladesh), USAM (Madagascar) and CLTM (Mauritania) add: Coherence is needed between the different legal instruments relating to the employment relationship. The primacy of human (social, labour) rights over economic and commercial interests is also of the utmost importance in this debate.

#### *Comments concerning negative replies*

*Barbados.* BWU: Commercial contractual arrangements may be impacted upon by the corporate social responsibility of an employer in a contract for a service relationship. It should be possible for the instrument to allow for framework agreements through which the approach to labour issues may be made to follow globally determined "decent standards".

*Benin.* The interference can be positive because the facts can constitute a different reality from the clauses of a contract.

*Finland.* SAK, STTK and AKAVA: Legislative measures are needed when civil or commercial contractual agreements are used to conceal employment relationships and to deny workers' rights.

*Germany.* There is interference when the worker's status is determined of necessity not by the contract between the parties but by the de facto conditions in which the work is done. There is also interference when certain provisions of the Labour Code are applied to the work of quasi-wage earners, as they must be for the workers' protection.

*India.* It would be valid not to insist on the instrument and preamble when the distinction between employee and employer vis-à-vis a person is ambiguous.

CITU: Ambiguous and disguised employment relationships thrive under the camouflage of civil and commercial contractual arrangements. Hence, the proposed instrument must be all-inclusive to bring those apparently civil and commercial contracts dealing with labour directly or indirectly under coverage of regulation.

*Japan.* Employment relationships should be determined from their conception. Even if a contract is a commercial one, it may require some modification in accordance with the legal principles on employment relationships. Therefore the contents of 6(2)(d) are not necessary and are, moreover, impossible to set up.

JTUC-RENGO: Each country's national policy should eliminate the use of civil or commercial contracts that could lead to disguised employment relationships and the exclusion of independent workers from the status of workers and social protection.

*Republic of Korea.* FKTU and KCTU: It would be possible to recognize the principle of non-interference if the contract is a genuine contract under the civil or commercial code and is predicated on equality of the parties. To include a reference to non-interference in an international standard which may be taken as a guideline for national legislation may lead to its being invoked as the grounds for abandoning the effort to regulate disguised employment relationships.

*Nepal.* GEFONT: We must be careful in this regard. All interference in contractual relationships is to be avoided. There must, however, be protection from a provision that may restrict the workers' rights and create unfair labour practices. Unfair labour practices must also be defined.

*Netherlands.* FNV: It is quite legitimate and in accordance with the legislative strategy of many jurisdictions to overcome the problems of ambiguous or disguised employment relationships by extending the scope of a specific act of labour legislation to other work relationships which meet specified criteria.

*South Africa.* Where an employment relationship exists, there should be sufficient protection of employees regardless of the type of contractual relationship that exists between the employer and the employee. Employees should enjoy equal protection wherever they are employed.

*Spain.* CC.OO.: Workers' representatives, both from the principal company and the subcontracting or provider company, must have access to information on externalized or subcontracted activities, on the conditions of employment, on the occupational health and safety of both the workers provided and those offering their services in a workplace that is not their own.

#### *Comments concerning other replies*

*Australia.* The instrument should provide protection for the terms of civil or contractual relationships. Non-employment relationships should be regulated by commercial laws rather than workplace relations laws. This is consistent with the true nature of independent contracting arrangements as commercial contractual agreements, not employment arrangements.

*Bulgaria.* BCCI: It should be absolutely clear that the instrument refers to employment relationships only.

*Spain.* In triangular relationships involving two companies and one worker, the link between the two companies is commercial in nature and in any case influences the worker's status, given the reciprocal influences.

*United States.* AFL-CIO: National policy should not allow such relationships to be used to deprive workers of adequate legal protection.

**Qu. 6(2)(e)** *Should the national policy include at least the following measures to:*

- (e) *ensure access to appropriate dispute resolution processes and mechanisms to determine the employment status of workers?*

*Affirmative*

*Governments:* 70. Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 3. Australia, Denmark, Tunisia.

*Employers' organizations:* EK (Finland); HSH, NHO (Norway); USCIB (United States).

*Other*

*Government:* 1. Algeria.

*Comments concerning affirmative replies*

*Austria.* Given that no new mechanisms should be created if bodies with jurisdiction already exist.

*Barbados.* BWU: Employers and workers may have a dispute over the interpretation or spirit of the employment status and there must be a means of resolution to determine the employment status.

*Benin.* This would make the work of labour inspectors easier. The implementation of such a mechanism could dissuade those using ruses to disguise employment relationships under another name.

*Canada.* CEC: Employers support appropriate dispute resolution mechanisms that are accessible, fair, inexpensive and not subject to abuse by either party.

*China.* In China, the status of workers is determined by legal means, so as to reduce the number of consequent disputes of another nature.

*Costa Rica.* UCCAEP: It is essential to strengthen the instruments of this kind.

*Côte d'Ivoire.* CGECI: It is advisable to facilitate the resolution of disputes.

*Czech Republic.* CMKOS: Material provisions without effective control or an effective judicial system do not fulfil their objectives.

*Egypt.* It is indispensable to establish dispute resolution mechanisms that are consistent with the nature of the triangular relationship between the employer, the provider and the worker, so as to promote stability in the relationship between these parties and to ensure that legislation provides the necessary protection of each party's rights.

*El Salvador.* The national legislation contains dispute resolution mechanisms that are used to determine the employment status of workers.

*Eritrea.* For example, the labour proclamation of Eritrea ensures, in the case of any type of labour dispute, access to appropriate dispute resolution processes. However, neither the labour proclamation nor any other laws provide guidelines with regard to the determination of the existence of an employment relationship. Therefore, to avoid this problem, it is better to have general guidelines, like those of Ireland mentioned on page 34 of Report V(1).

*Germany.* On condition that conciliation before a (labour) court is recognized as an appropriate and effective dispute settlement mechanism. In Germany, in the event of a dispute about the worker's status, only a court can hand down a binding ruling. The procedure always starts with an attempt at conciliation that is intended to result in an amicable settlement. Half of all disputes are resolved amicably in the first instance, and 36 per cent on first appeal.

*Guatemala.* Although Guatemalan legislation provides for dispute resolution procedures and mechanisms, it would be useful if the policy analysed their functioning with a view to reforming them as required.

*Honduras.* Because it is essential for workers and employers to have easy access to equitable, rapid and transparent mechanisms and to the procedures for resolving disputes on employment status.

*Hungary.* The provision of access to due process is a basic requirement, a rule guaranteeing such access. The right to due process is a basic constitutional right in the Republic of Hungary.

*India.* If it is established beyond a reasonable doubt that the person is a worker, then the existing dispute resolution mechanism may need to be strengthened. However, in India the Industrial Dispute Act 1947 provides for a dispute resolution mechanism.

*Indonesia.* Any labour dispute should be settled by a bipartite consultative forum.

*Japan.* Simple dispute settlement procedures are crucial for workers. In Japan, an administrative body in charge of labour standards legislation provides assistance for dispute settlement to workers through the Prefectural Labour Bureau and the legal authorities.

NK: Enforcement measures should be examined carefully in accordance with the circumstances of each country.

JTUC-RENGO: Dispute settlement procedures and mechanisms must be accessible to workers in terms of legal costs, and should be able to bring prompt help to workers. It is also necessary to publicize dispute settlement procedures that can assure workers of the right to access and protection against reprisals without losing their jobs. In Japan, an industrial tribunal system will be established in April 2006 and is expected to deal with dispute settlements on employment status.

*Republic of Korea.* FKTU and KCTU: There is a need for an effective dispute settlement process or mechanism (to be accessed before or after the judicial process) in order to ensure a speedy remedy for workers in dispute over the existence of an employment relationship. Long and complicated procedures may deny workers the ability to secure speedy remedies.

*Kuwait.* Individual and collective private sector disputes are governed by the Labour Code.

*Lebanon.* In so far as those mechanisms are initially limited to what industrial tribunals offer on the status of workers.

*Mauritius.* To encourage member States to develop or improve judicial bodies such as industrial courts to address problems of non-compliance regarding disputes of rights.

*Netherlands.* FNV: Such appropriate mechanisms might include giving trade unions the possibility to file class actions/litigation.

*Peru.* There must be guaranteed access for both workers and employers.

*Philippines.* Access to a dispute resolution mechanism is critical mostly in cases of triangular employment relationships wherein the use of contractors and private employment agencies is preferred.

*Qatar.* It is not important to enact laws. What is important is to have detailed laws and to enable employees to seek redress in the courts without too much expense and on easy terms.

*South Africa.* Quick access to effective and efficient dispute resolution institutions should be in place to clarify disputes that may arise due to unforeseen or unexpected ambiguities.

BUSA: Any international instrument would have to cover this matter in broad terms, the details being defined in suitable national laws and policies.

CONSAWU: Dispute resolution mechanisms should be freely available to workers and should be as speedy as possible.

*Spain.* Such procedures are always necessary.

CC.OO.: Consideration should be given to extra-judicial solutions between the parties in dispute.

*Sri Lanka.* EFC: The disputes settlement procedure should be streamlined.

*Sweden.* LO and TCO: An agency is needed for settling disputes.

*Switzerland.* UPS: Switzerland has such a mechanism: the *tribunaux de prud'hommes* (industrial courts).

USS/SGB: All dispute resolution mechanisms should be financially and rapidly accessible. Attention must be paid to the vulnerable position of many workers and measures should be introduced to enable them to have access to rights and protection without threat to their jobs.

*Trinidad and Tobago.* ECA: People should not only have access to the appropriate dispute resolution mechanisms, the mechanisms to determine the employment status of workers should be efficient.

*Ukraine.* FRU: This would make it possible to settle labour disputes as quickly as possible.

FPU: The guarantee of equality in employment relationships.

*United States.* AFL-CIO: Workers should have swift access to affordable dispute resolution mechanisms that provide meaningful remedies.

*Zimbabwe.* It is critical to the establishment of a good employment relationship that the policy has a provision that ensures access to appropriate dispute resolution processes and mechanisms to determine the employment status of workers.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT, CGT-FO (France), USAM (Madagascar), CLTM (Mauritania), UGT (Portugal), COSATU (South Africa), TUC (United Kingdom): All dispute resolution mechanisms should be financially accessible and expeditious. Consideration should be given to the vulnerability of many workers and measures should be introduced to enable them to access rights and protection without jeopardizing their employment.

#### *Comments concerning negative replies*

*Australia.* The Australian Government considers that appropriate dispute resolution mechanisms already exist under the Workplace Relations Act.

*Finland.* EK: The matter should be left with the ILO member States to decide at the national level.

*Tunisia.* The competent mechanism and the jurisprudence in this field are adequate to settle disputes involving the determination of the status of workers.

*United States.* USCIB: Although the idea is appropriate, the principle should be that the means of access to a dispute resolution process is available to those who seek to take advantage of it, not that such access is ensured. The existence of a separate dispute resolution system, or labour court, to define who is an employee will further erode the status of the employment relationship in the United States.

#### *Comments concerning other replies*

*Algeria.* The question is vague.

**Qu. 6(2)(f)** *Should the national policy include at least the following measures to:*

(f) *provide for effective and efficient enforcement?*

*Affirmative*

*Governments:* 68. Argentina, Austria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); CONSAWU, COSATU (South Africa); CC.OO. (Spain); LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 4. Australia, Barbados, Denmark, United Kingdom.

*Employers' organizations:* EK (Finland); CACIF (Guatemala); HSH, NHO (Norway); UPS (Switzerland); USCIB (United States).

*Workers' organizations:* ZSSS (Slovenia); CWC (Sri Lanka).

*Other*

*Government:* 1. Germany.

*Comments concerning affirmative replies*

*Australia.* ACTU: This is critical to the practical operation of employment rights. Enforcement agencies must be well resourced and active in prosecuting parties that breach legal obligations.

*Barbados.* BWU: The labour inspectorate must be empowered to provide efficient enforcement and must be provided with the human, financial and other resources required to do so effectively.

*Benin.* The efficiency and effectiveness of the implementation of such mechanisms depend on the clarification of the concept of employment relationship used to establish the existence of the relationship.

*Canada.* CEC: Enforcement must respect the needs of both workplace parties, including the operational and financial impact on both parties. Too often, enforcement comes at the expense of only one of the workplace parties.

CLC: Justice delayed is so often justice denied for workers in vulnerable situations.

*China.* First, strengthen inspection of labour protection and promote the application by the employer of legislation on the employment relationship. Secondly, strengthen judicial control and prosecute employers that fail to meet their responsibilities under the law.

*Costa Rica.* UCCAEP: Laws are made to be respected by the parties.

*Côte d'Ivoire.* CGECI: This is necessary, even indispensable.

*Denmark.* DA: If this includes also the enforcement by courts.

*Egypt.* By enacting legislation and monitoring its application. In addition, employers' and workers' organizations must help spread awareness among their members to that end.

*Eritrea.* Because sophisticated laws without effective and efficient mechanisms of enforcement are valueless.

*Finland.* SAK, STTK and AKAVA: It is difficult for individual workers to file complaints while still working. For this reason the authorities should have the power and the resources to discover shortcomings and take corrective measures.

*Guatemala.* By adopting surveillance measures such as monitoring and control by the Government and civil society, which in this case is the workers and employers.

*Honduras.* Because compliance with the law is a fundamental principle, the State must make a firm political commitment to ensure respect for legislation in order to reduce insecurity and fraud, in particular in cases in which workers are not able effectively to assert their rights.

*Hungary.* In the absence of actual, efficient enforcement, the Recommendation may not be implemented in practice.

*India.* BMS: Add the words "speedy, economical and certain" between "for" and "effective".

*Indonesia.* In Indonesia, if a labour dispute cannot be settled by bipartite consultative forum, it goes to the Industrial Dispute Settlement Court.

*Japan.* In Japan, Labour Standards Inspection Offices, etc., are in charge of giving effect to labour legislation and other related laws.

NK: Enforcement measures should be examined carefully in accordance with the circumstances of each country.

JTUC-RENGO: In Japan, each Prefectural Labour Bureau operates a "system of collaborators to secure the proper operation of worker-dispatching undertakings", and

collaborators from both employers and labour are registered with the Prefectural Labour Bureau. In order to ensure that the system operates properly, it is necessary to make active use of the collaborator system and to give greater authority to the collaborators.

*Republic of Korea.* FKTU and KCTU: The absence of a mechanism for enforcing a regulation allows employers, who are faced with competitive pressures, to be tempted to have abusive recourse to disguised employment relationships. An effective enforcement mechanism is a necessary precondition for giving effect to the standard.

*Lebanon.* This goes without saying. Subsequently, in the light of the progress being made on legislation in this field, recourse can be had to the competent administrative commissions of the Labour Ministry or to arbitration to settle disputes in this connection.

*Mauritius.* To ensure compliance with labour laws.

*Mexico.* The instrument must underscore the need for effective enforcement of the legislation by employers and workers.

*Morocco.* There must be effective enforcement and application of the legislation.

*Mozambique.* Laws are made to be respected; failure to recognize the law is subject to the penalties established by the legislation.

*Nepal.* GEFONT: Because normally, in the case of Nepal, laws are very poorly enforced and no one is willing to take responsibility for giving effect to the decisions of the authorities or the courts.

*Peru.* Enforcement depends on prior conditions, such as how clear the legislation is, whether the social players helped formulate it, and whether there exist in this field a clear policy and effective preventive, control, repression and dispute resolution mechanisms.

*Philippines.* Difficulties are foreseen in the case of domestic workers; the enforcement of labour laws in private homes is limited by the constitutional right to privacy.

*Portugal.* UGT: This is even more important than other kinds of measures.

*Qatar.* Effective and efficient enforcement is a very important factor in protection of the employment relationship and sustainable development and production.

*South Africa.* This is the most essential tool to give impetus to the successful implementation of the instrument and its rules.

BUSA: This is the primary cause of the inadequate protection afforded to vulnerable workers. Effective and efficient enforcement would need to be provided for at the national level.

*Spain.* Obviously.

CC.OO: Ensure that the legislation is enforced by means of labour inspection and industrial courts.

*Sri Lanka.* LJEWU: Effective enforcement is a grey area in many countries; adequate measures therefore need to be taken by the enforcing authority.

*Sweden.* LO and TCO: Implementation is important.

*Trinidad and Tobago.* ECA: The need for effective and efficient enforcement cannot be stressed enough. However, sufficient resources must be devoted to these mechanisms.

*Tunisia.* This would help combat in particular disguised employment relationships.

*United States.* AFL-CIO: Effective and efficient enforcement is a critical element of any system to protect workers' rights.

*Zimbabwe.* The national policy should provide for effective and efficient enforcement of other measures which may include the conducting of joint inspections by government officials, trade union representatives and the employers' representatives concerned to ensure the protection of workers.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania) and CONSAWU (South Africa): In addition, every decision taken should be enforced with impartiality.

#### *Other measures suggested*

*Argentina.* CGT RA: Enhance labour inspection services; facilitate the registration of workers for small and medium-sized enterprises.

*Belgium.* Distinguish between ambiguous employment relationships, which have to be resolved as a priority by specifying, in the legislation, the concepts used, and disguised employment relationships, for which the emphasis must be on effective monitoring mechanisms.

*Finland.* SAK, STTK and AKAVA. Employers' and workers' unions could work together with the authorities to find and examine cases where working conditions and payment of taxes and social security benefits are neglected.

*Honduras.* Labour inspectors must receive proper training and employers' and workers' organizations have to take part in the process and mechanisms of drafting legislation.

*Iraq.* Other measures. Consider national employment and national industry, provide opportunities for employers in internal contracts and discussions and require foreign contracting firms to draw on the local labour market, in particular in poor countries.

*Republic of Korea.* FKTU and KCTU. Detailed legislation, including penal provisions, needs to be established to combat disguised relationships.

*Peru.* Cooperation between government services, for example the Labour Ministry's inspection services and the relevant services of the agency in charge of control, in order to exchange information.

*Philippines.* Measures to regulate the employment relationship between teleworkers and their employers.

*Spain.* It is especially necessary to allocate and share liability in triangular relationships.

*Sri Lanka.* LJEWU: Organize awareness programmes and national, subregional and regional symposiums. The participants should include enforcement authorities, judges, policy-makers and relevant officials.

*Switzerland.* In Switzerland, it falls to the civil courts to implement Swiss labour law, but the procedure is for the judge to establish the facts and freely assess the evidence, independently of the parties' allegations. This is an exception to the general rules of procedure, according to which in principle the court rules only on the facts alleged and proved by the party concerned. This measure hugely simplifies the

implementation of the law and does more than merely lighten the burden of proof, since the judge can take the initiative to examine the facts he considers relevant to the dispute.

*Trinidad and Tobago.* ECA: Efficient and effective enforcement should not be the responsibility of the Government only, but emphasis should be placed on employers' and workers' organizations when developing the appropriate mechanism.

*Comments concerning negative replies*

*Australia.* The Workplace Relations Act provides adequate enforcement powers to authorized officers and inspectors.

*Barbados.* Provide mechanisms for effective and efficient determination.

*Finland.* EK: Sanctions and enforcement are national prerogatives.

*Switzerland.* UPS: This lies within the States' jurisdiction.

*United Kingdom.* Replace with "effective means of helping ensure compliance".

*Comments concerning other replies*

*Germany.* Yes, if the aim is to provide appropriate legal protection. No, if the outcome is the creation of new bodies (for example, labour inspectorate) to ensure compliance with the minimum norms of labour law. State control is not needed if the courts provide effective legal protection, i.e. if each worker can assert his or her rights individually.

CONSULTATION AND IMPLEMENTATION

**Qu. 7** *Should the instrument provide for the establishment of a new mechanism, or the designation of an appropriate existing mechanism, for reviewing changes in the labour market and in the organization of work, as well as advising the government on the adoption and implementation of the measures referred to in Question 6?*

*Affirmative*

*Governments:* 58. Algeria, Argentina, Austria, Bangladesh, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Costa Rica, Cuba, Dominica, Egypt, El Salvador, Eritrea, Fiji, France, Greece, Guatemala, Honduras, Hungary, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); MEDEF (France); CEIH (Hungary); CIE (India); NK (Japan); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, TUC (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV, VNO-NCW

(Netherlands); CONEP (Panama); Solidarnosc (Poland); CIP, CTP, CGTP, UGT (Portugal); PTUF (Romania); KOZ SR (Slovakia); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 16. Australia, Canada, China, Croatia, Cyprus, Denmark, Finland, Germany, Iceland, India, Portugal, Serbia and Montenegro, Slovakia, Switzerland, Tunisia, United Kingdom.

*Employers' organizations:* CNI (Brazil); CEC (Canada); CEC (China); CEIF (Cyprus); DA (Denmark); EK, SY (Finland); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); ALE (Lesotho); HSH, NHO (Norway); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* BWU (Barbados); ACTFU (China); LO (Denmark); VTML (Finland); ASI (Iceland).

#### *Other*

*Governments:* 2. Spain, Sweden.

*Employers' organizations:* ANDI (Colombia); UCCAEP (Costa Rica); JEF (Jamaica).

*Workers' organization:* CGT-FO (France).

#### *Comments concerning affirmative replies*

*Algeria.* But this provision should not be too restrictive due to the diversity of legislation and the complexity of national mechanisms implemented in the framework of the follow-up of the labour market.

*Argentina.* CGT RA: This depends on countries' capacities, there can be no absolute reply.

*Bangladesh.* There can be provision for establishing a new mechanism. But when the existing mechanism does not work properly, there is no other option than to adopt the new one. It is better to follow national laws and practices for periodic review and take decisions on that basis.

*Costa Rica.* The disadvantage is that this instrument runs the risk of overflowing with its somewhat mismatched objectives and intentions owing to the variety of aspects that it tries to incorporate. It would seem that there is sufficient material for another instrument.

*Côte d'Ivoire.* CGECI: No new mechanism. Existing structures like works advisory committees should simply be strengthened.

*Dominica.* Designate an appropriate existing mechanism.

*El Salvador.* One could use the labour market observatory for this purpose and its functions could be broadened.

*Egypt.* The Organization's contribution of providing advice to governments is also indispensable for the adoption and implementation of such mechanisms.

*Eritrea.* Because such a mechanism, if it were established, would allow the government to evaluate labour market developments and to propose better labour policies.

*Finland.* SAK, STTK, AKAVA: The discussions should be held on an ongoing and tripartite basis.

*France.* The designation of a mechanism goes hand in hand with the need to adapt legislation.

MEDEF: But only if the review shows that the existing mechanisms do not work properly.

*Greece.* The National Committee for Employment and the labour inspectorate are the mechanisms that provide feedback on changes in the labour market and advise the Greek Government on the adoption and implementation of labour legislation.

*Guatemala.* Such a mechanism provides support and follow-up for the policy and can suggest measures to take in support of it.

*Honduras.* In order to advise governments about the adoption and application of measures it intends to implement using this instrument, an appropriate mechanism is necessary to review developments in the labour market and the organization of work.

*Hungary.* The reply must be affirmative to ensure this recommendation is put into practice.

*Japan.* A mechanism for the examination of labour policy is crucial. However, a policy decision must depend on the situation of each country. Furthermore, in Japan there are councils composed of members representing employers, workers and the public interest, which advise the Government in planning and making policy decisions for the protection of workers.

*Republic of Korea.* FKTU, KCTU: In order for the standard to be applicable in the light of economic reality, national legislation and institutions must operate in accordance with international standards and at the same time the existing institutions must be reviewed at regular intervals. Appropriate mechanisms would be required to conduct this process.

*Mauritius.* Correct any discrepancies between labour legislation, developments in work organization and labour structures, and define the sectors requiring regulation.

*Morocco.* The labour relation should be in line with labour market developments.

*Mozambique.* It is difficult to establish parameters on the subject. The best thing would be to leave the social partners to deal with it and to choose together the best moment to evaluate and amend the law on the basis of the socio-economic changes taking place in each country.

*Philippines.* The mechanisms, whether new or existing, should operate in conjunction with the competent national authority and employers' and workers' organizations.

*Portugal.* UGT: The creation of such a mechanism is fundamental.

*Qatar.* Labour relations have become very complex and changeable and require greater participation.

*Slovakia.* KOZ SR: The social partners have an immutable role in the process of the organization of work. They should therefore be represented in the relevant

institutions so that they can hold consultations together, engage in social dialogue and evaluate the effectiveness of adopting measures to protect workers.

*Slovenia. ZSSS:* The instrument should also make provision for a mechanism that would allow “action against” a government that has neither adopted nor implemented the necessary measures.

*South Africa.* It seems clear that mechanisms should be established to ensure the implementation of the measures referred to in Question 6. Having said that, this mechanism should not be a model, but rather a guideline to help governments in the various countries to adopt and implement said measures.

*BUSA:* This instrument can do no more than encourage member States to put mechanisms into place to facilitate social dialogue on this issue. The details concerning these mechanisms are to be defined by the member State itself, together with the social partners.

*Spain. CC.OO.:* This mechanism would be of considerable interest because it would make it possible to monitor different national situations and it would facilitate the exchange of information and consultation.

*Sri Lanka.* An appropriate existing mechanism should be designated.

*LJEWU:* A new mechanism may be necessary but only to the extent that the existing mechanism cannot respond to current demands or fulfil the situations evoked.

*Sweden. LO, TCO:* A review body should be set up if one does not already exist.

