Document No. 1

Constitution of the ILO

Constitution of the International Labour Organization

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Contents

Constitution of the International Labour Organization

Preamble

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Editor's notes:

(1) The original text of the Constitution, established in 1919, has been modified by the amendment of 1922 which entered into force on 4 June 1934; the Instrument of Amendment of 1945 which entered into force on 26 September 1946; the Instrument of Amendment of 1946 which entered into force on 20 April 1948; the Instrument of Amendment of 1953 which entered into force on 20 May 1954; the Instrument of Amendment of 1962 which entered into force on 22 May 1963; the Instrument of Amendment of 1972 which entered into force on 1 November 1974; and the Instrument of Amendment of 1997 which entered into force on 8 October 2015.

(2) Equality for women and men in the world of work is a core value of the International Labour Organization. The resolution concerning gender equality and the use of language in legal texts of the ILO, adopted by the General Conference at its 100th Session, 2011, affirms that gender equality should be reflected through the use of appropriate language in official legal texts of the Organization and that, in the ILO Constitution and other legal texts of the Organization, the use of one gender includes in its meaning a reference to the other gender unless the context requires otherwise.

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization:

Chapter I. Organization

Article 1

Establishment and membership

1. A permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purposes of the International Labour Organization adopted at Philadelphia on 10 May 1944, the text of which is annexed to this Constitution.

2. The Members of the International Labour Organization shall be the States which were Members of the Organization on 1 November 1945 and such other States as may become Members in pursuance of the provisions of paragraphs 3 and 4 of this article.

3. Any original member of the United Nations and any State admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organization by communicating to the Director-General of the International Labour Office its formal acceptance of the obligations of the Constitution of the International Labour Organization.

4. The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two thirds of the delegates attending the session, including two thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director-General of the International Labour Office by the government of the new Member of its formal acceptance of the obligations of the Constitution of the Organization.

5. No Member of the International Labour Organization may withdraw from the Organization without giving notice of its intention so to do to the

Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any international labour Convention, such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto.

6. In the event of any State having ceased to be a Member of the Organization, its readmission to membership shall be governed by the provisions of paragraph 3 or paragraph 4 of this article as the case may be.

Article 2

Organs

The permanent organization shall consist of:

(a) a General Conference of representatives of the Members;

(b) a Governing Body composed as described in article 7; and

(c) an International Labour Office controlled by the Governing Body.

Article 3

Conference

1. The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members.

2. Each delegate may be accompanied by advisers, who shall not exceed two in number for each item on the agenda of the meeting. When questions specially affecting women are to be considered by the Conference, one at least of the advisers should be a woman.

3. Each Member which is responsible for the international relations of non-metropolitan territories may appoint as additional advisers to each of its delegates:

(a) persons nominated by it as representatives of any such territory in regard to matters within the self-governing powers of that territory; and

(b) persons nominated by it to advise its delegates in regard to matters concerning non-self-governing territories.

4. In the case of a territory under the joint authority of two or more Members, persons may be nominated to advise the delegates of such Members.

5. The Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.

6. Advisers shall not speak except on a request made by the delegate whom they accompany and by the special authorization of the President of the Conference, and may not vote.

7. A delegate may by notice in writing addressed to the President appoint one of his advisers to act as his deputy, and the adviser, while so acting, shall be allowed to speak and vote.

8. The names of the delegates and their advisers will be communicated to the International Labour Office by the government of each of the Members.

9. The credentials of delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two thirds of the votes cast by the delegates present, refuse to admit any delegate or adviser whom it deems not to have been nominated in accordance with this article.

Article 4

Voting rights

1. Every delegate shall be entitled to vote individually on all matters which are taken into consideration by the Conference.

2. If one of the Members fails to nominate one of the non-Government delegates whom it is entitled to nominate, the other non-Government delegate shall be allowed to sit and speak at the Conference, but not to vote.

3. If in accordance with article 3 the Conference refuses admission to a delegate of one of the Members, the provisions of the present article shall apply as if that delegate had not been nominated.

Article 5

Place of meetings of the Conference

The meetings of the Conference shall, subject to any decisions which may have been taken by the Conference itself at a previous meeting, be held at such place as may be decided by the Governing Body.

Article 6

Seat of the International Labour Office

Any change in the seat of the International Labour Office shall be decided by the Conference by a two thirds majority of the votes cast by the delegates present.

Article 7

Governing Body

1. The Governing Body shall consist of fifty-six persons:

(a) twenty-eight representing governments;

(b) fourteen representing the employers; and

(c) fourteen representing the workers.

2. Of the twenty-eight persons representing governments, ten shall be appointed by the Members of chief industrial importance, and eighteen shall be appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the ten Members mentioned above.

3. The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body. Any appeal made by a Member from the declaration of the Governing Body as to which are the

Members of chief industrial importance shall be decided by the Conference, but an appeal to the Conference shall not suspend the application of the declaration until such time as the Conference decides the appeal.

4. The persons representing the employers and the persons representing the workers shall be elected respectively by the Employers' delegates and the Workers' delegates to the Conference.

5. The period of office of the Governing Body shall be three years. If for any reason the Governing Body elections do not take place on the expiry of this period, the Governing Body shall remain in office until such elections are held.

6. The method of filling vacancies and of appointing substitutes and other similar questions may be decided by the Governing Body subject to the approval of the Conference.

7. The Governing Body shall, from time to time, elect from its number a chairperson and two vice-chairpersons, of whom one shall be a person representing a government, one a person representing the employers, and one a person representing the workers.

8. The Governing Body shall regulate its own procedure and shall fix its own times of meeting. A special meeting shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body.

Article 8

Director-General

1. There shall be a Director-General of the International Labour Office, who shall be appointed by the Governing Body, and, subject to the instructions of the Governing Body, shall be responsible for the efficient conduct of the International Labour Office and for such other duties as may be assigned to him.

2. The Director-General or his deputy shall attend all meetings of the Governing Body.

Article 9

Staff

1. The staff of the International Labour Office shall be appointed by the Director-General under regulations approved by the Governing Body.

2. So far as is possible with due regard to the efficiency of the work of the Office, the Director-General shall select persons of different nationalities.

3. A certain number of these persons shall be women.

4. The responsibilities of the Director-General and the staff shall be exclusively international in character. In the performance of their duties, the Director-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

5. Each Member of the Organization undertakes to respect the exclusively international character of the responsibilities of the Director-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 10

Functions of the International Labour Office

1. The functions of the International Labour Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international Conventions, and the conduct of such special investigations as may be ordered by the Conference or by the Governing Body.

2. Subject to such directions as the Governing Body may give, the Office shall:

(a) prepare the documents on the various items of the agenda for the meetings of the Conference;

(b) accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the

basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection;

(c) carry out the duties required of it by the provisions of this Constitution in connection with the effective observance of Conventions;

(d) edit and issue, in such languages as the Governing Body may think desirable, publications dealing with problems of industry and employment of international interest.

3. Generally, it shall have such other powers and duties as may be assigned to it by the Conference or by the Governing Body.

Article 11

Relations with governments

The government departments of any of the Members which deal with questions of industry and employment may communicate directly with the Director-General through the representative of their government on the Governing Body of the International Labour Office or, failing any such representative, through such other qualified official as the government may nominate for the purpose.

Article 12

Relations with international organizations

1. The International Labour Organization shall cooperate within the terms of this Constitution with any general international organization entrusted with the coordination of the activities of public international organizations having specialized responsibilities and with public international organizations having specialized responsibilities in related fields.

2. The International Labour Organization may make appropriate arrangements for the representatives of public international organizations to participate without vote in its deliberations.

3. The International Labour Organization may make suitable arrangements for such consultation as it may think desirable with recognized non-governmental international organizations, including international organizations of employers, workers, agriculturists and cooperators.

Article 13

Financial and budgetary arrangements

1. The International Labour Organization may make such financial and budgetary arrangements with the United Nations as may appear appropriate.

2. Pending the conclusion of such arrangements or if at any time no such arrangements are in force:

(a) each of the Members will pay the travelling and subsistence expenses of its delegates and their advisers and of its representatives attending the meetings of the Conference or the Governing Body, as the case may be;

(b) all other expenses of the International Labour Office and of the meetings of the Conference or Governing Body shall be paid by the Director-General of the International Labour Office out of the general funds of the International Labour Organization;

(c) the arrangements for the approval, allocation and collection of the budget of the International Labour Organization shall be determined by the Conference by a two thirds majority of the votes cast by the delegates present, and shall provide for the approval of the budget and of the arrangements for the allocation of expenses among the Members of the Organization by a committee of Government representatives.

3. The expenses of the International Labour Organization shall be borne by the Members in accordance with the arrangements in force in virtue of paragraph 1 or paragraph 2(c) of this article.

4. A Member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Conference, in the Governing Body, in any committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years provided that the Conference may by a two thirds majority of the votes cast by the delegates present permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

5. The Director-General of the International Labour Office shall be responsible to the Governing Body for the proper expenditure of the funds of the International Labour Organization.

Chapter II. Procedure

Article 14

Agenda and preparation for the Conference

1. The agenda for all meetings of the Conference will be settled by the Governing Body, which shall consider any suggestion as to the agenda that may be made by the government of any of the Members or by any representative organization recognized for the purpose of article 3, or by any public international organization.

2. The Governing Body shall make rules to ensure thorough technical preparation and adequate consultation of the Members primarily concerned, by means of a preparatory conference or otherwise, prior to the adoption of a Convention or Recommendation by the Conference.

Article 15

Transmission of agenda and reports for the Conference

1. The Director-General shall act as the Secretary-General of the Conference, and shall transmit the agenda so as to reach the Members four months before the meeting of the Conference, and, through them, the non-Government delegates when appointed.

2. The reports on each item of the agenda shall be despatched so as to reach the Members in time to permit adequate consideration before the meeting of the Conference. The Governing Body shall make rules for the application of this provision.

Article 16

Objections to agenda

1. Any of the governments of the Members may formally object to the inclusion of any item or items in the agenda. The grounds for such objection

shall be set forth in a statement addressed to the Director-General who shall circulate it to all the Members of the Organization.

2. Items to which such objection has been made shall not, however, be excluded from the agenda, if at the Conference a majority of two thirds of the votes cast by the delegates present is in favour of considering them.

3. If the Conference decides (otherwise than under the preceding paragraph) by two thirds of the votes cast by the delegates present that any subject shall be considered by the Conference, that subject shall be included in the agenda for the following meeting.

Article 17

Officers of the Conference, procedure and committees

1. The Conference shall elect a president and three vice-presidents. One of the vice-presidents shall be a Government delegate, one an Employers' delegate and one a Workers' delegate. The Conference shall regulate its own procedure and may appoint committees to consider and report on any matter.

2. Except as otherwise expressly provided in this Constitution or by the terms of any Convention or other instrument conferring powers on the Conference or of the financial and budgetary arrangements adopted in virtue of article 13, all matters shall be decided by a simple majority of the votes cast by the delegates present.

3. The voting is void unless the total number of votes cast is equal to half the number of the delegates attending the Conference.

Article 18

Technical experts

The Conference may add to any committees which it appoints technical experts without power to vote.

Article 19

Conventions and Recommendations

1. When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form:

(a) of an international Convention, or

(b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.

2. In either case a majority of two thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.

3. In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

4. Two copies of the Convention or Recommendation shall be authenticated by the signatures of the President of the Conference and of the Director-General. Of these copies one shall be deposited in the archives of the International Labour Office and the other with the Secretary-General of the United Nations. The Director-General will communicate a certified copy of the Convention or Recommendation to each of the Members.

5. In the case of a Convention:

(a) the Convention will be communicated to all Members for ratification;

(b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;

(c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;

(e) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

6. In the case of a Recommendation:

(a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them; and

(d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

7. In the case of a federal state, the following provisions shall apply:

(a) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal state shall be the same as those of Members which are not federal states;

(b) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall:

(i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action;

(ii) arrange, subject to the concurrence of the state, provincial or cantonal governments concerned, for periodical consultations between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal state coordinated action to give effect to the provisions of such Conventions and Recommendations;

(iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal state, provincial or cantonal authorities with particulars of

the authorities regarded as appropriate and of the action taken by them;

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;

(v) in respect of each such Recommendation, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

8. In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

9. Acting on a proposal of the Governing Body, the Conference may, by a majority of two thirds of the votes cast by the delegates present, abrogate any Convention adopted in accordance with the provisions of this article if it appears that the Convention has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the Organization.

Article 20

Registration with the United Nations

Any Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the

United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it.

Article 21

Conventions not adopted by the Conference

1. If any Convention coming before the Conference for final consideration fails to secure the support of two thirds of the votes cast by the delegates present, it shall nevertheless be within the right of any of the Members of the Organization to agree to such Convention among themselves.

2. Any Convention so agreed to shall be communicated by the governments concerned to the Director-General of the International Labour Office and to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations.

Article 22

Annual reports on ratified Conventions

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

Article 23

Examination and communication of reports

1. The Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of articles 19 and 22.

2. Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22.

Article 24

Representations of non-observance of Conventions

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

Publication of representation

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

Article 26

Complaints of non-observance

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall, if not already represented thereon, be entitled to send a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Article 27

Cooperation with Commission of Inquiry

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject matter of the complaint.

Article 28

Report of Commission of Inquiry

When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Article 29

Action on report of Commission of Inquiry

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.

2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission and if not,

whether it proposes to refer the complaint to the International Court of Justice.

Article 30

Failure to submit Conventions or Recommendations to competent authorities

In the event of any Member failing to take the action required by paragraphs 5(b), 6(b) or 7(b)(i) of article 19 with regard to a Convention or Recommendation, any other Member shall be entitled to refer the matter to the Governing Body. In the event of the Governing Body finding that there has been such a failure, it shall report the matter to the Conference.

Article 31

Finality of decisions of the International Court of Justice

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final.

Article 32

Effect of decisions of the International Court of Justice on findings or recommendations of Commission of Inquiry

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any.

Article 33

Failure to carry out recommendations of Commission of Inquiry or the International Court of Justice

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 34

Compliance with recommendations of Commission of Inquiry or the International Court of Justice

The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be, and may request it to constitute a Commission of Inquiry to verify its contention. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33.

Chapter III. General

Article 35

Application of Conventions to non-metropolitan territories

1. The Members undertake that Conventions which they have ratified in accordance with the provisions of this Constitution shall be applied to the non-metropolitan territories for whose international relations they are responsible, including any trust territories for which they are the administering authority, except where the subject matter of the Convention is within the self-governing powers of the territory or the Convention is inapplicable owing to the local conditions or subject to such modifications as may be necessary to adapt the Convention to local conditions.

2. Each Member which ratifies a Convention shall as soon as possible after ratification communicate to the Director-General of the International Labour Office a declaration stating in respect of the territories other than those referred to in paragraphs 4 and 5 below the extent to which it undertakes that the provisions of the Convention shall be applied and giving such particulars as may be prescribed by the Convention.

3. Each Member which has communicated a declaration in virtue of the preceding paragraph may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration and stating the present position in respect of such territories.

4. Where the subject matter of the Convention is within the self-governing powers of any non-metropolitan territory, the Member responsible for the international relations of that territory shall bring the Convention to the notice of the government of the territory as soon as possible with a view to the enactment of legislation or other action by such government. Thereafter the Member, in agreement with the government of the territory, may communicate to the Director-General of the International Labour Office a declaration accepting the obligations of the Convention on behalf of such territory.

5. A declaration accepting the obligations of any Convention may be communicated to the Director-General of the International Labour Office:

(a) by two or more Members of the Organization in respect of any territory which is under their joint authority; or

(b) by any international authority responsible for the administration of any territory, in virtue of the Charter of the United Nations or otherwise, in respect of any such territory.

6. Acceptance of the obligations of a Convention in virtue of paragraph 4 or paragraph 5 of this article shall involve the acceptance on behalf of the territory concerned of the obligations stipulated by the terms of the Convention and the obligations under the Constitution of the Organization which apply to ratified Conventions. A declaration of acceptance may specify such modification of the provisions of the Conventions as may be necessary to adapt the Convention to local conditions.

7. Each Member or international authority which has communicated a declaration in virtue of paragraph 4 or paragraph 5 of this article may from time to time, in accordance with the terms of the Convention, communicate a further declaration modifying the terms of any former declaration or terminating the acceptance of the obligations of the Convention on behalf of the territory concerned.

8. If the obligations of a Convention are not accepted on behalf of a territory to which paragraph 4 or paragraph 5 of this article relates, the Member or Members or international authority concerned shall report to the Director-General of the International Labour Office the position of the law and practice of that territory in regard to the matters dealt with in the Convention and the report shall show the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention

by legislation, administrative action, collective agreement or otherwise and shall state the difficulties which prevent or delay the acceptance of such Convention.

Article 36

Amendments to Constitution

Amendments to this Constitution which are adopted by the Conference by a majority of two thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two thirds of the Members of the Organization including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution.

Article 37

Interpretation of the Constitution and of Conventions

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.

Article 38

Regional Conferences

1. The International Labour Organization may convene such regional conferences and establish such regional agencies as may be desirable to promote the aims and purposes of the Organization.

2. The powers, functions and procedure of regional conferences shall be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation.

Chapter IV. Miscellaneous provisions

Article 39

Legal status of Organization

The International Labour Organization shall possess full juridical personality and in particular the capacity:

(a) to contract;

(b) to acquire and dispose of immovable and movable property;

(c) to institute legal proceedings.

Article 40

Privileges and immunities

1. The International Labour Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. Such privileges and immunities shall be defined in a separate agreement to be prepared by the Organization with a view to its acceptance by the States Members.

Annex

Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia)

The General Conference of the International Labour Organization, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organization and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:

(a) labour is not a commodity;

(b) freedom of expression and of association are essential to sustained progress;

(c) poverty anywhere constitutes a danger to prosperity everywhere;

(d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice, the Conference affirms that:

(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in

conditions of freedom and dignity, of economic security and equal opportunity;

(b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;

(c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;

(d) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;

(e) in discharging the tasks entrusted to it the International Labour Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:

(a) full employment and the raising of standards of living;

(b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;

(c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;

(d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement

of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(g) adequate protection for the life and health of workers in all occupations;

(h) provision for child welfare and maternity protection;

(i) the provision of adequate nutrition, housing and facilities for recreation and culture;

(j) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilization of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full cooperation of the International Labour Organization with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The Conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.

Document No. 2

Agreement between the United Nations and the ILO, 1946

INTERNATIONAL LABOUR OFFICE

OFFICIAL BULLETIN

20 December 1946 *Vol. XXIX, No. 6*

Protocol concerning the Entry into Force of the Agreement between the United Nations and the International Labour Organization

Article 57 of the Charter of the United Nations provides that specialized agencies established by intergovernmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields shall be brought into relationship with the United Nations. Article 63 of the Charter provides that the Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations, and specifies that such agreements shall be subject to approval by the General Assembly.

The International Labour Conference, meeting in its twenty-seventh session in Paris on 3 November 1945, adopted a resolution confirming the desire of the International Labour Organization to enter into relationship with the United Nations on terms, to be determined by agreement, which will permit the International Labour Organization, in which the representatives of workers and employers enjoy equal status with those of Governments, to co-operate fully for the attainment of the ends of the United Nations, while retaining the authority essential for the discharge of its responsibilities under the Constitution of the Organization and the Declaration of Philadelphia, and authorizing the Governing Body of the International Labour Office to enter, subject to the approval of the Conference, into such agreements with the appropriate authorities of the United Nations as might be necessary or desirable for this purpose.

The Economic and Social Council, during its first session, in January-February 1946, adopted a resolution establishing a Committee of the Council on Negotiations with Specialized Agencies which was directed to enter into negotiations as early as possible with the International Labour Organization.

Negotiations between the Committee on Negotiations with Specialized Agencies of the Economic and Social Council and the Negotiating Delegation of the International Labour Organization took place in New York on 28 and 29 May 1946 and resulted in an Agreement. This Agreement was signed on 30 May 1946 by Sir A. Ramaswami Mudaliar, President of the Economic and Social Council and Chairman of the Committee on Negotiations with Specialized Agencies, and Mr. G. Myrddin-Evans, Chairman of the Governing Body of the International Labour Office and of the Negotiating Delegation of the International Labour Organization.

On 21 June 1946, the Economic and Social Council, during its second session, unanimously recommended the Agreement between the United Nations and the International Labour Organization to the General Assembly for its approval.

Article XX of the Agreement provides that the Agreement shall come into force on its approval by the General Assembly of the United Nations and the General Conference of the International Labour Organization.

The Agreement was approved by the General Assembly of the United Nations on 14 December 1946 and by the General Conference of the International Labour Organization on 2 October 1946.

The Agreement accordingly came into force on 14 December 1946.

A copy of the authentic text of the Agreement is attached hereto.

IN FAITH WHEREOF we have appended our signatures this nineteenth day of December, one thousand nine hundred and forty-six, to two original copies of the present Protocol, the text of which consists of versions in the English and French languages which are equally authentic. One of the original copies will be filed and recorded with the Secretariat of the United Nations and the other will be deposited in the archives of the International Labour Office.

TRYGVE LIE,
Secretary-General of the United Nations

EDWARD PHELAN,
Director-General of the International Labour Office

Agreement between the United Nations and the International Labour Organization

Article 57 of the Charter of the United Nations provides that specialized agencies established by intergovernmental agreement and having wide international responsibilities as defined in their basic instruments in economic, social, cultural, educational, health and related fields shall be brought into relationship with the United Nations.

The International Labour Conference, meeting in its twenty-seventh session in Paris on 3 November 1945, adopted a resolution confirming the desire of the International Labour Organization to enter into relationship with the United Nations on terms to be determined by agreement.

Therefore, the United Nations and the International Labour Organization agree as follows:

ARTICLE I

The United Nations recognizes the International Labour Organization as a specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein.

ARTICLE II

Reciprocal representation

1. Representatives of the United Nations shall be invited to attend the meetings of the International Labour Conference (hereinafter called the Conference) and its committees, the Governing Body and its committees, and such general, regional or other special meetings as the International Labour Organization may convene, and to participate, without vote, in the deliberations of these bodies.

2. Representatives of the International Labour Organization shall be invited to attend meetings of the Economic and Social Council of the United Nations (hereinafter called the Council) and of its commissions and committees and to participate, without vote, in the deliberations of these bodies with respect to items on their agenda in which the International Labour Organization has indicated that it has an interest.

3. Representatives of the International Labour Organization shall be invited to attend, in a consultative capacity, meetings of the General Assembly and shall be afforded full opportunity for presenting to the General Assembly the views of the International Labour Organization on questions within the scope of its activities.

4. Representatives of the International Labour Organization shall be invited to attend meetings of the main committees of the General Assembly in which the International Labour Organization has an interest and to participate, without vote, in the deliberations thereof.

5. Representatives of the International Labour Organization shall be invited to attend the meetings of the Trusteeship Council and to participate, without vote, in the deliberations thereof with respect to items on the agenda in which the International Labour Organization has indicated that it has an interest.

6. Written statements of the Organization shall be distributed by the Secretariat of the United Nations to all Members of the General Assembly, the Council and its commissions and the Trusteeship Council as appropriate.

ARTICLE III

Proposal of agenda items

Subject to such preliminary consultation as may be necessary, the International Labour Organization shall include on the agenda of the Governing Body items proposed to it by the United Nations. Similarly, the Council and its commissions and the Trusteeship Council shall include on their agenda items proposed by the International Labour Organization.

ARTICLE IV

Recommendations of the General Assembly and of the Council

1. The International Labour Organization, having regard to the obligation of the United Nations to promote the objectives set forth in Article 55 of the Charter and the function and power of the Council, under Article 62 of the Charter, to make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters and to make recommendations concerning these matters to the specialized agencies concerned, and having regard also to the responsibility of the United Nations, under Articles 58 and 63 of the Charter, to make recommendations for the co-ordination of the policies and activities of such specialized agencies, agrees to arrange for the submission, as soon as possible, to the Governing Body, the Conference or such other organ of the International Labour Organization, as may be appropriate, of all formal recommendations which the General Assembly or the Council may make to it.

2. The International Labour Organization agrees to enter into consultation with the United Nations upon request, with respect to such recommendations, and in due course to report to the United Nations on the action taken, by the Organization or by its members, to give effect to such recommendations, or on the other results of their consideration.

3. The International Labour Organization affirms its intention of co-operating in whatever further measures may be necessary to make co-ordination of the activities of specialized agencies and those of the United Nations fully effective. In particular, it agrees to participate in, and to co-operate with, any body or bodies which the Council may establish for the purpose of facilitating such co-ordination, and to furnish such information as may be required for the carrying out of this purpose.

ARTICLE V

Exchange of information and documents

1. Subject to such arrangements as may be necessary for the safeguarding of confidential material, the fullest and promptest exchange of information and documents shall be made between the United Nations and the International Labour Organization.

2. Without prejudice to the generality of the provisions of paragraph 1:

(a) the International Labour Organization agrees to transmit to the United Nations regular reports on the activities of the International Labour Organization;

(b) the International Labour Organization agrees to comply to the fullest extent practicable with any request which the United Nations may make for the furnishing of special reports, studies or information, subject to the conditions set forth in Article XV; and

(c) the Secretary-General shall, upon request, consult with the Director regarding the provision to the International Labour Organization of such information as may be of special interest to the Organization.

ARTICLE VI

Assistance to the Security Council

The International Labour Organization agrees to co-operate with the Economic and Social Council in furnishing such information and rendering such assistance to the Security Council as that Council

may request including assistance in carrying out decisions of the Security Council for the maintenance or restoration of international peace and security.

Article VII

Assistance to the Trusteeship Council

The International Labour Organization agrees to co-operate with the Trusteeship Council in the carrying out of its functions and in particular agrees that it will, to the greatest extent possible, render such assistance as the Trusteeship Council may request, in regard to matters with which the Organization is concerned.

Article VIII

Non-self-governing territories

The International Labour Organization agrees to co-operate with the United Nations in giving effect to the principles and obligations set forth in Chapter XI of the Charter with regard to matters affecting the well-being and development of the peoples of non-self-governing territories.

Article IX

Relations with the International Court of Justice

1. The International Labour Organization agrees to furnish any information which may be requested by the International Court of Justice in pursuance of Article 34 of the Statute of the Court.

2. The General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.

3. Such request may be addressed to the Court by the Conference, or by the Governing Body acting in pursuance of an authorization by the Conference.

4. When requesting the International Court of Justice to give an advisory opinion, the International Labour Organization shall inform the Economic and Social Council of the request.

Article X

Headquarters and regional offices

1. The International Labour Organization, having regard to the desirability of the headquarters of specialized agencies being

situated at the permanent seat of the United Nations, and to the advantages that flow from such centralization, agrees to consult the United Nations before making any decision concerning the location of its permanent headquarters.

2. Any regional or branch offices which the International Labour Organization may establish shall, so far as practicable, be closely associated with such regional or branch offices as the United Nations may establish.

ARTICLE XI

Personnel arrangements

1. The United Nations and the International Labour Organization recognize that the eventual development of a single unified international civil service is desirable from the standpoint of effective administrative co-ordination, and, with this end in view, agree to develop common personnel standards, methods and arrangements designed to avoid serious discrepancies in terms and conditions of employment, to avoid competition in recruitment of personnel, and to facilitate interchange of personnel in order to obtain the maximum benefit from their services.

2. The United Nations and the International Labour Organization agree to co-operate to the fullest extent possible in achieving these ends and in particular they agree to:

(a) consult together concerning the establishment of an International Civil Service Commission to advise on the means by which common standards of recruitment in the secretariats of the United Nations and of the specialized agencies may be ensured;

(b) consult together concerning other matters relating to the employment of their officers and staff, including conditions of service, duration of appointments, classification, salary scales and allowances, retirement and pension rights and staff regulations and rules with a view to securing as much uniformity in these matters as shall be found practicable;

(c) co-operate in the interchange of personnel, when desirable, on a temporary or permanent basis, making due provision for the retention of seniority and pension rights;

(d) co-operate in the establishment and operation of suitable machinery for the settlement of disputes arising in connection with the employment of personnel and related matters.

Article XII

Statistical services

1. The United Nations and the International Labour Organization agree to strive for maximum co-operation, the elimination of all undesirable duplication between them, and the most efficient use of their technical personnel in their respective collection, analysis, publication and dissemination of statistical information. They agree to combine their efforts to secure the greatest possible usefulness and utilization of statistical information and to minimize the burdens placed upon national Governments and other organizations from which such information may be collected.

2. The International Labour Organization recognizes the United Nations as the central agency for the collection, analysis, publication, standardization and improvement of statistics serving the general purposes of international organizations.

3. The United Nations recognizes the International Labour Organization as the appropriate agency for the collection, analysis, publication, standardization and improvement of statistics within its special sphere, without prejudice to the right of the United Nations to concern itself with such statistics so far as they may be essential for its own purposes or for the improvement of statistics throughout the world.

4. The United Nations shall develop administrative instruments and procedures through which effective statistical co-operation may be secured between the United Nations and the agencies brought into relationship with it.

5. It is recognized as desirable that the collection of statistical information should not be duplicated by the United Nations or any of the specialized agencies whenever it is practicable for any of them to utilize information or materials which another may have available.

6. In order to build up a central collection of statistical information for general use, it is agreed that data supplied to the International Labour Organization for incorporation in its basic statistical series or special reports should, so far as practicable, be made available to the United Nations.

Article XIII

Administrative and technical services

1. The United Nations and the International Labour Organization recognize the desirability, in the interest of administrative and

technical uniformity and of the most efficient use of personnel and resources, of avoiding, whenever possible, the establishment and operation of competitive or overlapping facilities and services among the United Nations and the specialized agencies.

2. Accordingly, the United Nations and the International Labour Organization agree to consult together concerning the establishment and use of common administrative and technical services and facilities in addition to those referred to in Articles XI, XII and XIV, in so far as the establishment and use of such services may from time to time be found practicable and appropriate.

3. Arrangements shall be made between the United Nations and the International Labour Organization in regard to the registration and deposit of official documents.

Article XIV

Budgetary and financial arrangements

1. The International Labour Organization recognizes the desirability of establishing close budgetary and financial relationships with the United Nations in order that the administrative operations of the United Nations and of the specialized agencies shall be carried out in the most efficient and economical manner possible, and that the maximum measure of co-ordination and uniformity with respect to these operations shall be secured.

2. The United Nations and the International Labour Organization agree to co-operate to the fullest extent possible in achieving these ends and, in particular, shall consult together concerning the desirability of making appropriate arrangements for the inclusion of the budget of the Organization within a general budget of the United Nations. Any such arrangements which may be made shall be defined in a supplementary agreement between the two organizations.

3. In the preparation of the budget of the International Labour Organization the Organization shall consult with the United Nations.

4. The International Labour Organization agrees to transmit its proposed budget to the United Nations annually at the same time as such budget is transmitted to its members. The General Assembly shall examine the budget or proposed budget of the Organization and may make recommendations to it concerning any item or items contained therein.

5. Representatives of the International Labour Organization shall be entitled to participate, without vote, in the deliberations of the General Assembly or any committee thereof at all times when

the budget of the Organization or general administrative or financial questions affecting the Organization are under consideration.

6. The United Nations may undertake the collection of contributions from those members of the International Labour Organization which are also Members of the United Nations in accordance with such arrangements as may be defined by a later agreement between the United Nations and the International Labour Organization.

7. The United Nations shall, upon its own initiative or upon the request of the International Labour Organization, arrange for studies to be undertaken concerning other financial and fiscal questions of interest to the Organization and to other specialized agencies with a view to the provision of common services and the securing of uniformity in such matters.

8. The International Labour Organization agrees to conform as far as may be practicable to standard practices and forms recommended by the United Nations.

ARTICLE XV

Financing of special services

1. In the event of the International Labour Organization being faced with the necessity of incurring substantial extra expense as a result of any request which the United Nations may make for special reports, studies or assistance in accordance with Articles V, VI or VII or with other provisions of this agreement, consultation shall take place with a view to determining the most equitable manner in which such expense shall be borne.

2. Consultation between the United Nations and the International Labour Organization shall similarly take place with a view to making such arrangements as may be found equitable for covering the costs of central administrative, technical or fiscal services or facilities or other special assistance provided by the United Nations.

ARTICLE XVI

Inter-agency agreements

The International Labour Organization agrees to inform the Council of the nature and scope of any formal agreement between the International Labour Organization and any other specialized agency or intergovernmental organization and in particular agrees to inform the Council before any such agreement is concluded.

ARTICLE XVII

Liaison

1. The United Nations and the International Labour Organization agree to the foregoing provisions in the belief that they will contribute to the maintenance of effective liaison between the two organizations. They affirm their intention of taking whatever further measures may be necessary to make this liaison fully effective.

2. The liaison arrangements provided for in the foregoing articles of this Agreement shall apply as far as appropriate to the relations between such branch or regional offices as may be established by the two organizations as well as between their central machinery.

ARTICLE XVIII

Implementation of the Agreement

The Secretary-General and the Director may enter into such supplementary arrangements for the implementation of this Agreement as may be found desirable in the light of the operating experience of the two organizations.

ARTICLE XIX

Revision

This Agreement shall be subject to revision by agreement between the United Nations and the International Labour Organization.

ARTICLE XX

Entry into force

This Agreement shall come into force on its approval by the General Assembly of the United Nations and the General Conference of the International Labour Organization.

Document No. 3

United Nations General Assembly Resolution 50(I) of 14 December 1946

Takes note of the action of the Council to place certain non-governmental organizations in category *(a)*;

Expresses agreement with the general principle that all non-governmental organizations in category *(a)* should receive equal treatment in respect of consultative arrangements with the Council.

Sixty-sixth plenary meeting,
15 December 1946.

50 (I). Agreements with Specialized Agencies[1]

The General Assembly,

Whereas agreements entered into by the Economic and Social Council with certain specialized agencies are now before the General Assembly for approval:

Resolves to approve the agreements with the International Labour Organization,[2] the United Nations Educational, Scientific and Cultural Organization,[3] the Food and Agriculture Organization of the United Nations[4] and the International Civil Aviation Organization,[5] provided that, in the case of the agreement with the International Civil Aviation Organization, that Organization complies with any decision of the General Assembly regarding Franco Spain.

Furthermore, considering it essential that the policies and activities of the specialized agencies and of the organs of the United Nations should be co-ordinated:

Requests the Economic and Social Council to follow carefully the progress of such collaboration;

Instructs the Economic and Social Council to report on this question to the General Assembly within the space of three years, so as to keep the Assembly informed and in order that the Council and the General Assembly may, if necessary, and after consultation with the said agencies, formulate suitable proposals for improving such collaboration.

Sixty-fifth plenary meeting,
14 December 1946.

51. (I). Transfer to the United Nations of certain non-political Functions and Activities of the League of Nations, other than those pursuant to International Agreements

In accordance with the resolution adopted by the General Assembly on 12 February 1946 and the resolution adopted by the Economic and Social Council on 16 February 1946, the Secretary-

[1] See also a resolution adopted on the report of the Fifth Committee (page 148).
[2] Document A/72.
[3] Documents A/77, A/77/Corr. 1 and A/77/Corr. 2.
[4] Document A/78.
[5] Documents A/106 and A/106/Corr. 1.

Prend acte de la décision du Conseil de classer un certain nombre d'organisations non gouvernementales dans la catégorie *a*);

Approuve le principe suivant lequel on réservera à toutes les organisations non gouvernementales classées dans la catégorie *a*) le même régime en ce qui concerne les modalités de consultations avec le Conseil.

Soixante-sixième séance plénière,
le 15 décembre 1946.

50 (I). Accords avec les institutions spécialisées[1]

L'Assemblée générale,

Considérant que les accords conclus par le Conseil économique et social avec certaines institutions spécialisées sont actuellement soumis à l'approbation de l'Assemblée,

Décide d'approuver les accords avec l'Organisation internationale du Travail[2], l'Organisation des Nations Unies pour l'éducation, la science et la culture[3], l'Organisation des Nations Unies pour l'alimentation et l'agriculture[4], et l'Organisation de l'aviation civile internationale[5], sous réserve, en ce qui touche l'accord avec l'Organisation de l'aviation civile internationale, que cette Organisation se conforme à toute décision de l'Assemblée générale concernant l'Espagne franquiste.

Considérant d'autre part que la coordination des programmes et des activités des institutions spécialisées et de ceux des organes des Nations Unies est essentielle,

Demande au Conseil économique et social de suivre attentivement le développement de cette collaboration;

Charge le Conseil économique et social de faire rapport sur cette question à l'Assemblée générale dans le délai de trois ans, afin d'informer l'Assemblée, et de façon que le Conseil et l'Assemblée puissent, s'il y a lieu, et après consultation avec ces institutions, formuler les propositions appropriées en vue d'améliorer cette collaboration.

Soixante-cinquième séance plénière,
le 14 décembre 1946.

51 (I). Transfert aux Nations Unies de certaines fonctions et activités non politiques de la Société des Nations autres que celles lui appartenant en vertu d'accords internationaux

Conformément à la résolution adoptée par l'Assemblée générale le 12 février 1946 et à la résolution adoptée par le Conseil économique et social le 16 février 1946, le Secrétaire général a

[1] Voir aussi une résolution adoptée par la Cinquième Commission (page 148).
[2] Document A/72.
[3] Documents A/77, A/77/Corr. 1 et A/77/Corr. 2.
[4] Document A/78.
[5] Documents A/106 et A/106/Corr. 1.

Document No. 4

ILC, 32nd Session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, Official Bulletin, vol. XXXII, 1949, pp. 338–339

Proceedings of the Conference

The 32nd Session of the International Labour Conference was held at Geneva from 8 June-2 July 1949.

The texts adopted by the Conference in the course of this session are published in the *Official Bulletin,* Vol. XXXII, No. 3, 15 August 1949.[4]

The International Labour Office has also published the *Record of Proceedings* of the 32nd Session of the Conference, comprising the lists of members of the delegations and of committees, the officers and secretariat of the Conference, the stenographic record of the discussions, as well as appendices containing the documents and reports of the Conference committees and the texts adopted by the Conference.

The letters communicating these texts to the governments of States Members are reproduced on pages 341-343.

Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions

(Adopted by the International Labour Conference at Its 32nd Session[5])

Whereas the Agreement between the United Nations and the International Labour Organisation authorises the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies, and provides that such request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorisation by the Conference ; and

Whereas it is desirable that the Governing Body of the International Labour Office should be authorised to address to the International Court of Justice requests for advisory opinions ;

The General Conference of the International Labour Organisation, having been convened at Geneva by the Governing Body of the International Labour Office, and

Having met in its 32nd Session on 8 June 1949,

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[4] With the exception of two texts reproduced below (pp. 338-340).

[5] This resolution was submitted to the Conference in accordance with a decision taken by the Governing Body at its 107th Session. See *Official Bulletin,* Vol. XXXI, No. 3, 31 Dec. 1948, p. 211.

Hereby, this twenty-seventh day of June 1949, authorises the Governing Body of the International Labour Office to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the International Labour Organisation other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies.

Document No. 5

Letter of the Worker Vice-Chairperson of the ILO Governing Body to the ILO Director-General, dated 12 July 2023

To:
Mr Gilbert Houngbo, Director-General
International Labour Office
Route des Morillons, 4
CH – 1211 Geneva, Switzerland

Re: Referral of an interpretation dispute to the International Court of Justice under article 37(1) of the ILO Constitution

Dear Director General,

As already announced during the 347th Session (March 2023) of Governing Body Session, we are writing with respect to the long-standing dispute over the interpretation of International Labour Organisation (ILO) Convention 87 (Freedom of Association and Protection of the Right to Organise Convention), one of its fundamental Conventions, in relation to the right to strike.

In conformity with the International Labour Organisation's constitutional theory and practice, and in the interest of obtaining legal certainty and preserving the integrity and credibility of the Organization's supervisory system, we hereby submit a formal request to refer the matter urgently to the International Court of Justice (ICJ) for decision.

Despite multiple efforts of the tripartite constituents over the last many years to resolve this issue through social dialogue, no negotiated outcome proved possible and there is no reason to believe that further social dialogue will or can break this impasse.

We firmly believe that the ICJ as the principal judicial organ of the United Nations is best placed and equipped to provide the ILO and its constituents the much-needed authoritative guidance and legal certainty to robustly fulfil its mandate of social justice. Consistent with well-established constitutional practice, we are committed to accepting the binding nature of the ICJ's advisory opinion to provide for the final settlement of this dispute.

One hundred years after the landmark advisory opinion No.1 of the Permanent Court of International Justice on the nomination of the Workers' delegate at the third session of the Conference, and some ninety years after the advisory opinion on the interpretation of the Night Work (Women) Convention, the Organization should not hesitate to place once again its trust and confidence in the World Court.

In view of the above considerations, we recommend that the following questions be put to the ICJ for an advisory opinion:

1. **Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?**

2. **Was the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the ILO competent to:**

   (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and

   (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?

Accordingly, we would request the Office to take all necessary steps to:

(i) place an item on the agenda of the 349th Governing Body Session, for discussion and decision, regarding the request to the ICJ for an advisory opinion on the above questions, based on article 37 (1) of the ILO Constitution;

(ii) prepare a comprehensive Office report to facilitate an informed decision by the Governing Body in that session;

(iii) bring this communication as well as the Office report as soon as possible to the attention of all constituent groups and Member States of the ILO for any comments they may wish to transmit ahead of the 349th Governing Body Session.

Fully aware that the Governing Body is empowered to request an advisory opinion to the ICJ and mindful of the significance to have recourse to article 37 of the Constitution, we strongly believe that the Governing Body should now take swift action and decide on the referral at its next session in November 2023.

In anticipation of the Governing Body discussion and decision, we would also request that the matter should be referred to the ICJ for an urgent procedure, to the extent possible, and that international workers' and employers' organizations should be allowed to participate fully and autonomously in the proceedings in recognition of the ILO's unique tripartite structure.

Finally, to avoid any doubt as to the position of the Workers' Group on this matter, we confirm our strong conviction, supported by the long standing practice of the supervisory bodies of the ILO, that the right to strike is an intrinsic and indispensable corollary of freedom of association and the right to organise and therefore is protected under ILO Convention 87 and the Constitution of the ILO. This implies that the supervision of the application of the right to strike and the conditions of its exercise are in our view rightly within the mandate of the CEACR.

Thank you for confirming at your earliest convenience that this communication will be submitted to the Governing Body for its consideration and also that the Office will make all necessary arrangements in time for facilitating the Governing Body discussion, including by making available relevant background information.

Amstelveen, Netherlands, 12 July 2023

On behalf of the Workers' Group in the ILO

Kind regards,

Catelene Passchier
Chairperson Workers' Group and Vice-Chairperson Governing Body of the ILO

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E: catelene.passchier@fnv.nl

International Labour Organization

ilo.org | Twitter | Facebook | LinkedIn | Instagram

Document No. 6

Letter of the Permanent Representative of Spain to the International Organizations in Geneva to the ILO Director-General transmitting a letter on behalf of the EU Member States and Iceland and Norway, dated 14 July 2023

REPRESENTACIÓN PERMANENTE DE ESPAÑA
ANTE LAS ORGANIZACIONES INTERNACIONALES
GINEBRA
La Embajadora Representante Permanente

Ginebra, 14 de Julio de 2023

Sr. Gilbert F. Houngbo
Director General
Organización Internacional del Trabajo (OIT)
Ginebra

Estimado Director General,

Adjunto le remito carta en nombre de los Estados miembros de la Unión Europea, así como de Noruega e Islandia, países pertenecientes al Espacio Económico Europeo, por la que le solicitamos que se incluya en el orden del día de la 349ª reunión del Consejo de Administración un punto relativo a la remisión a la Corte Internacional de Justicia de la cuestión relativa a la interpretación del Convenio nº 87 de la OIT sobre la libertad sindical y la protección del derecho de sindicación en lo que se refiere al derecho de huelga.

Para fundamentar la decisión del Consejo de Administración, solicitamos a la Oficina que prepare un informe exhaustivo que contenga todos los elementos necesarios, incluidas la(s) cuestión(es) de interpretación que deben considerarse para su remisión al Tribunal.

Reciba un cordial saludo,

Aurora Díaz-Rato

EUROPEAN UNION

Permanent Delegation to the United Nations Office
and other international organisations in Geneva

U-23
PRESIDENCIA ESPAÑOLA

Geneva, 14 July 2023

Dear Director-General,

The EU and its Member States, and the EFTA countries Iceland and Norway, members of the European Economic Area, are following up on the discussions at the 347th Governing Body and the decision point adopted on the 'Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty (GB.347/INS/5)'. We would like to request that, as a matter of utmost importance, an item concerning the referral to the International Court of Justice (ICJ) of the dispute relating to the interpretation of ILO Convention (No. 87) on Freedom of Association and Protection of the Right to Organise as regards the right to strike be placed on the agenda of the 349th Session of the Governing Body as a point for decision.

We note that several attempts have been made by the tripartite constituents to overcome the longstanding dispute, including through social dialogue. Despite these efforts, a consensual outcome has not been achieved. Where disputes on legal interpretation continue, legal dispute settlement should be sought, as provided for in Article 37(1) of the ILO Constitution, which will offer a straightforward solution and a guarantee of integrity and independence. Without legal certainty this dispute will continue to have a detrimental impact on the supervisory system, the credibility of the ILO as a standard setting agency in the UN system and beyond, as well as on the effective implementation of the international labour standards. After more than a decade of failed attempts to find a solution, having legal clarity has become a matter of urgency.

In view of the above, and in line with our long-standing position reiterated during the 347th Governing Body, we request that this item be placed on the agenda of the 349th Governing Body. To inform the decision of the Governing Body, we ask the Office to prepare a comprehensive report containing all necessary elements, including the question(s) of interpretation to be considered for referral to the Court.

Due to the utmost institutional importance of this persistent interpretation dispute, we also ask the Office to circulate this letter as soon as possible to all constituents of the International Labour Organization ahead of the Governing Body discussions.

Yours faithfully,

H.E. Ms Lotte Knudsen
Ambassador
Permanent Representative of the European Union to the United Nations in Geneva

H.E. Ms Aurora Díaz-Rato Revuelta
Ambassador
Permanent Representative of Spain to the United Nations in Geneva

Document No. 7

Letter of the Minister of Labor and Employment of Brazil to the ILO Director-General, dated 13 July 2023

Permanent Mission of Brazil to the United Nations Office and other international organizations in Geneva
Chemin Camille-Vidart, 15, 1202 Geneva – Switzerland
Phone: (+41)(0) 22 3325000 /Fax: (+41) (0)229100751
E-mail: delbrasgen@itamaraty.gov.br

N° 340/ 2023

The Permanent Mission of Brazil to the United Nations Office in Geneva presents its compliments to the International Labor Organization (ILO) and has the honor to convey herewith, in attachment, the content of a letter from the Minister of Labor and Employment, Luiz Marinho, addressed to Director-General Gilbert Houngbo, in support of the Workers' Group formal request to place an item on the agenda of the 349th session of the Governing Body concerning the referral of an interpretation dispute (right to strike in ILO Convention 87) to the International Court of Justice under article 37(1) of the ILO Constitution.

2. The Permanent Mission of Brazil avails itself of this opportunity to renew the assurances of its highest consideration.

DELEGAÇÃO DO BRASIL JUNTO À ONU
ORDEM E PROGRESSO
GENEBRA

Geneva, July 14th, 2023

International Labor Office
Cabinet of the Director General
Route des Morillons, 4, 1211, Geneva
cabinet@ilo.org ; reloff@ilo.org

ATTACHMENT

CONTENT OF THE LETTER FROM THE MINISTER OF LABOR AND EMPLOYMENT OF BRAZIL, LUIZ MARINHO

Request to place an item on the 349th session of the Governing Body concerning the referral of an interpretation dispute to the International Court of Justice under article 37(1) of the ILO Constitution.

Dear Director-General,

Brazil herewith requests that, as a matter of urgency, an item be placed on the agenda of the 349th Session of the Governing Body for debate and decision concerning the referral to the International Court of Justice (ICJ) of the long standing dispute relating to the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (N° 87) as regards the right to strike.

To facilitate the Governing Body discussion and decision-making, we also request the Office to prepare a comprehensive report containing all necessary elements to be considered for referral to the Court, including the questions to be raised to the ICJ.

Several attempts have been made by the tripartite constituents to overcome the longstanding dispute, including through social dialogue. Despite these efforts, a consensual outcome has not been achieved. Since disputes on legal interpretation continue, the Organization should avail itself of the constitutional procedure provided for in Article 37(1) of the ILO Constitution and put the matter before the International Court of Justice. Governments require legal certainty regarding all their obligations under Convention 87 and in terms of the supervision of its application by the Committee of Experts.

We understand that without legal certainty this dispute will continue to have a harmful impact on the supervisory system, the credibility of the ILO as a standard-setting agency in the UN system and beyond, as well as on the effective implementation of international labour standards.

Considering the institutional impact of this persistent interpretation dispute and the urgent need to resolve it, we also ask the Office to circulate this letter as soon as possible to all ILO constituents ahead of the Governing Body discussion.