*Trinidad and Tobago.* A review system is necessary, bearing in mind the changing nature of work and the working relationship.

*ECA:* The instrument should establish a new mechanism which should complement existing mechanisms. It should also be adaptable to changes in the business environment.

*Ukraine. FRU:* The mechanism to review the evolution of changes in the labour market and in the organization of work will help to improve labour legislation.

*FPU:* If existing methods of work organization are not ideal.

#### *Comments concerning negative replies*

*Barbados. BWU:* Strengthening of old mechanisms like the labour inspectorate and tripartite consultation and effective and efficient enforcement should be adequate.

*Canada.* Member States/competent authorities should determine the appropriate mechanism to undertake this type of review based on their circumstances, for example, a review could be undertaken by an independent expert or group of independent experts. However, there is no need for a permanent mechanism.

*CEC:* If it appears from a review that the existing mechanism(s) do(es) not work adequately, further action may be required. There can be no value in dictating the process of review and response. If a periodic review is conducted, and the national authorities deem remediation necessary, they will act in accordance with national law and practice.

*China.* It is better to leave each member State to decide itself whether or not it should establish a new mechanism according to its own situation.

*Croatia.* The reply would be yes if the review reveals that the existing mechanism does not work correctly.

*Cyprus.* The establishment of appropriate mechanisms to review changes in the labour market and in the organization of work should be left to the discretion of each country, which should be able to assign such duties in accordance with their own labour market/industrial relations system and labour administration structures.

*Finland.* The answer depends, however, on what kind of mechanism it is. In Finland, for example, the Labour Council, which issues statements on the application of the Working Hours Act, the Annual Holidays Act and the Occupational Safety and Health Act, has been considered a successful organization in the interpretation of labour legislation.

EK: Such a mechanism is not necessary.

*Germany.* There is no need to create a new mechanism. Each member State is free to take the necessary measures. The social partners can also take initiatives vis-à-vis the government.

*Guatemala.* CACIF: At the very most it would be appropriate to recommend having such a mechanism, on a strictly technical basis.

*Iceland.* When an existing mechanism has proven to be successful it should be kept and designated to deal with consultation and implementation.

*India.* Consultation and review should not be regulated by an ILO instrument.

*Portugal.* The important thing is to combat undeclared employment; the instrument should help to distinguish what constitutes an employment relationship and what does not. The way in which each country achieves this wish will depend on a number of factors, namely the level of development and the greater or lesser capacity for action of the social partners.

CIP: We have reservations about the proposal to institute a new mechanism for this purpose, particularly if such mechanisms already exist. National laws and practices should be taken into account.

*Switzerland.* Such a mechanism is not justified from the Swiss point of view. We refer back to our reply to Question 4; moreover, various federal committees active in the labour and employment spheres, as well as the regular consultation of the social partners present in these bodies, make the establishment of a new tool pointless.

UPS: The mechanisms existing in Switzerland are sufficient. They should, however, be able to evolve, and not become rigid due to strict requirements.

*Tunisia.* The review of changes in the labour market and the adoption of the measures referred to in Question 6 could be entrusted to various bodies, while ensuring coordination among them.

*United Kingdom.* Not appropriate.

CBI: Too early to say. Let us first wait for these reviews to be carried out.

*United States.* USCIB: Such a provision can be construed as an attempt to prescribe a centralized system that will be used to encourage a broad definition of the employment relationship at the national level. This goes beyond the agreed scope of the Recommendation because it encroaches upon national legal systems, and contractual and commercial relationships.

*View shared by the following employers' organizations:* BCCI, BIA (Bulgaria); CNI (Brazil); CEIF (Cyprus); IBEC (Ireland); VNO-NCW (Netherlands); CONEP (Panama); CEOE (Spain): Not necessarily; the creation of such a mechanism is not

necessary unless the review shows that the existing mechanism(s) do(es) not work correctly. There can be no value in dictating the process of review and response.

*Comments concerning other replies*

*Colombia.* ANDI: This matter should be dealt with on the basis of national legislation and practice. A reform of the mechanism for reviewing changes in the labour market should be decided on by national States on the basis of their periodic evaluations.

*Costa Rica.* UCCAEP: In these times of considerable change, there is a need to review the instruments. At the end of the day, what we all want is solid enterprises offering quality work to their employees.

*France.* CGT-FO: The public administration is best placed to perform this role in a neutral and independent manner, in consultation with trade union organizations.

*Jamaica.* JEF: Once more, it is interesting to evaluate the effectiveness of a measure, but to impose the establishment of a new mechanism may prove unnecessary. Governments will take all the measures they consider appropriate, at various levels and according to various systems. They do not necessarily have the same interest in this sphere.

*Spain.* Social dialogue is in itself the most effective mechanism for discussing the various realities likely to require concrete measures.

*Sweden.* The Government refrains from replying to questions 7 to 9. It is difficult to foresee what the new mechanism would imply.

**Qu. 8** *Should such a mechanism provide for the participation of the competent authorities and the most representative organizations of employers and workers?*

*Affirmative*

*Governments:* 61. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Costa Rica, Cuba, Croatia, Cyprus, Dominica, Egypt, El Salvador, Eritrea, Fiji, France, Greece, Guatemala, Honduras, Hungary, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); CACIF (Guatemala); CEIH (Hungary); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO

(Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, TUC (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); FKTU, KCTU (Republic of Korea); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, NWC (Sri Lanka); LO (Sweden); USS/SGB(Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 9. Australia, Canada, China, Denmark, Germany, India, Panama, Slovakia, United Kingdom.

*Employers' organizations:* CEC (China); HSH, NHO (Norway).

*Workers' organizations:* ACTFU (China); LO (Denmark).

*Other*

*Workers' organization:* LJEWU (Sri Lanka).

*Comments concerning affirmative replies*

*Algeria.* Provided the mechanism is simplified.

*Barbados.* BWU: The mechanism referred to above already offers the various interest groups and authorities a way of allowing them to participate in the decision-making process (Barbadian model) and therefore an element of social dialogue is recommended as required by the instrument.

*Benin.* The effectiveness of the implementation of such a mechanism should depend on the exchange of information and tripartite consultation. This would facilitate the implementation of measures as they would have been adopted on the basis of consensus.

*Côte d'Ivoire.* CGECI: The participation of all the social partners is an effective way to implement the means proposed.

*Cyprus.* The existence of a mechanism to review labour policies should be clearly assigned to specific competent authorities which should possess the necessary mechanisms for reviewing the labour market and labour practices in consultation with the social partners.

*Egypt.* The participation of the competent authorities and the most representative organizations of employers and workers adds a realism and contributes to activating the established mechanisms.

*El Salvador.* ILO Convention No. 144 is of major importance for this purpose.

*Eritrea.* Given that any change in employment policy principally affects the government, the employers and the workers, these three partners should imperatively participate in the mechanism.

*Greece.* There is tripartite representation in national employment bodies.

*Guatemala.* Quite, and this will lead to more representative agreements being concluded.

*Honduras.* The social partners should certainly be associated with the formulation of any policy that the State intends to implement, which is why tripartite participation is necessary for this mechanism.

*Iraq.* A bigger role should be given to the most representative employers' and workers' organizations in legislation and in the development of policies.

*Japan.* In examining labour policy, dialogue with workers' organizations is crucial. However, the method of dialogue should depend on the situation in each country, and such a reservation must be mentioned.

*JTUC-RENGO:* It is indispensable for workers' and employers' organizations to participate in the evaluation process during the review of employment policy.

*Kuwait.* The consultation of employers has been imposed by international conventions.

*Lebanon.* For the advantages to be gained through tripartite consultation.

*Lithuania.* Decisions taken together with the social partners are very important and should play a major role.

*LPSK:* For example, the Tripartite Council of Lithuania.

*Mauritius.* To ensure the effectiveness of the mechanism and allow the government to be duly informed of the points of view of the most representative organizations of workers and employers.

*Mexico.* In Mexico, the participation of the public, private and social sectors as well as competition between them, are allowed.

*Morocco.* The participation of the social partners is essential.

*Nepal.* GEFONT: Workers' and employers' organizations may not participate in daily activities. However, their participation in policy revision by the enforcement authority must be ensured.

*Philippines.* In the employment relationship, matters involving local and overseas employment, working conditions, health and safety, and security of tenure are better addressed by the appropriate agencies and the sectoral partners concerned.

*Portugal.* UGT: This type of mechanism is currently fundamental.

*Qatar.* Tripartite social dialogue undertaken at frequent intervals is an important criterion for the organization of work, while also establishing appropriate regulations to this effect.

*Republic of Korea.* FKTU, KCTU: The institutional model established through dialogue between government representatives, employers and trade unions would be the most democratic.

*South Africa.* Any envisaged mechanism, to operate effectively, must ensure that there is genuine and broad participation of the parties concerned in order to build consensus around it.

*CONSAWU:* The workers should also be free to choose who they would like to represent them.

*Spain.* CC.OO.: For it to be effective.

*Sweden.* LO: The parties must be represented.

*Switzerland.* Subject to the remarks and the objection in principle to Question 7. In Switzerland, the representative organizations are active in all these committees.

*Trinidad and Tobago.* ECA: This mechanism should not only encourage the participation of employers and workers, but also of other civil society groups and NGOs.

*Tunisia.* Given that it is a mechanism whose aim is to review a matter of an occupational nature, the participation of the competent authorities and of the most representative organizations of workers and employers is necessary for this mechanism to work.

*Ukraine.* FRU: This is a condition in order to achieve a balance in the socio-economic interests of the social partners.

FPU: Any differences of opinion must be settled by professionals.

*United States.* USCIB: The participation of the authorities should be established at the national or local level.

*Zimbabwe.* The competent authorities should participate with the most representative organizations of employers and workers in this regard.

#### *Comments concerning negative replies*

*Canada.* A review of this kind should make provision for broad consultations with employers' and workers' organizations beyond those that are considered to be "the most representative". The competent authority should determine the appropriate structure of any review mechanism and provide for appropriate consultations with non-governmental organizations having expertise and a direct interest in the review.

*India.* The ILO should be requested to carry out empirical studies on trends and to submit the results for review.

#### *Comments concerning other replies*

*Sri Lanka.* LJEWU: The functions and structure of the mechanism should be decided upon.

**Qu. 9(a)** *Should the instrument provide that, within the framework of the mechanism referred to in Question 8, consultations with the organizations of employers and workers concerned should:*

(a) *be held at frequent intervals?*

#### *Affirmative*

*Governments:* 48. Algeria, Belarus, Benin, Brazil, Bulgaria, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Fiji, Greece, Guatemala, Honduras, Hungary, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Lebanon, Lithuania, Mauritius, Republic of Moldova, Morocco, Netherlands, Niger, Panama, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); JEF (Jamaica);

NK (Japan); NCE (Republic of Moldova); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 22. Argentina, Australia, Austria, Barbados, Belgium, Cameroon, Canada, China, Cyprus, Denmark, Eritrea, France, Germany, India, Lithuania, Mexico, Mozambique, Norway, Slovakia, Switzerland, Tunisia, United Kingdom.

*Employers' organizations:* BEA (Bangladesh); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CEIF (Cyprus); DA (Denmark); IBEC (Ireland); ALE (Lesotho); CTA (Mozambique); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIS (Portugal); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

*Workers' organization:* ACFTU (China); LO (Denmark); VTML (Finland); OTM-CS (Mozambique).

#### *Other*

*Workers' organization:* PTUF (Romania).

#### *Comments concerning affirmative replies*

*Benin.* Consultation at frequent intervals should make it possible to have available constantly updated information on labour market developments.

*Côte d'Ivoire.* CGECI: Provided that it does not constitute a major constraint. Moreover, the possibility of the initiative being taken by the social partners should be envisaged.

*Croatia.* But only in so far as necessary.

*Czech Republic.* CMKOS: Frequent contacts lead to better mutual understanding and enable solutions or compromises to be found more easily.

*El Salvador.* That would make it possible to update the mechanism at regular intervals and to adapt it to the national situation.

*Egypt.* Consultations need to be carried out constantly between the representatives of employers and workers concerned to identify problems of application, appropriate solutions and to propose applicable measures.

*Finland.* STTK, AKAVA: Continuous discussions would be better, but at least they should take place at frequent intervals.

*Guatemala.* Guarantee committed and constructive participation.

*Honduras.* That would guarantee the transparency of the national policy on the employment relationship. The Government would be well aware of the positions of the competent authorities and the most representative organizations of workers and employers.

*Japan.* In examining labour policy, dialogue with labour organizations is crucial and must be undertaken depending on the situation in each country, as the need arises. However, the criterion of “frequent intervals” is unclear. The method of dialogue should depend on the situation in each country.

*Republic of Korea.* FKTU, KCTU: Measures are needed to ensure that consultation is held at frequent intervals to prevent the suspension of dialogue due to the opposition of one of the parties which is resistant to the improvement of the institution.

*Lebanon.* With a view to a broader exchange of information and experience in the light of innovations in the concept of the employment relationship and examples of the application in practice of the relevant legal texts.

*Lithuania.* LPSK: At least once every two years.

*Mauritius.* So as to capture the trend of the evolution in work patterns and the labour market and accordingly reorient national policies.

*Morocco.* To follow in agreement changes in the labour market situation.

*Philippines.* The holding of consultations with workers and employers at frequent intervals is possible due to the existing tripartite mechanisms.

*Qatar.* To follow developments and trends in industrial relations.

*South Africa.* It is important to give them a regular platform.

BUSA: Qualified yes. What does “frequent” imply? While periodic reviews to take account of changes in the working environment are necessary, these should not undermine the stability and consistency of the labour market.

*Sweden.* LO: The parties must of course meet regularly.

*Switzerland.* USS/SGB: Yes. It should apply where solid, representative and independent organizations of workers and employers exist.

*Trinidad and Tobago.* Such consultations should be held as and when necessary.

ECA: monthly meetings of a committee appointed by Cabinet and chaired by the Minister of Labour.

*Ukraine.* FRU: It would make it possible to have constant information on what is happening on the labour market, including changes in the organization of work, as well as other socio-economic information.

FPU: For a systematic approach.

*Views shared by the following workers’ organizations:* ACTU (Australia), CLC (Canada), ETUF (Egypt), CFDT (France), JTUC-RENGO (Japan), COSATU (South Africa), TUC (United Kingdom): This should apply where there exist strong, representative and independent trade unions and employers’ organizations.

#### *Comments concerning negative replies*

*Argentina.* The frequency of consultations should be established for each State individually.

*Austria.* The decision as to when and at what frequency such consultations should be held should be left to each country.

*Barbados.* Consultation should be on a regular basis and as circumstances arise.

*Belgium.* At regular intervals would appear to be more appropriate than at frequent intervals.

*Canada.* Consultations should be held on an ad hoc basis as appropriate. Any efforts to include a notion of “frequency” in the proposed instrument will add an unnecessary level of detail and complexity.

*Cyprus.* It should be for the social partners and governments to decide how often consultations should take place.

*Eritrea.* It is not necessary for consultations to be frequent. It is better if the consultations are held whenever it is necessary to change the labour policy.

*France.* Member States could bring together the social partners on this issue in accordance with needs.

*Latvia.* Consultations with the organizations of employers and workers could be organized either on an ad hoc basis or constantly to avoid formal consultation procedures.

*Mexico.* The interval between consultations should be established in accordance with national law and practice.

*Mozambique.* In the case of Mozambique, it is not necessary to envisage frequent intervals as our tripartite social dialogue body operates on a permanent basis and its members are free to propose the agenda of its meetings.

*Norway.* An alternative that could be considered would be for consultations to be held at appropriate intervals.

*Tunisia.* Consultations, within the framework of the mechanism referred to, should be held at least once a year and whenever necessary.

*United States.* USCIB: By setting a time frame for consultations, the Recommendation would go beyond the scope agreed upon to take into account legal and industrial relations traditions.

*Views shared by the following employers’ organizations:* BEA (Bangladesh), BCCI (Bulgaria), CEC (Canada), ANDI (Colombia), UCCAEP (Costa Rica), CEIF (Cyprus), DA (Denmark), MEDEF (France), CACIF (Guatemala), VSI (Iceland), IBEC (Ireland), JEF (Jamaica), ALE (Lesotho), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), UPS (Switzerland), CBI (United Kingdom): Only when necessary.

**Qu. 9(b)** *Should the instrument provide that, within the framework of the mechanism referred to in Question 8, consultations with the organizations of employers and workers concerned should:*

(b) *ensure the representation of employers and workers on an equal footing?*

*Affirmative*

*Governments:* 59. Algeria, Argentina, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Dominica, Egypt, El Salvador, Eritrea,

Fiji, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); CEOE (Spain); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India), CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 11. Australia, Austria, Barbados, Canada, China, Denmark, Germany, India, Mexico, Slovakia, United Kingdom.

*Employers' organizations:* CEC (China); HSH, NHO (Norway).

*Workers' organizations:* ACFTU (China); LO (Denmark).

#### *Comments concerning affirmative replies*

*Benin.* This participates in the establishment and maintenance of a climate of mutual confidence and transparency.

*Côte d'Ivoire.* CGECI: Parity is a factor which creates confidence.

*Czech Republic.* CMKOS: Otherwise, right-wing governments could tend to favour employers.

*Egypt.* Equality between the representatives of employers and workers is necessary in consultations in order to achieve the desired equilibrium in the relations between workers and employers and to ensure effective decisions. The Egyptian legislator took this principle into account when establishing the Labour Advisory Council.

*Eritrea.* Since the policy affects employers and workers equally, both of them must have equal footing in representation.

*Guatemala.* It is an exercise in tripartism.

*Honduras.* Because that ensures the transparency of consultation and the participation of the social partners on an equal footing.

*Japan.* In examining labour policy, dialogue with the labour organizations is crucial. However, the method of dialogue should depend on the situation of each country. Moreover, a measure to ensure the representation of employers and workers on an equal footing cannot be determined.

*Republic of Korea.* FKTU, KCTU: There is no need to mention that the representation of employers and workers should be on an equal footing.

*Lebanon.* To guarantee representation on an equal footing between the social partners.

*Lithuania.* LPSK: On a tripartite basis.

*Mauritius.* Employers and workers should be equally represented for democratic reasons and to ensure a proper balance of interests.

*Morocco.* The most representative occupational organizations.

*Mozambique.* This is the underlying principle of the instrument establishing our tripartite body referred to above.

*Philippines.* The principle of representation on an equal footing has always been observed during consultations.

*Qatar.* To ensure the stability of industrial relations, and therefore of production and its quality, and the continuity of the development process.

*South Africa.* Questions 8 and 9 should be directed towards ensuring equal representation of both employers and workers.

BUSA: BUSA supports and upholds parity of representation.

*Sweden.* LO: The parties should be equal.

*Switzerland.* Yes, but please refer to our preliminary remarks.

*Trinidad and Tobago.* ECA: An equal number of employer and worker representatives should be represented on the Committee.

*Tunisia.* The representation of employers and workers on an equal footing is a prerequisite for the effectiveness of the mechanism.

*Ukraine.* FRU: It is one of the principles of social partnership, which makes it possible to balance the interests of employers and workers.

FPU: Yes. To achieve objectivity in the resolution of disputes.

*United States.* USCIB: The term “equal footing” should be defined to state clearly that it does not automatically mean representation by a labour organization or a trade union. The goals of a labour organization can often be in conflict with those of its members. Moreover, employee representation is an evolving concept. There exist a number of ways in which workers can be represented other than by labour organizations. Representation can include, but is not limited to, representation by associations, policy organizations, lawyers and government agencies. To this end, worker and employee choice in representation should receive deference.

*Comments concerning negative replies*

*Barbados.* It is unclear what would be considered an “equal footing”. Consensus should exist between employers’ and workers’ representative bodies on the composition of the consultative body.

*Canada.* This has already been addressed under Question 8 and additional provisions are unnecessary.

*India.* Where workers and employers take on each other’s roles, representation on an equal footing is difficult to achieve.

*Mexico.* Such representation should be established in accordance with national law and practice.

**Qu. 9(c)** *Should the instrument provide that, within the framework of the mechanism referred to in Question 8, consultations with the organizations of employers and workers concerned should:*

- (c) *be based on experts’ reports or technical studies using methods agreed by the parties?*

*Affirmative*

*Governments:* 55. Algeria, Argentina, Belgium, Benin, Brazil, Bulgaria, Cameroon, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Eritrea, Fiji, France, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Panama, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers’ organizations:* BEA (Bangladesh); CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d’Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); CBI (United Kingdom); USCIB (United States).

*Workers’ organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU (India), CGIL (Italy); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 16. Australia, Austria, Barbados, Belarus, Canada, China, Cyprus, Denmark, Germany, India, Japan, Mexico, Norway, Slovakia, Switzerland, United Kingdom.

*Employers' organizations:* CEC (China); NK (Japan); HSH, NHO (Norway); BUSA (South Africa); UPS (Switzerland).

*Workers' organizations:* ACFTU (China); LO (Denmark), BMS (India), JTUC-RENGO (Japan).

*Other*

*Employers' organization:* FRU (Ukraine).

*Workers' organizations:* BWU (Barbados); PTUF (Romania).

*Comments concerning affirmative replies*

*Bangladesh.* BEA: An experts' report may be sought when both the parties (employers and workers) agree, including agreement on the methodology to be adopted.

*Benin.* For greater reliability in the examination of data and the relevance of the measures to be taken.

*Côte d'Ivoire.* CGECI: The work of experts sheds light on the decisions to be taken.

*Egypt.* The Labour Advisory Council, composed of members of the authorities concerned, a number of experts and representatives of employers and workers in equal numbers, issues views on draft labour legislation and fulfils its other functions.

*Eritrea.* If the policy is based on expert reports and technical studies, it will have better results and will be more objective.

*Finland.* STTK, AKAVA: The parties should be able to discuss all the information available and clarify issues by agreeing on the studies needed and the methods to be used for this purpose.

*Guatemala.* In this manner, it is possible to make use of technical parameters and objectives to provide a better basis for interpreting the facts.

*Iraq.* Reports and studies with the active participation of employers and workers.

*Republic of Korea.* FKTU, KCTU: While experts' reports would be useful, experience in the Republic of Korea reveals some problems as there has been a tendency to adopt a particular point of view. Priority should therefore be given to the agreement, or consensus, of the representatives of employers and workers.

*Lebanon.* Without neglecting the positive role of the decisions of labour courts to give a clear picture of the progress achieved in industrial relations.

*Mauritius.* The position of both parties may be influenced by subjective interests. On the other hand, experts' reports and studies ensure objectivity. Agreement of both parties on the methods used will render the report more acceptable to them.

*Mozambique.* In accordance with our practice, the social partners request an experts' report for matters of great complexity.

*Morocco.* National practice should also be used as a basis.

*Philippines.* Experts' reports or technical studies are based on the information and reports provided by Members, so that the concerned sectors are inclined to agree on the methods used.

*Qatar.* If they are based on experts' reports or technical studies, effective consultations can be held on a scientific basis.

*Spain.* Experts' reports and technical studies can be important instruments.

*South Africa.* Obviously, experts' reports and technical studies would be necessary, although it is not easy to prescribe at this stage. However, all methodologies should be agreed upon by the parties. This means that there should be high levels of consultation on these matters before any decision is taken.

CONSAWU: Studies should be conducted using methodology agreed upon between both parties.

*Sweden.* LO: Participation of the parties facilitates agreements and results.

*Switzerland.* USS/SGB: Where possible, studies should be undertaken using methods agreed between the parties. However, that should not limit the role of the ILO in research, the provision of advice and technical assistance.

*Trinidad and Tobago.* ECA: These studies should be conducted on a frequent basis and should look at new and emerging trends in the business environment and the labour market.

*Tunisia.* Experts' reports and technical studies using methods agreed by the parties would clarify ambiguous situations and therefore facilitate objective decision-making.

*Ukraine.* FPU: The conclusions of experts assist in an in-depth examination of methods and problems which arise.

*United States.* USCIB: The use of experts should be approached with caution because of the costs involved. However, where necessary, such expertise should be utilized.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT, CGT-FO (France), USAM (Madagascar), CLTM (Mauritania), COSATU (South Africa): Where possible, studies should be conducted using methods agreed by the parties. However, this should not limit the role of the ILO in undertaking research and offering technical advice and support, and in assessing the implementation of the new Recommendation in the various member States.

#### *Comments concerning negative replies*

*Barbados.* This could be an approach. However, it should not be mandatory.

*Canada.* This is addressed by questions 7 and 8. This level of detail is unnecessary.

*India.* It should be based on technical studies where the facts are examined dispassionately in a bipartisan manner.

BMS: The wording should be "may be supplemented by experts reports or technical studies using methods agreed by the social partners".

*Japan.* The question of whether to use experts' reports or technical studies should be decided on a case-by-case basis, depending on the situation of each country.

JTUC-RENGO: Dialogue between the government and employers' and labour organizations would require input from surveys of actual conditions and research by

experts. However, in Japan, expert workshops, which have been held in recent years without the participation of representatives from employers and labour organizations, tend to put forward policy directions rather than limiting their role to sorting out the points at issue. Under these conditions, we cannot agree with the idea of attaching importance to experts' reports.

*Mexico.* This issue should be determined in accordance with national law and practice.