We would appreciate receiving confirmation that necessary action has been undertaken in response to the present letter.

Brasília, June 13, 2023

LUIZ MARINHO
Minister of Labor and Employment of Brazil

Document No. 8

Letter of the Minister of Employment and Labour of the Republic of South Africa to the ILO Director-General, dated 14 July 2023

MINISTRY
EMPLOYMENT AND LABOUR
REPUBLIC OF SOUTH AFRICA

Department of Employment and Labour, Laboria House, 215 Francis Baard Street PRETORIA Tel (012) 392 9628 Fax: (012) 320 1942
Private Bag X9090 CAPE TOWN, 8001 RSA 12th Floor 120 Plain Street CAPE TOWN Tel: 021 466 7160 Fax: 021 462 2832
www.labour.gov.za

Mr GF Houngbo
The Director General
International Labour Organization
4 route des Morillons
CH-1211, Geneva,
SWITZERLAND

Dear Mr Houngbo,

RE: SUPPORT FOR THE WORKERS' GROUP PROPOSAL ON THE RIGHT TO STRIKE

I hope this letter finds you well. I am writing to you to express full support for the proposal put forth by the Workers' Group regarding the interpretation of Convention 87 (Freedom of Association and Protection of the Right to Organise Convention) concerning the right to strike.

As you are aware, the Workers' Group has formally requested the urgent referral of this matter to the International Court of Justice (ICJ) to bring about legal certainty and preserve the integrity and credibility of the ILO's supervisory system. During the Governing Body session held in March, it was evident that consensus could not be reached on a procedural framework for such referrals.

Therefore, as the Government of the Republic of South Africa, we unreservedly support the Workers' Group's call for an urgent discussion about referring the case to the ICJ and for including the matter on the agenda of the upcoming 349th Governing Body Session in November 2023.

For our country, labour rights, particularly the right to strike and freedom of association, are extremely important. Our Constitution, along with various pieces of legislation such as the Labour Relations Act (LRA), enshrines and protects these fundamental socio-economic rights. These rights play a crucial role in safeguarding workers' interests and fostering a fair and balanced relationship between employers and employees.

Furthermore, it is our firm belief that resolving the matter concerning the right to strike is essential in our ongoing efforts to ensure better protection of labour rights all over the world. While we recognise the significance of social dialogue and collective bargaining as the ultimate objectives, the current uncertainty surrounding the interpretation of Convention 87 means that workers are deprived of their most potent tool in the event of industrial disputes.

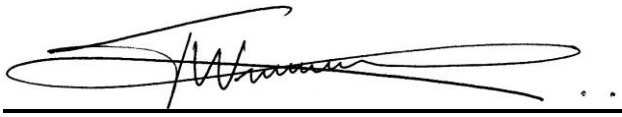
We kindly request that you convey our Government's unwavering support to the Workers' Group and assure them of our commitment to working collaboratively with all the ILO Constituents. We believe that a unified stance from everyone will strengthen our commitment to protect the most vulnerable among us and advance social justice in the world of work.

We further underscore the urgent need to address the lack of legal certainty regarding the interpretation of Convention 87. We also think that the ICJ is better positioned to assist us resolve this long-standing matter.

In conclusion, we express our gratitude for your efforts in advancing the cause of workers' rights and ensuring a fair and equitable global labour landscape. We trust that the ILO will continue to play a pivotal role in promoting social justice and protecting the rights of workers worldwide.

Thank you for your attention to this matter. We look forward to continued cooperation with the ILO and its Constituents.

Yours Sincerely,



MR TW NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
REPUBLIC OF SOUTH AFRICA

DATE: 14 JULY 2023

Document No. 9

Letter of the Minister of Labour, Employment and Social Security of Argentina to the ILO Director-General, dated 14 July 2023

Argentine Republic
National Executive Power 1983–2023
40 YEARS OF DEMOCRACY

Note

No.: NO-2023-81872752-APN-MT

CITY OF BUENOS AIRES
Friday, 14 July 2023

Reference: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87): Referral to the International Court of Justice – Right to strike

To: Gilbert F. Houngbo (International Labour Office (ILO)),

With copy to:

Dear Director-General,

I have the pleasure to write to you, in my capacity as Minister of Labour, Employment and Social Security of the Argentine Republic, in relation to the letter addressed to you by the Workers' group of the ILO concerning a request for a referral to the International Court of Justice for an advisory opinion on the scope of the provisions of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike.

In this connection, I wish to express my support for the request made by the Worker Vice-Chairperson of the Governing Body on behalf of the Workers' group of the ILO that an item be placed, as a matter of urgency, on the agenda of the 349th Session of the Governing Body for discussion and decision on a referral to the International Court of Justice (ICJ) of the longstanding dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike. To facilitate the discussion and decision-making of the Governing Body, the Office was also requested to prepare a comprehensive report containing all the necessary elements to be considered for a referral to the Court, including the questions to be put to the ICJ.

The tripartite constituents have made various attempts to resolve the prolonged interpretation dispute, including through social dialogue. Despite these efforts, no consensus-based outcome has been achieved. In the event that the dispute over the legal interpretation persists, the Organization must have recourse to the constitutional procedure set out in article 37, paragraph 1, of the ILO Constitution and refer the matter to the International Court of Justice. Governments need legal certainty in relation to all of their obligations under Convention No. 87 and to the supervision of its application by the

Committee of Experts on the Application of Conventions and Recommendations. Without legal certainty, this dispute will continue to have a detrimental effect on the supervisory system, on the credibility of the ILO as a standard-setting body within and outside the United Nations system, and on the effective application of international labour standards.

Taking into account the institutional impact of this persistent interpretation dispute and the urgent need to resolve it, the Office is also requested to transmit this letter as soon as possible to all ILO constituents before the Governing Body's discussion.

Lastly, I wish to note that, throughout the prolonged debate on this subject, the Argentine Republic has continuously maintained three clear positions:

I. In relation to the successive discussions of this matter in which divergent positions have been expressed, and with a view to providing the international community with greater certainty on the scope of Convention No. 87, the Argentine Republic has maintained that it is advisable to refer the matter to the International Court of Justice pursuant to article 37, paragraph 1, of the ILO Constitution for final decision.

II. Furthermore, when the discussion focused on the need for a special procedure to seize the International Court of Justice, the Argentine Republic stated that that was unnecessary, and that a clear request from a Member State or a group of Employers or Workers of the International Labour Organization was sufficient, as under article 37, paragraph 1, they have the right without any prior formalities, and subject only to the approval of the Governing Body in accordance with the required majority.

III. Without prejudice to all of the foregoing, in the various scenarios that have been discussed, the Argentine Republic has always maintained that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), contains the right to strike, in accordance with Articles 3 and 10 of this international instrument.

In the light of the above, I would be grateful to receive confirmation that the necessary measures have been taken in response to this letter.

I take this opportunity to renew to you the expression of my highest consideration.

Raquel Cecilia Kismer

Minister

Ministry of Labour, Employment and Social Security

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Date: 2023.07.14 19:59:12 -03:00

Document No. 10

Letter of the Employer Vice-Chairperson of the ILO Governing Body to the ILO Director-General, dated 2 August 2023

2 August 2023

Mr Gilbert Houngbo
Director General
International Labour Organisation
Route de Morillons
CH-1211 Geneva
Switzerland

Dear Director General,

Re: Letter dated 13 July 2023

I hereby acknowledge receipt of your letter dated 13 July 2023 regarding the communication of 12 July signed by Worker Vice-Chairperson of the Governing Body ('Workers' communication') which contains a formal request to refer the "*long-standing dispute over the interpretation of … Convention 87 … in relation to the right to strike"* urgently to the International Court of Justice for decision.

We take note that the Workers' communication in this context requests the Office to take all necessary steps to:

(i) place an item on the agenda of the 349th Governing Body Session, for discussion and decision, regarding the request to the ICJ for an advisory opinion on the above questions, based on article 37 (1) of the ILO Constitution;

(ii) prepare a comprehensive Office report to facilitate an informed decision by the Governing Body in that session;

(iii) bring this communication as well as the Office report as soon as possible to the attention of all constituent groups and Member States of the ILO for any comments they may wish to transmit ahead of the 349th Governing Body Session.

While we acknowledge the Workers' requests which they have announced their intention already during the March GB session, we oppose them for the following reasons:

First, according to Art. 3.1.1. of the Standing Orders of the Governing Body "*the agenda of each session shall be drawn up by a tripartite screening group composed of the Officers' of the Governing Body, the Chairperson of the Government group, the regional coordinators representing the governments, the secretaries of the Employers' and the Workers' groups, or their representative*. Furthermore, Art. 3.1.3 of the Standing Orders states that "*The provisional agenda may be updated for any urgent matter arising between sessions by the Officers of the Governing Body following consultations with the other members of the tripartite screening group referred to in paragraph 3.1.1*." (emphasis added). As a matter of fact, the provisional agenda agreed by consensus at the last screening group meeting held on 4th May does not contain any item concerning Article 37 of the ILO Constitution, right to strike or Convention 87. The proposed INS 7 item regarding the "Work plan on the strengthening of the supervisory system" only deals with representations submitted under Article 24 and

reporting under Article 22 of the ILO Constitution. Based on the above articles in the Standing Orders of the Governing Body, before making a decision on the possible updating of the provisional agenda, the Officers must have adequate time and opportunity to properly consult with the other members of the tripartite screening group. Only once this condition has been met, an Officers' meeting for updating the provisional agenda may be scheduled.

Second, we note that during the discussion at the March 2023 Governing Body, the groups were very divided on the procedural framework on Art 37 proposed to be used to solve the "right to strike" issue. A vote called by the Chairperson on this procedural framework was called off in the last moment. As one government declared, *"it was not ready to vote on such a complex and technical issue that required extensive discussion and negotiation."* Consequently, the Governing Body decided "*to defer the consideration of item GB 347/INS/5 to a future session*", without specifying a particular session. We noted from the Workers' communication, that the matter of a procedural framework on Article 37 is obviously no longer pursued and that now a referral of the matter to the ICJ is suggested without having established such a procedural framework. We would nevertheless point out that the complexity and the political brisance of the possible use of Article 37 in the case of the "right to strike" have not disappeared in the meantime. As also stressed by some governments in the March debate, we reiterate the need to find a solution within the framework of social dialogue, based on established rules and involving all the tripartite components of the organization as represented in the International Labour Conference. We continue to strongly believe that the issue of the "right to strike", which falls within the ILO's core competence, cannot simply be given out of hand and left to an external institution to decide. In our view, future deliberations by the Governing Body on this matter must therefore primarily incorporate ILO-internal options. Only such options, which inevitably involve compromises and for this reason may not be considered ideal by some, offer a prospect of broad acceptance and sustainability.

Accordingly, we kindly request the Director General to:

(i) place an item on the agenda of the 350th Governing Body Session regarding proposals on further steps to ensure legal certainty on the interpretation of the "right to strike" in the context of the Freedom of Association and Protection of the Right to Organisation Convention 1948 (No. 87);

(ii) request the Office to prepare a note that examines in detail all possible proposals to resolve the existing interpretation issue on the "right to strike" through social dialogue within the framework of established ILO procedures and rules;

(iii) invite all tripartite constituents in the ILO member States to submit their comments in this regard prior to the 350th Governing Body Session; and

(iv) transmit this letter with all constituent groups and Member States of the ILO for their consideration.

We appreciate your intervention on this important matter, and we look forward to receiving any updates on this regard.

Yours faithfully,

Renate Hornung-Draus
Chairperson of the Employers' Group and Vice-Chair of the Governing Body

Document No. 11

Letter of the Ambassador and Permanent Representative of Barbados to the United Nations Office at Geneva to the ILO Director-General, dated 4 August 2023

PERMANENT MISSION OF BARBADOS TO
THE UNITED NATIONS OFFICE AT GENEVA
18A Chemin François-Lehmann
Tel. (+41 22) 791 85 00
Fax. (+41 22) 920 98 58
Email: geneva@foreign.gov.bb

Mr. Gilbert Houngbo
Director-General
International Labour Office
4 route des Morillons
CH–1211, Geneva 22
Switzerland

August 4, 2023

Request to place an item on the 349th session of the Governing Body: Referral of an interpretation dispute to the International Court of Justice under Article 37(1) of the ILO Constitution

Dear Director-General,

On behalf of the Government of Barbados, I would wish to request that an item relating to the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), regarding the right to strike, be placed on the agenda of the 349th Session of the Governing Body for debate and decision on referring the long outstanding dispute to the International Court of Justice (ICJ).

To facilitate the Governing Body discussion and decision-making, Barbados requests the Office to prepare a report that includes all information necessary to be considered for referral to the Court, including the questions to be raised at the ICJ.

Barbados makes this request cognisant of the fact that several attempts have been made by the tripartite constituents to settle the dispute, including through social dialogue. Given that there has been no agreement so far, we are concerned that legal uncertainty remains and as you would appreciate, Governments need this legal certainty. We believe that the ILO should use the procedure provided for in Article 37(1) of its Constitution, and put the matter before the International Court of Justice.

We look forward to the Office taking the necessary action on this matter.

Matthew Wilson
Permanent Representative and Ambassador

Document No. 12

Letter of the Minister of Labour of Colombia to the ILO Director-General, dated 10 August 2023

Government of Colombia

Permanent Mission of Colombia to the
United Nations in Geneva

DCHONU No. 458/23

The Permanent Mission of the Republic of Colombia to the International Organizations in Geneva presents its compliments to the International Labour Office and, in relation to the request made by the Workers' group concerning the referral to the International Court of Justice of a question on the scope and content of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), has the pleasure to transmit the enclosed note from the Minister of Labour of the Republic of Colombia, Ms Gloria Ines Ramirez Ríos, addressed to the Director-General of the ILO, Mr Gilbert Houngbo.

The Permanent Mission of the Republic of Colombia to the International Organizations in Geneva avails itself of this opportunity to renew to the International Labour Office the assurances of its highest consideration.

Geneva, 10 August 2023

To the Honourable Director-General
of the International Labour Office
Mr Gilbert Houngbo

Bogotá, D.C.

GILBERT HOUNGBO,
Director-General
International Labour Office
Route des Morillons, 4
CH - 1211 Geneva, Switzerland

Re: Request to place an item on the agenda of the 349th Session of the Governing Body on the referral of an interpretation dispute to the International Court of Justice under article 37(1) of the ILO Constitution

Dear Director-General,

We have been informed that the Worker Vice-Chairperson of the Governing Body has submitted a letter containing requests on behalf of the Workers' group, following the formal announcement made at the 347th Session of the Governing Body in March.

We would like to indicate that the Government of Colombia fully supports the rationale and objective of the Workers' group's request that, as a matter of urgency, an item be placed on the agenda of the 349th Session of the Governing Body for discussion and decision on the referral to the International Court of Justice (ICJ) of the longstanding dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87),

in relation to the right to strike.

To facilitate the discussion and decision-making of the Governing Body, we also request that the Office prepare a comprehensive report containing all the necessary elements to be considered for a referral to the Court, including the questions to be put to the ICJ.

The tripartite constituents have made various attempts to resolve the prolonged discussion, including through social dialogue. Despite these efforts, no consensus-based outcome has been achieved. In the event that the dispute over the legal interpretation persists, the Organization should have recourse to the constitutional procedure set out in article 37, paragraph 1, of the ILO Constitution and refer the matter to the International Court of Justice. Governments need legal certainty in relation to all of their obligations under Convention No. 87 and to the supervision of its application by the Committee of Experts. Without legal certainty, this discussion will continue to have a detrimental effect on the supervisory system, on the credibility of the ILO as a standard-setting body within and outside the United Nations system, and on the effective application of international labour standards.

Taking into account the institutional impact of this persistent interpretation dispute and the urgent need to resolve it, we also request that the Office transmit this letter as soon as possible to all ILO constituents before the Governing Body's discussion.

We would be grateful to receive confirmation that the necessary action has been taken in response to this letter.

Yours sincerely,

(Signed)
GLORIA INES RAMIREZ RIOS
Minister of Labour

Document No. 13

Letter of the Minister of Labour of Ecuador to the ILO Director-General, dated 25 August 2023

Government of Ecuador

Government of Ecuador
Guillermo Lasso, President

Document No. MDT-MDT-2023-0482-O

Metropolitan District of Quito, 25 August 2023

Reference: ILO – Position of the Ministry of Labour with respect to the interpretation of Convention No. 87 and the right to strike

Mr Gilbert F. Houngbo
Director-General of the ILO
INTERNATIONAL LABOUR ORGANIZATION

Dear Sir,

I hereby extend a cordial greeting to you. I wish to refer to the letters sent by the International Labour Organization (ILO) regarding the interpretation of Convention No. 87 and the right to strike.

This Ministry has examined and reviewed the information sent by the ILO, workers' representatives, employers' representatives and governments, and considering that in the legislation of Ecuador the principle for settling conflicts is the peaceful resolution of international disputes and conflicts without resorting to threats or the use of force, this Ministry is very much in favour, in line with the requests made by other Member States, of including on the agenda of the 349th Session of the Governing Body an item for debate and decision on submitting to the International Court of Justice (ICJ) the longstanding controversy relating to the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), as regards the right to strike, thereby facilitating the debate and corresponding decision-making process in the Governing Body, contributing to legal certainty for all participants, as a fundamental principle of tripartite dialogue and decision-making.

I wish to stress that, in order to facilitate meaningful debate, the Office should prepare and share with members a comprehensive report containing all the information needed for an in-depth examination, and above all to facilitate the associated decision-making, in respect of the request of the Workers' group to the ILO, including the questions to be submitted to the ICJ.

Yours faithfully,

Patricio Donoso Chiriboga
Minister of Labour

Document No. 14

Note Verbale No. 185/MP-ANG/GEN/2023 of the Permanent Mission of the Republic of Angola, dated 6 September 2023

Government of Angola

Permanent Mission
of the Republic of Angola
Geneva

Geneva, 6 September 2023

N.V.No. 185 /MP-ANG/GEN/2023

The Permanent Mission of the Republic of Angola to the United Nations Office and international organizations in Geneva presents its compliments to the Office of the Director-General of the International Labour Organization (ILO) and has the honour to acknowledge receipt of the communication dated 17 July 2023 regarding the outstanding issue of the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike.

In this context, the Permanent Mission wishes to highlight the following points:

1. Rights to form associations and bargain collectively are fundamental human rights that make it possible to promote democracy, sound labour market governance and decent conditions at work;

2. In Angola, key aspects of strikes are regulated by Law No. 23/91 dated 15 June – the Strike Law, without prejudice to its general stipulation and/or its relationship with other legislation, namely:
   - The Constitution of the Republic of Angola (CRA);
   - Law No. 7/15 dated 15 June – General Labour Law (LGT);
   - Law No. 20-A/92 dated 14 August – Law on Collective Bargaining (LNC); and
   - Law No. 21-D/92 dated 28 August – Law on Unions (LS).

3. Article 50, paragraph 1 of the CRA provides that "workers have the freedom to establish trade union associations for the defence of their collective and individual interests";

4. Article 51, paragraph 1 of the CRA also states that "workers have the right to strike";

5. It is worth pointing out that strike action is a worker's fundamental right. It is therefore up to workers to decide whether or not to exercise this right, within the framework of the legally established procedures (art. 51, paragraph 1 of the CRA and art. 7, subparagraph (c) of the LGT);

Permanent Mission of the Republic of Angola to the United Nations
Office in Geneva
80-82, Rue de Lausanne - 1202 Geneva
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E-mail: ambmission.angola@bluewin.ch

Website: www.missionangola.ch

6. In accordance with article 2, paragraph 1 of the Strike Law, a strike is "the collective refusal by workers, in whole or in part, to perform work, whether continuous or discontinuous, in a concerted and temporary manner". Thus, workers may declare a strike whenever economic, social or professional interests linked to the work situation are at stake.

The Permanent Mission further recognizes the importance of social dialogue and collective bargaining. However, difficulties in interpreting Convention No. 87 pose a risk to its effective implementation for the benefit of workers.

As a result, the Permanent Mission expresses its support for the holding of an urgent debate on the outstanding issue of the interpretation of Convention No. 87 and is in favour of its inclusion on the agenda of the 349th Session of the Governing Body, which will take place in November 2023.

The Permanent Mission of the Republic of Angola to the United Nations Office and international organizations in Geneva avails itself of this opportunity to renew to the Office of the Director-General the assurances of its highest consideration.

TO THE OFFICE OF THE DIRECTOR-GENERAL
OF THE INTERNATIONAL LABOUR ORGANIZATION

Email: cabinet@ilo.org

GENEVA

Permanent Mission of the Republic of Angola to the United Nations
Office in Geneva
80-82, Rue de Lausanne - 1202 Geneva
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Document No. 15

Letter of the Swiss Federal Councillor and Head of the Federal Department of Economic Affairs, Education and Research to the ILO Director-General, dated 6 September 2023

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

The Head of the Federal Department of Economic Affairs, Education and Research (EAER)

Bern, 6 September 2023

Dear Director-General,

Switzerland wishes to thank you for your letters dated 17 July, 4 August and 10 August 2023, informing us that you had received a number of communications regarding the outstanding issue of the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike. We have taken due note of the request submitted by the Workers' representative and of the reply sent by the Employers' representative, as well as of the positions adopted by several governments.

Switzerland has followed the debate on the interpretation of Conventions of the International Labour Organization (ILO) and on the transposition of article 37 of the ILO Constitution very closely over the past 15 years. Questions of interpretation are of institutional importance. The ILO possesses a number of specific features. While respecting the request formally lodged by the Workers' group, Switzerland has consistently reiterated its preference for the approach set out in article 37, paragraph 2 of the Constitution for questions of interpretation. Switzerland also recalls that no procedural framework was adopted with regard to article 37, paragraph 1, at the Governing Body Session that took place in March 2023.

In preparation for a future discussion by the Governing Body of the possible referral of the question of interpretation to the International Court of Justice (ICJ), we would like to highlight the following points:

- The procedure cannot be separated from the question or questions of interpretation to be asked. Yet, at this stage, it is doubtful whether the questions submitted, as formulated, are truly questions of interpretation and whether they are admissible before the ICJ.

- The International Labour Conference (ILC) should approve the referral to the Court as well as the question(s) of interpretation, following an in-depth analysis by the Governing Body. Steps should be taken to ensure that all interested governments can take part in these discussions, in compliance with the rules of procedure. The Governing Body may meet in plenary session or as a Committee of the Whole, with all Member States having the right to speak. The discussion may also be referred and submitted to the Conference.

Mr Gilbert Houngbo
Director-General
International Labour Office

Geneva

Federal Palace East, CH-3003 Bern

- Deliberations and negotiations should be open to all Member States that are not represented on the Governing Body. All Member States should be able to take part in the discussions and decision-making process regarding the referral of disputes to the Court, and the efficiency and fairness of the process should be ensured.

It is imperative that the signatory States of Convention No. 87 be involved in the discussions on the substance of the question of interpretation to be submitted to the ICJ. Signatory States are indeed the first concerned. Furthermore, the ICJ has consistently held that it must ensure it has all the necessary information. To this end, the ICJ may invite all signatory States to participate actively in the proceedings. The involvement of these States in the drafting of the question is therefore essential to ensure continuity and consistency.

The question's content or, at the very least, the decision whether or not to refer the question(s) to the ICJ must be approved by the ILC. Convention No. 87 is regarded as fundamental and embodies a fundamental principle and right which all Member States must respect, promote and uphold. Moreover, the resolution giving the Governing Body the authority to submit requests for advisory opinions was adopted in 1949. The composition of the ILO today is not comparable to that of 1949. Back then, the ILO had 62 Member States. At that time, the Governing Body was much more representative of its membership. In the interest of fairness and inclusion, the ILC must therefore be involved in discussions and decisions on the content and/or referral of the matter to the ICJ.

The Swiss Government accordingly requests the Officers of the Governing Body to schedule a discussion at the Governing Body in the form of a Committee of the Whole and to make arrangements for the approval of the question(s) by the International Labour Conference in due course.

I thank you for taking due note of these remarks.

Yours sincerely,

Guy Parmelin
Federal Councillor

Document No. 16

Letter signed by 14 regular Employer members of the ILO Governing Body to the Chairperson of the Governing Body, dated 12 September 2023

12 September 2023

Mr Abiodun Richards Adejola
Permanent Representative of Nigeria to the UN
Chairperson of the Governing Body of the ILO
International Labour Organisation
Route de Morillons
CH-1211 Geneva
Switzerland

Re: Request by 14 regular members of the Employers` Group for a special meeting of the Governing Body under Article 3.2.2 of the ILO Governing Body Standing Order for the urgent inclusion of a standard setting item on the right to strike on the agenda of the 112th session of the International Labour Conference agenda

Dear Chairperson of the Governing Body,

The undersigned hereby submit to you a request for a special meeting of the Governing Body under Article 3.2.2 of the Standing Orders of the Governing Body.