*South Africa.* BUSA: Reports from experts should be available to inform the processes of social dialogue conducted by the parties. These reports should not necessarily be a determining factor on which to base the discussions.

*Switzerland.* UPS: Needs in this respect should be determined on a case-by-case basis in a pragmatic manner.

#### *Comments concerning other replies*

*Barbados.* BWU: Yes and no. In most cases, the Department of Labour or the Convention No. 144 Committee should be able to provide satisfactory guidance for the social partners. Care should be taken not to overburden the bureaucracy.

**Qu. 10** *Should the instrument clarify that the employment relationship creates a legal link between a person who performs work and the person for whose benefit the work is performed in return for remuneration, under certain conditions established by national law and practice?*

#### *Affirmative*

*Governments:* 67. Algeria, Argentina, Barbados, Belarus, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Cuba, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); SY (Finland); MGYOSZ (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); BUSA (South Africa); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); CMKOS (Czech Republic); ACFTU (China); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU (India), CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa);

CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB(Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 4. Belgium, Croatia, India, Serbia and Montenegro.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); CEC (Canada); CEIF (Cyprus); ANDI (Colombia); UCCAEP (Costa Rica); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

*Workers' organization:* BMS (India).

*Other*

*Governments:* 4. Australia, Austria, Indonesia, Peru.

*Workers' organization:* CGT-FO (France).

*Comments concerning affirmative replies*

*Australia.* ACTU: The reference to “under certain conditions established by national law and practice” is unclear in this context.

*Benin.* This specification should inform each of the parties with regard to their responsibilities and obligations.

*Bulgaria.* CITUB: Other features typical of the employment relationship include the availability of administrative commitment and the subordination of the worker.

*Canada.* As determined by national law and practice.

*China.* The existence of an employment relationship should be described in detail.

*Côte d'Ivoire.* CGECI: It would be desirable for the legal nature of the relationship to be determined as a result of agreement between the parties.

*Cuba.* In Cuba, the employment relationship is formalized by means of a contract of employment between the administration and the worker.

*Czech Republic.* CMKOS: We prefer this principle to be established by the Convention.

*Egypt.* The contract of employment is binding upon both parties and includes specific conditions with minimum thresholds.

*El Salvador.* This is the manner in which the concept of what is understood by employment relationship is strengthened still further.

*Eritrea.* However, while clarifying this link, the instrument should not provide a definition of the employment relationship which has to be left to national legislation. The instrument should provide general guidelines showing the factors and indicators that may be used to establish the existence of an employment relationship.

*Finland.* SAK, STTK, AKAVA, SY, VTML: The instrument may provide this clarification in the form of examples of possible factors and indicators which may assist in establishing an employment relationship. However, the actual definition of what

constitutes an employment relationship should be left to member States and national legislation.

*Guatemala.* That would make it possible to establish the employment relationship and leave no room for doubt.

*Honduras.* A classification should be provided in a general manner of what may constitute an employment relationship, with an indication of any factors and indicators which could be used to determine the employment relationship.

*Hungary.* Please also refer to section I.1.

*India.* CITU: National law and policies should be reviewed to broaden the protection of workers and service providers.

*Iraq.* But there is no guidance for the employer.

*Japan.* A person who performs work for remuneration under certain conditions should be legally protected by labour legislation.

JTUC-RENGO: It should be made clear that the concept of the employment relationship, within the meaning of the question, is a worldwide concept.

*Republic of Korea.* FKTU, KCTU: This is necessary. One of the major causes of the proliferation of disguised employment relationships lies in the insufficiencies and faults of the standards incorporated in national law and practice. As a consequence, reliance on national law and practice may lead to undesirable outcomes.

*Kuwait.* This is provided for by the private sector in the Labour Code.

*Lebanon.* National law and practice should determine these “certain conditions” as subordination in the broad sense.

*Mauritius.* To avoid any ambiguity concerning the definition of worker.

*Mexico.* States should have clear and precise legislation which includes a definition of the employment relationship between the employer and the worker in view of the important changes affecting employment relationships in certain countries and certain economic sectors and in view of the great diversity of methods used to engage self-employed workers, based on arrangements and under conditions which change from one day to the next.

*Morocco.* The national legislation must define the employment relationship.

*Mozambique.* The contract of employment must contain these fundamental aspects of the legal employment relationship.

*Philippines.* The legal link is crucial in determining the extent of the legal obligations and rights of employers and employees.

*Portugal.* The proposal appears appropriate to determine the existence of the employment relationship.

UGT: It is necessary to specify that the employment relationship is a legal concept used in all the countries of the world and that the exact nature of the conditions defining the relationship are determined by the legislation in each country.

*Qatar.* We support this proposal in view of its clarity.

*Slovakia.* The instrument should define the term “employment relationship”, for example, as “an obligation relationship in which the employee undertakes, according to a contract, to carry out work of a certain kind for the employer for remuneration and

according to his/her instructions, as well as under conditions stipulated by national law and practice”, or “a body of legal relations based on an employment contract between the employer and the employee, which are determined by national law and practice”.

*South Africa.* The protection of employees, particularly vulnerable ones, can only be effectively granted if there is a legal definition of employment relationship that is consistent with national laws and/or a definition which finds its expression within the scope of national law or practice.

CONSAWU: The current instruments must provide a list of criteria, such as subordination, work for the benefit of another person, work under instruction.

*Spain.* In the first place, it would be necessary to determine the elements which characterize the employment relationship by establishing the common positions of the parties on the various types of relationship.

*Sri Lanka.* EFC: What is required is a set of guidelines.

*Sweden.* The instrument must refer to national law in deciding whether an employment relationship exists.

LO: It is good to make clear when an employer-employee relationship comes into being.

*Trinidad and Tobago.* The legal linkage created by the employment relationship needs to be recognized.

ECA: The instrument should clarify that the employment relationship creates a legal link between the employer and the employee, and identify the factors and indicators common to various countries in identifying an employment relationship.

*Tunisia.* It is necessary to specify that the employment relationship creates a link which makes it possible to distinguish between an employment relationship and other relationships of a civil or commercial nature.

*Ukraine.* FPU: Regulation at the legislative level is necessary.

*United Arab Emirates.* In this way, many unlawful practices, which have an impact on the rights of both parties to the employment relationship, can be eliminated.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), COSATU (South Africa), USS/SGB (Switzerland): The instrument should specify that the employment relationship is a legal notion used throughout the world which refers to the relationship between an employee/worker and an employer for whom the employee performs work under certain conditions in return for remuneration. The exact nature of the conditions required to establish an employment relationship vary from one country to another and are determined by national law and practice. It should be clarified that this is the only meaning of the various references to in accordance with “national law and practice” which are contained in the text of the questionnaire.

#### *Comments concerning negative replies*

*Belgium.* Subordination must remain an essential element. The fact of working for (that is, for the benefit of) another party (or in other words, economic dependence) is not in itself an element which determines the existence of an employment relationship.

*Croatia.* This concept is a departure from that of the employment relationship: The expression “person for whose benefit the work is performed” introduces the possibility of a third party.

*Denmark.* LA: This is not an employment relationship issue.

*Finland.* EK: It should be left to States to consider the issue at the national level.

*France.* MEDEF: This would be contrary to the current concept of the employment relationship.

*India.* These should be allowed to evolve before any legal framework is imposed.

*Japan.* NK: If labour legislation provides protection for contracts for work or delegation contracts other than the employment relationship by requiring the creation of a new legal link, this would run counter to the principle of freedom of contract, and we strongly oppose it.

*Lesotho.* ALE: This introduces controversial and unacceptable terminology, namely the reference to “the person for whose benefit the work is performed”. We object to it as a source of confusion.

*Serbia and Montenegro.* The labour relationship should be understood as the contractual relation between an employee and the employer regulating the codes of conduct, rights and obligations of the parties.

*United Kingdom.* CBI: This question is problematic in view of tripartite relationships, agency workers, etc., and flexible working relationships.

*Views shared by the following employers' organizations:* BEA (Bangladesh), CNI (Brazil), CEC (Canada), ANDI (Colombia), UCCAEP (Costa Rica), CEIF (Cyprus), CACIF (Guatemala), VSI (Iceland), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), UPS (Switzerland), USCIB (United States): The expression “person for whose benefit the work is performed” introduces the possibility of a third party. In the case of most work today, someone other than the employer ultimately derives some benefit from the work of their employees. Thus, such a concept is contrary to existing law and concepts, and is a dramatic departure from the concept of the employment relationship.

#### *Comments concerning other replies*

*Australia.* This question concerns the definition of “employee” within the proposed instrument. The Workplace Relations Act adopts the common law definition of “employee”, which is preferable to any instrument which seeks to clarify the legal relationship between the parties given the extensive history of common law in dealing with the distinction between employees and contractors. This approach also provides a comprehensive and flexible test for employment given its ability to consider a broad range of employment indicators. When applied by courts and tribunals, this test provides an effective dispute resolution mechanism for parties who disagree about the nature of their relationship.

*France.* CGT-FO: The fact that an absence of remuneration is noted should not have the effect of nullifying the framework of the employment contract.

*Indonesia.* The employment relationship must be clear, especially in the working agreement, which should specify clearly at least who is the employer, who is the worker and where the workplace is.

*Peru.* The instrument should incorporate national, technical and descriptive definitions relating to the employment relationship, based on such notions as subordination, salaried employment, dependency, or all of these notions, and on the presence of factors characterizing the exercise of the powers conferred upon the employer by subordination.

**Qu. 11(1)** *Should the instrument provide that the existence of an employment relationship be determined on the basis of factors (such as subordination, work for the benefit of another person, work under instruction) established by national law and practice?*

*Affirmative replies*

*Governments:* 66. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Canada, China, Costa Rica, Cyprus, Denmark, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); SPD (Czech Republic); SY (Finland); CEIH (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); ZDODS (Slovenia); EFC (Sri Lanka); SN (Sweden); KZPS, ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CTC (Canada); ACTFU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU (India); ASI (Iceland); CGIL (Italy); JTUC-RENGO (Japan); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, TUC (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); TUC (United Kingdom); AFL-CIO (United States).

*Negative replies*

*Governments:* 6. Australia, Cameroon, Croatia, India, Kuwait, Serbia and Montenegro.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BCCI, BIA (Bulgaria); CCE (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CEIF (Cyprus); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); UPS (Switzerland); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* FKTU, KCTU (Republic of Korea); BMS (India); PTUF (Romania); FPU (Ukraine).

*Other replies*

*Government: 1. Cuba.*

*Comments concerning affirmative replies*

*Algeria.* However, it will be difficult to establish links of subordination when several persons are involved in the employment relationship or in the case of disguised or informal employment.

*Austria.* The factors cannot, however, be defined only by national law and practice; there is also case law. Under the heading "Determination of the existence of an employment relationship", reference should also be made to the facilitation of the burden of proof (for example, the issuance of a description of essential rights and duties).

*Barbados.* BWU: This would be the most effective way of addressing the matter of the determination of an employment relationship.

*Belgium.* Here, too, subordination must remain the fundamental factor. The other factors are merely possible, incidental clarifications of this basic concept.

*Benin.* This will make it easier to determine the existence of an employment relationship.

*Canada.* This should be determined by national law and practice.

*China.* It should be determined in juridical terms, and further clarified by a judicial explanation and by case law.

*Côte d'Ivoire.* CGECI: This is how the determination of the existence of a employment relationship should be facilitated.

*Czech Republic.* CMKOS: The factors that constitute an employment relationship, and consequently also dependent employment, should be laid down in the Convention.

*Egypt.* All available means must be used to establish the existence of an employment relationship.

*Eritrea.* The instrument should establish the factors or indicators determining the existence of an employment relationship so as to provide national legislation with appropriate guidelines.

*Fiji.* This would make it possible to include them in a guide or code and thus strengthen the provisions laid down in existing legislation which are too broad in scope.

*Germany.* Within the framework of a general definition of the employment relationship.

*Guatemala.* These are the factors that make it possible to clarify an employment relationship.

*Honduras.* It is important that the instrument mention these factors so as to distinguish employment relationships better from similar contracts.

*Iraq.* All the factors of the work contract should be mentioned.

*Japan.* Whether or not the person concerned claims to be a worker, the existence of an employment relationship should be determined by several factors set out in the instrument.

JTUC-RENGO: Economic subordination should be included among these factors.

*Lebanon.* To broaden the concept of subordination so as to include new forms of work.

*Mauritius.* To facilitate the definition of worker.

*Morocco.* An employment relationship exists from the moment there is a link of subordination.

*Mozambique.* The instrument should take national law and practice into account.

*Philippines.* These are the first factors in determining the existence of an employment relationship.

*Portugal.* Referring to national law and practice takes into account the specific characteristics of each country and respects the principle of subsidiarity.

UGT: Portuguese legislation assumes that a work contract exists when certain factors are present.

*Qatar.* It is preferable to have several factors for determining the existence of an employment relationship. It depends on how the employment relationship varies and evolves.

*Slovakia.* In an employment relationship, the subordination of the worker to the employer is the determining factor.

*South Africa.* While the instrument should not necessarily be prescriptive, it should as far as possible eliminate or mitigate any possible form of ambiguity. It must be sufficiently clear and precise not to give rise to different interpretations according to the user. Consequently, the factors mentioned can be among the indicators but should definitely not be the only ones.

*Spain.* From the standpoint of the definition of an employment relationship, in Spain it is the legislation that lays down the factors that determine its existence. National practice must respect the factors on which the law is based, due account being taken of the importance of other factors constituting an employment relationship. Remuneration, too, is an essential factor of an employment relationship, together with subordination, work for the benefit of another person and work under instruction.

CC.OO.: For greater juridical clarity. In Spain these factors are the personal and voluntary nature of the work, the existence of a third party (*ajenidad*) and dependency as determined and analysed by the Supreme Court. Ultimately, dependency and the existence of a third party are the factors that define a work contract (and the consequent juridical relationship) and set it apart from other contracts (and juridical relationships). The existence of a third party is the factor that guarantees a worker remuneration, irrespective of the performance of an enterprise and can be understood as an exemption from the risks or profits of the enterprise, from titularization, etc. Dependency or subordination means working under the direction and instruction of a third party.

*Sri Lanka.* EFC: However, this should depend on the contractual clauses.

LJEWU: It is difficult to establish all the factors underlying an employment relationship. It may therefore be advisable to specify basic factors that can be applied to many different cases.

*Sweden.* LO: This would clarify the concept of employee.

*Switzerland.* USS: The factors notably include economic dependency or subordination.

*Trinidad and Tobago.* ECA: States should however be reminded that the factors and indicators are guidelines and that the actual situation is even more important in determining the existence of an employment relationship. Any such determination must be based on the specific facts of each case and on current practice in the country.

*Tunisia.* Factors such as those mentioned in the questionnaire are essential in determining the existence of an employment relationship.

*Ukraine.* FRU: This would make it possible to distinguish clearly between employment relationships and other relationships.

*United Arab Emirates.* This will eliminate the negative aspects of an employment relationship.

*United States.* AFL-CIO: The instrument should identify the factors that are fundamental to the determination of the existence of an employment relationship so as to provide guidance for national law and practice.

*Zimbabwe.* National law and practice should determine the existence of an employment relationship.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CTC (Canada), ETUF (Egypt), CFDT (France), COSATU (South Africa), TUC (United Kingdom): The factors should notably include economic dependence and subordination.

*Views shared by the following workers' organizations:* USAM (Madagascar), CLTM (Mauritania), CONSAWU (South Africa): The instruments should include a list of criteria such as subordination, work for the benefit of another person, work under instruction, etc., so as to help distinguish employment relationships from civil relationships. The national authorities should also be invited to draft legislation that is more detailed than the instrument as such.

#### *Comments concerning negative replies*

*Bangladesh.* BEA: Including this in an instrument could cause confusion at the national level over the applicable law and practice. It would be better to leave it to national jurisdictions to establish the criteria for determining the existence of an employment relationship.

*Brazil.* CNI: The concepts of dependency, subordination, instruction and other factors have evolved differently from one country to another. It is important to respect these differences.

*Bulgaria.* CCIB, AIB: National law must lay down the criteria for determining the existence of an employment relationship. Otherwise, establishing atypical criteria could cause confusion about the applicable legislation.

*Colombia.* ANDI: Employment relationships are defined by national legislation. The concepts of dependency and subordination, among others, have evolved in their own specific way in Colombia's legal system. This evolution must be respected so as not to cause confusion about a legal system that has already been defined.

*Costa Rica.* UCCAEP: It is for each jurisdiction to establish the criteria for determining the existence of an employment relationship. There must be no confusion about the legislation and case law of each country.

*Croatia.* It is for each jurisdiction to establish the criteria for determining the existence of an employment relationship. Differences between jurisdictions must be respected.

*Denmark.* DA: These factors are important as such in many cases but must be determined by national law and practice.

*Guatemala.* CACIF: The establishment of criteria for determining the existence of an employment relationship is the responsibility of the legislation and courts of each country. Laying down criteria in an instrument could cause confusion at the national level about the applicable legislation and case law.

*Iceland.* VSI: It is for each jurisdiction to establish the criteria for determining the existence of an employment relationship. The concepts of dependency, subordination, work under instruction and other factors have evolved differently from one country to another. It is important to respect these differences.

*Jamaica.* JEF: This is not needed. It should however be borne in mind that subordination, dependency and work under instruction are initially defined by national legislation and are not necessarily similar in all jurisdictions.

*Japan.* NK: The instrument should not lay down the factors for determining the existence of an employment relationship, even by way of example. The definition and scope of an employment relationship and the factors used for determining whether a person is employed or not vary from one country to another according to their legal system and must be left to the appreciation of each country.

*Republic of Korea.* FKTU, KCTU: Although very few problems may exist in countries where national law and practice are clearly established, there are many other countries whose national law and practice do not provide for protective measures for workers engaged in a disguised employment relationship. It is therefore extremely important that the ILO set out clear standards in a Convention or Recommendation. Such an international standard should incite States to correct the shortcomings in their law and practice.

*Kuwait.* The text should not provide for determining the existence of an employment relationship. It is preferable for the conditions determining this matter to be established in the light of the judicial practice of each country.

*Portugal.* CIP: This is a matter for national legislation, as the importance attached to these factors differs from country to country.

*South Africa.* BUSA: Factors defined at the international level may not be the same as those applied by the member States that derive from legal processes adopted over the years in each country. The introduction of new factors could result in significant instability and uncertainty.

*Trinidad and Tobago.* These factors must be periodically re-examined.

*Views shared by the following employers' organizations:* CCE (Canada), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain), USCIB (United States): It should be left to national jurisdictions to determine the existence of employment relationships. The concepts of dependency, subordination, work under instruction and other factors have been designed by these jurisdictions for

various purposes. It is important to respect these differences and not to try and impose a framework for determining the existence of an employment relationship. An instrument of this kind that included a list of criteria would be useless, especially as it could cause confusion at the national level about the applicable legislation and case law. USCIB (United States) added: Moreover, by calling for these basic factors to be used in determining the existence of an employment relationship, such a provision would run counter to the agreement reached on paragraph 25 to the effect that the Recommendation would not define universally the substance of an employment relationship.

*Views shared by the following employers' organizations:* MEDEF (France), UPS (Switzerland), CBI (United Kingdom): It is for the national jurisdictions to establish the criteria for determining an employment relationship.

#### *Comments concerning other replies*

*Cuba.* Under a contract of employment a worker undertakes to perform a specific job or task and to respect work standards, while the employer undertakes to pay him or her a corresponding wage and to guarantee the working conditions and other rights laid down in the contract.

**Qu. 11(2)** *Should the instrument provide a list of indicators that may assist in establishing the factors mentioned in Question 11(1) (for example, the person who determines the conditions of work; whether remuneration is paid periodically and constitutes a significant proportion of the income of the worker; whether the tools, materials and machinery are provided; whether the work is performed solely or mainly for one person; the extent of integration of the worker into the business)?*

#### *Affirmative replies*

*Governments:* 53. Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, China, Cuba, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Hungary, Indonesia, Italy, Kiribati, Latvia, Lithuania, Mauritius, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Portugal, Qatar, Romania, Serbia and Montenegro, Slovenia, South Africa, Sudan, Sri Lanka, Switzerland, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* ACIB (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); SY (Finland); CEIH (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); BUSA (South Africa); SN (Sweden); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CTC (Canada); ACTFU (China); CMKOS (Czech Republic); LO (Denmark); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FK TU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); CFTU, TUC (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); TUC (United Kingdom); AFL-CIO (United States).

*Negative replies*

*Governments:* 21. Algeria, Australia, Cameroon, Canada, Cyprus, Costa Rica, Croatia, Denmark, Germany, Iceland, India, Iraq, Japan, Kuwait, Lebanon, Mexico, Saudi Arabia, Slovakia, Spain, Sweden, United Kingdom.

*Employers' organizations:* CNI (Brazil); AIB, CCIB (Bulgaria); CCE (Canada); ANDI (Colombia); CEIF (Cyprus); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); ZDODS, ZSSS (Slovenia); CEOE (Spain); EFC (Sri Lanka); UPS (Switzerland); ECOT (Thailand), CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CC.OO. (Spain); FPU (Ukraine).

*Other replies*

*Employers' organizations:* BEA (Bangladesh); UCCAEP (Costa Rica).

*Workers' organization:* CGT-FO (France).

*Comments concerning affirmative replies*

*Barbados.* Whether the remuneration constitutes a significant proportion of the income of the worker and whether the work is performed mainly for one person would not seem to be appropriate indicators.

*Bulgaria.* CITUB: There is no reason why the Recommendation should not mention these indicators.

*China.* It should mention the basic factors that constitute an employment relationship, such as subordination, supervision by the beneficiary, remuneration, provision of tools, etc.

*Côte d'Ivoire.* CGECI: For the sake of standardization in the present context of globalization.

*Cuba.* In a work contract the parties should define the rights and duties of each and establish the indicators that determine the employment relationship in accordance with specific national characteristics and legislation on the subject.

*El Salvador.* The fact that certain indicators vary from one country to another should be taken into account when drawing up the list.

*Egypt.* These indicators can even be used as guidelines for proving the existence of an employment relationship.

*Eritrea.* The text should not only list the factors for determining the existence of an employment relationship; the practice and intention of the parties should also be taken into account for this purpose.

*Finland.* In addition to a possible list of examples, a provision is needed indicating that the determination of the nature of the relationship should be based on the analysis of the list as a whole.

SAK, STTK, AKAVA, SY, VTML: The list should be open to modification, be carefully drawn up and contain examples. A list of possible indicators is useful.

*Guatemala.* To examine the fundamental factors of an employment relationship.

*Honduras.* Because they are decisive in proving the existence of an employment relationship.

*Japan.* JTUC-RENGO: In Japan, whether or not a person is a worker depends on such criteria as whether or not the work is supervised; this results in a narrow definition of the term “worker”. Other factors such as economic subordination must be added to the criteria, as well as a list of indicators for determining the factors.

*Republic of Korea.* FKTU, KCTU: Some of the factors proposed (such as whether the production tools, materials and machinery are provided) need to be revised, as well as formalist indicators (such as whether the relevant employment rules are observed, the method of payment of the remuneration or wage, whether the business is registered, whether social security contributions are paid, whether tax deductions from the wages have been made) which can be more or less unilaterally established by the hierarchically superior employer.

*Mauritius.* To help establish the primacy of facts.

*Morocco.* The instrument must provide indicators to assist in determining the employment relationship.

*Mozambique.* This ought rather to be covered by national practice, since these factors may be contained in the work contract, a collective agreement, works rules or instructions.

*Nepal.* GEFONT: There may be several indicators of an employment relationship.

*Netherlands.* A list of indicators can help judges to determine whether an employment relationship exists.

*Peru.* These indicators should be considered as signs of technical and economic dependency, concepts that are generally linked to subordination. The list of indicators must be open to modification so as to allow for future changes in the organization of production.

*Philippines.* Indicators such as the form of remuneration, the provision of tools, materials and machines and whether the work is performed solely for one person must not be considered exclusive and must be open to liberal interpretation.

*Portugal.* But it is for the legislation and practice of each country to determine how and when an employment relationship can be said to exist. This is the methodology used in Portugal. The law specifies a set of factors which, once they have been verified, constitute an assumption of the existence of a work contract.

*Qatar.* No objection so long as they are looked upon as guidelines for determining the existence of an employment relationship.

*Slovenia.* Two of the indicators mentioned in the questionnaire should be worded differently: whether the tools, materials and machinery are provided or reimbursed, and whether the work is performed solely for the benefit of one person.

ZSSS: The list of indicators should be open to modification.

*South Africa.* This cannot be overemphasized. The instrument should establish a common or standardized way of determining the existence of an employment relationship.

BUSA: These guidelines should be expressed in general terms and not seek to be prescriptive. The list should contain suggestions that member States could refer to when drawing up a list of indicators suited to their particular situation.

*Sri Lanka.* NWC: The Higher Judiciary has already laid down the criteria for determining the existence of an employer-employee relationship, or a disguised employment relationship and of a triangular employment relationship.

*Sweden.* LO: In accordance with national regulations.

*Switzerland.* For this, reference could be made to the German and South African solutions, which provide a catalogue of indicators, one or more of which could be said to constitute an employment relationship.

USS: A list of factors and indicators is an essential technical feature of the new Recommendation.