Purpose of the meeting would be to decide on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th session of the International Labour Conference (ILC) in 2024. More concretely, it is proposed that the ILC adopt a Protocol to C. 87 on the right to strike or more broadly on industrial action. The adoption of the Protocol would authoritatively determine the scope and limits of the right to strike in the context of C. 87. The obligations under the Protocol would become binding for those parties to C. 87 that ratify the Protocol. In this way, the adoption of the Protocol would settle the ongoing dispute about the interpretations on the right to strike.

The adoption of a Protocol to C. 87 on the right to strike would thus demonstrate that a lasting solution to the conflict over the interpretations of the right to strike is possible through dialogue within the tripartite structures of the ILO and that a referral to the International Court of Justice is not necessary.

In order to ensure that the possibility of standard-setting on the right to strike is not rendered obsolete by a referral of the matter to the ICJ, we also request that the special meeting is organized before the special meeting requested by the Workers' group and of 34 governments.

We kindly request you, the Chair of the Governing Body, to convene the special meeting at an appropriate time and to seek the assistance of the Office in preparing and arranging this special meeting as specified above.

Yours sincerely,

Signatures of 14 regular Employer members of the Governing Body:

Mr S. Barklamb (Australia	Mr H. Diop (Senegal)
Mr R. Dubey (India)	Ms R. Hornung-Draus (Germany)
Mr T. Mackall (United States of America)	Mr J. Mailhos (Uruguay)
Mr K. Mattar (United Arab Emirates)	Mr B. Matthey (Switzerland)
Ms J. Mugo (Kenya)	Mr H. Munthe (Norway)
Ms E. Nagasawa (Japan)	Ms A. Vauchez (France)
Sr. F. Yllanes (Mexico)	Mr H. Zouanat (Morocco)

Document No. 17

Note Verbale Z-2023/62441669/36640282 of the Permanent Mission of the Republic of Türkiye, dated 22 September 2023

PERMANENT MISSION OF THE REPUBLIC OF TÜRKİYE
TO THE UNITED NATIONS OFFICE IN GENEVA

Z-2023/62441669/36640282 -

The Permanent Mission of the Republic of Türkiye to the United Nations Office in Geneva and other international organizations in Switzerland presents its compliments to the International Labour Organization (ILO) and has the honour to acknowledge receipt of the communication dated 15 September 2023 regarding the special sessions of the Governing Body and to highlight the following points:

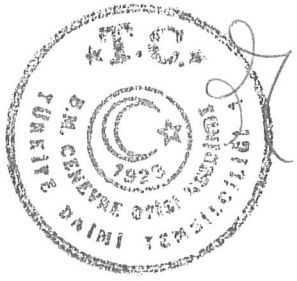
The Permanent Mission on behalf of the Government of Türkiye expresses its firm support for the inclusive approach presented by Switzerland and the Employers' Group for the forthcoming special meetings of the Governing Body. Specifically, the Permanent Mission reiterates its support for the proposal that special meetings be convened in the format of a Committee of the Whole, allowing non-Governing Body members to actively participate and express their views on the critical matter concerning ILO Convention No. 87. The Permanent Mission strongly believes that this approach aligns with the principles of transparency, representation, and dialogue, which are essential for the effective functioning of the ILO.

Furthermore, the Permanent Mission welcomes the request for a special meeting addressing the inclusion of a standard-setting item regarding the right to strike in the agenda of the 112th Session of the International Labour Conference which can play a crucial role in addressing this long-lasting dispute through constructive social dialogue within the ILO. The primary objective of such a special meeting should be to facilitate the endorsement of a Protocol associated with Convention No. 87, encompassing the topics of the right to strike and broader industrial actions. Therefore, this Protocol would establish clear and authoritative guidelines and serve as the definitive instrument for delineating precise and authoritative parameters governing the scope and limitations of the right to strike within the overarching framework of Convention No. 87, thereby ultimately resolving the ongoing disagreement.

In this regard, The Permanent Mission kindly requests the ILO to circulate this Note Verbal to all ILO member states as well as to the Governing Body of the ILO.

The Permanent Mission of the Republic of Türkiye avails itself of this opportunity to renew to the International Labour Organization, the assurances of its highest consideration.

Geneva, 22 September 2023



International Labour Organization (ILO)
4 route des Morillons
CH-1211 Genève 22, Switzerland

Document No. 18

ILO, Note concerning special Governing Body sessions – Past practice, September 2023

Special GB sessions – Past practice

1. A special meeting of the Governing Body (*session spéciale* or *session extraordinaire* in French) may be convened when (i) 16 regular GB members so request in writing (art 7(8) of the Constitution); (ii) 16 Government members or 12 Employer members or 12 Worker members so request (para 3.2.2. of the Standing Ordesr); (iii) the chairperson considers it necessary (para 3.2.2.).

2. The record shows that there have been three special meetings/ sessions convened by the GB Chairperson on the basis of his discretionary authority to do so when he considers it necessary. On two other occasions, he declined requests for a special meeting (see attached internal JUR Note of 16 August 1977).[1]

3. The first instance was the special meeting convened in September 1932 between the 59th and 60th Sessions of the Governing Body at the request of Italian Government. The Italian Governments proposal asked the Governing Body to decide that the International Labour Organisation should examine the question of the reduction of hours of work as an urgent matter, in accordance with the resolutions of the Unemployment Committee adopted by the Governing Body and with the resolution which the Conference itself had adopted at its Sixteenth Session. For the meeting, Italy proposed a Resolution, and the Office prepared a Note.

4. The second precedent was special meeting convened on 3 October 1935 between 72nd and 73rd Sessions of the Governing Body. The meeting took place one day before the opening of the 73rd Session and was summoned by the Chairperson to discuss matters that needed to be resolved prior to the beginning of the 73rd Session (in which new Officers would be elected). These matters were the effective withdrawal of Germany and the designation of Canada as a State of chief industrial importance, as well as the revision of the rules concerning the election of the Officers.

5. The third instance was the special session held on 19-20 May 1970 to elect ane Director-General following the resignation of David Morse on 9 February 1970, effective 31 May 1970. At the immediately preceding 178th Session, "the Chairman informed members that, in the light of consultations between the groups and as provided for in article 20 of the Standing Orders of the Governing Body, he had convened a special session, to be held from 18 to 20 May 1970, for the appointment of the Director-General of the International Labour Office." (GB.178/PV, p. 79).

6. As regards the two occasions on which the Chairperson refused to respond favourably to requests for a special meeting, the first was in 1973 when two Governing Body members solicited the holding of a special meeting to discuss the *coup* in Chile. The Chairperson, after consulting the Vice-Chairpersons, decided that no special session was necessary

[1] *Special meetings* should be distinguished from *special sittings* organized, for example, to honour (Albert Thomas in June 1932 or Wilfred Jenks in November 1973), or receive personalities (Joseph Stiglitz in March 2009).

“considering the ILO's financial situation and the fact that the present session was due to begin shortly” (GB.191/PV, p. II/1).

7. Two years later, in 1975, the WFTU requested the Chairperson to hold a special session regarding events in Spain but he decided not to summon such a special meeting (see attached internal JUR Note of 7 October 1975).

Document No. 19

ILO, Note concerning special Governing Body sessions – Origin and evolution of applicable rules, September 2023

Special sessions of Governing Body – Origin and evolution of applicable rules

	GB Standing Orders	Constitution	GB regular members	Origin and rationale
1920	ARTICLE 10 *Times of Meeting.* […] Without prejudice to the provisions of Article 393 of the Treaty of Versailles the President may also summon a special meeting, should it appear necessary to him to do so, and shall be bound to summon a special meeting on receipt of a written request to that effect signed by ***six*** *members of the same group*. * 50 per cent of the government group, or a full non-governmental group	ARTICLE 393 […] A special meeting shall be held if a written request to that effect is made by *at least* ***ten*** *members of the Governing Body.* * 41 per cent of total number of GB regular members (24)	12 G 6 Es 6 Ws	At the 2nd Session GB**,** Draft SO proposed but not discussed, Appendix IX of the minutes Then draft article 11proposed that a special session be summoned "on receipt of a written request to that effect signed by 10 or more Members, as provided in Article 393 of the Treaty of Versailles. Not less than 7 days' notice shall be given of any special Session." At the 3rd Session GB**,** SO proposed by a special committee and examined, GB.3/PV, p.16-18 and 60-61. Article 11 proposed by the Special committee was adopted as article 10. The explanation for the evolution from the second to the third sessions is found in an undated/ unsigned note that comments on the proposed number of ten members as follows: *« A ceci on peut objecter que, seul, le groupe des représentants des Gouvernements serait à même de provoquer une réunion et qu'aucun des autres groupes n'aurait la possibilité de le faire. Il conviendrait de réduire le nombre de membres exigés afin de permettre à tout group qui le désirerait, de provoquer une session extraordinaire ».*

1934	ARTICLE 11 2. Without prejudice to the provisions of Article 7 of the Constitution of the Organisation (393), the Chairman may also summon a special meeting, should it appear necessary to him to do so, and shall be bound to summon a special meeting on receipt of a written request to that effect signed by ***eight*** *members of the Government group, or* ***six*** *members of the employers' group, or* ***six*** *members of the workers' group.* * 50 per cent of Government group, or 75 per cent of a non-governmental group	Article 393 (amended by the ILC at its 4th Session in October 1922) A special meeting shall be held if a written request to that effect is made by at *least* ***twelve*** *of the representatives on the Governing Body.* * 37.5 per cent of total number of GB regular of members (32)	Article 393 (amended) 16 G 8 Es 8Ws	GB.68/PV, pp. 80-81 "The Committee felt that in view of the increased representation of overseas countries on the Governing Body it would be difficult to obtain the signatures of all the members of the employers' or workers' group for the convocation of special meetings of the Governing Body, so that if all the members of either of those groups were required to sign a request, it would be impossible for special meetings for urgent business ever to be convened at short notice, except at the request of the members of the Government group. *The Committee therefore proposed to increase the number of members of the Government group to eight and to retain the number of six in the case of the other two groups".*
1955	Article 20 2. Without prejudice to the provisions of article 7 of the Constitution of the Organisation, the Chairman may also summon a special meeting should it appear necessary to him to do so, and shall be bound to summon a special meeting on receipt of a written request to that effect signed by ***ten*** *members of the*	Article 7(8) (amended by the Conference at its 36th Session in June 1953) A special meeting shall be held if a written request to that effect is made by *at least* ***sixteen*** *of the representatives on the Governing Body.*	Article 7(8) (amended) 20 Gs 10 Es 10 Ws	GB.128/PV, p. 103 "The Committee further noted that several articles of the Standing Orders refer to the number of members of the Governing Body required to validate particular action and considered that in the light of the increase in the size of the Governing Body the numbers in these provisions should be changed to maintain the same or substantially the same proportion".

	*Government group, or **seven** members of the Employers' group, or **seven** members of the Workers' group*. * 50 per cent of Government group, or 70 per cent of a non-governmental group	* 40 per cent of total number of GB regular members (40)		
1974	Article 20 2. Without prejudice to the provisions of article 7 of the Constitution of the Organisation, the Chairman may also summon a special meeting should it appear necessary to him to do so and shall be bound to summon a special meeting on receipt of a written request to that effect signed by ***sixteen** members of the Government group, or **twelve** members of the Employers' group, or **twelve** members of the Workers' group*. * 57 per cent of Government group, or 85 per cent of a non-governmental group	Article 7(8) Unchanged	Article 7(1) (amended in 1962 and 1972) 28 Gs 14 Es 14 Ws	GB.194/SC/5/4, para. 6(d) “Article 20, paragraph 2, which provides that a special meeting of the Governing Body shall be summoned on the written request of ten members of the Government group, or seven of the Employers' group, or seven members of the Workers' group; until 1963 these figures were equivalent to half the membership of the Government group and 70 per cent of the Employers' or Workers' groups; from 1963, they represented some 40 or 60 per cent respectively. In both cases the figures are substantially less than the 16 members required for this purpose by the Constitution (Article 7, paragraph 8), as fixed by the Constitution of the International Labour Organisation Instrument of Amendment, 1953, so as to maintain the previous proportion to the total size of the Governing Body (40 per cent). In view of the constitutional provision whereby it is not possible to require more than 16 signatures calling for a special session of the Governing Body it is proposed that the figures "ten", “seven" and "seven" should be replaced by the figures "sixteen", "twelve" and "twelve”.

2005	3.2.2 Unchanged	Unchanged	Unchanged	GB.294/LILS/1 Renumbering as part of the publication of the Compendium
2016	3.2.2. Without prejudice to the provisions of article 7 of the Constitution of the Organization, the Chairperson may also convene, after consultation with the other Officers, a special meeting should it appear necessary to do so, and shall be bound to convene a special meeting on receipt of a written request to that effect signed *by **sixteen** members of the Government group, or **twelve** members of the Employers' group, or **twelve** members of the Workers' group.*	Unchanged	Unchanged	GB.326/LILS/2 Consultation with the other Officers was added, codifying existing practice.

Conclusion

Art 7(8) of the Constitution provides for the holding of a special GB meeting at the request of a specified number of regular GB members irrespective of the group to which they belong (representing approximately 40 per cent of the total number of regular members). This number was originally set at 10 members, currently stands at 16 and will increase to 32 upon the entry into force of the 1986 amendment.

Art 7 of the Constitution also provides that the GB controls its own procedure. Within those limits, the GB has developed complementary rules providing that a special meeting may also be convened at the initiative of the Chairperson or at the written request of a specific number of regular members of one of the three groups. The number of group members required to convene a special meeting has evolved from 6-6-6 to 8-6-6, then 10-7-7 and is currently set 16-12-12. The rationale underlying this complementary rule was that each of the three groups – and not only the government group – should be empowered to provoke the convening of a special meeting.

Based on a combined reading of art 7(8) of the Constitution and para 3.2.2 of the Standing Orders, it is established that a special GB meeting (*session spéciale* or *session extraordinaire* in French) may be convened in three distinct instances.

- First, at the request of at least 16 regular GB members regardless of the group (for instance, a written request signed by 8 G, 2 E and 6 W members, or a request signed by 6 G and 10 E members, or a request signed by 7 E and 9 W members). No record of relevant practice.
- Second, at the discretion of the Chairperson if he/she considers it necessary after consulting the Vice-Chairpersons. Provision invoked on five occasions; three special meetings convened.
- Third, at the request of the majority of the regular members of any of the three groups, i.e. 16 G members, or 12 E members, or 12 W members. No record of relevant practice.

In sum, due to its extraordinary nature, a special GB meeting should be convened only if the Chairperson deems it necessary, or if a considerable number of GB regular members of the same or different groups formally so requests. These are complementary, self-standing rules that can be applied separately.

Document No. 20

ILO, Note concerning the binding legal effect of ICJ advisory opinions, September 2023

The binding legal effect of ICJ advisory opinions

1. The question is often raised whether in case of referral to the ICJ, the advisory opinion given by the Court would have binding effect, and if so, on what basis.

2. According to general legal theory, ICJ advisory opinions are judicial statements on legal questions submitted to the Court by organs of the UN and other international bodies so authorized. Advisory opinions do not constitute a decision within the meaning of article 59 of the ICJ Statute. Unlike contentious proceedings, advisory proceedings do not involve parties to an inter-State dispute and are not vested with *res judicata* effect, meaning that they do not result in a final and non appealable judgment precluding relitigation of the same claim between the same parties.

3. However, advisory opinions relating to the interpretation of the ILO Constitution or of an international labour Convention are endowed with binding effect because art 37(1) expressly provides so (I). More broadly, there is strong support in State practice and legal scholarship that the legal effect of an ICJ advisory opinion is in reality as authoritative as a judgment and that the requesting organ is bound by the Court's 'advice' (II).

I.

4. According to the International Court of Justice, "a distinction should thus be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, "as such, … has no binding force" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Reports 1950, p. 71). These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements; in the present case Article VIII, Section 30, of the General Convention provides that "the opinion given by the Court shall be accepted as decisive by the parties". (*Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, para. 25, p. 77)

5. As explained in the website of the Court, "contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding. *The requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions*."

6. In the case of the ILO, a 'particular effect' is attributed to the Court's advisory opinions by an express constitutional provision, i.e. article 37(1) that unambiguously provides for a "decision" of the International Court of Justice. The ICJ has therefore been entrusted by the drafters of the ILO Constitution with the responsibility of delivering "decisions" – and not opinions – for the final settlement of interpretation disputes. It follows that by joining the Organization, all Member States accept the binding nature of any "decision" that the ICJ would deliver in response to a request made by the Organization under article 37(1).

7. As *Roberto Ago*, former President of the ICJ has written, "under certain provisions [advisory opinions] "may pursue a more ambitious aim, namely, to settle a dispute to which one of those institutions is a party. Examples of such provisions may be found in [...] the constituent instruments of certain of these organizations [...] The essential common feature of these provisions is that they characterize the opinion requested from the Court as a "decision" in relation to the dispute at issue; that is, they confer "binding force" on the opinion for the parties to the dispute".[1] While *Shabtai Rosenne* refers to "those exceptional instances in which by collateral agreements States and international organizations have agreed that the opinion will have binding force or will be decisive. In those cases the obligation of compliance derives from the agreement".[2]

8. Similar clauses providing for referral to the ICJ may be found in section 32 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, that provides that the opinion given by the Court shall be accepted as decisive, and former article XII of the ILOAT Statute. *Guillaume Bacot*, making explicit reference to article 37(1) of the ILO Constitution, notes that "il est habituellement admis que toutes ces dispositions signifient que ces avis rendus par la Cour doivent être acceptés comme obligatoires".[3] While for *Robert Kolb*, "the binding force of the Court's pronouncement derives, as a matter of law, not from the opinion itself, but from the collateral legal text that confers upon the opinion a legal force it would not otherwise have had. In such a case, the opinion is a disguised form of judgment, the Court's advisory function being used to decide a dispute or a point of law [...] The parties cannot derogate from the Statute and Rules [of the Court] by *reducing* their obligations under those texts [...] However, they are perfectly entitled to *add* to their obligations provided that their doing so does not conflict with the letter and spirit of the texts".[4]

9. The binding nature of ICJ advisory opinions delivered at the ILO's own request has been generally acknowledged and accepted for more than 100 years by all tripartite constituents (governments, employers, workers) without exception. Indeed, ILO records are replete with references of constituents (bur also of the Office and of supervisory bodies) to "binding opinion", "binding authority", "binding ruling", "the legal truth", "authoritative interpretation", "authoritative ruling", "definitive interpretation", "final decision", "statement of the law in force" – all conveying the deep-rooted belief that article 37(1) confers a binding effect to advisory opinions obtained on that basis. A compilation of statements to this effect is in the Annex. In essence, this *opinio juris* of the ILO tripartite

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[1] Roberto Ago, "Binding Advisory Opinions of the International Court of Justice", *American Journal of International Law*, vol. 85, 1991, p 439. As Ago notes, "the Court has never considered its task to be to pronounce on whether these clauses conform with the criteria by which its Statute distinguishes between the Court's functions. Nor has it seen fit to comment on whether attributing the binding nature of a 'decision' to a text adopted as an 'opinion' is consistent with the intrinsically advisory character of the latter"; *ibid*, p. 443.

[2] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, 2006, vol. III, p. 1698.

[3] Guillaume Bacot, "Réflexions sue les clauses qui rendent obligatoires les avis consultatifs de la CPJI et de la CIJ", *Revue générale de droit international public*, vol. 84, 1980, p.1034.

[4] Robert Kolb, *The International Court of Justice*, 2014. pp. 1187-1188. See also Jochen Frowein; Karin Oellers-Frahm, "Advisory opinions - Article 65" in A Zimmermann; C Tomuschat; K Oellers-Frahm (eds.), *The Statute of the International Court of Justice – A Commentary,* 2006, p. 1416.

constituency reflects the fact that article 37(1) must be understood as a 'compromissory clause' attributing decisive and conclusive effect to ICJ advisory opinions.

10. It was precisely this belief that motivated the six referral requests transmitted to the Permanent Court of International Justice in the period 1922-1932. What would be the purpose of debating and voting on these referral requests if there was no shared understanding among ILO constituents that they would be obliged to abide by the 'ruling' of the Court? And who would know better the legal effect of advisory opinions than those predecessors who have stood before the Court and explained the reasons of ILO's referral requests? When the first two interpretation questions were referred to the PCIJ in 1922, *Albert Thomas* stated that "there was no authority more highly placed or in whose judgement more reliance could be reposed than the Permanent Court of International Justice for the purpose of settling disputes of this nature" and noted "the acceptance of its obligatory jurisdiction [of the Permanent Court], [that had] the right of giving to any international convention an official interpretation, having the same binding force as the instrument itself". As for *Harold Butler*, he noted ten years later in the written statement to the Court the following: "The object of the present proceedings before the Court is to secure an authentic interpretation. Once such an interpretation is given in whatever sense, it will lead ipso facto to the disappearance of all divergences and inequalities, for States bound by the Convention will be under an obligation to take the necessary measures to give effect to the interpretation laid down by the Court".

11. Apart from the express reference to "decision" in article 37(1), the biding effect of advisory opinions is also grounded on institutional logic and common sense. If the Court's opinion were not accepted as binding, article 37 would become meaningless and its very purpose as a dispute settlement clause would be defeated as there would be no authority designated as competent to settle authoritatively an interpretation dispute. In that case, what would be the need or utility of including article 37(1) in the ILO Constitution and why would the Constitution require any dispute or question to be referred to the ICJ for decision?

II.

12. At a more general level, it is generally admitted in State practice and legal scholarship that ICJ advisory opinions, even though not formally binding, carry legal weight and may be assimilated in many respects to binding judgments. As early as 1927, a committee of the Permanent Court expressed the opinion that "the difference between contentious cases and advisory opinions is only nominal. The main difference is the way in which the cases come before the Court. So the view that advisory opinions are not binding is more theoretical than real".[5]

13. Writing in 1929, *Charles De Visscher* took the view that "dans les limites de la question qu'il a posée à la Cour sur les aspects juridiques d'un différend, le Conseil [de la Société des Nations] est forcément lié par l'avis rendu : cet avis n'est donc pas une consultation

[5] Quoted in Leland Goodrich, "The nature of the advisory opinions of the Permanent Court of International Justice", *American Journal of International Law*, vol. 32, 1938, p. 739.

ordinaire, semblable à celle que le Conseil pourrait demander à un comité de juristes, par exemple, et qu'il serait libre par la suite d'écarter à volonté".[6] And *Georges Scelle*, four years later had this to say: "an advisory opinion is a statement of the law; it is self-contradictory, and thus technically impossible, to declare that a subject of law [...] when he knows what the law has to say about a concrete case, can refuse to yield to it".[7]

14. Legal writings have since confirmed that the authoritativeness of the Court's opinions renders them - for all intents and purposes - binding on the requesting organ. As it has been observed, "an advisory opinion is not just advice or consultation [...] There is no fundamental difference between the intrinsic value of the content of the Court's opinion and that of a judgment given by the same Court, in the sense that both are authoritative judicial pronouncements deciding questions that have been submitted to the Court".[8] In the words of another scholar, "no matter whether the Court's advisory opinions are formally binding on others, they are binding on the UN's organs as regards the point of law decided by the Court's jurisdictional act. To the extent that such organs are obliged, or deliberately choose, to adopt a legal solution to the point decided by the Court's opinion, that point of law becomes binding on the requesting organ".[9]

15. There is also considerable evidence that States invariably accept the Court's opinions as final and refrain from questioning the Court's legal reasoning. The statements of the French and UK representatives at the UN General Assembly in reaction to the *Reparation for Injuries* advisory opinion are eloquent illustrations in this regard. As Ms Bastid from France stated, "the Assembly had requested an authoritative opinion of the International Court of Justice, for it did not know exactly what legal conditions must be complied with for the Secretary-General to be able to take action. The General Assembly was now in the same condition as an individual who had consulted a jurist on a legal matter and who. On the strength of his opinion and without discussing it, acted in conformity with that experts' conclusions". As for Mr Fitzmaurice of the United Kingdom, he stated: "the Sixth Committee could neither approve nor disapprove of the findings of the Court on a point of law. The United Kingdom government greatly welcomed the opinion of the Court, not because its findings were in accordance with the argument which the United Kingdom had presented to the Court but because it believed they were in the best interests of the United Nations itself".[10]

16. It shall also be recalled that in its resolution A/RES/73/295, adopted on 22 May 2019 to follow up on the advisory opinion given by the Court in the Chagos case, the General Assembly "[considered] that respect for the Court and its functions, including in the exercise of its advisory jurisdiction, is essential to international law and justice and to an international order based on the rule of law". In the same vein, the General Assembly in

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[6] Ch De Visscher, "Nature des avis consultatifs et limites de leur autorité", *Recueil des cours de l'Académie de La Haye*, vol. 26, 1929, p. 27.
[7] Georges Scelle, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de La Haye*, vol 46, 1933, p. 581.
[8] Georges Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour international,* 1967, p.75.
[9] R Kolb, *op cit*, p. 1184.
[10] Cited in Edvard Hambro, "The Authority of the Advisory Opinions of the International Court of Justice", *International and Comparative Law Quarterly*, vol. 3, 1954, pp. 16-17.

resolution A/RES/ES-10/15 adopted after the advisory opinion on the Wall case "[considered] that respect for the Court and its functions is essential to the rule of law" and "[called] upon all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion".