*Trinidad and Tobago.* Other examples should be mentioned, such as whether the worker can terminate the contract, whether the worker is liable to be exposed to financial risk in performing the work, whether the worker is entitled to compensation for overtime.

ECA: The list of indicators should, however, reflect common trends among certain countries that would be relevant to all countries (as far as possible). The list of indicators can be looked upon as mere guideline that States are at liberty to adopt or not.

*Tunisia.* These indicators are necessary to establish whether the factors determining the existence of an employment relationship are present.

*Ukraine.* FRU: This will make it possible for each country, in adapting its legislations to the standards of international law, to choose the indicators that can help it establish the factors that distinguish employment relationships from other legal relationships.

*Views shared by the following trade union organizations:* BSSF (Bangladesh), CTC (Canada), ETUF (Egypt), CFTD (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), TUC (United Kingdom): The definition of the factors and indicators is an essential technical feature of the new Recommendation.

#### *Comments concerning negative replies*

*Algeria.* This provision would be difficult to apply, other than for homeworkers; in other instances, various situations may arise, making it difficult to combine all the factors.

*Australia.* The existing common law approach is preferable to the adoption of this provision.

*Canada.* This must be determined by national law and practice. The inclusion of a number of indicators in the instrument might suggest that the list is comprehensive. Similarly, some of the indicators may not be universally recognized.

*Colombia.* ANDI: The way in which the factors that determine the existence of an employment relationship are established is dictated by national factors and features. Consequently, the instrument adopted must not mention these aspects.

*Croatia.* The concept of an employment relationship reflects a wide spectrum of national characteristics; it would be inappropriate to try to devise an international definition of the term.

*Denmark.* The Danish Government considers that these matters are not entirely appropriate in determining the existence of an employment relationship.

*Finland.* EK: An endless list of this kind would merely accentuate the vagueness of the law.

*France.* MEDEF: There is no call for an international definition of an employment relationship.

*Germany.* In theory it is of course desirable to provide the interested parties with a list of indicators, but with a broad definition of the term “wage-earner” and bearing in mind the diversity and flexibility of employment relationships. It is virtually impossible to devise indicators applicable to all cases which are anything more than broad definitions and are to some extent binding. It is more important that each worker be entitled to have his status established in binding terms by an appropriate body (such as a labour tribunal)

*Iceland.* The Government of Iceland considers that these matters are not relevant to determining the existence of an employment relationship.

VSI: The concept and scope of an employment relationship reflect a wide spectrum of national characteristics, including the way national legislation and case law, social relations and the labour market have evolved. Consequently, an attempt to devise an international definition of an employment relationship, whether directly or in the form of a proposal, would be inappropriate and potentially disruptive.

*India.* The periodicity of a source of income without a firm basis is not an irrefutable sign of worker status.

*Jamaica.* JEF: There can be no universal definition or indicators of an employment relationship, if for no other reason than that labour legislations and, especially, labour markets differ from country to country.

*Japan.* In Japan, several factors are usually taken into account to determine the status of workers, such as the right of decision, the right of supervision or monitoring of the work, etc. It will, however, be difficult to draw up a list of common indicators because the variety of national situations would entail a wide range of indicators.

NK: We are strongly opposed to a list of indicators, which would be liable to interfere with the concept of employment relations clearly established by each country, in terms of its legal system and current practice. Moreover, there is no reason to introduce these indicators to determine the existence of an employment relationship.

*Kuwait.* The meaning and scope of an employment relationship is to a great extent determined by the national legislation, case law, social relations and labour market conditions of each country. An international definition of an employment relationship, whether direct or indirect, would be inappropriate and conducive to anarchy.

*Lebanon.* It would be preferable for such indicators to be set out in the legislation of each country.

*Lesotho.* ALE: The instrument should neither formulate a definition nor propose indicators because that is precisely the source of the problem.

*Mexico.* The indicators and criteria must be in line with the provisions of national law and practice.

*Portugal.* CIP: The employment relationship is determined by member States on the basis of specific characteristics; any attempt to devise an international definition of the term would be inappropriate and potentially harmful.

*Spain.* In traditionally legislative systems, once the basic factors of an employment relationship have been established, it is unnecessary to define indicators because there are a large number of potential situations, and doing so would not do anything to lessen the variety of possible hypotheses. It is for the courts, in the light of the facts of each case, to determine whether or not an employment relationship exists on the basis of legally established factors. The indicators are established by the judgements handed down by the courts, which are closer to reality and can genuinely serve as guidelines.

*CC.OO.:* In Spain it is the courts that define the characteristics of an employment relationship, suitably adapted to the changing framework of occupational and productive relations. For this purpose the courts have based their decisions on the existence of indicators that prove that work is being performed in a context of subordination. The combination of certain of these indicators provides convincing evidence of the type of relationship that exists between the parties and of the kind of position that the worker occupies within a productive organization.

*Sweden.* It is important that the definition of employee conform to national law and practice. A list of indicators would be incompatible with this concept.

*Switzerland. UPS:* Any attempt to devise an international definition of an employment relationship, whether directly or in the form of suggested criteria, would in our opinion be inappropriate, especially as a large number of definitions already exists. A discussion on this would be pointless.

*United Kingdom. CBI:* This again is a matter for national legislation and jurisprudence. Any Recommendation should provide no more than examples.

*Views shared by the following employers' organizations: CNI (Brazil) and CCIB, AIB (Bulgaria):* The scope of an employment relationship reflects a wide variety of national situations that take into account the way the legislation, the social relations and the labour market have evolved.

*Views shared by the following employers' organizations: CCE (Canada), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain), USCIB (United States) :* The scope of an employment relationship reflects a wide variety of national features. The treatment of employment relationships has influenced the way national legislation and case law, social relations and the labour market have evolved within each State. It is therefore inappropriate and potentially dangerous to try and draft an international definition of an employment relationship. CCE (Canada) added: this matter has been debated at length, inter alia, at the sessions of the International Labour Conference in 1997 and 1998 in the context of contract labour, at the Meeting of Experts in 2000 and at the 91st Session of the International Labour Conference in 2003 in the context of the employment relationship. An attempt to introduce the idea of common indicators in any form will lead to divisiveness and increase the likelihood of an outcome that is unsatisfactory to all the social partners. We strongly caution against this course of discussion. USCIB (United States) added: Moreover, this is too binding and contrary to the agreed scope of paragraph 25, to the effect that the Recommendation should not define the substance of an employment relationship. The level of detail required by the concept of indicators is impracticable in so far as national and local legal systems are different. This is not in line with United States labour legislation.

*Comment concerning other replies*

*Bangladesh.* BEA: It is not appropriate to devise a new concept for the international definition of an employment relationship. The existing concept is widely followed in national legislations.

*Costa Rica.* UCCAEP: The specific features of each country must be respected.

*France.* CGT-FO. Any such list of indicators should really be indicative and neither cumulative nor exclusive. The fact that one or other of the factors is not explicitly verified should not enable the employer to evade the obligations arising out of the framework of the employment relationship or the employment contract.

**Qu. 11(3)** *If yes, please specify the indicators that may be used.*

*Argentina.* The examples given in Question 11(2) are appropriate.

CGT RA: The personal performance of the tasks, whether or not risks are involved, economic, technical and temporal dependency and/or subordination.

*Austria.* In addition to the indicators given in Question 11(2), it should also be possible to use the following: whether or not supervised, obligation to follow instructions, obligation to perform the work personally, duration of the work, expected method of working, integration into the business (personal dependency).

*Barbados.* The person who determines the working conditions, the degree of integration of the person into the business, any arrangement or agreement between the parties.

BWU: Supervision and control of the work and objectives, assessment structures, determination of remuneration, discipline and related matters.

*Benin.* Legal subordination, remuneration, performance of the work, ownership of the materials used, replacement of the person holding the job by a trainee.

*Bulgaria.* ACIB: Membership of the works' committee.

CITUB: The way the responsibilities of both parties engaged in an employment relationship are established, whether or not the relationship depends on the personality of the worker.

*China.* Subordination, supervision by the beneficiary, payment of remuneration, provision of work tools, etc.

*Côte d'Ivoire.* CGECI: Written or verbal instructions, remuneration, observance of working hours and of works rules.

*Cuba.* Type of contract, title of the post, nature of the tasks, wages and form of payment, general standards of behaviour and standards relating specifically to the post, duration of the work and rest periods, occupational safety and health conditions, reasons for terminating the contract, starting date, signature of the parties.

*Czech Republic.* CMKOS: Type of work, duration of the relationship, hours worked, place of work, remuneration, other factors of the employment relationship.

*Dominica.* The remuneration is paid periodically and constitutes a significant proportion of the income of the worker.

*Egypt.* Contributions to an insurance; medical certificate prior to the start of work or to be signed periodically; total and fixed income of the worker; deductions by external bodies from the worker's wages; membership of trade union organizations; statements by witnesses.

*El Salvador.* Membership of a social security scheme.

*Eritrea.* Degree of supervision by and authority of the employer; hours of work; degree of economic dependency of the worker; origin of the tools and materials used for the work to be performed; whether or not the person works for one or more employers; whether he or she receives a fixed hourly/weekly/monthly wage; whether the work entails any personal financial risk; whether the person is reimbursed for his or her subsistence or travel expenses.

*Fiji.* Whether there is any kind of supervision of the work performed; whether the remuneration is paid periodically.

*Finland.* SAK, STTK, AKAVA: The indicators mentioned in paragraphs 27 and 28 of the report. The work must be performed personally by the worker.

VTML: The person/organization that determines the working conditions, subordination, work under instruction, provision of tools, materials and machines.

*France.* Integration into an organized department, authority to give orders, issue guidelines or impose sanctions.

CGT-FO: Such a list should be open-ended and the presumption of the existence of an employment relationship (or employment contract) should prevail.

*Gabon.* COSYGA: All the indicators mentioned above should be used.

*Guatemala.* Matter or object involved; form, manner, duration of the work; place of work and remuneration due; legal economic link of personal services to another person; obligation to perform the work personally in a situation of continuous dependency and under the immediate or delegated authority of another person for remuneration of any kind or in any form.

*Honduras.* Nature of the work; place of work; amount and form of remuneration; duration; requisites (food, accommodation, transport, fuel, depreciation of vehicles).

*Hungary.* Degree of supervision, link of subordination between the parties, rights and duties attached to the post, regular and continuous work.

NFWC: Payment of a wage, work performed personally.

*Iceland.* The person who determines the working conditions.

*India.* CIE: Conditions of service, wages and other compensatory payments.

CITU: All the relevant indicators mentioned in Question 11(2) should be used.

*Italy.* See information note.

CGIL: The indicators mentioned in Question 11(2), plus the existence of arrangements concerning working hours. Generally speaking, it should be stated that no business should function without employees.

*Japan.* JTUC-RENGO: The indicators mentioned in Question 11(2), plus other useful indicators for establishing economic dependency – for example, the possibility for the person to increase his or her profits or remuneration by organizing the work and the

way it is performed independently, to recruit and dismiss, to perform the work over a freely chosen period of time.

*Kiribati.* The existence of a wage, the performance of the work for the benefit of another person, whether only one person determines the working conditions and the way the work is organized.

*Republic of Korea.* FKTU, KCTU: The person lives on an income other than that which he or she receives in return for labour provided for the regular operations of the business; the person is subject to indirect comprehensive supervision by the employer as regards the substance and conduct of the work; the person does not employ others to perform the work (mere support may be acceptable); the remuneration and working conditions are substantially determined by the employer.

*Latvia.* The indicators mentioned.

*Lithuania.* LPSK: The person who determines the working conditions; the degree of integration of the worker into the business; the extent of the commercial risk to the worker.

*Mauritius.* “Supply of labour” rather than “supply of equipment”, dependency (income, whatever the proportion), “subordination” and “accountability” rather than “direct control”.

*Republic of Moldova.* Whether the remuneration is paid periodically; whether the tools, materials and equipment are provided; degree of integration of the worker into the structure of the business.

*Morocco.* All the indicators mentioned in the national labour legislation (wage, hours of work and rest time).

*Mozambique.* Collective agreements, works rules, instructions.

*Nepal.* GEFONT: Wages, delegation of work or supervision.

*Netherlands.* Only three indicators are used in the Netherlands: subordination, remuneration, and the obligation to perform the work personally.

FNV: Also: whether a person other than the worker determines the working hours and workplace; whether the work is in practice performed under binding instructions; whether a person other than the worker keeps a record of his or her leave and holidays; whether the worker has to be at the disposal of another person.

*Niger.* Age of the worker, regularity of the work or of the tasks performed, payment in cash and/or in kind, duration of the relationship, use of the business’s resources.

*Norway.* The following list, which is not comprehensive: the work is performed mainly or solely for one person; the relationship and the performance of the work are tied to the person, who does not have the right to recruit other workers to do the work; the work is performed under the direction and supervision of another person; the tools materials and machines are provided; determination of the person who is responsible for the finished job; payment of remuneration.

*Panama.* Depending on the activity.

*Peru.* (a) Indicators linked to technical dependency: receiving instructions as to the services to be rendered; supervision; physical presence at the centre of operations of the productive organization or extent of functional integration into the productive organization; (b) indicators linked to economic dependency: exclusive nature of the

services rendered; duration of the work; working hours; periodicity of the remuneration, absence of commercial risk.

*Philippines.* Remuneration, working conditions, form of recruitment, method of payment of the remuneration, nature of the work, type of work contract.

*Portugal.* The existence of an employment relationship in Portugal can be determined by the following indicators, taken together: the worker is integrated into the administrative structure of the beneficiary of the activity and performs the work under the latter's instructions; the work is performed in the beneficiary's enterprise or in premises controlled by the enterprise, according to a previously determined timetable; the worker is remunerated according to the time spent performing the work or is in a position of economic dependency on the beneficiary; most of the work tools are provided by the beneficiary; the work is performed over an uninterrupted period of at least 90 days.

UGT: Working hours; establishment of an uninterrupted period of time for performing the work; performance of the work under the direction of the employer; whether or not the worker can recruit other people.

*Qatar.* Dependency and supervision; the real/theoretical facts of the case; payment of remuneration for the work (this is one of the main factors in an employment relationship); the right to give instructions and orders and to determine the place of work.

*Romania.* Working conditions, monthly remuneration, hours of work and rest periods, identity of the parties, duration of the work contract, basic wage and other factors of the remuneration, technical and organization conditions.

*Slovenia.* The worker cannot subcontract the work; the work does not entail any personal financial risk for the worker; the worker bears no responsibility in terms of investment; he or she works solely for one person or business.

ZDS: Voluntary participation of the worker in the work process organized by the employer; personal performance of the work under the instructions and supervision of the employer.

ZSSS: Voluntary work, fixed remuneration, personal work, continuous work, under the supervision of another person, according to instructions.

*South Africa.* The indicators referred to in Labour Relations Act No. 66, as amended in 2002, namely: the way the person works is subject to the supervision or authority of another person; the hours of work of the person are subject to the supervision or authority of another person; if employed by an organization, the person is part of the said organization; the person has worked for the other person for at least 40 hours per month on average during the past three months; the person is economically dependent on the person for whom he or she works or provides his or her services; the tools and materials that the person uses are supplied by the other person; the person works or provides services only for one person.

BUSA: Section 83A of Act No. 75 of 1997 defining the minimum standards that are applicable to working conditions establishes a refutable presumption of employment relations wherever one or more of the factors mentioned by the Government in its reply are present, except in the case of persons earning more than a certain amount.; the section further stipulates that persons earning that amount or less may request a legal opinion regarding their status. The Act will shortly be supplemented by a code of good practice entitled "Who is an employee?"

*Sri Lanka.* LJEWU: There are no specific indicators, but the provision of a workplace, facilities for employment, equipment, tools, remuneration, fees, rewards, benefits, etc., are generally taken into account.

NWC: Supervision, integration, essential activities and accessory activities.

*Sweden.* LO: The employer provides the tools, machines, and raw materials, directs and distributes the work and establishes the working hours.

*Switzerland.* Assumption of the economic risk by the worker; performance of the work for the benefit of a single person; freedom of choice of the person for whom the service is rendered; integration of the worker into a structure determined by another person; provision of the necessary tools; existence of a link of subordination; freedom for the worker to organize his work.

USS: All the indicators listed in Question 11(2) should be used. Other indicators should also be included to help determine economic dependency, such as whether the person is able to increase his or her profits or remuneration by means of the independent management or personal programming of the work, and whether the person is at liberty to choose and recruit other people, under his or her own terms, to perform the work.

*Suriname.* How the working conditions are determined; the person who determines the employment conditions; the person responsible in the event of an occupational injury.

*Syrian Arab Republic.* The person normally works for only one contractor; the person does the same work as that performed by regular employees; integration of the worker into the business.

*Thailand:* The authority to give instructions.

NCTL: The authority to give instructions.

*Togo.* CSTT: The person who determines the working conditions, remuneration, degree of integration into the business.

*Trinidad and Tobago.* Additional indicators: possibility of terminating the contract, personal financial risk for the worker, remuneration of overtime.

ECA: The degree of control; amount of remuneration and method of payment; the person who provides the capital and risks making a loss; the person who provides the tools and equipment; whether the worker is tied to a single employer, or is free to work for others; how each of the parties views their relationship; whether or not a "traditional structure of employment" exists in the trade considered; type of arrangement for the payment of income tax and national insurance; procedure for terminating the contract.

NATUC: Whether the work is done for an employer; whether the worker is subordinate.

*Tunisia.* Work performed solely for another person; remuneration paid periodically, as a significant proportion of the worker's income; the person who determines the working conditions.

*Ukraine.* FRU: The degree of integration of the worker into the structure of the business; the person who determines the working conditions.

*United Arab Emirates.* Existence of a work contract clearly defining the responsibility of the worker and of the employer under the applicable legislation.

*United States. AFL-CIO:* Indicators include, but are not limited to, the following: (1) the hiring party's right to control the manner and means of production; (2) the skills required; (3) the technology and tools used; (4) the place of work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign other tasks to the hired party; (7) the extent of the hired party's discretion over how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. None of these factors, taken alone, is decisive.

*Zimbabwe.* Hours of work, provision of protective clothing, increase in the number of inspections carried out.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), TUC (United Kingdom): All the indicators listed under this question should be used. Other indicators should also be introduced to help determine economic dependency, for example, whether the person has the possibility of increasing his or her profits or remuneration by independent management or programming of the work, or whether the person is at liberty to choose or engage other persons to perform the work, under his or her own conditions. CLC (Canada) and COSATU (South Africa) added: Consideration should also be given to the prevailing type of relationship (commercial or employment) in a given sector or trade.

**Qu. 12** *Should the instrument provide that when one or more of the indicators, as determined by national law and practice, are met, the relationship between the worker who performs work and the person for whose benefit the work is performed should be deemed, prima facie, to be an employment relationship?*

*Affirmative*

*Governments:* 50. Algeria, Argentina, Belgium, Benin, Brazil, Bulgaria, Cameroon, China, Cuba, Dominica, Egypt, El Salvador, Fiji, France, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Kiribati, Latvia, Lebanon, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Panama, Peru, Philippines, Portugal, Qatar, Romania, Slovenia, South Africa, Sri Lanka, Sudan, Suriname, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* BIA, BICA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); SY (Finland); MGYOSZ (Hungary); CIE (India); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); SN (Sweden); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); CMKOS (Czech Republic); ACFTU (China); LO (Denmark); ETUF (Egypt); VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CGTP, UGT (Portugal); PTUF (Romania); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO

(Sweden); USS/SGB(Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 21. Australia, Barbados, Belarus, Canada, Costa Rica, Croatia, Cyprus, Denmark, Eritrea, Finland, Germany, India, Japan, Kuwait, Norway, Saudi Arabia, Serbia and Montenegro, Slovakia, Sweden, Tunisia, United Kingdom.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); CEC (Canada); ANDI (Colombia); UCCAEP (Costa Rica); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK (Finland); MEDEF (France); CACIF (Guatemala); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CIP (Portugal); CEOE (Spain); BUSA (South Africa); EFC (Sri Lanka); UPS (Switzerland); ECOT (Thailand); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* AKAVA, SAK, STTK (Finland); ZSSS (Slovenia).

*Other*

*Governments:* 2. Austria, Spain.

*Comments concerning affirmative replies*

*Benin.* This provision will lighten the burden of proving the existence of an employment relationship for the worker.

*China.* If certain fundamental factors of the employment relationship are present, its existence should be recognized.

*Côte d'Ivoire.* CGECI: Through a concern for harmonization.

*Dominica.* At least two indicators.

*Egypt.* The existence of one of these indicators is sufficient to prove the employment relationship.

*Gabon.* COSYGA: The list should not be limited to national legislation.

*Greece.* Most of the indicators mentioned are already in force.

*Guatemala.* The provision of services in itself gives rise to an employment relationship.

*Honduras.* On condition, however, that the instrument provides for more than one indicator, as determined by national law and practice.

*Japan.* JTUC-RENGO: Whether or not a person is defined as a worker should be determined by general consideration in the light of both subordination in the performance of work and economic subordination. However, compliance with all of the indicators should not be a requirement for a person to be provided with any of the protections offered to workers. Instead, the possibility of providing protection as needed should be considered when one or more of the indicators are met.

*Italy.* CGIL: Yes, and it should also be deemed to be a relationship without limit of time.

*Republic of Korea.* FKTU, KCTU: It should be made clear that an employment relationship exists when one out of the two indicators is met. Given the possibility of the

denial of the existence of an employment relationship by the arbitrary opinion of the competent state authority, it should be made clear that it is deemed to be an employment relationship if some of the indicators are found to prevail.

*Lebanon.* These indicators, and particularly the indicator relating to legal subordination, have to be clear in their conception so as to confirm the employment relationship as it emerges between the worker who performs work and the person for whose benefit the work is performed.

*Lithuania.* LPSK: A full, compulsory and clear list has to be provided by the legislation. All the indicators have to be met for a relationship to be deemed an employment relationship.

*Mauritius.* Yes, so as to facilitate the determination of the existence of an employment relationship.

*Mexico.* In Mexico, any situation in which an individual provides a service and another benefits from it presupposes, in accordance with the law, the existence of a contract and an employment relationship between the two parties. The law also considers certain specific categories of workers to be engaged by the enterprise when they meet certain conditions.

*Morocco.* The indicators set out in national law and practice are considered to be the same for the employment relationship.

*Mozambique.* Provided that the instrument refers explicitly to the existence of an employment relationship between the parties.

*Peru.* This presumption would facilitate the compilation of proof by workers, particularly since subordination is a legal concept which is determined through characteristics that the employer can disguise, or which is difficult to ascertain in new production units.

*Philippines.* Where indicators, prima facie, are considered to determine the existence of an employment relationship, the rights of workers are protected at the outset or at least at an early stage in their employment.

*Portugal.* The UGT: The Labour Code establishes this presumption for this purpose.

*Qatar.* This proposal favours employers, workers and the development process in general. These indicators are deemed to be an indication. Anyone who claims otherwise will have to produce proof to the contrary.

*South Africa.* The indicators are an attempt to respond to different types of employment relationships. Therefore, they may not ostensibly mean that an employment relationship exists only when all these indicators or elements of an employment relationship exist. However, while the latter is not excluded, it should be clearly stipulated that should one of these indicators exist, it means there is an employer and an employee, and therefore an employment relationship.

CONSAWU: The list must be as broad and precise as possible to avoid any legal vacuum.

*Spain.* CC.OO.: It is necessary to start from the assumption of the existence of the employment relationship.

*Sri Lanka.* LJEWU: Once a prima facie employment relationship has been established, the opposing party has to rebut it by means of other evidence.

*Sweden.* LO, TCO: It would clarify the concepts of employer and employee.

*Switzerland.* USS/SGB: Unclear reference to national law and practice.

*Trinidad and Tobago.* ECA: While the existence of one or more indicators may be good grounds for the existence of an employment relationship, such a determination should not be limited to the identification of mere indicators, but should be based on the reality of the situation and what actually subsists between the parties. In other words, the mechanism should seek to determine the existence of an employment relationship by looking at factors beyond those mentioned in the instrument. This will give the instrument much needed flexibility.

*Ukraine.* FRU: That would make it possible to determine justly, based on these indicators, employment relationships to provide a certain level of protection to workers.

FPU: The work performed is the beginning of the employment relationship.

*View shared by the following workers' organizations:* CLC (Canada), COSATU (South Africa): The instrument should provide that when one or more indicators in the ILO instrument are present, an employment relationship should be deemed to exist.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania): The list must be as broad and precise as possible to avoid any legal vacuum. Since it is unclear, the reference to national law and practice must be deleted. The discussion during the Conference in 2006 will help to establish more precisely the list of indicators.

*View shared by the following workers' organizations:* ACTU (Australia), ETUF (Egypt), CFDT (France), TUC (United Kingdom): Unclear reference to national law and practice.

#### *Comments concerning negative replies*

*Barbados.* The instrument should provide for due consideration of all the facts and circumstances of the relationship.

*Belarus.* The instrument should provide that several fundamental indicators have to be taken into account for this purpose.

*Canada.* This should not be considered to be a prima facie case. Each case has a unique set of circumstances and facts related to it and therefore cases should be determined on the basis of national law and practice, and if necessary by an accessible dispute resolution mechanism.