17. Moreover, the moral authority ICJ advisory opinions enjoy due to the stature of the judges and the high esteem to which the Court is held can hardly be overestimated. The ICJ has delivered landmark opinions which have been instrumental for the development of international law in many different areas (for instance, the *Genocide* opinion of 1951, the *Reparation for injuries* opinion of 1949, the *Namibia* opinion of 1971, the *Nuclear Weapons* opinion of 1996).[11] Not to mention that advisory opinions are often couched in terms that leave little doubt as to the authoritativeness of the statements of law they contain. The advisory opinions on the Construction of a Wall of 2004 and the Chagos Archipelago of 2009 are notable examples of legal 'advice' carrying the weight of legal pronouncement *erga omnes* that compels compliance, especially with respect to duties and obligations of UN Member States under international law.[12]

18. It is noteworthy that even the main point of distinction between judgments and advisory opinions, namely the fact that only judgments are vested with *res judicata* effect (i.e. adjudication is conclusive and matter cannot be relitigated), has recently been called into question. In a Judgment of 2021 concerning maritime delimitation between Mauritius and Maldives, the ITLOS argued that the 2019 advisory opinion on the Chagos archipelago had resolved the dispute in favour of Mauritius, thus marking "the beginning of a new era where international courts and tribunals recognize ICJ advisory opinions as precedents having the (normative) authority to resolve a dispute".[13] Even before the ITLOS judgment, however, it had been highlighted in academic writings that "an advisory opinion, like a judgment in a contentious case, enjoys a kind of factual *res judicata* status, since there is no mechanism for appealing against either. In short, the absence in an advisory opinion of the force of *res judicata,* though often emphasized, has quite negligible practical implications".[14]

* * *

19. In conclusion, in contemplating a possible referral of the interpretation dispute on Convention No 87 to the ICJ, due account should be taken of the fact that, for the reasons explained above, the Court's opinion on the legal question(s) put to it would be binding for the Organization and its tripartite constituents. Clarity on this important parameter would be a necessary condition for any referral decision-making process. To quote once more from a seminal work on the Court's functioning, "any other attitude would

[11] On the normative effect of ICJ advisory opinions, see Teresa Mayr, Jelka Mayr-Singer, "Keep the wheels spinning: The contributions of advisory opinions of the international Court of Justice to the development of International Law", *ZaöRV*, vol. 76, 2016, pp.425-449.

[12] See Richard Falk, "Towards Authoritativeness: The ICJ Ruling on Israel's Security Wall", *American Journal of International Law*, vol. 99, 2005, pp. 42-52.

[13] Niccolo Lanzoni, "The authority of ICJ advisory opinions as precedents: The *Mauritius/ Maldives* Case", *Italian Review of International and Comparative Law*, 2022, p.321.

[14] R Kolb, *op cit*, p. 1183.

undermine the Courts' authority and prestige. In political terms, the two things are one: either the requesting organ is ready to follow or be guided by the Court's advisory opinion, in which case it can ask for one, or it is not, in which case it must not ask for the opinion in the first place. This is a major political responsibility resting on anybody contemplating requesting an advisory opinion. It must obviously avoid embarrassing the UN's highest judicial organ".[15]

20. As the current President of the ICJ put it in a recent statement, "States that are truly committed to the rule of law must entrust international courts and tribunals with judicial settlement of legal disputes. When a State avoids binding and compulsory third-party dispute settlement, its invocations of the rule of law sound hollow [...] The rule of law requires States to comply systematically with decisions of international courts and tribunals that are binding on them, even if they disagree with a decision." It is difficult to imagine why the rule of law principle would apply any differently to the ILO in relation to an advisory opinion delivered by the ICJ at the ILO's own request and on the basis of the compulsory third-party dispute settlement clause that is found in its Constitution.

[15] R Kolb, *op cit*, p. 1186.

Annex - Compilation of statements concerning the legal effect of advisory Opinions requested under art. 37(1) of the ILO Constitution

I. Governments

In 1922, during the discussions at the Council of the League of Nations concerning the possible referral to the PCIJ of the question on *Agricultural Production* (1922), the representative of **France** delegate stated that "*it would remove all possible difficulty if a formal decision was obtained from the Court*" (Official Bulletin, 1922, Vol. VI, No. 11, p. 384).

In 1931, the representative of **Poland** stated before the PCIJ in the context of the *Free City of Danzig and ILO* advisory proceedings that it "*awaits with deference the advisory opinion of the Court. In the light of the reply given to the question put by the Council of the League, Poland will take the necessary steps to meet the situation thus created*" (Official Bulletin, 1931, vol. XVI, No. 2, p. 239).

In 1932, in the context of the advisory proceedings on the *Interpretation of the Convention of 1919 concerning employment of women during the night*, the representative of **Great Britain** stated that "*it became apparent that different interpretations were being placed by different States (...), and in these circumstances His Majesty's Government moved the Governing Body to invite the Council to obtain an authoritative ruling from the Court*" (Official Bulletin, 1933, vol. XVIII, No. 2, p. 84).

In 1989, the Government member of the **Netherlands** in the CAS stressed "*the necessity of close co-ordination between the lawyers of the Office and national jurists* (because) *their interpretation of ILO standards might differ widely, although neither of them was authoritative since, as was known, only the International Court of Justice was competent in this regard*" (ILC, Record of Proceedings, 1989, p. 26/4, para. 12).

In 1990, the Government member of **Finland**, speaking on behalf of the **Nordic governments**, stated in the CAS that "*according to the ILO Constitution, the competence for giving definitive interpretations of Conventions, however, was vested in the International Court of Justice*" (ILC, Record of Proceedings, 1990, p. 27/8, para. 31).

In 1991, the Government member of **France** stated in the CAS that "*the International Court of Justice provided the final recourse for the interpretation of the Constitution and of Conventions*" (ILC, Record of Proceedings, 1991, p. 24/5, para. 21).

In 2010, the Government member of **Venezuela**, speaking on behalf of **GRULAC**, expressed the view that "*the Committee of Experts interpreted Conventions which was delegated to the International Court of Justice in the Constitution*" (ILC, Record of Proceedings, 2010, Provisional Record No. 16, Report of the CAS, Part I, para. 64).

In 2014, the Government delegate of **Venezuela** stated in the ILC plenary that "*Article 37(1) of the Constitution of the International Labour Organisation clearly and categorically puts forward a solution in this regard. The issue must be referred to the International Court of Justice, so that, once and for all, the Court can interpret Convention No. 87 and issue a binding opinion in that regard*" (ILC, Records of Proceedings, 2014, pp. 17/11-12).

II. Employers

In 1926, the representative of the International Organization of Industrial Employers before the PCIJ in the *Personal Work of Employers* (1926) advisory proceedings, noted that "*it is futile to say that the Court can give only an Advisory Opinion. It is clear that here as in other spheres the Court exercises a judicial function which consists in interpreting the law, and its judgments must be considered as a statement of the law in force*" (Official Bulletin, 1926, vol. XI, No. 5, p. 223).

In 1989, the Employers' member of Sweden in the CAS stated that "*Only one body – the International Court of Justice – could make authoritative interpretations of international labour Conventions. Recourse to it had seldom been sought, probably because there had been considerable satisfaction with the way the system functioned. Nonetheless, the role of the International Court of Justice as the ultimate arbiter should always be borne in mind*" (ILC, Records of Proceedings, 1989, p. 26/6, para. 21).

In 1992, the Employers' spokesperson to the CAS affirmed that "*under the ILO Constitution only the International Court of Justice may give a definitive interpretation of a Convention*" (ILC, Record of Proceedings, 1992, p. 27/4, para. 17).

In 1993, the Employers' spokesperson observed that "*every supervisory body examining whether a State was fulfilling its obligations under a Convention had to undertake the task of interpretation, although only one – the International Court of Justice – could do so with binding authority*" (ILC, Record of Proceedings, 1993, p. 25/4, para. 19).

In 1994, the Employers' spokesperson remarked that "*Only the International Court of Justice may give binding interpretations*" (ILC, Record of Proceedings, 1994, p. 25/8, para. 21).

In 1998, the Employers' spokesperson reiterated that "*According to the ILO Constitution, only the International Court of Justice was empowered to give definitive interpretations*" (ILC, Record of Proceedings, 1998, p. 18/8, para. 17).

In 1999, the Employers' spokesperson regretted that "*It was therefore small consolation that the only binding interpretation of legal texts could be made by the International Court of Justice. In view of the absence of any decision by that Court, there was therefore no generally binding interpretation of the two Conventions*" (ILC, Record of Proceedings, 1999, p. 23/37, para. 114).

In 2001, the Employer Vice-Chairperson of the CAS expressed the view that the CEACR "*should not develop jurisprudence, and it should certainly not assume responsibility for issuing binding interpretations of standards. Under article 37 of the ILO Constitution, that is a power reserved for the International Court of Justice*" (ILC, Record of Proceedings, 2001, p. 22/4).

In 2002, the Employers spokesperson to the CAS emphasized that "*only the International Court of Justice had the authority to make binding interpretation of Conventions and Recommendations, which clearly derived from article 37 of the ILO Constitution*" (ILC, Record of Proceedings, 2002, Provisional Record No. 28, Report of the CAS, Part I, p. 28/13, para. 45).

In 2006, the Employers' representative to the Selection Committee stated that "*an advisory opinion by the ICJ was a result which could be obtained in a relatively short time, and it would be a binding ruling that could be enforced through the UN Security Council*" (ILC,

Record of Proceedings, 2006, Provisional Record No. 3-2, Second Report of the Selection Committee, p. 3-2/4).

In 2012, the Employers spokesperson to the CAS stated that "*under article 37 of the ILO Constitution, only the ICJ could give a definitive interpretation of international labour convention*" (ILC, Record of proceedings, 2012, Provisional Record No. 19(Rev.), Report of the CAS, Part I, para. 82).

III. Workers

In 1932, in the context of the advisory proceedings concerning the *Night Work (Women) Convention*, the representative of the International Confederation of Christian Trade Unions stated that what he expected from the Court was « *la vérité juridique sur le texte en question, plus encore: la méthode d'interprétation des conventions qui sera le guide des Etats, de l'Organisation internationale du Travail et des organisations professionnelles dans tout le domaine des conventions* » (Official Bulletin, 1933, vol. XVIII, No. 2, p. 147).

In 1991, the Workers' spokesperson to the CAS considered "*that neither the assessments of the present Committee nor the views expressed by the Committee of Experts had the force of law, although the opinion of the Committee of Experts was generally accepted in view of the Committee's composition and working methods, subject to a definitive interpretation by the International Court of Justice*" (ILC, Record of Proceedings, 1991, p. 24/4, para. 16).

In 1992, the Workers' member of Finland in the CAS stated that "*until recently the established interpretations made by the Committee of Experts have been considered binding by member States until the International Court makes a final decision*" (ILC, Record of Proceedings, 1992, p. 27/5, para. 19).

IV. Committee of Experts

In 1977, the Committee of Experts stated that its "*terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution.*" (ILC, 1977, Report III, Part 4A, Report of the Committee of Experts, General Report, para 32).

The Committee reiterated that "*its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution*" in 1987, 1990, 1991, 2006 and 2013 (ILC, 1987, Report III, Part 4A, para 21; ILC, 1990, Report III, Part 4A, para 7; ILC, 1991, Report III, Part 4A, para 9; ILC, 2006, Report III, Part 1A, p. 2; ILC, 2013, Report III, Part 1A, para 26).

In 1991, the Committee noted that "*It is essential for the ILO system that the views that the Committee is called upon to express in carrying out its functions, in the conditions recalled above, should be considered as valid and generally recognised, subject to any decisions of the International Court of Justice which is the only body empowered to give definitive interpretations of Conventions*" (ILC, 1991, Report III, Part 4A, para 12).

V. The Office

In 1922, in the framework of the very first advisory opinion requested by the ILO, its Director General, Sir Albert Thomas, stated that "*It appeared to our Organisation and to our Governments that there was no authority more highly placed or in whose judgement more reliance could be reposed than the Permanent Court of International Justice for the purpose of settling disputes of this nature.*" (Official Bulletin, 1922, vol. VI, pp. 72-73)

In 1922, in the Office memorandum concerning the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (1922), it was noted that "*until the creation of the Permanent Court of International Justice and the acceptance of its obligatory jurisdiction, the right of giving to any international convention an official interpretation, having the same binding force as the instrument itself, to which it is assimilated, belonged exclusively to the signatory States*" (Official Bulletin, 1922, vol. VI, p. 325).

Following the advisory opinion of the Court, a letter was sent to several Governments by which they were informed that the "*controversy which was closed by the advisory opinion given by the Permanent Court of International Justice*" (Official Bulletin, 1923, Vol. VIII, Nos 1-2, p. 2).

In 1926, in the Office memorandum concerning the *Personal Work of Employer*, it was noted that "*of course, the preamble accompanying the question submitted to the Court is not intended to be taken as in any way prejudicing the opinion the Court is invited to give. There is no need to say that on the contrary the Governing Body of the International Labour Office will bow to the decision of the Court*" (Official Bulletin, 1926, Vol. XI, No. 5, p. 180).

In 1930, in the Office memorandum concerning the *Free City of Danzig* it was stated that "*the International Labour Office does not consider itself qualified to form any conclusion on the subject, and awaits with respect the answer of the Court, with which the attitude of the International Labour Organisation will not fail to comply*" (Official Bulletin, 1931, vol. XVI, No. 2, p. 104).

In 1932, in his oral statement in the context of the proceedings concerning the *Night Work (Women) Convention*, the ILO representative stated that "*the object of the present proceedings before the Court is to secure an authentic interpretation. Once such an interpretation is given in whatever sense, it will lead* ipso facto *to the disappearance of all divergences and inequalities, for States bound by the Convention will be under an obligation to take the necessary measures to give effect to the interpretation laid down by the Court*" (Official Bulletin, 1933, vol. XVIII, No. 2, p. 116).

In 1969, the representative of the Legal Adviser explained to the members of the Committee on Youth Schemes that, "*according to article 37 of the Constitution, only the International Court of Justice could authoritatively interpret Conventions*" (ILC, Records of Proceedings, 1969, p. 694, para. 59).

In 1978, the Legal Adviser of the Conference gave an opinion on the possible admission of Namibia as a member of the ILO and stated that "*the International Court of Justice is, in accordance with article 37, paragraph 1 of the Constitution, alone competent to*

give an authoritative answer" on any question or dispute regarding the interpretation of the Constitution (ILC, Record of Proceedings, 1978, p. 24/20).

In his report to the 70th Session of the ILC in 1984, the Director-General recalled the position of the Committee of Experts that "*competence to give interpretations of Conventions is vested in the International Court of Justice by article 37 of the Constitution. While, on account of the standing and expertise of the members of the Committee of Experts, the Committee's views merit the closest attention and respect and in the great majority of cases find acceptance from the governments concerned, they do not have the force of authoritative pronouncements of law. The Committee is not a court able to give decisions binding upon member States*" (ILC, Report of the Director-General, 1984, p. 30).

In 1990, the representative of the Secretary-General to the CAS indicated that the opinions of the Committee of Experts "*are not authoritative as concerns interpretations to which they may give rise, [and that] this authority attaches exclusively to the International Court of Justice*" (ILC, Record of Proceedings, 1990, p. 27/9, para. 35).

In 2010, the representative of the Secretary-General to the CAS noted that the ICJ is "*the only body at present competent to provide the authoritative interpretation set forth in article 37(1) of the Constitution*" (ILC, Record of Proceedings, 2010, Provisional Record No. 16, Report of the CAS, Part I, para. 33).

(Source: GB.347/INS/5, para 13, footnote 11)

Document No. 21

ILO, Note concerning the legal basis for requesting an advisory opinion, September 2023

Legal basis for requesting an advisory opinion

1. There are two concurrent legal bases for referring a matter to the ICJ; the first is in article 37(1) of the Constitution and the second in article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organization (also known as UN-ILO relationship agreement).

2. Article 37(1), originally article 423 of the Treaty of Versailles, provides that any question or dispute relating to the interpretation of the Constitution or of an international labour Convention shall be referred for decision to the ICJ. As it currently reads, article 37(1) suggests that referral of interpretation disputes to the ICJ is compulsory and that the decision of the Court is final and binding (see GB.322/INS/5, para. 27).

3. Article IX(2) of the 1946 UN-ILO relationship agreement provides that "the General Assembly authorizes the International Labour Organization to request advisory opinions of the International Court of Justice *on legal questions arising within the scope of its activities* other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies." This authorization was required since under article 96(2) of the UN Charter only organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may request advisory opinions of the Court on legal questions arising within the scope of their activities. Similarly, under article 65 of the ICJ Statute, "the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

4. The negotiating history of the 1946 UN-ILO relationship agreement confirms that the intention was to secure the possibility to refer legal matters to the ICJ beyond the narrow confines of questions of interpretation of the Constitution or of international labour Conventions. Following the mandate given by the ILC, in its Resolution of 3 November 1945 concerning the relationship between the International Labour Organisation and the United Nations, a negotiating delegation drew up a draft agreement which was later signed by the Chairperson of the Governing Body on behalf of the Negotiating Delegation on 30 May 1946 (Official Bulletin, vol. XXVII, No. 3, p. 914). During the 1946 Conference discussions on that agreement, the President of the Delegation on constitutional questions clarified that the Agreement provided for a blanket authorisation and did not require a separate request to be made each time that an opinion was sought (ILC, 29th Session, 1946, Official Bulletin, p. 842). At no point was mention made of article 37 or of the need to align the relationship agreement with the constitutional provision. If this had been the intention, the drafters would have simply made a cross-reference to article 37(1).

5. The broad scope of legal matters that may be referred to the ICJ was confirmed in a 1956 advisory opinion, in which the Court stated that an authorized specialized agency of the United Nations "has the general power to ask for an Advisory Opinion of the Court on questions within the scope of its activity" (Judgments of the Administrative Tribunal of the ILO upon Complaints Made against the Unesco, Advisory Opinion, ICJ Reports 1956, p. 99).

6. The Court has further clarified that "three conditions must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency" (see Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996, pp. 71–72).

7. It is therefore clear that the scope of legal matters that can be submitted to the ICJ under article IX(2) of the 1946 UN-ILO relationship agreement is much wider than the questions of interpretation that can be put to the Court under article 37(1) of the Constitution.

8. Within the UN system, there is nothing uncommon about this dual legal basis for referring to the ICJ, on one hand, interpretation questions, and on the other, legal questions arising within the scope of the organization's activities; see, for instance,
    - art 75 of the WHO Constitution and art X(2) of the 1948 UN-WHO agreement;
    - art XVII(2) of the FAO Constitution and art IX(2) of the 1947 UN-FAO agreement;
    - arti XIV(2) of the UNESCO Constitution and art XI(2) of the 1947 UN-UNESCO agreement.

9. It is interesting to note that in the case of certain specialized agencies, the relevant provision of the relationship agreement is also expressly reflected in the Constitution; for instance, articles 75 and 76 of the WHO Constitution read:

> *Article 75*
> Any question or dispute concerning the interpretation or application of this Constitution which is not settled by negotiation or by the Health Assembly shall be referred to the International Court of Justice in conformity with the Statute of the Court, unless the parties concerned agree on another mode of settlement.
>
> *Article 76*
> Upon authorization by the General Assembly of the United Nations or upon authorization in accordance with any agreement between the Organization and the United Nations, the Organization may request the International Court of Justice for an advisory opinion on any legal question arising within the competence of the Organization.

Likewise, article XVII of the FAO Constitution reads:

> *Article XVII*
> 1. Any question or dispute concerning the interpretation of this Constitution, if not settled by the Conference, shall be referred to the International Court of Justice in conformity with the Statute of the Court or to such other body as the Conference may determine.
> 2. Any request by the Organization to the International Court of Justice for an advisory opinion on legal questions arising within the scope of its activities shall be in accordance with any agreement between the Organization and the United Nations.

10. Specialized agencies have made use of that dual legal basis in past practice. For instance, the request made by the WHO for an advisory opinion concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict was based on article 76 of the WHO Constitution and article X(2) of the UN-WHO relationship agreement. Likewise, in the advisory opinion on the *Constitution of the Maritime Safety Committee*, the Intergovernmental Maritime Consultative Organization (IMCO) invoked article 56 of its constituent instrument and article IX of the UN-IMCO relationship agreement.

11. If the ILO Constitution does not follow the same articulation importing the provision of article IX/(2) of the UN-ILO relationship agreement into article 37, this is probably due to the fact that, contrary to most UN agencies which were created alongside the UN, the ILO predates the creation of the United Nations. The Constitution has never been modified to align the text of article 37 with that of the UN Charter or the ICJ Statute, possibly because the focus was at the time on the adoption of a new paragraph to article 37 to allow for the establishment of an in-house tribunal.

12. In conclusion, article 37(1) is not the only legal basis for referring a legal question or dispute to the ICJ for an advisory opinion. The UN-ILO relationship agreement, read in conjunction with the UN Charter and the ICJ Statute, permits the ILO to refer legal questions, other than questions of interpretation of the Constitution or of Conventions, to the Court and establishes the jurisdiction of the Court to examine those questions. [1]

[1] Parenthetically, there are also other texts that provide for referral to the ICJ; for instance, section 32 of the 1947 Convention on the Privileges and Immunities of Specialized Agencies provides that any difference arising out of the interpretation or application of the Convention shall be referred to the ICJ for advisory opinion and that the opinion given by the Court shall be accepted as decisive. Mention may also be made of former article XII of the ILOAT Statute which provided that an organization having recognized the Tribunal's jurisdiction could challenge the validity of a decision of the Tribunal for reasons of fundamental procedural flaw by requesting an advisory opinion, to the ICJ.

Document No. 22

Comments of the Employers' Secretariat concerning the Office notes, October 2023

Employers' Secretariat's Preliminary Comments to Additional Notes on the ICJ Advisory Opinions prepared by the Office

After a thorough examination of the Office's three additional documents communicated to the ILO tripartite constituents on 20 October 2023, the Employers' secretariat unfortunately has to conclude that the information and analysis contained therein is legally inconsistent and can be strongly misleading for the following reasons. Comments on these three documents will be addressed separately below:

1. The binding legal effect of ICJ advisory opinions

Paragraph 3 of this document states that "*advisory opinions relating to the interpretation of the ILO Constitution or of an international labour Convention are endowed with binding effect because article 37(1) expressly provides so.*" We consider this argument legally inconsistent.

The Office's line of argument seems to be that, as indicated in paragraph 5, while apart from rare cases ICJ advisory opinions are not binding, the *"requesting organ, agency or organization remains free to decide, as it sees fit, what effect to give to these opinions"* and that the ILO through Article 37(1) of ILO Constitution has determined for its constituents the binding nature of ICJ advisory opinions.

It should be noted, however, that **Article 37(1) is silent on the binding nature of ICJ advisory opinions**. Article 37(1) reads as follows: "*Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*." Nowhere in the provision is provided that specifically ICJ advisory opinions are legally binding.

In particular, no legally binding effect for an ICJ advisory opinion can be derived from the term "decision". The term "decision" in Article 37(1) seems to be used as a generic term for all types of pronouncements that can be obtained from the ICJ under this provision, which are not only advisory opinions. For example, Article 37(1) may also be invoked by an individual member State to obtain a ruling in the event of a dispute over the interpretation of a Convention with another member State. A "decision" of the ICJ, which in this case would take the form of a judgment in the contentious proceedings, would indeed be binding.[1]

Moreover, Article 37(2) provides that "*Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph*." From the absence of a corresponding formulation in Article 37(1) can be concluded that the binding nature of an ICJ advisory opinion is limited to any established tribunal under Article 37(2), and there is no binding effect for ICJ advisory opinions in the case of Article 37(1). This is also the view of the former ICJ President, Roberto Ago, who states that

[1] ILO, International Labour Conference, Provisional Record 2, Ninety-fifth Session, Geneva, 2006, p..2/8, first bullet point.

"As regards the ILO, however, the tribunal in question has never seen the light of day, and any request by the ILO Governing Body to the International Court of Justice could accordingly lead only to an advisory opinion, which, as such, would not have decisive effect .[2]

Third, given the sensitive nature of a possible binding effect of ICJ advisory opinions on national sovereignty, the requirements for clarity and unambiguousness of the wording in the relevant provisions should be rather high. As mentioned above, Article 37(1) is not clear and unambiguous in this respect.

Fourth, it is important to note that the Office itself, in documents prepared for the Governing Body in 2006 and 2007, has questioned the binding effect of ICJ advisory opinions for the ILO and its constituents:

> *"However, apart from a question relating to the interpretation of the Convention, there are other questions that the Governing Body may wish to consider in the event that an advisory opinion is sought from the International Court of Justice. The first would concern the interpretation of the ILO Constitution. To the extent that the Governing Body decides to refer any question of interpretation to the International Court of Justice,* ***it would be logical to submit the complementary question as to whether such interpretation sought in the form of an advisory opinion could or should be recognized as binding for all Members under article 37(1) of the Constitution****. This question, which has for some time posed a theoretical issue, would immediately become of great practical significance should the Governing Body decide to submit a request for an advisory opinion to the Court."*[3]
>
> *"[t]hought could also be given* ***to whether the Court could interpret article 37(1) as providing a basis for an advisory opinion on a question of interpretation to be considered as binding on the ILO and on the States parties to the Convention involved".***[4]

As indicated above, it appears that the Office itself and also the former ICJ President were much more cautious when it came to the question of the possible binding nature of ICJ advisory opinions. In light of this, the Employers have doubts about the effectiveness of ICJ advisory opinions to resolve disputes over the interpretation of ILO Conventions with definitive legal certainty.

In any case, before any referral of the dispute on the right to strike is made to the ICJ under Article 37(1), the International Labour Conference (ILC) should necessarily have the opportunity to discuss and clarify the binding effect of a possible referral to the ICJ.

2. ICJ advisory proceedings – Relevant jurisprudence

As for this Office document, the Employers' Secretariat believes that it is of little relevance for the understanding of ICJ advisory opinions for ILO purposes. **Most of the ICJ advisory opinions**

[2] Roberto Ago, "Binding" Advisory Opinions of the International Court of Justice, p.449, footnote 44.
[3] ILO, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB 298, March 2007, INS/5/2, para. 5.
[4] ILO, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), GB 297, November 2006, INS 8/2, para 9.

presented here concern legal questions that **do not involve the interpretation of Conventions**.

It should also be noted that the ILO is unique and different from the UN and other UN organizations in that its organs are composed not only of government representatives but also of representatives of employers and workers. The ICJ advisory opinion jurisdiction concerning the UN and other UN organizations should therefore be viewed with great caution for ILO purposes.

Furthermore, while all ICJ advisory opinions that the ILO has sought in the past have been followed up by consensual decisions either by the ILC or the Governing Body, there is no automatism to declare ICJ advisory opinions legally binding.

3. Legal basis for requesting an advisory opinion

The Employers' Secretariat notes from this document that Art IX(2) of the 1946 UN-ILO Relationship Agreement is wider in scope than Article 37(1) of the ILO Constitution in that it authorizes the ILO to request advisory opinions from the ICJ "*on legal questions arising within the scope of its activities*" other than questions concerning the mutual relationships of the Organizations and the UN or other specialized agencies.

It is not quite clear why the third document was produced in the context of the interpretation dispute on the right to strike in C87. ICJ opinions issued on the basis of Art IX(2) of the 1946 UN-ILO Relationship Agreement are in any case not legally binding. This provision is completely silent on the binding nature of ICJ advisory opinions and the ICJ has itself declared that they are inherently not legally binding. [5]

While there is a legal basis in Article 37(1) of the ILO Constitution for referring a legal question or dispute concerning the interpretation of a Convention to the ICJ, there are other ways to resolve legal questions and interpretation disputes using the existing ILO`s internal means of action. In particular, the International Labour Conference (ILC), the ILO's supreme body, has the competence and legal authority to settle disputes related to the interpretation of Conventions, through the adoption of revising Conventions or the adoption of Protocols.

Given the complexity and the multi-layered nature of the interpretation dispute on the scope and limits of the right to strike, the ILC also appears to be the most appropriate authority to settle this dispute as it allows all ILO constituents to actively contribute to and engage in the process. In fact, it is the only body that can ensure that any solution would be based on consensus or would enjoy broad support of ILO constituents, thus enhancing the desired legal certainty.

[5] ICJ, Advisory Jurisdiction "*Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding*."

Document No. 23

IOE, Comments to the background report prepared by the Office titled "Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution", dated 6 October 2023

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6 October 2023

Comments to the Background report prepared by the Office titled "*Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*"

Table of Contents

I. Introduction

On 31 August 2023, the ILO Director General sent to all ILO Member States, along with an invitation to provide comments before 6 October 2023, the background report prepared by the Office entitled "*Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the ILO Constitution*".

As the secretariat of the Employers' group in the ILO, the International Organisation of Employers (IOE) hereby provides preliminary comments on the background report. We note that a slightly revised version of the background report was published on the ILO Governing Body website on 18 September 2023 as an Appendix to a document for the 349th bis (Special) Session of the Governing Body, scheduled for 10 November 2023.[1] Furthermore, we reserve the possibility of updating and supplementing our position in the light of the second content of the background report that the Office is currently preparing for the 349th (Special) Session of the Governing Body requested by the Employers and scheduled for 11 November, as well as in light of any subsequent consultations with and feedback received from the Employers' group and the discussions that will take place during the special meetings on 10-11 November 2023.

At the outset, the **IOE considers that the title of the background report, which refers to "34 governments" is misleading**. Article 7(8) of the Constitution[2] and paragraph 3.2.2 of the Standing Orders of the Governing Body,[3] which the Workers' group rely on to call for a special meeting, mean only governments represented on Governing Body. We note that the first version of the background report sent by the Office on 31 August 2023 contains in Appendix I the letters received from supporting Governments. However, the letter from the European Union (EU) and its member States, Iceland and Norway was only signed by the Permanent Representative of the EU to the United Nations (UN) in Geneva and the Permanent Representative of Spain to the UN in Geneva. There were no signatures and thus no "written requests" from other EU member States. Apart from the fact that the EU is not an ILO member State, not all the member States to the EU or EFTA countries (Iceland) are members of the

[1] ILO, *Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, GB.*349bis/*INS/1, 18 September 2023.

[2] ILO Constitution, Article 7(8) reads "*The Governing Body shall regulate its own procedure and shall fix its own times of meeting. A special meeting shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body*." (emphasis added)

[3] ILO, Standing Orders of the Governing Body, p. 34-35, para 3.2.2, reads "*Without prejudice to the provisions of article 7 of the Constitution of the Organization, the Chairperson may also convene after consulting the Vice-Chairpersons, a special meeting should it appear necessary to do so, and shall be bound to convene a special meeting on receipt of a written request to that effect signed by sixteen members of the Government group, or twelve members of the Employers' group, or twelve members of the Workers' group*."

Government group of the Governing Body.[4] Likewise, South Africa, which also sent a supporting letter, is not a member of the Government group of the Governing Body. The Office should have only counted those member States that are members of the Governing Body. In total, it seems **only 23 members of the Workers' and the Government groups of the Governing Body out of those that made the request for a special meeting of the Governing Body were actually entitled to do so,**[5] not 34 as indicated in the title of the Background report or 36 as indicated in the version published on 18 September 2023.[6]

II. General Remarks

The Employers wish to the lack of objectivity and impartiality shown by the Office in preparing the background report. Although the background report states that "***its aim is not to provide substantive answers to the long-standing controversy concerning the right to strike, to assess the merits of the opposing views, or to express any views on the advisability of a referral to the Court***",[7] the Office partly provides a one-sided narrative that supports the referral to the ICJ.

In particular, **the background report does not reflect the views expressed by the Employers regarding the Workers' proposal in the recent letters they sent to the ILO Director General; neither are these letters attached to the background report**. There were in total seven letters received by the ILO Director General at the time the background report was sent on 31 August 2023.[8] These letters are highly relevant in providing ILO tripartite constituents with a complete view of the various positions on this topic and align with the principles of transparency and inclusivity.

Furthermore, **the background report goes beyond providing information on the dispute, but also seeks to pre-empt the outcome of the Governing Body discussions**. This concerns in

[4] EU member States that are GB titular members are Germany, France, Romania, Italy and Czechia, and GB deputy members are Croatia, Belgium, Croatia, Spain, Lithuania, Portugal, Sweden and Slovenia. EU member States that are not GB members are Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Luxemburg, Malta, Netherlands, Poland and Slovakia.

[5] (Undated) Response from the Office to the "*Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body*" submitted by the IOE on 20 August 2023, p.2.

[6] ILO, *Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, GB.*349bis/*INS/1, 18 September 2023.

[7] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 4.

[8] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, Appendix I, which contains only the letters received by the Workers and Governments.

particular the Draft Governing Body resolution in Appendix II[9] and the chart advisory procedure before the ICJ in Appendix IV.[10] The draft resolution in Appendix II is misleading as it presents the referral of the dispute on the right to strike to the ICJ under Art 37(1) of the ILO Constitution as "*the only viable option available*" to end the dispute. In this way, the draft resolution seeks to preclude the forthcoming discussions on this contentious point. Appendices II and IV do not take into account the views that were previously expressed by the various groups, nor do they recognise that no consensus was reached during the March 2023 Governing Body session. This is totally unacceptable.

III. Understanding the long-standing dispute

The background report depicts the interpretation dispute on the right to strike as a "*dispute between the ILO Employers' and Workers' group, which has lasted more than 30 years*".[11] However, this is not accurate as it does not provide the full picture of the long-standing dispute.

The dispute has its origin in ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR)'s broad, detailed and extensive interpretation on the right to strike in its observations on the application of C87 in its annual report. These interpretations were subsequently supported by the Workers and challenged by the Employers and some governments. The very fact that the CEACR has continued to further develop these interpretations year after year against all the concerns expressed by constituents has resulted in the ongoing dispute, which has now lasted for more than three decades.

In that regard, the influential role of the Office on the CEACR interpretations should be noted. The Office in that it prepares the drafts for the CEACR observations has ensured the continuity and consistency of the interpretations over time irrespective of changes in the composition of the CEACR.

It is clear that without the Office assisting the CEACR, the dispute between the Employers and the Workers on the right to strike would not have arisen in the first place. The Employers would recall once more that the CEACR, in line with its mandate and past practices, whenever it identifies divergences in the interpretation of Conventions could bring these divergencies

[9] *See also* ILO, *Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, GB.*349bis/*INS/1, 18 September 2023, Annex I.

[10] *See also* ILO, *Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, GB.*349bis/*INS/1, 18 September 2023, Annex III.

[11] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 7.

to the attention of the Governing Body and the International Labour Conference (ILC) so that they can take the necessary action.[12]

IV. Employers' Position on the Right to Strike in the Context of C87

It is important to clarify that the Employers recognise that the right to strike is guaranteed in most jurisdictions and that countries have established diverse ways to determine its scope and limits under national law. The Employers have also acknowledged that the right to take industrial action by workers and employers in support of their legitimate industrial interests is jointly recognised by the constituents of the ILO.[13] Therefore, the **Employers are not challenging the right to strike at national level which is a reality.** However, **the Employers firmly believe and have consistently done so in the past that the right to strike is not provided for or regulated in C87 or any other ILO Convention.** The recognition and regulation of the right to strike in an ILO standard would require the implementation of a standard-setting process with all its participatory approach, its procedural guarantees and its established decision-making rules, which alone could adequately take into account the great diversity of industrial relations systems in ILO member States.

The legislative history of C87 is indisputably clear that the right to strike was not overlooked but that the tripartite constituents who were the drafters of the Convention intentionally did not include the right to strike in any implicit or explicit way. As rightly pointed out in the background report, at the time of the adoption of C87:

> "*Several Governments …have… emphasised, **justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike**, a question which will be considered in connection with Item VII (conciliation and arbitration) on the agenda of the Conference. In these circumstances, **it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association***".[14]

While Article 37(1) of the ILO Constitution provides that any question or dispute relating to the interpretation of the Constitution or of any subsequent Convention shall be referred to the ICJ, constituents have always favoured tripartite solutions except for one occasion: In 1932, the ILO referred a dispute over the interpretation of the term "women" in Art 3 of the Night Work (Women) Convention, 1919 (No. 4) to the ICJ.

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[12] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, paras 79 and 86.

[13] ILO, *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level*, TMFAPROC/2015/2, 23 February 2015, Appendix I, p. 2.

[14] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 43. *See also* ILO, *Freedom of Association and Protection of the Right to Organise: Report VII*, ILC 31st Session, 29 June 1948, p. 87.

More importantly, the **ICJ is not the only competent body available** to provide legal certainty.[15] There is also the **ILC, which is the executive body of the ILO, and which has full authority and competence** to clarify any interpretation through standard setting.

Furthermore, it is also important to highlight that **ICJ advisory opinions are inherently not legally binding**, unless when otherwise explicitly indicated.[16] While Article 37(2) of the ILO Constitution indicates that "*any applicable judgement of the ICJ shall be binding upon any tribunal established in the virtue of this paragraph*", Article 37(1) is completely silent on the legal effect of an ICJ decision.[17] In other words, the binding nature of an ICJ advisory opinion is limited to any established tribunal under Art 37(2), which to date does not exist. Considering that – beyond this very marginal and theoretical exception – "*the requesting organ, agency or organization remains free to give effect to the opinion as it sees fit, or not to do so at all*",[18] **the ICJ can only provide limited legal certainty to the interpretation dispute**. Therefore, **any legal impact of ICJ advisory opinions** for the various ILO players involved in the dispute, including the possibilities of creating a legally binding effect for ILO constituents, **needs to be carefully examined and discussed in the Governing Body or the ILC.**

On the other hand, **standard setting at the ILC can provide more legal certainty** regarding possible ILO rules on the right to strike, including legal obligations on these rules upon member States that ratify the new instrument. Furthermore, only such a tripartite social dialogue-based approach in addressing the right-to-strike issue would **ensure inclusivity and democracy**, by allowing all ILO constituents to actively engage in the process; solutions would **be based on** prior research (law and practice report) and **consensus or at least a broad majority**; and outcomes adopted would be universally relevant and accepted. More importantly, this approach is entirely consistent with the mandate of the ILO and **upholds the principles of tripartism and social dialogue**.

It may be recalled that the Governing Body had a discussion in 1992 on the proposal by the Government of Colombia to place a standard-setting item concerning the right to strike on the agenda of the ILC in 1994.[19] The Colombian proposal was justified in the following terms:

> "*The right to strike is one of the basic safeguards of the working class. This has been recognised in the constitutions and legislation of countries having democratic systems of government, including Colombia. However, **within the International Labour Organisation itself, 72 years after its establishment, no Convention of this kind has been adopted**. … In reality, Convention No. 87 only deals with the right of workers and employers to establish and join organisations;*

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[15] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 14.

[16] ICJ, Advisory Jurisdiction "*Contrary to judgments, and except in rare cases where it is expressly provided that they shall have binding force (for example, as in the Convention on the Privileges and Immunities of the United Nations, the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, and the Headquarters Agreement between the United Nations and the United States of America), the Court's advisory opinions are not binding*."

[17] Article 37(1), ILO Constitution "*Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*."

[18] ICJ, How the Court Works.

[19] ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992.

the right for such organisations to draw up their constitutions and rules and elect their representatives in full freedom without being liable to be dissolved or suspended by administrative authority; and their right to establish federations or confederations."[20]

During the 1992 discussion, a number of countries supported this proposal recognising that the right to strike was not regulated in ILO standards.

In particular, the Government member of Morocco stated:

"***Since no instrument existed on the subject, there was a legal gap which had to be filled.*** *Though the right to strike was granted to workers in a large number of countries, only a few countries had fixed the modalities of its implementation. It was essential to define the notion of the right to strike,* ***since there was no such thing as an absolute right to strike. It was therefore important to define its limits, which concerned in particular the essential services.***"[21]

Likewise, the Government member of Venezuela, justified its position by affirming that "*the relevant ILO instruments, in particular Conventions No. 87 and No. 98, made no mention of the right to strike. […]* ***An international instrument on the right to strike was therefore essential***."[22]

In this way, governments recognised that C87 does not contain the right to strike and considered possible standard setting as the natural option to address this issue.

V. The Core Elements of the Dispute

A. Neither Convention 87 nor any ILO instruments to date provide for "the right to strike"

It is important to emphasise that Employers, Workers and Governments, as well as ILO standards supervisory bodies have all acknowledged on multiple occasions that neither C87 nor any ILO instruments provide for nor intended to include "the right to strike".

First, at the time of the drafting and adoption of C87, **the Office concluded that the right to strike would not be included in such Convention**.[23] In line with this, the Workers' and Governments' members of the drafting committee for the 1970 ILO Resolution concerning trade union rights and their relation to civil liberties stated that, "*while the right to strike was provided for in certain instruments adopted by other international organisations,* ***no ILO instrument dealt with this right and the adoption of standards on this subject should be considered by the ILO***."[24]

[20] ILO, *Agenda of the 81st (1994) Session of the Conference*, GB.253/2/3(Rev.), Appendix I, p. 21-22.
[21] ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13.
[22] ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/16.
[23] ILO, *Freedom of Association and Protection of the Right to Organise: Report VII*, ILC 31st Session, 29 June 1948, p. 87.
[24] ILO, *Record of Proceedings*, ILC 54th Session, 22 June 1970, p. 580 & 583, paras 12 & 25.

Similarly, **Governments have also acknowledged that C87 does not provide for the right to strike**. For example, during the discussion of the General Survey on C87 and 98 in 1973, the **Government of Switzerland** indicated that the right to strike was not covered under C87, as shown by the preparatory work leading to its adoption.[25] The **Government member of Japan** also pointed out that "*there was no Convention or Recommendation or other decision of the International Labour Conference defining the extent of the right to strike in the public sector.*"[26] Likewise, the **Government member of Cyprus** *"considered that the position of a number of governments on this matter was that they could not relinquish the sovereignty of the State. His own conclusion was that the Convention on freedom of association was now inadequate as far as public servants were concerned and that they should be re-examined with a view to up-dating them"*.[27]

During the discussion of the General Survey on C87 and 98 at the ILC in 1983, the **Government member of Tunisia** challenged the Committee of Experts' interpretations regarding a right to strike in C87 stating that *"his Government was not in agreement with the Committee of Experts concerning the interpretation which the Committee had given to the concept of essential services"*.[28]

Likewise, in 1991 Governing Body session, the **Government member of Sweden** recognised that"*Not all aspects of Conventions were entirely clear, however, and **one grey area surrounded the right to strike, which was not mentioned in Conventions Nos. 87 and 98** and had **not been covered in the preparatory work** of the International Labour Conference when it adopted them.*"[29]

Furthermore, during the discussion in the Conference Committee on the Application of Standards (CAS) in 1986, the **Government member of the German Democratic Republic** stated *"that no mention was made of the right to strike in any of the provisions of the Convention"* and referred to the view of the CEACR that *"the prohibition of strikes was not in conformity with Article 3 of the Convention"* as a *"personal interpretation"* which as *"a method of work should be rejected"*.[30]

The CEACR has also itself recognised that "*the right to strike is not explicitly stated in the ILO constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98*".[31] Likewise, the **Fact-Finding and Conciliation Commission** on Freedom of Association recognised this by stating that "*while in international law the right to strike is explicitly recognized in certain texts adopted at the international and regional levels, the **ILO instruments do not make such a specific reference**.*"[32]

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[25] ILO, *Record of Proceedings*, ILC 58th Session, 22 June 1973, p. 544, para 27.
[26] ILO, *Record of Proceedings*, ILC 58th Session, 22 June 1973, p. 544, para 26.
[27] ILO, *Record of Proceedings*, ILC 58th Session, 22 June 1973, p. 544, para 27.
[28] ILO, *Record of Proceedings*, ILC 69th Session, 17 June 1983, p. 31/13-31/14, para 62.
[29] ILO, *Minutes of the 251st Session*, GB.251/PV(Rev.), 12 November 1991, p. III/8.
[30] ILO, *Record of Proceedings*, ILC 72nd Session, 21 June 1986, p. 31/33.
[31] ILO, *Freedom of association and collective bargaining*, ILC 81st Session, 1994, p. 62, para 142.
[32] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 67.

Moreover, **the Governing Body acknowledged that C87 does not include the right to strike**. In 1956, the Governing Body decided against revising the reporting form for C87 with a view to adding specific questions on restrictions to the right to strike for public employees, precisely because it considered that C87 did not cover the right to strike.[33] To date, the reporting form for C87 does not include any question relating to the right to strike. Likewise, the ILC also made no mention of the right to strike during the 40th anniversary of the adoption of C87, given that such right does not exist in the instrument.[34]

To sum up, it can be said that various ILO constituents and ILO bodies at different occasions have acknowledged that C87 does not expressly or impliedly include the right to strike. The background report should have provided a complete record of all the discussions that took place on the right to strike in the ILO and in relation to C87, not only at the ILC.

B. Rules of Treaty Interpretation under Vienna Convention should be fully respected

The general rules of interpretations under Articles 31 and 32 of the Vienna Convention on Law of Treaties (Vienna Convention) are explicitly clear and should be fully respected.[35] There is no disagreement about the applicability of the Vienna Convention to ILO Conventions, such as C87. **Other interpretation methods not recognized by the Vienna Convention should not be accepted, as they would provide legal uncertainty and ambiguity.**

1. *Dynamic or evolutive interpretation*

The Workers argue that *"the possibility for 'dynamic' interpretation*" is afforded by Article 31 of the Vienna Convention.[36] Article 31(1) of the Vienna Convention reads as follows "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" It appears that Art 31(1) clearly defines the criteria for valid interpretation and that there is no room for vague concepts such as "dynamic" interpretation. In particular, to meet the criterion "the ordinary meaning to be given to the terms of the treaty", the words "right to strike" or similar terms would have to use in C87, which is not the case.

2. *Object and purpose*

Second, the Workers' group justified that dynamic interpretation is used "*insofar as it requires treaty provisions to be interpreted in light of the object and purpose of the treaty*". However, at the time of the drafting of C87, it was indicated that "*[s]everal Governments …have…emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike*".[37] Furthermore, the Chairman stated clearly "***the Convention was not intended to be a 'code of regulations' for the right to***

[33] ILO, *Minutes of the 131st Session of the Governing Body*, 1956, Appendix XXII, p. 188.
[34] ILO, *Resolutions adopted by the International Labour Conference*, ILC 73rd Session, 1987.
[35] UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, *Treaty Series*, vol. 1155, p. 331.
[36] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 10.
[37] ILO, *Freedom of Association and Protection of the Right to Organise: Report VII*, ILC 31st Session, 29 June 1948, p. 87.

organise, but rather a concise statement of certain fundamental principles".[38] Therefore, while it is clear that the "object and purpose" of C87 was to regulate freedom of association and the right to organize, it was also explicitly stated that its "object and purpose" was not to regulate the right to strike.

3. *Subsequent agreement between the parties regarding the interpretation and subsequent practice establishing agreement of the parties regarding the interpretation*

Third, the Workers' group contends that:

> *"the terms of Convention No. 87 guaranteeing the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice that establishes general agreement regarding their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention."*[39]

However, neither the Preamble nor the text of the ILO Constitution and of the Declaration of Philadelphia expressly or impliedly include the right to strike, nor even the right to organise. Therefore, the Workers' argument that C87 includes the right to strike based on this "context" is unfounded and invalid.

Concerning any subsequent agreement regarding this interpretation, **the fact that several ratifying States of C87 have at different points in time stated that neither C87 nor any other ILO instrument provide for the right to strike illustrates that there is no such a general agreement**.[40]

As regards possible subsequent practice establishing agreement of the parties regarding the interpretation, the ongoing non-compliance by most ratifying countries with one or more of the CEACR's interpretations on the right to strike, as reflected in the CEACR's observations on C87 in each annual report, is proof that such practice does not exist.