*Eritrea.* The list provided in the instrument should only be used as a general guideline, and discretion to determine the existence of the employment relationship should be left to the national legislation in order to allow flexibility.

*Finland.* EK, SAK, STTK and AKAVA: The matter should be left to ILO Members to consider at the national level, as harmonization at the ILO level is impossible.

*Japan.* The employment relationship should be determined by general considerations, not by simple indicators. Thus, the relationship should not be presumed as mentioned in Question 12. (If the indicators are prescribed concretely, certain employers might abuse them to disguise an employment relationship.)

*Kuwait.* The employment relationship must be clear and not disguised for the reasons indicated in the previous reply.

*Norway.* An alternative provision that could be considered is that unclear points in the contract or relationship shall be interpreted in favour of the worker.

*Serbia and Montenegro.* With regard to defining labour relations, the Recommendation should contain only provisions on matters of principle. Standards relating to the rights and status of employees are provided for in Conventions and other texts developed by the ILO. The Recommendation should not regulate the question of the employment relationship in detail due to the fact that member States need to take into account the specific characteristics of socio-economic systems, labour market requirements and employment policy at the national level.

*Slovenia.* ZSSS: More than one indicator should be met.

*South Africa.* BUSA: The number of indicators, and their exact terms, should be left to national laws and policies to define.

*Sweden.* This would constitute interference with national law as regards deciding whether or not an employment relationship exists, and should not therefore be included in the instrument. The question of how many indicators have to be met according to national law and how they are to be weighted when deciding whether an employment relationship exists can vary from case to case, depending on the circumstances. It must be possible for this to be taken into consideration. In addition, difficulties are foreseeable regarding countries with intermediate groups, for example contractors who are not deemed employees but who nevertheless, due to their position of dependence, are granted a certain measure of protection corresponding to that enjoyed by employees.

*Switzerland.* UPS: Isolated indicators may lead to error. The employment relationship has to be considered as a whole.

*Tunisia.* Determination of the employment relationship requires more than one indicator since, for example, the provision of tools and materials cannot in itself constitute proof of the establishment of an employment relationship and may, for example, constitute a commercial relationship.

*United States.* USCIB: This provision runs directly contrary to the agreed upon scope of the Recommendation: a legal test to determine the existence of an employment relationship is something that must be left to national policy and practice.

*View shared by Denmark, Finland and Germany.* See the comments on Question 11.

*View shared by the following employers' organizations:* BEA (Bangladesh), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), MEDEF (France), CACIF (Guatemala), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), CBI (United Kingdom): No, for the reasons indicated above.

#### *Comments concerning other replies*

*Austria.* It is only possible to reply in the affirmative to this question if it is specified that the majority of characteristics of an employment relationship have to be taken into account. It should also be indicated that it is necessary to take as a basis the real circumstances in determining whether or not there is an employment relationship. The form taken by the employment relationship in practice is the determining factor (see also Question 5).

*Spain.* The reasoning should be the following: on the basis, not of indicators of the employment relationship, but of its characteristics, the absence of one of these

characteristics would provide grounds for considering that it is not an employment relationship.

*Trinidad and Tobago.* The instrument should provide that whether or not an employment relationship exists should be determined on the basis of a combination of indicators.

#### DISPUTE SETTLEMENT

**Qu. 13** *Should the instrument provide that effective and speedy administrative or other procedures should be established to allow the competent authority to deal with disputes concerning the employment status of workers?*

#### *Affirmative*

*Governments:* 65. Algeria, Argentina, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Indonesia, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Philippines, Qatar, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); CBI (United Kingdom).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India), CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 5. Australia, Denmark, India, Iraq, Portugal.

*Employers' organizations:* EK (Finland); MEDEF (France); HSH, NHO (Norway); FRU (Ukraine); USCIB (United States).

*Workers' organizations:* LO (Denmark).

*Other*

*Governments: 4.* Austria, Iceland, Romania, South Africa.

*Workers' organization:* FNV (Netherlands).

*Comments concerning affirmative replies*

*Argentina.* CGT RA: An alternative would be conciliation procedures prior to the lodging of a judicial complaint, which are very useful in Argentina, particularly in relation to small amounts.

*Australia.* ACTU: This should include provision for the competent authority to deem that in particular occupations or workers in a particular sector of the economy have employee status and therefore to be covered by all the rights and protections provided through an employment relationship.

*Bulgaria.* BCCI: It is also possible to envisage such procedures.

*CITUB:* The public authorities should undertake to settle disputes relating to labour, although there is also nothing to prevent mechanisms for the voluntary settlement of disputes in their early stages.

*Canada.* Dispute resolution mechanisms should also be accessible, timely and not cost-prohibitive.

*China.* The instrument should provide that member States may, in accordance with their specific situations, establish new procedures for the settlement of disputes, or specify the arbitration procedures or processes for settling disputes relating to the employment relationship.

*Costa Rica.* UCCAEP: Yes, that is fundamental.

*Côte d'Ivoire.* CGECI: In the context of an amicable settlement.

*Egypt.* Through national legislation establishing the procedure for the settlement of disputes and protecting the rights of the two parties.

*El Salvador.* Dispute settlement mechanisms are regulated by the national legislation.

*Eritrea.* The instrument should contain provisions of this type, because adopting laws which do not establish such effective and speedy dispute settlement mechanisms is valueless.

*Finland.* SAK, STTK, AKAVA, SY, VTML: Those who are in the most vulnerable situations do not have access to these procedures.

*Germany.* In so far as effective legal protection is deemed sufficient. There is no need to create new labour inspection services or other similar services.

*Greece.* The labour legislation provides for immediate notification to the competent authority.

*Guatemala.* This will provide the policy guidance for determining the employment relationship.

*CACIF:* It should be specified that legal mechanisms have to be applied rapidly and effectively by the competent authorities in accordance with the legislation in each country. The administrative authorities do not have competence to deal with this type of dispute in certain countries.

*Honduras.* It is not sufficient to formulate and apply a policy for the settlement of disputes relating to the employment relationship; it is also necessary for effective and speedy mechanisms to be available to workers and employers for the prevention and settlement of disputes relating to conditions of work.

*Indonesia.* It should be one of the procedures when a labour dispute occurs in an enterprise. Bipartite consultation is the first step in settling a dispute.

*Italy.* CGIL: However, the nature of the employment relation is not for the social partners to determine, but only for the judiciary (in accordance with the Italian Constitution).

*Jamaica.* JEF: The instrument could provide for the establishment of rapid administrative procedures and the enhancement, enabling and support of existing procedures.

*Japan.* The establishment of simple dispute settlement procedures is crucial for workers. However, such procedures should also be appropriate to the situation of each country.

JTUC-RENGO: Competent authorities should be allowed to rule that certain professionals or workers in special economic sectors have the status of worker and are eligible for protection based on the employment relationship.

*Republic of Korea.* FKTU, KCTU: If the existence of an employment relationship is determined by the courts, it may take an inordinately long time considering the characteristics of the three-tier system. At the same time, it would be extremely difficult to uncover disguised employment relationships only through the corroborating evidence to be produced by the person raising the issue, without the mandated investigation by a competent body. There is a need for an administrative body provided with a mandate and the necessary competence to ascertain the facts to bring disputes concerning employment relationships to a speedy conclusion. It should be made clear that the foremost purpose of the establishment of such an administrative body lies in providing effective protection for workers and in preventing the damage arising from disguised employment relationships.

*Kuwait.* This is provided for in the labour legislation. Disputes first have to be settled amicably before recourse to legal procedures, and account needs to be taken of the cost of such effective and speedy procedures.

*Lebanon.* In this context, it is necessary to reinforce the competence of the labour inspection system and the related administrative and judicial bodies, lighten administrative procedures and simplify procedures in the event of disputes.

*Mauritius.* To provide institutional recourse to workers to address problems of definition and to sue employers for non-compliance with the labour legislation.

*Morocco.* The instrument must provide for administrative procedures through which the competent authority can deal with disputes.

*Poland.* Solidarnosc: but the competence should not be exclusive.

*Portugal.* CIP: No objection to the establishment of such procedures.

UGT: Essentially taking into account the fact that in most cases the settlement of disputes is slow.

*Qatar.* To ensure the enforcement of laws with a view to achieving the objectives.

*South Africa.* BUSA: Supported, with the proviso that the nature of the procedures and authorities should be determined at the national level.

*Spain.* The settlement of labour disputes outside the courts is a very useful procedure to obtain speedy and immediate results, which does not exclude recourse to the courts.

CC.OO.: Administrative procedures exist in Spain for this purpose.

*Sri Lanka.* CWC: Such guidelines are imperative, particularly as workers are being pushed into the informal sector.

LJEWU: Any time frame established by law will be mandatory for the parties only, but not for the judges who decide the case.

NWC: The competent authority would make the decision. Compliance would be through the courts of law.

*Sweden.* LO and TCO: Dispute settlement issues should be included.

*Switzerland.* UPS: This exists in Switzerland. It is desirable for disputes relating to labour law to be treated effectively.

USS/SGB: The competent authorities should determine whether specific occupations or workers in particular sectors of the economy have the status of employees and are therefore covered by the protection afforded by an employment relationship.

*Thailand.* NCTL: The administrative body has to be tripartite.

*Trinidad and Tobago.* ECA: Speedy administrative procedures are necessary if disputes concerning the employment status of a worker are to be handled effectively. Sufficient resources also have to be provided for the appropriate institution.

*Tunisia.* The labour inspection services can fulfil this function.

*Ukraine.* FPU: In situations of disagreement, for a speedy settlement of disputes.

*Views shared by the following employers' organizations:* BEA (Bangladesh), CEC (Canada), ANDI (Colombia), CEIF (Cyprus), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CEOE (Spain): Consideration may also be given to addressing the cost-effectiveness of such procedures, and the cost consequences of abuse. CEC (Canada) adds that employers support appropriate dispute resolution mechanisms that are accessible, fair, inexpensive and not subject to abuse by the other party.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), COSATU, CONSAWU (South Africa): The competent authorities should be able to determine, through impartial procedures, whether specific occupations or workers in particular sectors of the economy have employee status and are therefore covered by the protection provided through an employment relationship.

#### *Comments concerning negative replies*

*India.* Employers disguised as workers should not be included in the category of workers.

*Iraq.* May lead to interference by the authorities, particularly in poor countries.

*Portugal.* This is a matter for the legislation in each State, which is the most effective means, as the actual situation in each State can be taken into account and obstacles are not created for the approval of the international instrument.

*Ukraine.* FRU: The labour dispute settlement procedure is established and it is not necessary to provide for one in the instrument on the employment relationship.

*United States.* USCIB: It is contrary to the scope of Paragraph 25 of the Recommendation to refer to detailed legislative schemes. Qualifying the effectiveness and timing of an administrative procedure is very detailed and overly prescriptive. Cost-effectiveness and the risks of abuse should also be mentioned.

#### *Comments concerning other replies*

*Austria.* An affirmative answer can only be given if the wording, taking into account the explanations accompanying the questionnaire, also encompasses (effective and speedy) judicial procedures which already exist. Procedures (judicial) which allow for the effective and speedy settlement of disputes as to whether or not there is an employment relationship can only be welcomed.

*Iceland.* Where existing mechanisms have proven to be successful, they should be kept and designated to deal with consultation and implementation.

*Netherlands.* FNV: It is unclear what is meant by “competent authority” other than the institutions referred to in Question 14, and what is meant by “deal with” other than to determine the employment status of a worker. In the Netherlands, the labour administration and the labour inspectorate have to deal with disputes concerning the employment status of a worker only in so far as this status is relevant in their role of supervising and enforcing acts of public law in the labour legislation (Working Conditions Act, Working Hours Act).

*Romania.* In the view of the authority determining the policies, the answer is no: for the authority implementing the policies, the answer is yes.

*South Africa.* This does not necessarily call for a yes or no answer. In the first place, it is necessary to examine whether it should be done or not. There may be a backlog of unresolved disputes in many member States due to the dispute resolution procedures under relevant institutions. Care must therefore be taken not to concentrate all the authority or power on an individual. While seeking to eliminate duplication and expand participation, there must be an unbiased and coordinated way of dealing with disputes.

**Qu. 14** *Should the instrument provide that the settlement of disputes with a view to determining the status of workers should be a matter for labour courts, other tribunals, arbitration or other bodies in accordance with national law and practice?*

#### *Affirmative*

*Governments:* 67. Algeria, Argentina, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Dominica, Egypt, El Salvador, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Japan, Kiribati, Kuwait, Latvia, Lebanon, Lithuania, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname,

Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BIA, BICA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India), CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); CONSAWU, COSATU (South Africa); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Negative*

*Governments:* 8. Algeria, Australia, Cyprus, Denmark, Eritrea, India, Panama, Portugal.

*Employers' organizations:* EK (Finland); HSH, NHO (Norway); BUSA (South Africa).

*Workers' organizations:* LO (Denmark); CSTT (Togo).

#### *Other*

*Employers' organization:* SN (Sweden).

*Workers' organization:* BWU (Barbados).

#### *Comments concerning affirmative replies*

*Argentina.* CGT RA: There should be free labour arbitration bodies proposing free legal advice to workers. Workers' organizations can offer free legal defence services through trade union officers or legal advisers.

*Austria.* The choice of competent bodies for the settlement of such disputes must be left to national legislation. Labour courts are the competent bodies in Austria.

*Benin.* Arbitration by other bodies should not be excluded, but they should not be the final instance. In case of failure, the labour court is competent.

*China.* The settlement of disputes in the determination of the status of workers, and the relevant procedures, should be established by the national legislation.

*Côte d'Ivoire.* CGECI: Labour courts. The procedure for the settlement of disputes should be established by each national legislation.

*Egypt.* The State must establish the necessary machinery for the settlement of disputes. Collective bargaining has to play an important role in the settlement of collective disputes. In Egypt, the settlement of individual disputes is governed by the Labour Code. They are within the competence of industrial tribunals. Collective disputes are settled in the first instance by collective bargaining. If this fails, through an amicable settlement and, in the case of failure, by arbitration.

*El Salvador.* The legislation in our country clearly establishes the competent body for the settlement of disputes.

*Greece.* The labour law provides for the settlement of disputes through the applicable procedure and arbitration.

*Guatemala.* Even where administrative and judicial mechanisms are established by law, the instrument will assist in determining their respective competences.

*Honduras.* It is essential for workers and employers to be able to have recourse to effective procedures for the prevention and settlement of disputes so as to be able to defend their rights, which implies a guarantee of legal certainty and security.

*Iceland.* Other bodies, in accordance with national law and practice.

*Indonesia.* In our country, if agreement cannot be reached through the bipartite consultative forum, disputes have to go to the Industrial Dispute Settlement Court.

*Jamaica.* GEF: The settlement of disputes definitely has to be in accordance with national laws and as such cannot be determined and/or resolved by international standards.

*Japan.* Settlement of legal disputes should be handled by the legal authorities as a last resort. However, dispute settlement by an administrative body is also effective as a preceding step.

*JTUC-RENGO:* In order to keep the impact of labour disputes to a minimum and ensure rapid compliance with the law, the national policy should make broad assumptions in favour of the employment status of workers. In addition, both legal and administrative dispute settlement mechanisms should be accessible and bring rapid relief to workers. In Japan, an industrial tribunal system will be initiated in April 2006. It is expected to deal with the settlement of disputes regarding employment status. The system should be enhanced and developed into a joint judge-jury system. The tribunal system should be enhanced and developed into a labour court system in which professional and lay judges work and decide together.

*Lebanon.* This is clear in respect of the determination of the authorities responsible for the settlement of disputes. These authorities must be determined by national law.

*Mauritius.* To identify clearly the avenues and institutions where workers may seek redress in instances of non-respect of their employment rights.

*Mexico.* The settlement of such disputes must be within the competence of labour courts.

*Morocco.* Disputes have to be settled in accordance with national law and practice.

*Mozambique.* An indication should be provided of the labour dispute settlement bodies established by the law in each country.

*Niger.* Preferably, special courts competent to investigate thoroughly labour-related matters.

*Peru.* Recognition should also be given to the importance of the role played by labour inspection in determining the existence of indicators which can help in defining the nature of the relationship in future procedures for the settlement of disputes.

*Portugal.* CIP: No objection to the provision proposed in the questionnaire.

UGT: In Portugal, these matters lie within the competence of the labour courts.

*Qatar.* This should be within the competence of labour courts, provided that the procedure is free and the dispute is decided upon referral after all the competent bodies have been exhausted for the amicable settlement of the dispute.

*Romania.* This is a matter for the labour courts and other competent tribunals in accordance with national legislation.

*Slovenia.* ZSSS: Some form of State provided conciliation or mediation is required for the prompt settlement of disputes.

*South Africa.* The instrument should be read in conjunction with national laws.

*Spain.* The law must establish the machinery for the settlement of labour disputes relating to the employment relationship, including procedures outside the courts, for which social dialogue is essential.

*Sri Lanka.* CWC: The settlement of disputes should not be left exclusively to judicial or quasi-judicial bodies. It should also be covered by collective agreements.

LJEWU: This is already practised in Sri Lanka. The instrument should also indicate the competent body for this purpose.

NWC: This is a matter for the judiciary (labour tribunals and the higher courts).

*Sweden.* LO and TCO: Special dispute settlement agencies should be established in accordance with national law (such as the labour court in Sweden).

*Switzerland.* Reference should also be made at this point to national practice so as not to interfere with the competence of administrative and judicial authorities. Reference to other bodies is important since, in certain cases, they may consist of joint bodies established by collective labour agreements.

UPS: Yes, provided that other solutions are not excluded which may be effective, such as through collective labour agreements.

USS/SGB: To minimize such disputes and ensure laws are implemented rapidly and effectively, the national policy should include a broad presumption in favour of employee status. In case of dispute, the burden of proof should be placed on those disputing this presumption. Whatever the nature of the body assigned the role of dispute settlement, it is important that this information be speedily conveyed to workers and that the body should be easily accessible, have an independent judicial status, and be dedicated to this role and not be overburdened by a lengthy litigious process.

*Syrian Arab Republic.* Conciliation and arbitration bodies, as well as labour courts.

*Trinidad and Tobago.* The complexity of the issues requires that the determination of the status of workers should be in the hands of a body of qualified personnel dedicated to such tasks.

ECA: The labour courts are the best bodies for determining the status of workers. Sufficient flexibility is required in the jurisdiction of the labour courts.

NATUC: Providing that the instrument obliges the legal authority to be guided by specific criteria.

*Tunisia.* The labour courts are the most appropriate bodies for the settlement of disputes and to determine the status of workers in accordance with the national legislation in force. The opinion of the labour inspection services should be required in such cases.

*Ukraine.* FRU: In the Ukraine, the courts currently deal with various types of disputes. To protect the labour rights of workers, it would be necessary to establish specialized courts in the field of industrial relations, which would allow for the objective and speedy settlement of such disputes.

FPU: The final instance for the settlement of disputes should be the courts.

*United Arab Emirates.* The establishment of a flexible mechanism for the settlement of disputes will help the parties to find objective solutions based on national conditions and the traditions and customs of the country concerned.

*United States.* USCIB: This is consistent with the scope of the Recommendation as agreed in Paragraph 25.

*Zimbabwe.* Disputes relating to the status of workers should be handled by labour courts and other competent bodies in accordance with national law and practice.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), TUC (United Kingdom): To minimize such disputes and ensure laws are implemented rapidly, the national policy should include a broad presumption in favour of employee status. In case of dispute, the burden of proof should be placed on those disputing this presumption. Competence should preferably be given to existing labour courts or a new body with financial means and an independent judicial status which is dedicated to this role and not overburdened by lengthy litigious process, and which is highly accessible to workers.

#### *Comments concerning negative replies*

*Algeria.* National legal rules should apply to all workers, irrespective of their status, in relation to the settlement of disputes.

*Eritrea.* The instrument should provide that there should be an institution that handles disputes concerning employment relations, but the determination of the procedures should be left to national laws.

*India.* Since the relationship is not clearly that of employee/employer, nothing should be imposed.

*Panama.* Each country should follow its procedure.

*Portugal.* Each State has to guarantee the effective application of the law, and the best way of achieving that.

*South Africa.* BUSA: This issue is too specific to be dealt with in an international instrument.

*Togo.* CSTT: Only labour courts and arbitration.

*Comments concerning other replies*

*Barbados.* BWU: Yes and no. This must be addressed by national law and practice. In Barbados, for example, labour courts do not exist. On the other hand, provisions are being made in the draft Employment Rights Bill to deal more comprehensively with the issue.

COMPLIANCE AND ENFORCEMENT

**Qu. 15** *Should the instrument provide that effective and efficient enforcement measures should be undertaken by the competent authorities in accordance with national law and practice?*

*Affirmative*

*Governments:* 62. Algeria, Argentina, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Croatia, Cuba, Cyprus, Dominica, Egypt, El Salvador, Eritrea, Fiji, Finland, France, Greece, Guatemala, Honduras, Hungary, Indonesia, Iraq, Italy, Japan, Kiribati, Latvia, Lebanon, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Peru, Philippines, Portugal, Qatar, Romania, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CLC (Canada); ACFTU (China); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK, VTML (Finland); CFDT, CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); CITU, BMS (India), CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); USAM (Madagascar); CLTM (Mauritania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU, COSATU (South Africa); CC.OO. (Spain); CWC, LJEWU, NWC (Sri Lanka); LO, TCO (Sweden); USS/SGB (Switzerland); NCTL (Thailand); NATUC (Trinidad and Tobago); TUC (United Kingdom); AFL-CIO (United States).

*Negative*

*Governments:* 6. Australia, Denmark, Germany, India, Panama, Switzerland.

*Employers' organizations:* EK (Finland); HSH, NHO (Norway); UPS (Switzerland).

*Workers' organizations:* LO (Denmark), CSTT (Togo).

*Other*

*Governments:* 4. Austria, Iceland, Sweden, United Kingdom.

*Workers' organization:* FPU (Ukraine).

*Comments concerning affirmative replies*

*Australia.* ACTU: Effective implementation of this provision may require the establishment of new institutions or the substantial expansion of existing institutions devoted to labour inspection and labour administration.

*Barbados.* The result of a dispute settlement process in cases relating to the determination of the existence of an employment relationship should be a declaration to that effect. The instrument should provide for an effective administrative adjudication mechanism.

*Belgium.* In addition to the settlement of disputes at the request of the parties, States should undertake to supervise the application of the concept of worker, which itself determines the application of many labour provisions. Once again, a role should be reserved for the labour inspectorate and the bodies supervising the application of the social security system.

*Benin.* The specification of such measures will facilitate the task of labour inspectors and judges.

*Canada.* CEC: It may be useful to reflect on the examples highlighted in the 2003 ILC discussion on the employment relationship. It was evident that most, if not all, of the problems raised by governments were due to inadequate enforcement. A government does not require an international instrument to meet its enforcement obligations, but if that is what governments require, such a statement may be helpful. More likely, if enforcement is an issue with so many governments, the capacity-building support of the ILO may be of greater consequence than the development of any instrument.

*China.* The instrument should provide for certain enforcement measures, which would serve as a reference for national legislation.

*Côte d'Ivoire.* CGECI: Provided that these measures are in conformity with the law.

*Cuba.* The labour inspection services should ensure compliance with the legislation respecting the employment relationship.

*Czech Republic.* CMKOS: Efficiency is a deciding criterion.

*Egypt.* It is even possible through these measures to establish procedures for the settlement of industrial disputes guaranteeing the protection of the rights of both parties, thereby saving effort.

*Eritrea.* Because such a provision places an obligation on governments to establish effective and efficient enforcement mechanisms for the rights of workers and employers which are adapted to national conditions.

*Gabon.* COSYGA: It is therefore sufficient to strengthen bodies such as the labour inspectorate and the Ministry of Labour.

*Greece.* Penal and administrative penalties are provided for.

*Guatemala.* In this way, the bodies could adopt new measures.

*Honduras.* It is essential for the authorities of member States to show commitment and to be able to ensure the effective enforcement of legislation on the employment relationship, and for the parties concerned to comply with the labour legislation.

*Iraq.* All the mechanisms established by the authorities must be based on the participation of employers and workers, without being exclusively run by the State.

*Jamaica.* JEF: Enforcement will have to be determined by national standards and jurisdictions, which once again differ across jurisdictions.

*Japan.* The competent labour authorities should enforce the labour legislation.

JTUC-RENGO: Competent labour authorities should be newly established within organizations of labour inspection offices or labour management bureaus, or the powers of existing authorities should be strengthened to ensure effective enforcement activities. It is also important for these agencies to be adequately staffed and to have sufficient resources to fulfil their functions. Moreover, their enforcement officers should be appropriately trained to be able to address and manage changes in the nature of employment, and thus identify the true employment relationship. In particular, they should take care to carry out adequate labour inspections of smaller businesses and in remote areas, which tend to be neglected.

*Republic of Korea.* FKTU, KCTU: It would be necessary for the effective protection of workers to enable or to mandate the competent authority to take measures for the speedy resolution of cases of violations of rights.

*Lebanon.* Clearly, the parties to the dispute must be able to recover their entitlements without delay.

*Mauritius.* To protect the rights of workers by enforcing labour legislation and ensuring rapid compliance without reference to the courts.

*Morocco.* In accordance with national law and practice, enforcement measures have to be taken.

*Mozambique.* With a view to ensuring that the countries will take this aspect into consideration.

*Netherlands.* The Netherlands has an effective and efficient enforcement system adapted to the national situation.

FNV: In so far as such authorities have a role to play in enforcing labour legislation. With regard to the role of the labour administration and the labour inspectorate in the Netherlands, see the reply to Question 13.

*Peru.* The importance should also be emphasized, for the adoption of such measures, of cooperation between government services, particularly the labour inspectorate, social security and the tax authorities.

*Portugal.* This solution will be the best adapted to the diversity of legal systems and socio-economic situations to which the instrument will apply.

CIP: Nothing prevents the provision from calling for effective and efficient enforcement measures to be taken in accordance with national law and practice.

UGT: But that requires the establishment of institutions responsible for enforcing the legislation.

*Romania.* Reference should be made in the instrument to institutions responsible for carrying out supervision in respect of the labour legislation.

*Slovakia.* The instrument should make reference to labour inspection and the national legislation on illegal work and illegal employment.

*South Africa.* It would however be interesting to know how the various member States define a competent authority in their national laws. Even non-democratic States declare their undemocratic institutions competent. It depends on the agenda of the State and who defines the competent authority.

CONSAWU: Effective implementation may require the establishment of new institutions.

*Spain.* Yes, clearly.

*Sri Lanka.* CWC: Enforcement is dependent on competence and human resources. These should be the priority considerations.

LJEWU: In many countries, enforcement of many laws is poor. It is therefore necessary to prescribe effective and efficient enforcement measures.

NWC: In case of non-compliance, a fine and/or imprisonment should be imposed. The enforcement of these provisions may be difficult because workers engaged in such employment relationships are rarely unionized.

*Sweden.* LO and TCO: It is important that rules, decisions and judgments are complied with.

*Switzerland.* USS/SGB: Effective implementation may require the establishment of new institutions, unless existing institutions cover this matter, including those responsible for labour inspection and/or administration. It is therefore essential that the labour administration and inspection services should be adequately funded and staffed and that proper attention is given to the ongoing training of all staff to allow them to respond to changes in the nature of employment and to properly recognize genuine employment relationships. Particular attention should be given to assisting labour inspectorates in addressing small and medium-sized enterprises and enterprises in remote areas, which are often neglected.

*Trinidad and Tobago.* ECA: Sufficient resources should be provided for the appropriate authorities.

*Tunisia.* Legislative or practical enforcement measures are necessary, particularly in complex cases in which the worker is not able to assert her or his rights effectively, and also to ensure fair competition between enterprises.

*Zimbabwe.* The effectiveness of any instrument is dependent on enforcement mechanisms. The competent authorities therefore need to develop these measures in accordance with national law and practice.

*Views shared by the following workers' organizations:* BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT (France), USAM (Madagascar), CLTM (Mauritania), COSATU (South Africa), TUC (United Kingdom): It is essential that the labour administration and inspection services should be adequately funded and staffed, and that proper attention is given to the ongoing training of all staff to allow them to respond to changes in the nature of employment and to properly recognize genuine employment relationships. Particular attention should be given to assisting labour inspectorates in addressing small and medium-sized enterprises and enterprises in remote areas. BSSF (Bangladesh), USAM (Madagascar), CLTM (Mauritania) added that, in the case of non-compliance, a fine or imprisonment should be imposed. In many cases, the penalties envisaged in the law are too weak and not adapted to the current context, or are not

applied. The instrument should invite ILO Members to examine this issue at the national level and in a tripartite manner.

*Comments concerning negative replies*

*Australia.* Compliance with the requirements of the Workplace Relations Act is already effectively ensured by authorized officers and inspectors.

*Switzerland.* UPS: The question is unclear. In Switzerland, we have a clear division between justice and enforcement (*Vollzug*); this would lead us to answer in the negative.

*Comments concerning other replies*

*Austria.* An affirmative answer to the question can only be given with the reservation that the system of measures for effective and efficient enforcement does not necessarily have to be implemented by bodies responsible for determining the status of workers. The wording of the questionnaire, according to which the competent authorities have to take enforcement measures, does not necessarily mean that the enforcement of judicial decisions should be automatic. In the view of Austria, the executory power of the courts in this field is admittedly desirable, but the automatic enforcement of decisions in matters of labour law would break with the system. The reply to the question is affirmative, provided that the instrument envisages that effective and efficient enforcement measures may be taken by the competent authorities in accordance with national law and practice where, in a particular case, the parties to the dispute so request. Furthermore, in Austria, in the context of the enforcement procedure, implementation orders are not always issued by labour courts, but also by other courts, which in a certain manner act as implementing bodies ordering the adoption of effective and efficient enforcement measures.

*Iceland.* In Iceland, it is mainly the social partners who supervise compliance with the rules in this area.

*Sweden.* The Government refrains from answering this question. In Sweden, it is mainly the social partners who supervise compliance with the rules in this area.

*Ukraine.* FPU: The question is unclear.

*United Kingdom.* If “enforcement” was changed to “compliance”, we would consider it appropriate for inclusion.

#### CIVIL OR COMMERCIAL CONTRACTS

**Qu. 16** *Should the instrument provide that none of its provisions may be interpreted as limiting in any way the right of employers to establish civil or commercial contractual relationships?*

*Affirmative*

*Governments:* 56. Algeria, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, Canada, China, Croatia, Cuba, Cyprus, Denmark, Egypt, El Salvador, Eritrea, Finland, France, Guatemala, Honduras, Hungary, Iceland, Indonesia, Iraq, Italy, Kiribati, Kuwait, Latvia, Lebanon, Mauritius, Mexico, Republic of Moldova, Morocco, Netherlands, Niger, Norway, Panama, Peru, Philippines, Qatar, Romania, Serbia and Montenegro, Slovenia, South Africa, Sri Lanka, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BEA (Bangladesh); CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (Canada); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CGECI (Côte d'Ivoire); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); EK, SY (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); JEF (Jamaica); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); VNO-NCW (Netherlands); CONEP (Panama); CIP (Portugal); ZDODS, ZDS (Slovenia); BUSA (South Africa); CEOE (Spain); EFC (Sri Lanka); SN (Sweden); UPS (Switzerland); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* ACFTU (China); LO (Denmark); VTML (Finland); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); CITU, BMS (India); CGIL (Italy); LDF, LPSK (Lithuania); Solidaritate, CTU (Republic of Moldova); Solidarnosc (Poland); CGTP (Portugal); PTUF (Romania); KOZ SR (Slovakia); ZSSS (Slovenia); CC.OO. (Spain); CWC, NWC (Sri Lanka); LO, TCO (Sweden); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago).

#### *Negative*

*Governments:* 14. Argentina, Austria, Costa Rica, Dominica, Germany, Fiji, India, Japan, Mozambique, Portugal, Saudi Arabia, Slovakia, Spain, Sudan.

*Employers' organizations:* CTA (Mozambique); HSH, NHO (Norway).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BSSF (Bangladesh); BWU (Barbados); CITUB (Bulgaria); CLC (Canada); CMKOS (Czech Republic); ETUF (Egypt); AKAVA, SAK, STTK (Finland); CFDT, CGT-FO (France); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); USAM (Madagascar); CLTM (Mauritania); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); CTP, UGT (Portugal); CONSAWU, COSATU (South Africa); CWC, LJEWU (Sri Lanka); USS/SGB (Switzerland); FPU (Ukraine); TUC (United Kingdom); AFL-CIO (United States).

#### *Other*

*Governments:* 2. Australia, Barbados.

#### *Comments concerning affirmative replies*

*Bangladesh.* BEA: Yes it should contain these provisions.

*Benin.* It is essential not to confuse employment relationships and civil or commercial relationships.

*China.* The existence or not of the employment relationship and its legal effect should not limit the effectiveness of commercial contracts.

*Colombia.* ANDI: This aspect is fundamental.

*Côte d'Ivoire.* CGECI: What is at issue is to uphold contractual freedom.

*Cuba.* On each occasion that these provisions are not applied with a view to circumventing or disguising an employment relationship or undermining the rights deriving from the employment relationship.

*Czech Republic.* KZPS: This is a fundamental provision for the entrepreneurial sector.

*Denmark.* Reference is made to the resolution adopted at the ILC in June 2003.

*Egypt.* The employment relationship should not prevent the employer from carrying out activities through civil or commercial contractual relationships. It is by nature different and independent of all other contractual relationships concluded by the employer.

*Eritrea.* Because if the instrument so provides, it is in no way against the principle of freedom of contract and allows flexibility for the contracting parties (workers and employers).

*Gabon.* COSYGA: The instrument should abolish the possibility for employers to be able to manipulate civil or commercial contractual relationships to their benefit in relation to disguised employment relationships.

*Guatemala.* Such a provision is appropriate.

CACIF: Yes, and it should be emphasized.

*Honduras.* This regulation must not interfere with the right of the individual to contract the services of other persons on a civil or commercial basis.

*Italy.* CGIL: However, the legislation should avoid as much as possible de facto or subordinate employment being considered a commercial relationship (see the Italian regulation on “project labour”).

*Japan.* NK: In Japan, the effect of such a provision is not clear, as even a commercial contract is modified by labour-related legal principles if it concerns a labour contract. However, the provision may be useful in some other countries.

*Lebanon.* Based on the principle of freedom of contract and the freedom to determine the appropriate framework within the national laws that are in force.

*Lithuania.* LPSK: This provision is supposed to be related to questions 11 and 12.

*Mauritius.* An employee may have two jobs and a dual status. A worker may fall within the scope of an employment relationship with one employer and at the same time conclude a contract of service with another.

*Mexico.* That depends on the national legislation that is in force.

*Netherlands.* The international instrument should not interfere with genuine commercial and independent contracting arrangements.

*Peru.* The decentralized organization of production has opened up new spaces for the development of independent work. On each occasion that the provision of services under a contract is carried out independently, the establishment of civil or commercial relations is a legitimate act in accordance with the employer’s entrepreneurial freedom.

*Qatar.* There should be no confusion between civil and commercial contractual relationships. The distinction between them must be clear and unambiguous so as to prevent the circumvention of employment relationships. Furthermore, it is important not to interfere with individual rights by requesting a service on a civil or commercial basis.

*Slovakia.* KOZ SR: Such a provision would be useful.

*Slovenia.* Yes, it is very important.

*South Africa.* Of course, there is no reason why any responsible employer should think that provisions of this instrument are aimed at limiting in any way the right of employers to engage in any form of contractual relationship. What these provisions do

is, actually, to assist both employers and employees to understand their rights and to have a common understanding of the expectations emanating from their contractual obligations by regulating and giving guidelines as to the kind of relationship they are in. This will go a long way in assisting the two parties to attain a win-win situation. Furthermore, it will assist governments, who often act as a third party to disputes with a view to their resolution, to have a consistent approach or mechanism for resolving disputes.

*BUSA*: Strongly supported. This right should also be accorded to workers, that is, neither the rights of employers nor workers should be limited.

*Sri Lanka*. *EFC*: A contract, being an arrangement between two or more parties, should take precedence, unless it is invalid in a national context.

*CWC*: With the proviso that contract labour is also covered by the instrument.

*NWC*: As long as the minimum entitlements of the worker are guaranteed, the commercial arrangement would not be impaired.

*Sweden*. *LO* and *TCO*: But if a Recommendation on job security is to be drawn up, it must make clear to whom it applies, and the employer must not then be at liberty to opt for another instrument.

*Switzerland*. Subject, clearly, to the abuse of a civil or commercial relationship with a view to circumventing the protection deriving from the employment relationship, which corresponds in practice to a disguised relationship.

*Trinidad and Tobago*. Because of the importance of civil and commercial contractual relationships.

*ECA*: Contracting out is a good and necessary business strategy in today's economic environment from which employers should not be unfairly restricted in any way.

*Tunisia*. This provision will explicitly reflect the specificity of the employment relationship in relation to other contractual relationships.

*Ukraine*. *FRU*: This provision will exclude interference in civil and commercial contractual relationships from interpretation of the provisions of the instrument on the employment relationship.

*United States*. *USCIB*: This is an inherent conflict with the underlying concept of the proposed Recommendation. The employment relationship is based on a contract in the United States and elsewhere. The relationship between a provider and user, when not in an employer/employee relationship, is also contractual in nature. The provision of benefits to employees is also based upon contract. The proposed statement, which is a necessary component of any Recommendation, would appear to render such Recommendation of no practical value.

*Zimbabwe*. It is necessary to be clear that this instrument does not limit in any way the right of employers to establish civil or commercial contractual relationships, but they have a duty to protect their workers through an enabling employment relationship.

#### *Comments concerning negative replies*

*Argentina*. *CGT RA*: The definition of employment relationships does not affect the right of employers to conclude civil or commercial contractual relationships if the provisions are clear and transparent, applied in a responsible manner, and if the State secures their enforcement.

*Austria.* The explanations accompanying the questionnaire show that this relates primarily to the principle referred to on many occasions in the report of the actual facts of the case: the fact of designating a relationship as a commercial relationship, a civil relationship or an employment relationship is not the determining factor; the circumstances on which the relationship is based are decisive. As the labour legislation contains provisions which are binding in many areas and the employer cannot avoid them, irrespective of the right to conclude contracts under civil or commercial law, a provision worded in such general terms is not desirable. However, this clearly does not mean that the freedom to conclude contracts other than employment contracts should not be respected.

*Bulgaria.* CITUB: The Recommendation should eliminate the possibility of concealing the employment relationship behind civil or commercial contractual relationships.

*Czech Republic.* CMKOS: We do not consider this to be an essential issue.

*Fiji.* We should not curtail the rights of employers to establish civil or commercial contractual relationships that are beneficial to both parties to the contract.

*Finland.* SAK, STTK, AKAVA: Legislative action is needed to eliminate cases in which civil or commercial contracts are used to conceal employment relationships and deny workers' rights.

*Germany.* See the reply to Question 6(2)(d).

*India.* No instrument whatsoever is needed to regulate an evolving and dynamic relationship of a very complex nature.

*Japan.* Employment relationships should be determined on the basis of their own independent conception. Even if a contract is a commercial one, it may require some modification in accordance with the legal principles on employment relationships.

JTUC-RENGO: Any description which allows employment relationships to be disguised behind civil contracts or commercial contracts should be eliminated.

*Republic of Korea.* FKTU, KCTU: A genuine Civil Code or Commercial Code contract must respect the views of the parties involved. In view of the proliferation of disguised employment relationships, which are on the increase, it is not necessary to retain this provision. Instead, there should be a provision stating that "a Civil Code or Commercial Code contract concluded for the purpose of avoiding an employment relationship is to be deemed null and void".

*Mozambique.* This reference would be superfluous, as there is specific legislation covering civil and commercial contracts.

*Portugal.* Such a provision would be redundant.

*Spain.* All measures adopted to guarantee the security of the employment relationship between the enterprise and the worker, and the definition of the relationship between such a worker and the second enterprise involved, govern commercial or civil relationships between enterprises, which must assume the related responsibilities. Consequently, in view of the existing mutual relationships, it is not appropriate to include such a categorical statement or provision as the one proposed.

*Sri Lanka.* LJEWU: The employment relationship may facilitate the establishment of civil or commercial contractual relationships. Therefore, each case should be decided on its merits. The instrument may therefore be silent on this issue.

*Views shared by the following workers' organizations:* ACTU (Australia), BSSF (Bangladesh), CLC (Canada), ETUF (Egypt), CFDT, CGT-FO (France), USAM (Madagascar), CLTM (Mauritania), CONSAWU, COSATU (South Africa), USS/SGB (Switzerland), TUC (United Kingdom): The instrument should eliminate the possibility for employers to establish civil or commercial contractual relationships resulting in disguised employment relationships or preventing dependent workers from receiving the protection they require.

*Comments concerning other replies*

*Australia.* If an instrument relating to the employment relationship is drafted, it should provide that none of its provisions may be interpreted as limiting the right of employers to establish civil or commercial contractual relationships.

#### IV. Other issues

**Qu. 17** *Are there any particularities of national law and practice that may create difficulties in the application of the instrument as proposed in this report?*

*If yes, how should these difficulties be addressed?*

*Affirmative*

*Governments:* 10. Eritrea, Finland, Iraq, Lebanon, Norway, Peru, Philippines, Qatar, Romania, South Africa.

*Employers' organizations:* CNI (Brazil); BCCI, BIA (Bulgaria); CEC (Canada); CEIF (Cyprus); ANDI (Colombia); DA (Denmark); MEDEF (France); CACIF (Guatemala); VSI (Iceland); IBEC (Ireland); JEF (Jamaica); ALE (Lesotho); HSH, NHO (Norway); CONEP (Panama); VNO-NCW (Netherlands); CIP (Portugal); BUSA (South Africa); CEOE (Spain); CBI (United Kingdom); USCIB (United States).

*Workers' organizations:* AKAVA, SAK, STTK (Finland); COSYGA (Gabon); CGIL (Italy); HSH (Norway); CONSAWU (South Africa); CWC, LJEWU (Sri Lanka); TUC (United Kingdom).

*Negative*

*Governments:* 58. Argentina, Australia, Austria, Barbados, Belarus, Belgium, Brazil, Bulgaria, Cameroon, Canada, China, Costa Rica, Cuba, Cyprus, Dominica, Egypt, El Salvador, Fiji, France, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, India, Italy, Japan, Kiribati, Kuwait, Latvia, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Panama, Portugal, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* BICA (Bulgaria); GICAM (Cameroon); CEC (China); CGECI (Côte d'Ivoire); KZPS, SPD (Czech Republic); SY (Finland); MGYOSZ (Hungary); CIE (India); NK (Japan); NCE (Republic of Moldova); CTA (Mozambique); ZDODS, ZDS (Slovenia); EFC (Sri Lanka); SN (Sweden); ECOT (Thailand); ECA (Trinidad and Tobago); FRU (Ukraine).

*Workers' organizations:* CGT RA (Argentina); ACTU (Australia); BWU (Barbados); ACFTU (China); CMKOS (Czech Republic); VTML (Finland); CGT-FO

(France); MTOSZ (Hungary); ASI (Iceland); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); LDF, LPSK (Lithuania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); GEFONT (Nepal); FNV (Netherlands); Solidarnosc (Poland); CTP, CGTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CC.OO. (Spain); NWC (Sri Lanka); LO (Sweden); NCTL (Thailand); CSTT (Togo); NATUC (Trinidad and Tobago); FPU (Ukraine).

*Other*

*Government: I. Algeria.*

*Employers' organizations: BEA (Bangladesh); UCCAEP (Costa Rica); CITU (India); UPS (Switzerland).*

*Comments concerning affirmative replies*

*Bulgaria. BAI, BCCI:* It will cause a significant problem if the instrument interferes in commercial relations. The established contractual and commercial principles must be preserved.

*Colombia. ANDI:* If the instrument includes elements that are deemed to be problematic, it would give rise to confusion in national legislation which might prejudice the proper functioning of legitimate civil and commercial relationships.

*Eritrea.* Regulations should be adopted which are applicable to domestic employees and self-employed workers.

*Finland.* National legislation must be able to exclude from its scope certain work situations (such as persons covered by labour market policy measures).

*AKAVA, SAK, STTK:* As labour legislation in Finland is drafted in a tripartite manner, employers will probably oppose changes in the joint liability of provider and user enterprises, as well as the power of the authorities and trade unions to bring cases to bodies for final decision.

*France. MEDEF:* If all the questions proposed in the report were to be adopted, the instrument would interfere with contractual and commercial principles that are well established at the national level.

*Gabon. COSYGA:* The lack of will by the public authorities to supplement the Labour Code through the adoption of implementing texts and the lack of resources allocated to the ministry and the courts.

*Iraq.* Change the structures of the competent ministries in line with changes in the labour market, making use of specialists and high-level staff of proven competence and devotion, with a belief in the role of the private sector.

*Italy. CGIL:* The instrument should envisage a consistent review of recent Italian labour legislation.

*Jamaica. JEF:* In general, the questionnaire as it is prepared is "leading" and as such may in practice create difficulties for national laws if the answers are not objective. Recommendations include the fact that, although there is not necessarily a universal definition of the employment relationship, it can be easily ascertained by national jurisdictions. Moreover, the instrument need not address areas of the employment relationship affecting civil and commercial contracts.

*Lesotho. ALE:* Instruments that are too prescriptive inhibit the natural and progressive development of jurisprudence, as well as the flexibility required to allow

more job creation and employment. The danger of going too far is, in particular, impinging on commercial and contractual arrangements.

*Lebanon.* These difficulties can be overcome through the amendment of national labour legislation.

*Norway.* Question 12 is not in accordance with the context and tradition of Norwegian labour law. An alternative provision could be that unclear points in the contractual relationship shall be interpreted in favour of the worker.

*Peru.* In the administration, the conclusion of contracts for services under the form of relationships of a civil or commercial nature makes it possible to obtain the necessary personnel without having to comply with the restrictions imposed by labour regulation, which does not generally apply where workers are engaged on the basis of civil or commercial rules.

*Philippines.* Difficulties are related to the enforcement of labour law, for example in the case of domestic workers, who usually work in the households of their employers, due to the Constitutional limitation on the right to privacy. The proposal is to involve local government units in dispute settlement.

*Romania.* These difficulties should be addressed through special regulations.

*South Africa.* However, it would be inaccurate to think or suggest that the diversity of national experience can be a source of serious disagreement, rather than a basis for rich discussion and a good ingredient for progressive resolutions.

*BUSA:* There is a substantial history of established case law which distinguishes employment from other relationships. Many commercial relationships are established and operate within the framework of existing common law and the regulatory framework. An international instrument that influences the current framework could potentially destabilize many industries and could result in closures, job losses and rationalization. International regulations should be limited and permissive, rather than imposing obligations on member States to reconstruct their market structures.

*CONSAWU:* The labour courts take too long to resolve workers' disputes.

*Sri Lanka. CWC:* Legal provisions relating to the eligibility of workers to join trade unions should be made applicable to workers in the informal sector, where the employment relationship is non-existent.

*LJEWU:* Although there are no direct laws prohibiting the employment relationship, certain laws prohibit specific forms of employment, such as prostitution, illegal games, pornography, illegal trafficking, the deployment of army deserters, etc. It is difficult to obtain relief or redress for affected workers in these fields.

*United Kingdom. CBI:* If the current questions are taken forward, they will be very problematic.

*TUC:* The continuing distinction in United Kingdom labour law between "worker" and "employee" is unsatisfactory and creates confusion and uncertainty about their rights and protections. A single definition of the term "worker", covering all but those genuinely in business on their own account, would assist greatly in the application of the instrument as proposed in this report.

*Views shared by the following employers' organizations:* CNI (Brazil), CEC (Canada), CEIF (Cyprus), CACIF (Guatemala), IBEC (Ireland), VNO-NCW (Netherlands), CONEP (Panama), CIP (Portugal), CEOE (Spain), USCIB (United

States): The questions above indicate a direction that could cause significant problems if adopted. An instrument developed along the lines of the questions would interfere in commercial relations and undermine well-established contractual and commercial principles. CEC (Canada) further specifies that it is also possible that an instrument along the lines indicated by the questionnaire might interfere with well-established protections that are not based on the employment relationship, such as worker protection in many health and safety schemes. There are also many civil remedies based on commercial principles that have been relied upon by parties in the formal economy. Finally, more regulation will not promote helpful solutions to the challenges of workers in the informal economy.

*Comments concerning negative replies*

*Argentina.* CGT RA: Problems may arise in the application of the instrument in practice due to the weight of the employers' sector.

*Canada.* Provided that the instrument is promotional in nature.

*Egypt.* Provided that the State can exclude certain categories from the scope of the provisions of the instrument, in accordance with economic and social conditions.

*Germany.* The limitations of the national legislation have been taken into consideration in the replies to the preliminary questions and to each of the other questions.

*Iceland.* VSI: The questions indicate a direction that could cause significant problems if adopted.

*Republic of Korea.* FKTU, KCTU: The Labour Standard Act of the Republic of Korea defines the employment relationship in relatively broad terms. However, the clear criteria provided by the ILO instrument may serve to bring about positive changes in the attitude of the courts.

*Sri Lanka.* The difficulties could be overcome by carrying out extensive educational programmes.

EFC: Provided that the Recommendation focuses on guidelines.

*Sweden.* LO and TCO: One precondition for the Recommendation is for national legislation to apply.

*Trinidad and Tobago.* ECA: The legislation and case law in the country established guidelines for the determination of the employment relationship. The new instrument should serve to complement these, as well as to provide support in making the existing terms of reference more flexible in the light of today's business environment.

*Comments concerning other replies*

*Algeria.* In accordance with the legislation that is in force, the employment relationship is currently established directly between the employer and the employee in our country. Intermediary situations are not covered. Difficulties could arise in the application of this instrument until private employment agencies, recently introduced by the Employment Act in 2005, are regulated.

*Bangladesh.* BEA: The inclusion of such wording in the instrument could cause significant problems. It would jeopardize well-established contractual and commercial principles.

*Costa Rica.* UCCAEP: That is not impossible, but the issue will have to be examined more thoroughly.

*India.* CITU: Any difficulties should be overcome by changing national laws to meet the need to broaden workers' protection.

*Switzerland.* UPS: We refer to the Government's reply. It would appear that an instrument developed as proposed would cause problems.