Furthermore, it is important to note that while CEACR observations are influential in national courts, **only 12 countries and one regional court have applied the CEACR interpretations on the right to strike in their national court decisions**.[41] Given that 158 ILO member States have

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[38] Renate Hornung-Draus, 'The Right to Strike in the ILO System of Standards: Facts and Fiction' (2018) 39 Comp Lab L & Pol'y J 531, p. 534.

[39] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 10.

[40] *See* for example Morocco, Venezuela, Germany, and Colombia, in 1992, as well as Sweden in 1991. ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13 and I/16; ILO, *Agenda of the 81st (1994) Session of the Conference*, GB.253/2/3(Rev.), Appendix I, p. 21-22; ILO, *Minutes of the 251st Session*, GB.251/PV(Rev.), 12 November 1991, p. III/8.

[41] Namely Botswana, Brazil, Burkina Faso, Canada, Colombia, European Court of Human Rights, Fiji, Kenya, Nigeria, Peru, Russian Federation, Senegal and South Africa. *See* ITC-ILO, *Compendium of Court Decisions*, under "right to strike".

ratified C87,[42] application of the CEACR interpretations by 12 member States is far from representing subsequent practice establishing agreement of the parties to C87 on the interpretation regarding the right to strike.

Moreover, the Background report also notes that the Governing Body Committee on Freedom of Association and its predecessor the Fact-Finding and Conciliation Commission on Freedom of Association have affirmed that the right to strike is intrinsically linked to the principle of freedom of association and is thus protected under C87.[43] It is important to note that the mandate of both of these bodies is to examine alleged infringement of the principles of freedom of association and the effective recognition of the right to collective bargaining in the ILO Constitution and Declaration of Philadelphia. The mandate does not include the supervision of the application of C87.[44] Both bodies provide recommendations and conclusions that are decided on a case-by-case basis and do not form any legal precedents. **Occasional pronouncements by the Committee on Freedom of Association on the right to strike for individual countries cannot replace a proper standard-setting process, whereby the ILO tripartite constituents negotiate and decide on the content and scope of the instruments**.

Lastly, the Conference Committee on the Application of Standards (CAS) also for many years did not make any references to the "right to strike" in its conclusions on cases concerning C87 due to the disagreement on the interpretation of C87.[45]

All this considered, it cannot be argued that an agreement on the interpretation of the right to strike in C87 has been established through the subsequent practice of the parties.

4. Preparatory work of treaty

Finally, the Workers argued that "*no recourse to the preparatory work is needed, as the conditions of the Vienna Convention are not met; that is to say, the interpretation suggested*

[42] ILO, Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

[43] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, paras 61-67.

[44] ILO, Compilation of decisions of the Committee on Freedom of Association, para 1 "*The Committee on Freedom of Association (CFA) is a tripartite body set up in 1951 by the Governing Body (GB) of the International Labour Organization (ILO). The CFA examines alleged infringements of the principles of freedom of association and the effective recognition of the right to collective bargaining enshrined in the Constitution of the International Labour Organization (Preamble), in the Declaration of Philadelphia and as expressed by 1970 ILC Resolution*."

[45] ILO, *Committee on the Application of Standards*, CAN/D.1, 5 May 2023, p. 7, para 32 "*The conclusions regarding individual cases are proposed by the Vice-Chairpersons and submitted by the Chairperson to the Committee for adoption. The conclusions should take due account of the elements raised in the discussion and information provided in writing by the government. The conclusions should be short, clear and specify the action expected of governments. They may also include reference to the technical assistance to be provided by the Office. The conclusions should reflect consensus recommendations. Divergent views can be reflected in the Committee's Record of Proceedings.*"

in accordance with article 31 does not leave the meaning ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable."[46]

On this point, the Employers agree that the application of the interpretative means under Article 31 does not leave the meaning of C87 relevant provisions ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable. **As argued above, C87 provisions are clear as to the non-inclusion of the right to strike.**

However, it also needs clarifying that according to Article 32 of the Vienna Convention, **recourse to supplementary means of interpretation, such as preparatory works, can be made "*in order to confirm the meaning resulting from the application of article 31*"**.[47] This means that it will always be possible to resort to the preparatory works as a supplementary means to confirm an interpretative outcome resulting from the application of means under Article 31.

As the background report indicates, when responding to the questionnaire on the form and content of possible international regulations concerning the right to freedom of association and the right to organise, **several governments indicated that the proposed instrument should only relate to the freedom of association and not the right to strike**.[48] As a result, the Office did not include a provision on the right to strike in the draft instrument and in the discussion at the Conference the right to strike was not even mentioned. This fact confirms the interpretation under Article 31 of the Vienna Convention that C87 does not include the right to strike.

VI. The mandate of the CEACR

The mandate of the CEACR is clear. The CEACR is to "*undertake an **impartial and technical analysis** of how the Conventions are applied in law and practice by Member States, while **cognizant of different national realities and legal systems**. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its **opinions and recommendations are non-binding**, being intended to guide the actions of national authorities."*[49] The ILC clarified in this regard that the CEACR "***would have no judicial capacity***

[46] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 10.

[47] Vienna Convention on the Law of Treaties, Article 32 "*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*"

[48] ILO, *Freedom of Association and Protection of the Right to Organise: Report VII*, ILC 31st Session, 29 June 1948, p. 67. *See* Netherlands and Sweden, who considered that the Convention should not be concerned with questions relating to the right to strike.

[49] ILO, *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level*, TMFAPROC/2015/2, 23 February 2015, Appendix I, p. 2.

nor would it be competent to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than of another."[50]

It is important to note that the CEACR mentioned a right to strike for the first time in its third General Survey on the subject in 1959 in only one paragraph and only with respect to public services.[51] However, the CEACR over time gradually expanded its views on the matters to seven paragraphs in 1973, 25 in 1983 and with a separate chapter of no few than 44 paragraphs in 1994 and 2012, including a number of new subjects.[52]

Most worryingly, the CEACR in paragraph 145 of its 1994 General Survey stated that "*in the absence of an expression provision on the right to strike in the basic text, **the ILO supervisory bodies have had to determine the exact scope and meaning of the Convention on this subject***."[53] This statement testifies to a completely misguided and highly questionable understanding of the CEACR of its tasks. It is by no means that the CEACR has the power or even the duty to regulate by means of interpretation matters that were deliberately not regulated in an ILO Convention. **Such a competence has never been conferred on the CEACR, neither by the Governing Body nor by the ILC**.

The Government member of Denmark, who spoke on behalf of the Nordic Governments also questioned the CEACR's self-proclaimed authority by stating that:

> "[*P*]*erhaps the Committee of Experts went too far when it suggested that a government which did not agree with its interpretation would have obtain a legally binding opinion from the International Court of Justice, [since] this obligation was not within the spirit of article 37 of the ILO Constitution.*"[54]

Based on this mistaken assumption, the CEACR has provided observations on numerous cases involving specific national provisions or practices restricting strike action. [55] In approximately 90% to 98% of these cases, the experts concluded that restrictions on strike action are not compatible with C87. **The CEACR gradually built a comprehensive body of broad, extensive and detailed interpretations that provide a far-reaching, almost unrestricted freedom to strike.** The expansion of the CEACR's interpretation on the right to strike, overtime, led to a critical situation on which the Employers needed to become progressively vocal, at least, since 1987.

Therefore, the Employers consider that **CEACR's interpretations cannot and should not be used as the basis for determining at the international level the scope and limits of the right to strike** nor should they be used as the basis for assessing or monitoring its implementation.

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[50] ILO, *Record of Proceedings*, ILC 8th Session, 1926, Appendix V, pp. 405–407.
[51] ILO, *Freedom of Association and Collective Bargaining*, ILC 43rd Session, 1959, p. 114, para 68.
[52] Renate Hornung-Draus, 'The Right to Strike in the ILO System of Standards: Facts and Fiction' (2018) 39 Comp Lab L & Pol'y J 531, p. 533.
[53] ILO, *Freedom of association and collective bargaining*, ILC 81st Session, 1994, p. 64, para 145.
[54] ILO, *Record of Proceedings*, ILC 78th Session, 1991 p. 24/7, para. 33.
[55] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 60.

VII. The questions to be put to the Court

The Employers take note that the Workers' referral questions retain the same wording of those proposed for the Governing Body discussion in November 2014.[56] However**,** it should have been pointed out here that the first question, **whether a right to strike is part of C87, can only be decided on the basis of the rules in Articles 31 and 32 of the Vienna Convention**.

Regarding the second question on whether the CEACR was competent to specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise in the context of C87, reference should also have been made to Articles 31 and 32 of the Vienna Convention. In fact, **the CEACR has never been given an interpretative mandate that would have dispensed it from complying with the rules in the Vienna Convention**. In other words, the competence of the CEACR to make specifications on the scope, limits and the conditions of the right to strike in the context of C87 is limited by the requirements of Articles 31 and 32 of the Vienna Convention, which the Committee needs to respect in each individual case.

In any case, the two questions proposed by the Workers' Group are insufficient as, among many other points, the ICJ should also be asked to clarify the role of the ILC in relation to the CEACR and the competence of the ILC to authoritatively settle interpretation disputes through standard-setting.

VIII. Possible next steps

The Employers consider that it would be too simplistic to have just the Governing Body as the responsible body for assessing referral requests and leave aside the State Parties to the C87. We suggest that State parties to a Convention under which there is an interpretation dispute (and their respective national social partners), as they could be directly affected by an ICJ decision, should have a priority right to be involved in Art 37(1) referral decisions. This seems necessary if only to promote their acceptance of an advisory opinion of the ICJ. Therefore, in our view, **no decision to refer an interpretation dispute to the ICJ should be made unless it is based on the support of the State parties to the Convention concerned during the ILC**.

IX. Conclusion

In conclusion, the IOE appreciates the opportunity to provide its comments to the background report and its preliminary views on a possible referral for the dispute on the interpretation of C87 in relation to the right to strike to the ICJ. The Employers have been clear: **a referral to the ICJ cannot settle the dispute on the right to strike in a conclusive manner and thus does not provide for a viable way forward, as the right to strike is a multifaceted and complex issue that cannot be separated from the widely diverging industrial relations systems and**

[56] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 100.

practices in ILO Member States. It is unclear how external and judicial bodies could possibly develop a solution that would meet the diverse realities and needs of industrial relations systems in member States and thus would be widely accepted by ILO constituents.

The Employers have expressed their firm belief that **the solution to ending this dispute and achieve legal certainty should remain in the hands of the ILO's tripartite constituents**. ILO and its tripartite constituents need the necessary room for dialogue and cooperation to move closer to consensus. While the ILO Constitution provides an avenue to referral to the ICJ to resolve interpretation disputes, this does not appear to be a suitable one for the case of the right to strike. On the contrary, **standard setting on the right to strike would ensure that all ILO constituents could actively engage in the process, that any solution achieved would be based on consensus or at least a broad majority, and finally that any outcome adopted is universally relevant and accepted**.

It follows that, **referral to external and judicial bodies, the ICJ or an ILO tribunal, should not occur unless all possibilities of dialogue between the main ILO actors competent with respect to ILO standards have been exhausted**, which is not currently the case. In particular, standard setting, which in the ILO is the most developed form of social dialogue for finding common ground on labour and social issues, has never been used with regard to the right to strike.

The Employers have expressed their commitment to social dialogue and tripartism, which are the cornerstones of the ILO, and we look forward to the substantive discussions during the Governing Body special meeting that will take place on 10 and 11 November 2023.

Document No. 24

ITUC, Comments on the Office background report regarding the request of the Workers' group to urgently refer the dispute on the interpretation of Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, dated 6 October 2023

ITUC CSI IGB

ITUC International Trade Union Confederation
CSI Confédération syndicale internationale
CSI Confederación Sindical Internacional
IGB Internationaler Gewerkschaftsbund

Akiko Gono
President
Présidente
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Presidenta

Luc Triangle
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Mr Gilbert Houngbo
Director-General
International Labour Office
Route des Morillons, 4
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Switzerland

ITUC/Lex

6 October 2023

Re: Action to be taken on the request of the Workers' group and 36 governments to urgently refer the dispute on the interpretation of Convention 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution

Dear Director General,

We refer to your letter dated 31 August 2023 addressed to all Member States of the ILO regarding the request, by the Workers' group letter of 12 July 2023, for the urgent referral of the dispute over the interpretation of ILO Convention 87 in relation to the right to strike to the International Court of Justice (ICJ) for decision in accordance with article 37(1) of the ILO Constitution.

We welcome the Office Background report, attached to your letter, as a good basis for discussion at the special meeting to be held in conjunction with the 349th Session (October-November 2023) of the Governing Body, scheduled for 10 November 2023 (as the 349th bis session).

Pursuant to your request that any comments on the Office Background report from Governments or Employers' and Workers' organizations concerned should be addressed to the Office of the Legal Advisor not later than Friday 6 October 2023, please find below the commentary of the International Trade Union Confederation (ITUC) in this regard. In addition, we also refer to the ITUC's 2014 legal analysis on the legal basis of the right to strike in international law and a Background Note (Questions and Answers) by the Workers' Group in the ILO (see attached). We also draw the attention of the Office and ILO constituents, with the permission on the authors, to the 2020 book, *The Right to Strike in International Law*[1].

We expect, in due course, that you will bring this to the attention of Governing Body and further processes in relation to this dispute.

Yours sincerely,

Luc Triangle
Acting General Secretary

[1] Jeffrey Vogt, et. al., THE RIGHT TO STRIKE IN INTERNATIONAL LAW (Hart Publishers, 2020).

Comments of the International Trade Union Confederation (ITUC) on the Office Background report regarding the request of the Workers' group to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution

Introduction

This document is sent to the Office of the ILO as per the request of its Director General, in response to the background report published by the Office on 31 August 2023. The aim is to provide the perspective of the ITUC and its affiliates, representing over 191 million workers, to enable the Governing Body take a decision to refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice in accordance with article 37(1) of the ILO Constitution.

Summary of the facts and the nature of the dispute on the right to strike under ILO Convention 87

1. In 2012, the Employers' group created an institutional crisis for the ILO when it prevented the Conference Committee on the Application of Standards (CAS) from performing it's institutional function. The group disrupted the CAS because it disputed the long-standing authoritative guidance of the supervisory bodies of the ILO, including the Committee of Experts on the Application of Conventions and Recommendations (CEACR/Committee of Experts), regarding the right to strike and the scope of Convention 87. Since then, the ILO, governments, and the social partners have engaged in several efforts to resolve this dispute through social dialogue. These efforts have proven unsuccessful, and there is no reason to believe that further dialogue will break this impasse.

2. The dispute and the confusion and lack of legal certainty it has created has served to undermine the proper functioning of the supervisory system[2] and has damaged the ILO as a whole[3]. Fortunately, the ILO Constitution provides an efficient and ready mechanism to resolve this legal dispute through article 37.1 in accordance with the rule of law.

[2] Since 2012, for example, the Conference Committee on the Application of Standards (CAS) has been unable to reach conclusions on the exercise of the right to strike and therefore not been able to provide guidance to Member States in this regard.

[3] We do not here attempt to address the merits of the dispute of interpretation, but only to note that one exists, and that the ILO constitution obliges us to resort to the ICJ for an advisory opinion.

It makes clear that such disputes of interpretation must be referred to the International Court of Justice (ICJ) for an advisory opinion[4]. The ICJ, one of the principal organs of the United Nations, with its competent judges of high repute on matters of international law, is well placed to provide the ILO, and its constituents, the needed legal clarity and certainty to robustly fulfil its mandate of social justice.

3. As was indicated in a previous Office paper on the subject[5], "Disagreement on the scope or meaning of certain provisions may arise without necessarily calling into question the validity of comments, conclusions or recommendations of the supervisory bodies or interfering with their authority to formulate such comments, conclusions or recommendations." The current dispute regarding the right to strike under Convention 87 does not fall into such a category. As already stated, this dispute has created an institutional crisis for the ILO since 2012 by calling into question the validity of comments, conclusions and recommendations of the supervisory bodies and interfering with their authority to formulate such comments, conclusions and recommendations with respect to the right to strike and the scope of Convention 87.

4. According to article 37(1) of the ILO Constitution, when a question or dispute arises regarding the interpretation of a Convention, it is the International Court of Justice (ICJ) that has the power of final determination or settlement. Settling the legal interpretation of the scope of Convention 87 regarding the right to strike and as a result affirming the authoritative guidance of the supervisory system in this regard, including the Committee of Experts, must be prioritized as the most reasonable, efficient and effective way to proceed. No other path will provide the requisite legal clarity and certainty upon which the constituents depend, and which is necessary for the functioning of the ILO as a normative organization.

5. Other options, such as recourse to article 37(2) of the ILO constitution will not provide finality to the dispute, as an award of a tribunal under article 37(2) could nevertheless be "appealed" to the ICJ. Additionally, there is no such tribunal in existence ready to receive and determine a dispute, there is no agreement about whether or how to set up such a tribunal, and as such the process would be cumbersome and further delay resolution of the dispute. Further, where the dispute is significant, rather than merely technical, and has wider implications for the obligation of Member States within the broader supervisory system of the ILO as well as the stability of international human rights law generally, then it stands to reason that the ICJ is the best judicial forum to settle the interpretation dispute.

[4] Noting, in line with para 104 of the Office Background report that "The Court has even taken the view that "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate".

[5] See para 14 of GB.343/INS/INF/5(Rev.1)

6. Any attempt to use the legislative power of the ILO (through standard setting) is also not appropriate. There is a 70-year record of expert, bipartite and tripartite conclusions and recommendations on the subject of a right to strike. The body of legal guidance resulting from this 70-year record has informed, and indeed, is embedded in the law and practice of governments, national and international courts, multilateral organizations, national, international and regional human rights bodies and has been relied upon by workers and their organizations for the defence of their rights and interests. It cannot be wished away. If the Employers group in the ILO have doubts about the legal interpretation that make up this body of legal guidance on the right to strike as a fundamental and intrinsic corollary of freedom of association and the right to organize, this should be confirmed or otherwise through an authoritative legal opinion that will provide the legal clarification and certainty for the way forward. And it is the ICJ, through an advisory opinion, that can provide such an authoritative legal clarification and certainty. Moreover, it is difficult to comprehend the idea that it will be easier to achieve consensus on a standard setting item regarding this issue than on referring the matter to the ICJ. The same opposite and mutually exclusive views on the legal scope of Convention 87 as regards the right to strike and the authoritativeness of the long standing body of legal guidance provided by the supervisory bodies, would be an obstacle to such consensus. Past attempts at addressing this issue through standard-setting have failed as was the case in 1991 when, according to the Office Background report, the Governing Body attempted to place a standard-setting item on the conference agenda on this issue "but ultimately decided against it"[6].

7. At the heart of this interpretation dispute is the refusal by **one group only**, the Employers group, to accept that the ILO's supervisory system has for more than 70 years found that Convention 87 protects a right to strike. It must be emphasised that this is not a dispute between the workers and employers. This dispute is arising because the Employers' group is disputing the legal validity of the guidance of the supervisory system of the ILO regarding the right to strike and the scope of Convention 87. This is based in the long-standing view, indeed one which was held when freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is an a fundamental and intrinsic corollary of freedom of association and the right to organize. The right to strike is an essential trade union action or means (program and activity) by which workers and their organizations defend their interests and rights. To that extent, any measure(s) or action(s) taken in the application of Convention 87 which impairs, restricts, impedes or otherwise interferes with the exercise of the right to strike for the defence of workers' rights and interests falls within the scope and meaning of the Convention.

[6] See para 44 of the Office Background report and further comments with reference to this issue below.

Once within the scope of the Convention, it is subject to the normal supervision by the supervisory bodies of the ILO including the Committee of Experts, the Committee on Freedom of Association (CFA) and the Conference Committee on the Application of Standards (CAS).

8. It is worth recalling that this legal interpretation and the body of legal guidance resulting from it, has been recognized and coherently applied by the Supervisory Bodies of the ILO in a manner consistent with the legal rules for the interpretation of treaties. It has also been relied upon by ILO constitutional complaint mechanisms such as those set up under article 24 and 26 of the ILO Constitution. This intrinsic corollary between the right to strike and freedom of association has also been recognized and relied upon by the Fact-Finding and Conciliation Commissions on Freedom of Association of the ILO. Indeed, the UN and other human rights bodies have affirmed it has achieved the status of customary international law.

9. It should also be recalled that no group has questioned the existence of the right to strike as protected by the Constitution of the ILO, which is also derived from the very same legal principle of freedom of association and the right to organize. This is one basis for the supervision of the principles of freedom of association by the Committee on Freedom of Association (CFA). The basic principles of the hierarchy of norms and the need for institutional consistency and coherence in the application of legal principles (a cornerstone of the rule of law) would necessitate an equal application of this Constitutional principle regarding the right to strike within the supervisory system of the ILO and must guide its normative actions (including standard setting). In this regard, there will be legal uncertainty and confusion for any normative action of the ILO on the very same subject to not protect the same right, and to the same extent, which is agreed to be protected by the Constitution.

10. To reject this widely recognized legal interpretation and the body of legal guidance it has produced in the supervisory system of the ILO and beyond would deny workers and their organizations the protection relied on for, at least, over 70 years for the defence of their rights and interests including under Convention 87. It would also undermine the legal foundations upon which other UN organizations, regional human rights courts and the high court decisions of several Member States of the ILO have relied to interpret their own instruments and laws, all of which have understood that freedom of association protected in Convention 87 also protects the right to strike.[7] It is upon this foundation, that an international rights-based industrial relations approach has been functioning with the ILO as its fulcrum[8].

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[7] Id.

[8] See the ILO 1998 Declaration "… Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles; 9 Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application…'

Rationale for proposing recourse under article 37.1 of the ILO Constitution

11. Article 37.1 of the ILO Constitution provides:

> Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution **shall** be referred for decision to the International Court of Justice.

There is a dispute relating to the interpretation of a convention.

12. At the commencement of the International Labour Conference in 2012, the Employers' group spokesperson in the Committee on the Application of Standards (CAS) announced that his group would refuse to agree to a short list of cases for supervision unless the Workers' group refrained from proposing any case on Convention 87 where the Committee of Experts had made observations concerning the right to strike. In addition, the Employers' Group demanded a 'disclaimer' on the Committee of Experts' General Survey, which that year had confirmed its longstanding view that ILO Convention 87 protects the exercise of the right to strike. These two pre-conditions, which were contrary to established law and practice, were rejected by the Workers' group. In response, the Employers' Group refused to participate in the supervisory work of the CAS and, as a result, the CAS failed adopt a list of cases to examine and therefore did not examine any cases during the Conference. Since then the dispute has persisted and continues to affect the smooth function of the supervisory system.

It is a dispute for which the ICJ, and not an in-house tribunal, was meant to resolve.

13. As the INS 5 report for the 344th Session of the Governing Body explains, in the Conference discussions leading up to the 1946 constitutional amendment, the nature of questions that could be brought to the tribunal was distinguished from those which should be referred to the ICJ. While, in principle – should a tribunal be established – any question or dispute could be submitted to either body at the discretion of the Governing Body, it was generally accepted that some questions about the scope or meaning of provisions of international labour Conventions might not merit to be brought before the principal judicial organ of the UN.

Accordingly, it may be assumed that questions with broader systemic implications for the Organization and beyond could be referred to the ICJ whereas questions of a narrowly technical nature with limited repercussions outside the confines of the Convention in question could be in the first instance transmitted to the tribunal.[9]

14. The right to strike has been repeatedly defined as "an intrinsic corollary" of the fundamental right to freedom of association protected by Convention No 87.[10] The interpretation dispute here relates to the *existence* of a fundamental right. This can hardly be classified as one of a narrow or technical nature. The outcome of the dispute obviously has significant implications both inside and outside of the organization. As the former Special Rapporteur on Freedom of Peaceful Assembly and Association has explained, *"The right to strike has been established in international law for decades, in global and regional instruments, and is also enshrined in the constitutions of at least 90 countries. The right to strike has, in fact, become customary international law."*[11] One can imagine few disputes more consequential for the ILO and its social justice agenda and for the world of work than this one.

15. Setting aside the obvious fact that no such tribunal exists, such a dispute would not be properly lodged there even if it did. Any suggestion that the current dispute should be allowed to continue for the several years necessary to agree to the modalities of an in-house tribunal and then submit the dispute there, though may be proposed in good faith, are wholly without merit. And, as we have seen, there is currently no consensus that such a tribunal should be established and its award final. On the contrary, faced with such an interpretation question of a legal nature which will impact the exercise of a fundamental right and the smooth functioning of the supervisory system of the ILO and beyond, the most prudent and appropriate recourse for settlement is by means of article 37.1. Article 37.1, in stating that a dispute "shall be referred" to the ICJ, creates a direct legal obligation to refer this dispute over the interpretation of a convention[12].