**Qu. 18** *Are there any other pertinent issues not covered in this questionnaire?*

*If yes, please specify.*

*Affirmative*

*Governments:* 10. Argentina, Canada, Cuba, India, Iraq, Philippines, Qatar, Slovakia, Spain, Tunisia.

*Employers' organizations:* CGECI (Côte d'Ivoire); JEF (Jamaica); BUSA (South Africa); SN (Sweden); ECA (Trinidad and Tobago); USCIB (United States).

*Workers' organizations:* CGT RA (Argentina); ETUF (Egypt); AKAVA, SAK, STTK (Finland); CFDT (France); CGIL (Italy); JTUC-RENGO (Japan); FKTU, KCTU (Republic of Korea); GEFONT (Nepal); FNV (Netherlands); CGTP (Portugal); CWC (Sri Lanka); LO (Sweden); USS/SGB (Switzerland); NATUC (Trinidad and Tobago); TUC (United Kingdom).

*Negative*

*Governments:* 57. Algeria, Austria, Barbados, Belarus, Belgium, Benin, Brazil, Bulgaria, Cameroon, China, Costa Rica, Croatia, Cyprus, Dominica, Egypt, El Salvador, Eritrea, Fiji, Germany, Greece, Guatemala, Honduras, Hungary, Iceland, Indonesia, Italy, Japan, Kiribati, Kuwait, Latvia, Mauritius, Mexico, Republic of Moldova, Morocco, Mozambique, Netherlands, Niger, Norway, Panama, Peru, Portugal, Romania, Saudi Arabia, Serbia and Montenegro, Slovenia, Sri Lanka, Sudan, Suriname, Sweden, Switzerland, Syrian Arab Republic, Thailand, Trinidad and Tobago, Ukraine, United Arab Emirates, United Kingdom, Zimbabwe.

*Employers' organizations:* CNI (Brazil); BICA, BIA, BCCI (Bulgaria); GICAM (Cameroon); CEC (China); ANDI (Colombia); UCCAEP (Costa Rica); CEIF (Cyprus); KZPS, SPD (Czech Republic); DA (Denmark); SY (Finland); MEDEF (France); CACIF (Guatemala); MGYOSZ (Hungary); VSI (Iceland); CIE (India); IBEC (Ireland); NK (Japan); ALE (Lesotho); NCE (Republic of Moldova); CTA (Mozambique); VNO-NCW (Netherlands); HSH, NHO (Norway); CONEP (Panama); CPI (Portugal); ZDODS, ZDS (Slovenia); CEOE (Spain); EFC (Sri Lanka); UPS (Switzerland); ECOT (Thailand); FRU (Ukraine); CBI (United Kingdom).

*Workers' organizations:* ACTU (Australia); BWU (Barbados); ACFTU (China); CMKOS (Czech Republic); VTML (Finland); CGT-FO (France); COSYGA (Gabon); MTOSZ (Hungary); ASI (Iceland); LDF, LPSK (Lithuania); Solidaritate, CTU (Republic of Moldova); OTM-CS (Mozambique); CTP, UGT (Portugal); PTUF (Romania); ZSSS (Slovenia); CONSAWU (South Africa); CC.OO. (Spain); NWC (Sri Lanka); NCTL (Thailand); CSTT (Togo); FPU (Ukraine).

*Other*

*Governments: 3:* Australia, Lebanon, South Africa.

*Employers' organizations:* CEC (Canada); CITU (India).

*Workers' organization:* LJEWU (Sri Lanka).

*Comments concerning affirmative replies*

*Argentina.* An attempt should be made to include persons working on their own account.

*CGT RA:* The activities of the liberal professions.

*Canada.* The role of member States in educating the labour market parties about how labour and employment laws apply to them and their rights and responsibilities under these laws.

*Côte d'Ivoire.* CGECI: Apprenticeship contracts sometimes give rise to problems with regard to the employment relationship.

*Cuba.* Legitimate reasons for the termination of the employment relationship, and the powers of the labour inspectorate to require compliance with legislation on the employment relationship.

*Egypt.* ETUF: It is necessary to refer in the Convention to the importance of the role of information by emphasizing the fact that the social protection of workers based on the transparency of the employment relationship is a necessary concern, not only in the interests of workers and enterprises, but also the general interest of society, as it is necessary to be able to collect unpaid contributions to social security and health protection systems, as well as revenue from income tax, etc.

*Finland.* AKAVA, SAK and STTK: There is also the problem of "zero hour" contracts, under which the worker is obliged to be available, but the employer chooses when the work is offered. The question is whether an employment relationship exists without an obligation to offer work.

*India.* The question is designed to acquire a role on a subject that is not necessarily labour.

*Iraq.* Provide effective assistance to employers' organizations in countries in a situation of conflict, war and instability so that they can hold up and resist these circumstances to take on an effective role in the business community.

*Italy.* CGIL: As indicated under question 6(2)(c), considerable attention should be given to the difference between the employment relationship in cases such as interim work and ever more frequent situations such as outsourcing, where there is often a disguised employment relationship under the form of a commercial relationship.

*Republic of Korea.* FKTU, KCTU: Issues concerning the triangular employment relationship, including labour lease by temporary employment agencies, have been dealt with only partially in view of the existence of Convention No. 181. As the outsourcing of labour in the form of labour lease, subcontracting and labour service provision contracts is expanding rapidly, there is a need for a revision of Convention No. 181 and the adoption of a comprehensive Convention and Recommendation concerning indirect employment.

*Nepal.* GEFONT: Reference should be made to the benefits of the employment relationship and it should be clearly mentioned that social security should depend on the creation of an employment relationship.

*Netherlands.* FNV: The preamble should begin by recalling the importance of the employment relationship as the pre-eminent means of providing for the livelihood and social participation of men and women and of securing their work-related rights.

*Philippines.* Whether or not international agreements or domestic laws may address the issue of regulating private entities engaged in the employment of persons through electronic media, and the means of determining the employment relationship in such cases.

*Portugal.* CGTP: The concept of the employment relationship should be extended to self-employed workers who work regularly and exclusively for one and the same employer.

*Qatar.* It is not possible to address all subjects relating to the employment relationship, particularly in view of the development of information technology and communications systems and their impact on the performance of activities by individuals and enterprises. In this respect, the Internet gives rise to more problems than solutions. For example, commercial and civil activities and the contractual labour relationship.

*South Africa.* BUSA: The need to strike a balance between protection of rights and flexibility is not emphasized sufficiently. In an ever-changing world, working arrangements that were once considered to be “atypical” have now become the norm and in many instances a condition for success. The questionnaire does not seem to pay sufficient attention to this.

*Spain.* In situations of subcontracting, special measures for the coordination of enterprise activities at the same workplace in order to avoid additional risks for workers; verification as to whether standards for the prevention of occupational risks are well adapted to the new forms of organization of enterprise activities; the obligation of the principal entrepreneur for the prevention of occupational risks, that of subcontractors for subcontracted work or services relating to their own activities and the joint responsibility of the user enterprise and subcontractor for any breach of health and safety standards at the workplace of the principal enterprise; ensuring in information provided to workers and their representatives that these situations are more transparent and offer greater legal security; and adapting workers’ representation standards to the new forms of enterprise organization through networks of user and subcontracting enterprises. (b) a charter for self-employed workers or the regulation of dependent self-employment to clarify certain situations and contribute to greater legal security by determining the rights and obligations of workers in this situation.

*Sweden.* LO and TCO: The possibility for employers to give workers notice and the possibility of summary dismissal are closely related to recruitment and the question of who is to be regarded as an employee. Perhaps this should not be addressed in the same Recommendation, but it should be raised in close conjunction with these issues.

*Switzerland.* USS/SGB: The instrument should recall the purpose of the employment relationship and affirm the importance of the employment relationship as a means of securing social justice and the protection of workers.

*Trinidad and Tobago.* ECA: Capacity building and awareness raising for employers, workers and other stakeholders, especially as the new mechanism will be flexible and new trends and practices will emerge from time to time.

NATUC: Whether or not safety and health standards should be related to those who fall under the employment relationship.

*Tunisia.* Encouraging the use of collective bargaining as an effective means of extending the application of labour legislation to categories of workers who were denied protection at the national level; the promotion of cooperation at the national level between the State and employers' and workers' organizations, and at the international level between member States with a view to combating disguised employment relationships and possibly to regulate effectively atypical forms of work.

*United States.* USCIB: Why is this issue not being proposed as a set of simple principles?

*Views shared by the following workers' organizations:* ETUF (Egypt), CFDT (France), JTUC-RENGO (Japan), TUC (United Kingdom): The instrument should recall the purpose of the employment relationship and affirm the importance of the employment relationship as a means of securing social justice and the protection of workers.

*Comments concerning negative replies*

*Sri Lanka.* EFC: This subject needs to be viewed and reviewed regularly in the context of economic changes and other labour market factors.

*Comments concerning other replies*

*Canada.* CEC: The questionnaire does not seek to draw lessons from the debate on this topic that has been ongoing since 1997 at the very least, if not since the early 1990s. The fact that views are requested on such matters as "triangular employment relationships" and "ambiguous employment" and on criteria for determining an employment relationship to be included in an international instrument indicates a lack of appreciation of the contribution of these notions to the failure of past debates. It is to be feared that, if we cannot learn from these unfortunate failures, we will be unable, in 2006, to commit to a constructive and fruitful Conference. In 2003, after nearly two weeks of repeatedly having the concerns of employers rejected by the Committee on the Employment Relationship, the three parties agreed to a single paragraph, in which it was agreed to discuss a "Recommendation" on the topic of disguised employment within certain parameters. This approach may work. However, based on history, it will be challenging to undertake a constructive discussion and debate on a topic that is broader than that expressed in the consensus.

*India.* CITU: Social dialogue should be used to discourage flexibility of labour law, leading to informality and ambiguity in the employment relationship.

*Lebanon.* Intermittent work, seasonal work and domestic work. These categories of workers are still without legal protection.

*Sri Lanka.* LJEWU: Most of the important issues are covered. However, many issues may arise once the instrument is put into practice by member States. The ILO should therefore periodically review the instrument once it has been adopted.

## OFFICE COMMENTARY

This section reviews the replies to the questionnaire which was designed with a view to the preparation of the proposed Recommendation concerning the employment relationship. It takes into account the explanations regarding the questionnaire contained in Chapter III of Report V(1).<sup>9</sup>

The replies of governments and of employers' and workers' organizations are of particular importance in the present case, given that the issue of the employment relationship will be considered by the Conference in accordance with the single-discussion procedure. The proposed Recommendation will consequently be based essentially on these replies, and on the conclusions contained in the resolution concerning the employment relationship, which was adopted by the Conference in its 91st Session (2003).<sup>10</sup>

### General observations

Overall, the governments' replies give clear indications as to the main areas which the Recommendations should cover; this is shown in table 1 below which shows the distribution of replies.

Table 1. Replies from governments

Question	Affirmative	Negative	Other	Question	Affirmative	Negative	Other
1	68	7	2	6(2)(f)	68	4	1
2	67	6	2	7	58	16	2
3(1)(a)	55	18	0	8	61	9	0
3(1)(b)	52	19	1	9(a)	49	21	0
3(1)(c)	54	14	3	9(b)	59	11	0
3(2)	58	16	0	9(c)	55	16	0
3(3)	62	12	0	10	67	4	4
3(4)	66	6	0	11(1)	66	6	1
3(5)	67	6	1	11(2)	53	21	0
3(6)	58	13	1	12	50	21	2
4	68	5	1	13	65	5	4

<sup>9</sup> ILO: *The employment relationship*, Report V(1), International Labour Conference, 95th Session, Geneva, 2006.

<sup>10</sup> *ibid.*, Annex 2.

Question	Affirmative	Negative	Other	Question	Affirmative	Negative	Other
5	67	6	1	14	67	8	0
6(1)	70	4	0	15	62	6	4
6(2)(a)	68	5	1	16	56	14	2
6(2)(b)	71	3	0	17	10	58	1
6(2)(c)	57	13	5	18	10	57	3
6(2)(d)	62	6	2				
6(2)(e)	70	2	2				

Most of the government replies are affirmative. They contain important comments, including useful suggestions regarding the structure, limits and other characteristics of the future instrument. The different positions of the social partners are reflected in the general observations.

In the view of the employers' organizations, the text should focus on disguised relationships and on mechanisms ensuring access for workers to legal protection; it should not universally and in a binding way define the content of employment relationship, it should take into account specific national conditions, and should avoid any conflict with regard to genuinely independent contractual and commercial relationships. The latter should not be considered on the basis of preconceived ideas, given that certain relationships are manifestly of a civil or commercial nature. One employers' organization, while highlighting the importance of protecting workers in an employment relationship, recalled the case of countries in which most wage earners work in the informal economy. Another considered that it will again be difficult to deal with the issue from the perspective of a Recommendation, and that a declaration of principles would have been more realistic. On the workers' side, one organization indicates that in cases where the relationship is ambiguous or unclear, the worker has no protection, and emphasizes the importance of having an instrument which clearly defines the scope of the employment relationship. Lastly, one joint body considers that the ILO's ambition to produce a Recommendation is of great interest and part of a very useful initiative in view of the importance of the employment relationship issue.

*Two elements that are crucial to the future of the possible Recommendation are made evident by the replies to the questionnaire: (1) the comparative analysis contained in Report V(1) is regarded as sound by most of the countries concerned; (2) most of the replies, in particular those of governments, indicate that applying a Recommendation as proposed in that report would cause difficulties only with regard to particular aspects of national legislation and practice.*

*The proposed Recommendation, in accordance with traditional ILO practice, begins with a Preamble and comprises four major Parts concerning:*

- I. National policy of protection for workers in an employment relationship
- II. Determination of the existence of an employment relationship
- III. Monitoring and implementation
- IV. International exchange of information

## 1. The instrument

Certain governments in their replies emphasize the current importance of the employment relationship, especially in the context of globalization, and the utility of an international instrument that will pay due regard to national conditions in order to face new challenges. The instrument could, given the diversity of national systems, serve to harmonize or supplement legislation so as to remedy growing areas of legal uncertainty in this area, in particular with regard to workers whose legal status is not clear or workers in the informal sector, and to address the case of workers who in practice are not covered by labour legislation, the objective being decent work.

A number of governments have nevertheless observed that it is not really necessary to adopt further obligations and regulations with regard to the employment relationship, that a new instrument is not absolutely essential, and that a digest, set of guidelines, code of good practice or a plan of action would suffice. They affirm their continuing support for the consensus reached at the 91st Session (2003) of the Conference, provided that the instrument reflect what was agreed. One government considers that what is needed is an instrument that allows for different solutions to the problem of disguised, ambiguous or triangular relationships.

Workers' organizations consider that one or more instruments should be adopted, given the new trends regarding the employment relationship, the erosion of protection for the workers concerned and the need to address the legislative vacuum or deregulation in a number of countries. An international instrument would be an important compass to guide national discussions.

One government, however, considers that the concept has not been sufficiently clarified at this stage for an international instrument to be envisaged, and others take the view that such an instrument would be ineffective owing to the risk of restricting the freedom of the parties concerned to enter into contracts and of restricting the area of cooperation between employers and workers. One government fears that the instrument could hamper commerce and economic progress and could be counter-productive in terms of employment.

Most employers' organizations consider that an instrument is not the right means of dealing with the issue, given the current challenges from within and outside the area of the employment relationship and the legislative differences that exist from one country to another. The instrument would, in their view, limit flexibility to enter into different types of employment, and the problem needed instead to be dealt with at the national level, as the European Union directives envisage. At the international level, what is needed is to undertake studies of comparative law, consider different experiences and compile best practices, among other activities. Nevertheless, in the light of the 2003 consensus, they are willing to consider adopting an instrument in the form of a Recommendation concerning the disguised employment relationship. One organization, however, considers that there is a need to reconsider whether or not a Recommendation was really needed, since the report and the questionnaire go beyond the agreement reached in 2003, as expressed in paragraph 25 of the conclusions of the general discussion. Certain employers' organizations favour the adoption of an instrument which should be juridically useful, promotional in nature, and should contain provisions concerning all rights arising from the employment relationship. One, however, considers that the adoption of such an instrument would be difficult.

## 2. Form of the instrument

Most of the replies from governments, employers and workers favour a Recommendation, as agreed by the Conference at its 91st Session (2003). That would be a flexible framework and well adapted to the needs of the member States. It could help to clarify the employment relationship and to adapt it to the new trends and characteristics of the labour market.

A number of governments and workers' organizations would have preferred a Convention, or a Convention supplemented by a Recommendation, and some still adhere to that position. One government would have preferred a compendium or a set of guidelines on good practices.

In view of the decision of the 2003 session of the Conference, a number of employers' organizations indicate their willingness to contribute constructively to the examination of a Recommendation, on condition that it remain within the limits agreed on that occasion. That is also, in general terms, the position of two governments.

*The general discussion of 2003 thus appears to have created conditions favourable to discussion of a proposed Recommendation text, although there are still significant differences regarding its content and scope.*

## 3. Preamble

### *General comments*

Four governments indicate that the Preamble should be more general and less detailed, because the instrument should deal with three separate categories of workers concerned, or because it would suffice to state that, in view of the changes that have taken place in the labour market and in the organization of work, it could be difficult to determine whether or not an employment relationship exists, or because the Preamble should set out general principles and the purpose of the proposed provisions, without dealing in detail with substantive rules. One government considers that it would be appropriate to avoid a tone or wording that is accusatory or implies that bad faith is the cause of problems with the employment relationship, and considers that it should be indicated that changes in the labour market are tending to erode differences between wage earners and non-wage earners and to prompt States to develop mechanisms for solving the problem at the national level.

Another government and most employers' organizations consider that the Preamble should be clear and concise and deal exclusively with problems related to fraud, and emphasize that it should respect legitimate commercial and other lawful relationships. Three employers' organizations and one government take the view that a Preamble is unnecessary.

*In the light of the comments received, the Preamble has been drafted in a relatively concise manner and focuses on the fundamental purpose of the instrument.*

### *Question 3(1)(a). Inadequacies of the legislative framework*

According to some government replies, certain States need to adapt the scope of their legislation to the new forms of employment, either because it excludes many workers who are thus denied protection or because it is too narrow in scope, imprecise or unclear. In the case of some States, it is difficult to ensure that the many different possible situations are covered. One government indicates that measures to apply

legislation are lacking, an important role being played in that area by culture and tradition. The instrument will be useful for clarifying and adapting legislation, and for that purpose will need to be clear and flexible.

One government considers the proposed wording to be vague. A number of governments consider that their legislation is appropriate and clear. One government, adopting a similar position, indicates that its legislation is based on a “common law” definition of employee which has the advantage of evolving, through judicial decisions, in a manner that reflects developments in the labour market and organization of work.

A number of workers’ organizations note that legislation is too narrow in scope and ambiguous or that it needs to be clarified and broadened in order to protect both “directly” and “indirectly” employed workers, those working under an ostensibly commercial or subcontracting arrangement, and those involved in a supply chain. It should cover all forms of the employment relationship, including those in the informal sector and new forms of employment.

All the employers’ organizations consider that the question should not be dealt with in the Preamble as it presupposes the existence of a juridical standard which could serve as a reference. It is for the legislative authorities to determine clearly what should be defined in laws and regulations and what should be decided by judges in the light of relevant facts. The concept of the scope of application is considered to serve no purpose, as is the phrase “or otherwise inadequate”, as they do not help to clarify the desired objectives. The Preamble should refer only to the problem of disguised employment relationships.

*The reference to inadequacies and limitations of legislation is contained in the second point “Considering” of the Preamble.*

#### *Question 3(1)(b). Ambiguous employment relationships*

The government replies indicate that in certain countries, employment is still defined in accordance with “common law”, while in others with the same system, precise legal standards have been adopted. In countries with different legal systems, the labour code may not contain specific provisions, or provisions that can be easily applied to new forms of work, or may not be sufficiently broad in scope. Lastly, jurisprudence may not be consistent with regard to workers in ambiguous situations, even if in a number of countries the provision most favourable to workers must be applied, and may consider in ambiguous situations that an employment relationship exists. However, in many cases the employment relationship is obvious in the light of the laws and regulations in force, except in the case of non-traditional working arrangements which allow the worker a considerable degree of independence. In such cases, the employment relationship may not be obvious. Such atypical forms have emerged in recent years and make it difficult to apply the law. Greater flexibility in laws and regulations and changes in the organization of work exacerbate the difficulty, as does the attitude of some employers. The employment relationship may resemble civil relationships, making it difficult to draw a distinction between them. Moreover, some semi-autonomous workers, and certain self-employed workers who over time enter into a permanent relationship with a particular client, are difficult to categorize. Regulations are needed to allow States to determine the precise nature of ambiguous relationships, but it is important to avoid varying interpretations of the concept of ambiguity. One government considers that the Preamble should not refer to this issue, even if certain relationships are clearly ambiguous. Others indicate that their legislation is precise and ambiguous relationships are rare.

Workers' organizations note that ambiguous employment relationships are on the rise. Others consider that it is employers who make them ambiguous. Legislation may not include provisions relating specifically to the employment relationship, or such provisions as do exist may be inadequate to cover the new forms of employment relationship or contradict civil or commercial standards. Some replies indicate that jurisprudence may be inconsistent and make it difficult to determine whether or not a worker is to be regarded as wage earning or self-employed.

For most employers' organizations, the notion of ambiguity is out of place in the Preamble and in the rest of the instrument. It serves no useful purpose and would only increase confusion. Whether or not an employment relationship exists must be determined on the basis of the facts and, in the event of a dispute, it is the courts that must decide. One organization indicates that the reference to the potential difficulty of determining the existence of an employment relationship is contrary to the agreement reached in 2003 according to which the Recommendation must be flexible and take into account the diversity of national systems.

In the view of one workers' organization, the issue is not one of ambiguity, except in exceptional cases, but of disguised relationships.

*The Preamble does not explicitly refer to the term "ambiguous employment relationship". More generally, it refers in its second "Considering" clause to situations in which the respective rights and obligations of the parties are not clear.*

#### *Question 3(1)(c). Disguised employment relationships*

A number of replies from governments and from workers' organizations emphasize the possible ways of disguising an employment relationship, including in public enterprises: pseudo-independent workers, illicit "loans" of workers, claimed family relationships, subcontracting, "cooperation", and informal arrangements. In some cases the problem is one of failure to apply the law, sometimes with the complicity of workers intent on evading their tax or social security contributions.

Some governments consider that cases of disguised employment relationships would be better dealt with by the courts. One government in particular opposes any provision which would define as employed workers individuals working in subcontracting arrangements in accordance with common law. Another considers that it is important, given the international mobility of workers, to avoid relationships that are incorrectly defined as commercial.

Most employers' organizations consider that the employment relationship must be regarded as disguised only in cases of fraud and failure to observe legal obligations, and that it is important to steer away from anything that might restrict the employer's freedom. They consider it too early to express a view on this issue before it has been discussed by the Conference. If it is dealt with appropriately there, it will not be necessary to refer to it in the Preamble.

*The Office will return to this question, which is referred to in the second "considering" clause of the Preamble, in connection with Question 6(2)(b).*

#### QUESTION 3(2). DIFFICULTIES IN DETERMINING WHO IS THE EMPLOYER

According to some government replies, this difficulty arises in particular in connection with employment relationships linked to outsourcing. They cite, for example, the following cases: very extensive subcontracting chains, successive service contracts, undeclared relationships, employers' changes of address, activities in the informal sector

or in the public sector when problems of representation arise, the presence of intermediaries, and triangular relationships. Apart from this, changes in the organization of production can result in changes in the traditional profile of the parties to a contract of employment. In some cases, legislation may be insufficiently precise or it may be difficult to establish proof. The State's role is to put in place the mechanisms required to enforce the law. Jurisprudence is also important. A number of governments maintain that their legislation is clear. One employers' organization shares this view. However, on rare occasions it may be difficult to identify the applicable provisions.

Some governments state that the question is answered implicitly in the reply to Question 3(1)(a). It should be included in the operative part of the instrument.

Some workers' organizations observe that such situations arise in the following cases: subcontracting strategies, services activities, temporary work, arrangements for "lending" workers, the "tâcheron" system, enterprise networks, and public sector activities. They emphasize the importance of helping workers to provide the evidence that determines who the employer is.

In the view of a number of employers' organizations and certain governments, there is no employment relationship in which the employer's identity is unknown. Determination of the existence of an employment relationship is of necessity based on the existence and identification of the parties involved, and there can be only one employer in an employment relationship. One organization considers that the reference to this issue in the instrument is contrary to the agreement reached in 2003 concerning the triangular employment relationship.

*The problem posed by this issue is of great importance and current relevance, in the view of most of the governments and workers that replied to the questionnaire. It is accordingly mentioned in the fourth "considering" clause of the Preamble. It is nonetheless true that this problem is central to a discussion which was not concluded in 2003, as is clear from paragraph 25 of the conclusions of the general discussion. The issue will be considered again in connection with Question 6(2)(c).*

### QUESTION 3(3). WORKERS WITHOUT PROTECTION

A number of workers' organizations state that situations in which workers have no protection are very widespread, citing the following examples: workers excluded from the scope of legislation on the employment relationship, workers who are indirectly employed, semi-autonomous workers who are in fact subordinate to the employer, false commercial contracts and illegal work. It is essential to have international labour standards in this area because of globalization, as a lack of protection can result from different factors including the rapid evolution of the labour market. These provisions would provide possible ways to the national authorities of protecting the workers concerned.

Some government replies recall that this question, like the previous one, is answered implicitly under Question 1(a), that it is unnecessary to refer to this in the Preamble, and consider that it should be dealt with in the operative part of the text or rephrased in less negative terms. A number of governments state that their legislation is appropriate and they can deal with this problem.

Most employers' organizations consider that the question is not sufficiently nuanced and could be restricted to workers who are the victims of fraud.

*In the light of the different observations, the question is reflected in the proposed text in more general terms: the fifth "considering" clause states that the difficulties*

*referred to can cause serious problems. At the same time, the scope has been broadened: the problems in question can affect not only workers but also their families and dependants, and may have a detrimental effect on the productivity and financial results of an enterprise.*

#### QUESTION 3(4). NATIONAL POLICY

In order to make the proposed text more succinct, and in line with one government's suggestion, the question of a possible policy for ensuring adequate protection for the workers concerned has been removed from the Preamble and will be dealt with in Paragraph 1 (Question 4).

#### QUESTION 3(5). SOCIAL DIALOGUE

This point was widely supported. The effective participation of the social partners is regarded as fundamental. A number of workers' organizations recall that such dialogue presupposes the existence of well-established and independent organizations, and that in their absence, it is the duty of governments to assume responsibility for protecting workers. The employers' organizations emphasize that social dialogue must be adapted to national conditions and benefit all those concerned, not just the workers.

One workers' organization emphasizes the importance of giving top priority to legislative measures in countries where collective agreements are not binding.

Other replies indicate that it serves no purpose to recall the importance of social dialogue in the Preamble, or that in certain countries, such dialogue rarely influences policy-making.

*This point is included in Paragraph 5 of the proposed text.*

#### QUESTION 3(6). REFERENCE TO THE DECLARATION OF 1998 AND OTHER RELEVANT INSTRUMENTS

A number of governments and workers' organizations and one employers' organization favour the inclusion of a reference to the ILO Declaration on Fundamental Principles and Rights at Work, while others want to include a reference to a number of different Conventions. Another group considers that the Recommendations should refer to both the Declaration and certain other relevant instruments. The majority of employers' organizations and some governments, however, take the view that it would not be appropriate to include a reference to the Declaration, which in their view is not directly relevant, or to other ILO instruments which do not appear to be directly applicable or to shed any useful light on the issues.

*In accordance with a number of replies, the proposed text now refers to the Declaration and to other ILO standards in a different manner, on the basis of a statement of fact. It begins by emphasizing, in the first "considering" clause of the Preamble, the unquestionable importance of the employment relationship for the application of national and international labour standards and for giving effect to the principles set out in the ILO Declaration on Fundamental Principles and Rights at Work.*

### **4. National policy**

*The idea of a national policy to allow an examination of the employment relationship situation with a view to adopting specific measures is central to the*

*proposed text and, in the light of the replies, appears to be approved by most governments, as well as by most employers' and workers' organizations. Differences of opinion concern mainly the scope of the policy and its potential implications.*

On the one hand, there is a concern that the legislative framework should be stable and coherent. On the other, there is the desire to ensure that the review in question does not infringe certain principles or workers' acquired rights.

Certain employers' organizations take the view that there can be no question, once a revision of legislation has been undertaken, of broadening its scope. Certain workers' organizations, by contrast, state that the scope of labour legislation, as well as its application, should be examined.

A number of employers' organizations consider that the expression "adequate protection" is subjective and confused. One government maintains that its legislation already provides "adequate" protection for workers and that the scope of legislation is reviewed every year.

Lastly, one government considers that it is for each State to decide whether it needs to review its legislation and when to do so. Another considers that it is not appropriate to add new obligations concerning the revision of legislation, and another is not clear as to the implications of such a policy.

*National policy is dealt with in Paragraph 1 of the proposed Recommendation. The most important aspect of this national policy would appear to be the suggestion to member States to review regularly the manner in which their legislation protects workers with an employment relationship, to identify any deficiencies in that area, and to endeavour to provide appropriate remedies in response to actual conditions, in a continuous and consistent manner, not simply through isolated measures. The instrument would not seek to give Members specific instructions regarding the form or content of the policy to adopt.<sup>11</sup> The subsequent Paragraphs deal only with the basic principles and modalities of the policy.*

### ***The most vulnerable workers***

National policy, as referred to in Question 3(4), should provide adequate protection for the workers concerned, taking into account the gender dimension.

*Given the importance of this point in the work of the Office and in the discussions during the Conference in 2003, Paragraph 4 of the proposed Recommendation has been devoted to this aspect, and also refers to other workers especially affected by the uncertainty of their status.*

## **5. Determination of the existence of an employment relationship**

The principle, rooted in comparative law, of the primacy of facts, is widely endorsed in the replies. Employers' organizations note, however, that the intention of the parties must also be respected, and a number of replies suggest that the reference to national policy is not necessary.

*In actual fact, the reference to national policy is included because it is within the framework of such a policy that measures and provisions concerning the employment relationship are adopted, but the main point of the question has been included in*

<sup>11</sup> See Report V(1), op. cit., paras. 218-221.

*Paragraph 7 of the proposed text, in the section concerning the determination of the existence of an employment relationship.*

QUESTION 6(1). THE NATURE AND SCOPE OF PROTECTION; TRANSPARENCY

Most of the replies to this question are affirmative. However, the workers' organizations and one employers' organization note that the reference to "national legislation and practice" is inappropriate in the case of countries with legislation that is not in conformity with international labour standards, and propose to replace it with a reference to "international labour standards"; they also consider that the policy should be applied in a transparent manner in cooperation with the most representative organizations of workers and employers.

Other replies emphasize the importance of participation by the social partners at all levels, in particular because this helps to identify needs with regard to the application of legislation, draws attention to their interests, and facilitates the formulation of policy and the application of legislation.

A number of governments want flexibility in the Recommendation, to reflect the diversity of national conditions. One government and one workers' organization state that the instrument should specify the minimum level of protection, with States then being able to make any changes they may wish to make. One government does not agree with the adoption of such a policy.

*The proposed text tends towards flexibility and reflects the observations made by the workers' organizations. Paragraph 2 states that the nature and scope of the protection given to the workers concerned should be determined by national legislation and practice, taking into account the relevant international labour standards.*

QUESTION 6(2). PROTECTION MEASURES

*Question 6(2)(a). Guidance*

*Guidance is a key word in the questionnaire, and the replies indicate general approval for this.*

The governments consider this point to be crucial as a means of guaranteeing legal security for those involved in the labour market and for avoiding, according to one reply, any ambiguity or dispute. National policy should give employers and workers the means that they need to know what an employment relationship is. An erroneous description of the relationships concerned can lead to problems when a contract is implemented, or when it is to be terminated. Effective application of the law will ensure effective protection for workers and fair competition among employers. One workers' organization adds that precise guidance is needed to distinguish between disguised dependent workers and those who are independent. Defining an employment relationship is often a complex matter, according to one employers' organization, and consequently, general guidance must be given. According to a number of employers' organizations and one workers' organization, national legislation and jurisprudence must be taken into consideration.

On the other hand, some governments consider that the general notion of "employee" is not adequate for the purpose of giving valid guidance in all possible cases, given the diversity and flexibility of the different forms of employment relationship, or consider that it should be left to States to take their own decisions on this point, or that the instrument should confine itself to giving a number of examples of the

possible content of a national policy without imposing any minimal content. One government, supported by one workers' organization, considers that, rather than giving guidance, it would be better to establish a legal framework which would place the employment relationship on a secure footing and prevent moves of dubious legality.

*The proposed text deals with the matter of guidance in Paragraphs 3(a) and 10.*

*Question 6(2)(b). Combating disguised employment relationships*

This is the question that gave rise to the greatest number of affirmative replies, with only three negative replies. This shows the importance for governments of the problem of disguised employment relationships. It is in response to this problem that the employers' group expressed willingness to consider the possibility of adopting a Recommendation.

The replies generally emphasize that any worker wishing to do so should have the opportunity to establish his or her status through an independent body, that Members should enjoy a certain degree of discretion in combating the various methods used to disguise employment relationships, and that the labour inspectorate should play a monitoring and advisory role, with adequate regulation and effective systems of enforcement in place. One government proposes the definition of criteria by which the disguised employment relationship would be defined, and a number of workers' organizations suggest broadening the scope of labour legislation or introducing the possibility of legal presumption to allow legislation to be applied to relationships which might appear to be different in kind from the employment relationship. A number of employers' organizations consider that it is necessary before anything else to define what is meant by "disguised employment", which is linked to the notion of fraud, and that it is important not to prevent workers and employers from entering into legitimate contractual arrangements different from the employment relationship, or to interfere with legitimate commercial relationships.

*The expression "disguised employment relationships" has been used at ILO meetings for a number of years, and the relationships in question have been described in a number of Office reports. In the conclusions of the general discussion in 2003, employment is deemed to be disguised when the employer treats an employee in a way other than as an employee in order to dissimulate the worker's real legal status, possibly by resorting to inappropriate civil or commercial arrangements.<sup>12</sup> Report V(1) states that disguising an employment relationship consists in giving the relationship an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations.<sup>13</sup> In the proposed text of the Recommendation, where this point is dealt with in Paragraph 3(b), the national authority is competent to determine the cases in which an employment relationship may be considered to be disguised.*

*Question 6(2)(c). Establishing clear rules for situations where work is performed for the benefit of a person other than the employer*

This is a delicate and controversial point and is dealt with in Question 3(2). Many governments reply in the affirmative: the constant evolution in the forms of employment would justify giving them particular attention; and regulations should include the obligation to identify the parties to an employment relationship. Such rules are justified

<sup>12</sup> Report V(1), op. cit., Annex 2, para. 7.

<sup>13</sup> Report V(1), op. cit., para. 46.

by considerations of legal security for workers and employers, and enable the State to carry out better enforcement and prevent fraudulent use of subcontracting arrangements.

One government proposes that a distinction be drawn between situations in which the user has authority over the workers employed by the provider, and subcontracting per se, in which the workers in question are not subordinate to the user. One government considers that it is difficult to stipulate international regulations in this area, and two others consider that triangular relationships should be dealt with in a separate instrument.

Workers' organization want the responsibilities of the user and provider to be transparent and made clear to the workers concerned; some consider that the terms "provider" and "user" are not appropriate. The view was also expressed that transfers of workers should be prohibited, or authorized only in clearly defined cases, and that hiring via agencies should be distinguished from subcontracting.

Workers' organizations state that, in an employment relationship, labour standards must be applied, and that it is important to avoid any interference with commercial contracts concluded between provider and user and to ensure that the obligations arising from the employment relationship are not transferred to the user when they should be incumbent on the provider. It is felt that this would go beyond the agreement reflected in paragraph 25 of the 2003 conclusions, and harmonization by the ILO in this area is not possible.

*It should be noted that the proposed text confines itself, in very general terms and in Paragraph 3(c), to suggesting that member States establish standards applicable in situations to which the question refers, but does not propose any specific type of regulation or any specific guidance. The advantage of such a proposal lies above all in encouraging States with inadequate legislation to rectify the legal deficiencies or to make its laws and regulations clearer, which can only benefit all concerned – workers, employers and users. The purpose of such standards would be to determine in unambiguous terms who the employer is, what the worker's rights are and who is responsible for them – questions on which opinion is divided.*

*Question 6(2)(d). Non-interference with civil or commercial contractual relationships*

In general, the affirmative replies show similarities as well as differences. On the one hand, employers' organizations express the wish for the instrument to concern employment relationships, without any implications for bona fide civil or commercial relationships. On the other hand, workers' organizations state that national policy should prohibit the use of false civil or commercial contractual relationships. One government considers that the freedom of the contracting parties must be respected by the national policy, but that it should not be unlimited or obstruct efforts to protect workers' rights.

In the view of one government, interference occurs where the worker's status is determined not by the contract concluded between the parties but by the de facto conditions in which the work in question is actually carried out. One workers' organization considers that the principle of non-interference may be recognized if the contract is of a genuinely civil or commercial nature and concluded between the parties on the basis of equality, but that including this point in an international instrument might be interpreted as providing guidance for national legislation and could be used to justify abandoning regulation of disguised relationships.

*The point has been retained as Paragraph 6 in the proposed text and has been worded in the following way: “National policy should not interfere with legitimate civil and commercial relationships.”*

*Question 6(2)(e). Access to appropriate dispute resolution processes*

On this point there is almost unanimous agreement between governments, employers and workers. One employers’ organization recalls that the instrument should address the subject in broad terms, detailed provisions being left to national law and practice. Another employers’ organization notes that the processes in question must be accessible, fair and inexpensive, and that the parties should not be able to abuse them. The workers’ organizations and a number of governments consider that these processes should be financially affordable and speedy, and workers should be able to make use of them without putting their jobs at risk. Certain governments indicate that they already have appropriate processes.

*This question, in general terms, has become Paragraph 3(d) of the proposed text.*

*Question 6(2)(f). Effective and efficient enforcement*

The final category of measures suggested to Members as part of the national policy concerns the enforcement of legislation concerning the employment relationship. In this area too, there is broad convergence of views. It is emphasized that the enforcement of legislation is absolutely fundamental, and indeed more important than other measures. One reply states that failure to enforce legislation is the main reason for the absence of protection for vulnerable workers, and another states that enforcement must respect the needs of both parties, which includes the operational and financial impact. Other measures are proposed, such as measures to strengthen the labour administration, including inspection.

*The point is addressed in Paragraph 3(e) of the proposed text.*

## **7-9. Monitoring and review mechanism**

The replies concerning different aspects of this mechanism can be considered together.

### **CREATION OR USE OF THE MECHANISM (QUESTION 7)**

As regards the question whether the instrument should provide for the establishment of a review and advisory mechanism, most of the replies are affirmative and acknowledge the potential benefit and importance of such a mechanism, although a number of replies express reservations as to its nature and scope. For example, one reply indicates that the mechanism should not be too restrictive, but should depend on the capacities of the country concerned. A number of replies ask whether the mechanism should be new or whether an existing mechanism could also meet the requirements of the instrument, while one government considers that States should have total freedom to determine the appropriate mechanism. One government considers that the question has no place in an international instrument, while another takes the view that such a mechanism is not appropriate. In the view of another government, given the system of regular consultation which it has already established, the creation of such mechanism would not be justified.

*The proposed Recommendation, in Paragraph 15, provides for the establishment of an appropriate mechanism to allow more effective monitoring of developments in the labour market and to promote transparent national policy. The instrument does not contain precise indications as to the nature of the mechanism, which should be defined at the national level. It goes without saying that the mechanism must be consistent with the possibilities and particular conditions of each country, and may be new or an existing mechanism.*

PARTICIPATION OF THE COMPETENT AUTHORITIES AND ORGANIZATIONS  
OF EMPLOYERS AND WORKERS (QUESTION 8)

Replies to the question as to whether the mechanism should provide for tripartite participation are mostly affirmative. One government considers that provision should be made for broader consultations with other employers' and workers' organizations in addition to the most representative ones.

CONSULTATION OF EMPLOYERS' AND WORKERS' ORGANIZATIONS  
(QUESTIONS 9(a), (b), (c))

The replies given to the three subsidiary questions concerning consultation (frequent intervals; representation of organizations on an equal footing; experts' reports or technical studies) were generally similar and positive. Replies emphasized the merit of such consultation, although sometimes with reservations and questions.

Consultations at frequent intervals are justified where strong independent representative organizations exist. The question is what is meant by frequent intervals and should the consultations be frequent, regular or arranged according to need?

It is generally agreed that organizations should be represented on an equal footing, subject to definition. For one government, the instrument should not go into detail, the content of Question 8 being considered sufficient.

The idea of making use of experts' reports or technical studies is generally accepted, although for some, this raises the problem of costs and for others, experts' reports might be useful but should not be decisive. Others take the view that the decision to use such experts' reports should be taken on a case-by-case basis.

*Questions 8 and 9 have given rise to Paragraph 16 of the proposed text, in Part III concerning monitoring and implementation. The reference to the frequency of consultations and the possible use of experts' reports or technical studies has been made more flexible.*

## **10. Description of the employment relationship**

This general question was intended to help clarify ideas, it being understood that, in keeping with the logic of the proposed text, it is for member States to define in specific terms the employment relationship. Most of the replies from employers' organizations consider that the wording used in the questionnaire, which is based on comparative law, allows the possibility of inclusion of a third party.

*This point has not been retained in the proposed Recommendation, which in this respect is geared more to the determination of the existence of an employment relationship.*

## 11. Factors and indicators of the existence of an employment relationship

- (a) As regards the factors that can be used to determine the existence of an unemployment relationship (Question 11(1)), a number of replies acknowledge the utility of identifying such factors, while others indicate that it is for the competent authorities to define them, indicating also that it is important in this area to take account of jurisprudence. Others indicate a preference for different factors.

The employers' organizations consider that these factors should not be defined in the instrument but by the national authorities, as they are based on different concepts in different countries. An instrument containing a list of such factors would not be useful and, according to one organization, would be at variance with the agreement that the Recommendation should not universally define the content of the employment relationship. On the other hand, one employers' organization recalls that national legislation and practice may not provide for measures of protection in the case of disguised employment relationships, and consequently, the instrument should set out clear provisions in this area.

- (b) The question concerning indicators (Question 11(2) and 11(3)) is of considerable interest to governments, which consider that indicators facilitate the determination of the existence of an employment relationship. In their replies to Question 11(3), some 41 governments mention the indicators that could be included in the proposed Recommendation; several of them endorse those mentioned in the questionnaire. A comparative study of indicators used in those countries and elsewhere would therefore be of considerable interest.

Reservations were expressed, especially by employers' organizations, which oppose in particular the idea of an international definition of the employment relationship. The definition and scope of that relationship depend on a wide range of national characteristics. Any attempt to introduce the concept of common indicators would only lead to disagreements and dissatisfaction among the social partners.

One government prefers the "common law" approach. Another considers that indicators are not relevant to determining the existence of an employment relationship. One indicates that such indicators should be derived from law and jurisprudence. Another considers that they should be defined by national law and practice, that their inclusion in the instrument could be interpreted as implying an exhaustive list, and that some indicators may not be universally recognized. Finally, one government considers that, given the diversity of employment relationships, it is virtually impossible to cite all valid indicators.

*It is clear from the questionnaire that the instrument will not contain any definition of the employment relationship, although it would be desirable for Members themselves to establish such a definition on the basis of a certain number of factors – or "conditions", the term used in Paragraph 8 of the proposed text. This reflects the concerns that have been expressed in this area, and the conditions mentioned both in the questionnaire and in the proposed text are just examples.*

*A list of indicators is a credible objective. The replies are encouraging in the long-term, although the conditions do not appear to be met at this stage for such a list to be included in the proposed text. The latter, in Paragraph 9, contains only the few examples cited in the questionnaire.*

## 12. Presumption that an employment relationship exists

The principle that the proposed text should presume the existence of an employment relationship where certain indicators are present is acknowledged by the majority of governments and workers' organizations.

Some governments and employers' organizations, however, are more critical and suggest, for example, that it should be left to national legislation and that, given the diversity of employment relationships, such indicators are inadequate when considering specific cases: each case must be assessed on its own merits, in the light of national legislation and practice, possibly through an accessible disputes settlement mechanism. One government proposes that such a presumption should be based on the characteristic elements of the employment relationship. Another government would favour taking into consideration the preponderance of factors that characterize the employment relationship. In the view of another government, any points in the employment contract or employment relationship that are not clear should be interpreted in the worker's favour.

*The proposed presumption would be intended solely to assist workers in proving the existence of an employment relationship on the basis of factors which would obviously be specified by national legislation.*

*Along the same lines, and given the general advantage of ensuring that the parties concerned have access to effective mechanisms and procedures for resolving disputes in this area, the proposed text includes a detailed paragraph, Paragraph 11, which includes the following three clauses based on comparative law:*

- (a) allowing a broad range of means for establishing the employment relationship;*
- (b) providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present; and*
- (c) deciding, following consultations with the most representative employers' and workers' organizations, where they exist, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.*

## 13. Disputes settlement procedures

There is broad tripartite consensus in favour of including in the instrument information providing for the establishment of administrative or other procedures of the type indicated in the questionnaire. The replies indicate that this measure will be unnecessary if such procedures, including judicial procedures, already exist; that the authorities concerned should be sufficiently competent to conduct such procedures; that the procedures should be accessible, inexpensive and reliable. It is also considered important to consider cost-effectiveness, cost implications, the risks of abuse, and the possibility of also providing for voluntary procedures. One employers' organization considers that the question goes against the agreement reached by the Conference in 2003. One government considers that this provision could result in unwelcome interference by the authority concerned, especially in the poorer countries, while another considers that the question is a matter for national legislation.

*This question is included in Paragraph 3(d), which focuses on access for the parties concerned, in particular employers and workers, to appropriate and speedy*

*procedures and mechanisms for settling disputes concerning the existence and terms of an employment relationship.*

#### **14. Disputes settlement bodies**

The replies, which are broadly similar and affirmative, recall that the choice of competent body for settling disputes concerning employment relationships should be a matter for national legislation and practice. The employers' organizations emphasize that the body in question should be provided with the necessary means and have an independent and specific legal status, that it should not be burdened by an unduly lengthy litigation process, and that workers should enjoy easy access to it. One government mentions the role which the labour inspectorate can play in recording suitable indicators of the existence of an employment relationship.

*The question has given rise to Paragraph 12 of the proposed Recommendation.*

#### **15. Compliance and enforcement**

There is also very broad consensus with regard to problems of non-compliance with legislation concerning the employment relationship and the need for the instrument to provide for appropriate measures in response to them. For example, some respondents ask which will be the competent body in this area, or whether the application of such a provision will require the establishment of new institutions or a considerable extension and strengthening of existing labour inspection and administration institutions. Two governments indicate that in their countries, it is the social partners that are mainly responsible for enforcing laws and regulations in this area. Another government would prefer the Recommendation to use the term "compliance" instead of "enforcement". One employers' organization recalls that most if not all the problems evoked by governments during the general discussion in 2003 were due to inadequate enforcement, and suggests that the ILO's assistance in strengthening the capacity of States to enforce legislation might be more important than developing a new instrument.

One government emphasizes that the parties themselves must comply with labour legislation, a fact that is also referred to elsewhere. This aspect concerns the behaviour of the parties with regard to labour legislation, rather than the action needed to enforce legislation, and has a particular significance with regard to disguised employment relationships.

*Both these aspects are reflected in Paragraph 13 of the proposed Recommendation.*

#### **16. Civil and commercial contracts**

Views on this point were similar to those expressed in the replies to Question 6(2)(d).

*The replies to these two questions were taken into consideration for the purpose of drafting Paragraph 6 of the proposed text, which defines one of the bases of the national policy.*

### Collective bargaining, information and surveys, and the role of the ILO

Three provisions of the proposed Recommendation do not correspond directly to the questionnaire but to the conclusions of the general discussion which took place at the 91st Session of the Conference (2003);<sup>14</sup> those conclusions are mentioned in a number of replies. The provisions in question concern the promotion of the role of collective bargaining in helping to clarify the existence of the employment relationship and facilitating the implementation of labour legislation (Paragraph 14 of the proposed text), measures by Members to collect information and statistical data and to undertake research (Paragraph 17), and the role of the International Labour Office in bringing about international exchanges of information (Paragraph 18).

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*In order to facilitate comparisons between the Office comments and the proposed text of the Recommendation concerning the employment relationship, the following table indicates the correspondence between the replies to the questionnaire and relevant paragraphs of the proposed text.*<sup>15</sup>

**Table 2. Correspondence between the questionnaire and the proposed Recommendation**

Question in questionnaire	Paragraph of proposed text	Question in questionnaire	Paragraph of proposed text
1	–	6(2)(f)	Para. 3(e)
2	–	7	Para. 15
3(1)(a)	2nd "considering"	8	Para. 16
3(1)(b)	2nd "considering"	9(a)(b)(c)	Para. 16
3(1)(c)	2nd "considering"	10	–
3(2)	4th "considering"	11(1)	Para. 8
3(3)	5th "considering"	11(2), 11(3)	Para. 9
3(4)	6th "considering", Para. 4	12	Para. 11(b)
3(5)	Para. 5	13	Para. 3(b) and 10
3(6)	1st "considering"	14	Para. 12
4	Para. 1	15	Para. 3(e)
5	Para. 7	16	Para. 6
6(1)	Paras. 2 and 5		Para. 14
6(2)(a)	Paras. 3(a) and 10		Para. 17
6(2)(b)	Para. 3(b)		Para. 18
6(2)(c)	Para. 3(c)		

<sup>14</sup> See in particular paras. 18, 20 and 25 of the conclusions.

<sup>15</sup> Para. 14, 17 and 18 refer to the conclusions of the general discussion of 2003. See Report V(1), op. cit., paras. 18, 20 and 25 of Annex 2.

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<b>Question in questionnaire</b>	<b>Paragraph of proposed text</b>	<b>Question in questionnaire</b>	<b>Paragraph of proposed text</b>
6(2)(d)	Para. 6		
6(2)(e)	Para. 3(d)		

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