[9] ILO, *Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan,* 16 Feb 2022 (GB344/INS/5), para 41.
[10] ILO, Compilation of decisions of the Committee on Freedom of Association (Geneva, 6th edition, 2018), para 754.
[11] Maina Kiai (Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association), Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, para. 56, U.N. Doc. A/71/385 (Sept. 14, 2016).
[12] See para 21 of GB.343/INS/INF/5(Rev.1)

The dispute will not be resolved by other means

A. Further Dialogue Will Not Resolve the Matter

16. As already stated above, since 2012 in particular, the ILO, governments, and the social partners have engaged in several efforts to resolve their differences through social dialogue (refer to the Background Note (Question and Answer) by the Workers' group), specifically with regard to the right to strike, as well as the mandate and functioning of the various bodies of the ILO supervisory system. These efforts have not resolved the issue concerning the right to strike. There is no reason to believe that further social dialogue will break this impasse. Standard setting would be inappropriate and in any case will also not resolve this dispute, as the legal basis of any such standard setting activity would still have be based on the existing body of legal guidance by the supervisory system which the Employers' group fundamentally opposes. The employers' group continue to challenge the position of the Committee of Experts with regard to Convention 87 (and indeed now other conventions).

17. It is clear, from all the efforts so far, including the 2015 tripartite meeting on the right to strike, that the nature of the dispute is not amenable to dialogue as the primary and first means for its full and final settlement and that, unless the Employers' group recognizes the widely held legal interpretation and principle regarding the fundamental link between the right to strike and freedom of association and right to organize and their protection under Convention 87 as well as the authoritativeness of the body of legal guidance of the supervisory bodies including the CEACR, legal clarity and certainty by recourse to article 37(1) will of necessity be required[13].

18. Also, it is important to recall the discussion in the GB of March 2022 and its outcomes. There was a general understanding of the correctness of the analysis in the Office paper that the only way to provide for legal certainty when it comes to the interpretation of a Convention (or the Constitution itself) is through judicial means, i.e. through article 37 (para 1 or para 2) of the Constitution, and that social dialogue cannot provide for that.

[13] The Office Background report mentions in para 15 the "firm and uncompromising positions".

Alternatives Suggested by the Employers Group are Not Appropriate

19. On repeated occasions, the Employers' group has suggested that the dispute should be discussed at the International Labour Conference, and that the Conference could provide an interpretation of Convention 87, or otherwise produce guidelines.[14] This idea however has no constitutional basis and in practice will not provide the legal certainty required to settle this legal dispute.

20. The question as to whether the Conference was best placed to both adopt and interpret conventions was discussed in a report submitted by the ILO to the Governing Body in 1993. The report noted that no conference can bind another. The report also questioned whether interpretation by the Conference could result in a 'clandestine modification of meaning'. The report concluded that 'an interpretation by the Conference, if it is to be perfectly legitimate, should logically be recast – that is, through a revision'.[15] This is to say, if the Conference does not like how an instrument has been interpreted, it is free to amend that instrument through its legislative function. Thus, the Conference has the right to revise conventions to express exact meanings, subject to ratification of the revised instruments. The paper goes on to discuss that the process for revision was set up more for adapting conventions to new situations (modernizing) rather than to address views on differences of interpretation.[16]

21. Indeed, the legislative power of the Conference should be used prospectively to address gaps in coverage and protection of workers and not retrospectively to limit already elaborated rights being exercised by workers. It is important to recall, that prior to and since 2012, the Supervisory system, the Government group and the Workers group have been on the side of supporting the long standing authoritative guidance of the CEACR and the supervisory bodies regarding this issue and the Employers' group are the only group still challenging the fundamental legal validity of this body of legal guidance. There is therefore no role for the Conference in this regard.

[14] ILO, Draft minutes of the Institutional Section, 347th Session, Geneva, March 2023, paras 228-29.
[15] ILO, Article 37, Paragraph 2, of the Constitution and the Interpretation of International Labour Conventions, Governing Body, 256th Session, May 1993, GB256/2/2, paras 22-4.
[16] A 2009 GB paper in para 31-33 restates the 1993 paper.

22. The Employers group has recently – in its letter of 13 September to the Chair of the Governing Body asking to organize a special meeting of the GB to discuss this - proposed the discussion and adoption of a protocol as an alternative means of addressing the interpretation dispute. For all the reasons provided already regarding the fundamental legal nature of the dispute and the primary need for legal clarification and certainty in the first instance, any effort to use the legislative power of the Conference to resolve this dispute will lead to more division and confusion regarding the legal obligations of Member States and constituents under Convention 87, taking also into account that the legal views and perspectives on the subject matter are diametrically opposite, mutually exclusive and irreconcilable, so there cannot be any expectation of easier consensus on such a legislative exercise.[17]

23. This is not the place to specifically address the Employers' group request for a special meeting which has been scheduled[18], save to repeat that standard setting (and by way of a protocol which will require new ratifications) will be a fruitless exercise in this regard as it is not clear at all how a protocol on the right to strike could take out from the scope of Convention 87 (concerning freedom of association and the right to organize) measures taken by Member States which impact the exercise of the right to strike as a means (action/activity/program) by which workers or their organizations defend or further their interests and rights. It is only the interpretation of Convention 87, with fidelity to the meaning of its text, object and purpose, in line with the Vienna Convention on the Law of Treaties that legal clarity and certainty can be authoritatively secured. In any case, there already exists an elaborate body of authoritative guidance on the scope, meaning and content of the right to strike concerning Convention 87 which has been relied upon for protecting human rights, for at least the last 70 years, and which cannot be wished away. Legally and practically, any effort to address this interpretation dispute through a standard setting activity, while the legal unclarity, and uncertainty brought on by the Employers' challenge remains, cannot and will not effectively address the scope of Convention 87 in relation to the right to strike and therefore will not address the nature and extent of the current interpretation dispute.

24. Additionally, commencing standard setting on this issue will lead to further legal uncertainty and lack of coherence resulting in more confusion regarding the obligations of Member States which will be a recipe for a very divisive exercise that, rather than leading to more consensus, will undermine consensus and also undermine the human rights and social justice reputation and mandate of the

[17] In addition to the legal and policy reasons to reject a protocol, the Employer proposal for standard setting on this issue in 2024 is both legally, technically and politically impossible. The procedures for placing an item on a standard setting track have not been followed, and it is inconceivable how the Office could possible prepare for such an exercise without recourse to the rules and normal consideration of the ILO in this regard.

[18] See https://www.ilo.org/gb/GBSessions/GB349bis/lang--en/index.htm

ILO. In this regard, recalling a previous advice per the Minutes of the Governing Body in 1930, is instructive;

> *"The Director said that he hoped there would not be, in connection with this question, a recrudescence of the discussions with which the Governing Body was familiar concerning the power of interpretation of the Governing Body and the Conference, and the functions of the Office in giving information concerning the interpretation of Conventions. It had, however, been thought useful, in connection with the question now under consideration, to recall the fact that, according to Article 423 of the Treaty of Peace, the Permanent Court of International Justice alone was qualified to give authoritative interpretations of Conventions. All other interpretations, even those given by the Conference, might give rise to dispute. It might therefore be well to remind States of the possibility of appealing to the Permanent Court of International Justice. It had been said that this was an expensive and cumbrous procedure, but even if the procedure were slow and costly, it was better to apply to the Court than to remain in a state of uncertainty.*[19] *(Emphasis added).*

25. The post-war ILO constitution does not differ on this point. Article 37.1 is clear: "Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice." There is as such no role for interpretation assigned to the members of the Conference.

Rationale for proposing the questions or legal issues to be put to the court

Borad jurisdiction of the ICJ to render advisory opinions with respect the ILO

26. The ILO may request an advisory opinion of the International Court of Justice (ICJ) on the basis of its own Constitution as well as on the basis of the agreement between the United Nations (UN) and the ILO. The Agreement between the UN and the ILO allows the world court, if requested, to pronounce on legal questions arising within the scope of ILO activities. Article 9 provides at subsection 2: *"The General Assembly authorises the International Labour Organisation to request advisory opinions of the International Court of Justice on legal questions arising within the scope of its activities other than questions concerning the mutual relationships of the Organisation and the United Nations or other specialised agencies."(Emphasis added).*

[19] ILO Governing Body, Minutes, 50th Session, Oct. 1930, pp. 656-57.

The question(s) should lead to the full settlement of the legal issues

27. In 2014, the Office proposed the following questions when the ILO Governing Body was considering the question of the referral of this dispute to the ICJ;

1. **Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?**

2. **Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to: (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?**

28. An objective consideration of the debate that has taken place since 2012 will show that the legal determination of these two questions cover all the necessary aspects of this interpretation dispute. Though answering the first question in the affirmative would necessarily give support to the work of the ILO supervisory system, a clear statement of the mandate to supervise and provide guidance on the application of the Convention would go far to prevent further attacks on the system. Obtaining legal certainty on the mandate of the ILO supervisory system, and in particular the Committee of Experts, is therefore critical to resolving the dispute. The Employers' challenge, while initially focused on the right to strike, has been to persistently and fundamentally challenge the ability of the organization to effectively apply its conventions to Member States through its supervisory system – which has always required a measure of interpretation. The final question(s) must therefore have a clear view towards also addressing the mandate of the Committee of Experts regarding their guidance on the application of the Convention.

29. It is equally noted that the final determination of the question(s), as is the referral itself, is subject to a decision by the Governing Body. The question(s) that will be finally adopted by the Governing Body must be such that, if successful, will settle, by way of confirmation, the long-standing view, since freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is an intrinsic corollary of freedom of association and the right to organize, as it is an essential means (action/program/activity) by which workers and their organizations defend their interests and rights which, also therefore, means that any measure(s) or action(s) taken in the application of Convention 87 which impairs, restricts, impedes or otherwise interferes with the exercise of the right to strike for the defence of workers interests and rights, falls within the scope and meaning of the Convention and therefore comes under the normal supervision by the supervisory bodies of the ILO including the Committee of Experts, CFA and the CAS.

30. It recognized that regardless of these questions raised, the ICJ's practice show that: *"It is for the Court itself to determine on an objective basis the subject matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the applicant's claims. In doing so, the Court examines the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant. It takes account of the facts that the applicant presents as the basis for its claims. The matter is one of substance, not of form*[20]*. (Emphasis added).*

The long standing authoritative guidance of the CEACR regarding the right to strike as protected under C87

The mandate of the Committee of Experts of the ILO

31. Paragraph 29 of the 2015 report of the Committee of Experts outlines the mandate of the Committee of Experts, thus,[21]

> *"The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions."*

[20] See para 41 and 42 of the Qatar v UAE case (2018) and reference to …"(Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II), p. 575, para. 24; Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), pp. 308-309, para. 48 https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf. The ICJ's practice and rulings must also be read in light of the specific agreement between the United Nations (UN) and the ILOregarding the ICJ's jurisdiction.

[21] See also the 23 February 2015 Joint Statement of the Workers' and Employers' Groups https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351479.pdf

Respect and support for the authoritative guidance of the CEACR

32. The ITUC and its affiliates respect and support the long-standing authoritative guidance of the supervisory bodies of the ILO on the right to strike as protected under ILO Convention 87 and the interpretation approach adopted by the CEACR to arrive at its determination as articulated in the 2012 General Survey[22].

33. According to the Committee of Experts, the right to strike derives from Convention 87. The Committee reaffirmed this inevitable legal conclusion in line with a purposive reading (considering the text, object and purpose of the instrument under interpretation) of the scope and meaning of the Convention. The Committee's well considered view outlines that *"Strikes are essential means available to workers and their organizations to protect their interests, but there is a variety of opinions in relation to the right to strike. While it is true that strike action is a basic right, it is not an end in itself, but the last resort for workers' organizations, as its consequences are serious, not only for employers, but also for workers, their families and organizations and in some circumstances for third parties. In the absence of an express provision in Convention No. 87, it was mainly on the basis of Article 3 of the Convention, which sets out the right of workers' organizations to organize their activities and to formulate their programmes, and Article 10, under which the objective of these organizations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed (as was the case for other provisions of the Convention) by the Committee on Freedom of Association as a specialized tripartite body (as of 1952), and by the Committee of Experts (as of 1959, and essentially taking into consideration the principles established by the Committee on Freedom of Association)"*[23]. This must also be applied in light of Article 8 of the Convention which while recognizing that organizations are bound, in the exercise of these rights, to respect the law of the law, the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the rights protected under the Convention.

34. It is worth pointing out that the 1959 General Survey, the first on Convention 87, about a decade after its adoption, found that in addition to running counter to Articles 8 and 10 of the Convention, *"prohibition of strikes by workers other than public officials acting in the name of public powers… may sometimes constitute a considerable restriction of the potential activities of trade unions"*… contrary to Article 3.

[22] See paras 117 – 127 of the 2012 General Survey of the ILO CEACR https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf

[23] See para 117 of the 2012 General Survey

35. On the much-debated question of the preparatory work and whether or not it supports the protection of the right to strike under Convention 87, we echo the position of the Committee of Experts that *"... the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose."* As the Experts copiously stated, the preparatory work, as an interpretive source in its work regarding the application of the Convention by a Member State, *"... may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties)* and that *"...the process of determining whether there is compliance with a general right to strike invariably involves consideration of the specific circumstances in which the Committee is called upon to determine the ambit and modalities of the right."* This interaction and dialogue occurring between ratifying Member States and the CEACR, strongly and uniquely and on an ongoing basis, integrates the authoritative guidance of the CEACR with the subsequent practice of ratifying Member States which lead to changes or amendments in law and practice, regarding their legislation and labour market institutions, in line with specific recommendations, comments, and conclusions of the Committee of Experts.

36. Additionally, the 2014 legal analysis of the ITUC on this subject already cautioned regarding the over-reliance on the preparatory work on Convention 87 indicating that *"The question put to the constituents in the questionnaire related only to whether the right of association of public officials would prejudge the question of the right of such officials to strike. There was a presumption of the existence of the right to strike inherent in this question, which was intended to address only the right of public officials to strike and not to address the right of all workers to strike."* In any case, there was no vote called on this question therefore affirming that the preparatory work is not dispositive.

37. Regarding the issue of subsequent practice and the nature of the guidance provided by the CEACR in line with its mandate, the Committee have stated that each year it supervises "*...many individual cases relating to national provisions regulating strikes, most frequently without being challenged by the governments concerned, which generally adopt measures to give effect to the comments of the Committee of Experts. Over the years, the supervisory bodies have specified a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise, which may be summarized as follows: (i) the right to strike is a right which must be enjoyed by workers' organizations (trade unions, federations and confederations); (ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) the objectives of strikes must be to further and defend the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination.*

Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention."[24]

38. As has already been stated, the Committee undertakes its functions on a country-by country assessment of the application of the Convention in law and practice. In a case when the Committee was approached following some decisions of the Court of Justice of the European Communities (CJEC) concerning the exercise of the right to strike, the Committee recalled… that its mandate is limited to reviewing the application of Conventions in a given member State[25].

39. The CEACR have also highlighted regarding the broad reference of the right to strike in the legislation of the great majority of countries and by a significant number of constitutions, as well as by several international and regional instruments and by that justifying its own approach on the matter, that it had "*…never considered the right to strike to be an absolute and unlimited right, and that it has sought to establish limits to the right to strike in order to be able to determine any cases of abuse and the sanctions that may be imposed…*"[26]

40. It is therefore worth noting, that the CEACR and the supervisory bodies will have to continue to supervise the application of Convention 87 to ensure that measures taken in its implementation does not result in abusing, by way of impairing, prohibiting, impeding or otherwise interfering with, freedom of association concerning the right to strike.

[24] See para 127 of the 2012 General Survey

[25] See para 128 of the 2012 General Survey regarding comments on decisions of the Court of Justice of the European Union (Viking, Laval, Ruffert and Luxembourg) on freedom of association rights and the effective recognition of collective bargaining.

[26] See para 119 of the 2012 General Survey

Opinions of other international and regional human rights instruments regarding freedom of association and the right to strike

41. International and regional human rights instruments and bodies have also had occasion to pronounce on and/or give guidance regarding freedom of association and the right to right to strike for workers and their organizations.

42. The African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution on Economic, Social and Cultural Rights in Africa with respect to articles 14, 15, 16, 17, 18 21 and 22 of the African Charter on Human and Peoples' Rights stating regarding article 15 on the right to work as including *"The right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights"*[27].

43. The Inter-American Court of Human Rights has held in a recent advisory opinion that *"... the right to strike... is one of the fundamental rights of workers and their organizations, as it constitutes a legitimate means of defending their economic, social, and professional interests. States must therefore protect the exercise of this right by law."*[28]

44. The General Comment No. 23 (2016) on article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that *" The right of everyone to the enjoyment of just and favourable conditions of work is recognized in the International Covenant on Economic, Social and Cultural Rights and other international and regional human rights treaties, as well as related international legal instruments, including conventions and recommendations of the International Labour Organization (ILO). It is an important component of other labour rights enshrined in the Covenant and the corollary of the right to work as freely chosen and accepted. Similarly, trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work..." (Emphasis added).*

45. The legal interpretation and body of legal guidance on principle the right to strike is an essential means (activity/program) linked to freedom of association and the right to organize for the defence and furthering of the rights and interests of workers and their organizations is also protected under the European human rights instruments and decision of the European Court of Human Rights.

[27] https://africanlii.org/akn/aa-au/statement/resolution/achpr/2004/73/eng@2004-12-07/source.pdf
[28] https://corteidh.or.cr/docs/comunicados/cp_47_2021_eng.pdf

Conclusion

46. First, we appreciate the Office report as an important and valuable background report to the discussion pursuant to the Workers' group letter of 12 July 2023 requesting the referral of the longstanding dispute on the right to strike to the ICJ under article 37(1).

47. In that regard, procedural fairness and the necessity to be thorough regarding the preparation of information and time for proper consideration would require that our request tabled on 12 July is treated separately from any subsequent requests, such us the one tabled by the Employers' group on 13 September which proposes alternatives diametrically opposed to our request. For the same reasons, it is important that our request, pursuant and akin to a constitutional complaint is not blocked by procedural considerations including considerations of convenience. Each proposal must be considered separately and treated on the basis of their own merit.

48. In this light, we agree with the resolution proposed in the report as a good basis for discussion.

49. Secondly, the long-standing view, as was held when freedom of association was included in the 1919 Constitution, that the right to strike for workers and their organizations is fundamental and intrinsic corollary of freedom of association and the right to organize has found expression in the scope of various national, international and regional human rights instruments providing authoritative guidance and decisions to protect workers. The practice of the ILO and its supervisory bodies in this regard, including the CEACR, the CFA and CAS, is consistent with such interpretation. The challenge posed by the Employers' group to this legal interpretation, and the institutional crisis this has caused in the ILO necessitates legal clarity and certainty. It is only the ICJ that can settle this issue of legal certainty and clarity with such broad implications.

50. The court has said regarding treaty interpretation that *"… Article 31, paragraph 1, of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and therefore "The Court's interpretation must take account of all these elements considered as a whole.*[29] *The court has also said that "… in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation… "*[30].

[29] See para 78 of the Qatar v UAE case and references to (Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 29, para. 64) https://www.icj-cij.org/public/files/case-related/172/172-20210204-JUD-01-00-EN.pdf

[30] See para 77 of the Qatar v UAE case including the following references (Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012 (I), p. 331, para. 13; pp. 334-335, para.

Only if the means of interpretation under Article 31 lead to ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result will it *"... turn to the supplementary means of interpretation provided for in Article 32, such as reference to the preparatory work. (Emphasis added).*

51. The Committee of Experts and the supervisory system of the ILO have properly relied upon the rules of interpretation to interpret Convention 87 and authoritatively derive therefrom the protection of the right to strike. In the face of the challenge to the validity of their authoritative guidance, it is for the ICJ, which has been given an integral role in the ILO Constitution to determine such consequential interpretation disputes to finally settle it to ensure that the ILO continues to undertake its social justice mandate. The ICJ has played this role credibly in the past. Any attempt to use the legislative power of the ILO through standard setting to settle this interpretation dispute will be contrary to article 37(1) and will be inappropriate, and even more so if any such standard setting activity is launched prior to obtaining the necessary legal clarity and certainty on this issue. Forcing such an effort will merely be an obvious attempt to bypass a 70-year record of expert, bipartite and tripartite conclusions and recommendations on the subject of the right to strike which will not be in the interest of the ILO and its constituents, nor will provide for the necessary legal clarity and certainty.

24; p. 337, para. 33, and pp. 339-340, para. 40; Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II), pp. 457-458, para. 101; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II), pp. 663-664, para. 66; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 179, para. 109, and pp. 192-193, para. 136)

Document No. 25

IOE, Comments to the background report prepared by the Office titled "Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference", dated 24 October 2023

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24 October 2023

Comments to the Background report prepared by the Office titled "*Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*"

Executive Summary

The Employers are convinced that to resolve the long-standing dispute on the interpretation of the right to strike in the context of Freedom of Association and the Right to Organise Convention (C87), a solid and sustainable social dialogue-based solution determined by the ILO tripartite constituents should be strived for, rather than resorting to external means for the quickest possible solution.

The Employers are not challenging the right to strike at national level which is a reality in most countries. However, the Employers firmly believe and have consistently argued in the past that the right to strike is not provided for or regulated in C87 or any other ILO Convention. Other ILO constituents as well as ILO standards supervisory bodies, including the Committee of Experts (CEACR), have acknowledged that the right to strike is not explicitly stated or recognised in C87 or any other ILO instruments. This means that there may be a regulatory gap in the ILO body of standards on the right to strike and the only way to address this gap would be through standard setting in the International Labour Conference (ILC). So far, the ILC has not attempted to set standards for the right to strike or industrial action.

The Employers consider standard setting is the most obvious, appropriate and logical step towards defining authoritative ILO rules on the right to strike, and thus resolving the dispute over interpretation. Standard-setting is linked to the ILO's core mandate and reflects the ILO's core values of tripartism and social dialogue. Only standard-setting will ensure that all ILO constituents can actively engage in the process, that any solution achieved is based on consensus or at least a broad majority, and that any outcome adopted is universally relevant and accepted.

More concretely, the Employers propose that the International Labour Conference adopt a legally binding instrument on the right to strike or more broadly on industrial action, in particular a Protocol to C87. The objective of this Protocol would be to authoritatively determine a right to strike in an international labour standard, and its scope and limits and in this way put an end to the ongoing dispute about the interpretations on the right to strike.

Any inconvenience or difficulties for standard setting at an early date should not be a reason for not pursuing the standard-setting option and leave the definition of rules on the right to strike to external institutions such as Committee of Experts and the International Court of Justice (ICJ). While the Employers have proposed standard-setting on the right to strike at the earliest possible date, i.e. at the ILC in 2024, they would not oppose a later ILC on the condition that there is no referral to the ICJ. It is important that no decision on a referral to an external solution should be taken without proper consideration and discussion on this present proposal.

Table of Contents

I. Introduction

On 13 September 2023, the Chairperson of the Governing Body decided that on 10 November the 349th *bis* special session of the Governing Body would be held to discuss the Workers' proposal for a referral to the International Court of Justice (ICJ). This decision was made despite concerns regarding the agenda of this special session expressed by several groups. Consequently, the Vice-Chair of the Employers' Group announced to the Chairperson of the Governing Body a letter signed by 14 regular members of the Employers' Group for another special session of the Governing Body under Article 3.2.2 of the ILO Governing Body Standing Orders. The purpose of this special session would be to discuss the urgent inclusion of a standard setting item on the right to strike or more broadly on industrial action on the agenda of the 112th session of the International Labour Conference (ILC) in 2024.[1]

On 11 October 2023, the ILO Director General sent to all ILO Member States, along with an invitation to provide comments, a background report prepared by the Office entitled "*Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*".

As the secretariat of the Employers' group in the ILO, the International Organisation of Employers (IOE) hereby provides preliminary comments on the background report. We reserve the possibility of updating and supplementing our position in light of any subsequent consultations with and feedback received from the Employers' group and the discussions that will take place during the 349th *bis* special session on the Workers' proposal on 10 November and the 349th *ter* special session on Employers' proposal on 11 November 2023.

II. General Remarks

At the outset, the **IOE would like to point out that the title of the background report is inaccurate**. The Government of Türkiye sent a letter to the Director General on the 22 September 2023 indicating their support to the Employers' request. Therefore, like the

[1] Employers Letter to Chair of the Governing Body, *Request by 14 regular members of the Employers; Group for a special meeting of the Governing Body under Article 3.2.2 of the ILO Governing Body Standing Order for the urgent inclusion of a standard setting item on the right to strike on the agenda of the 112th session of the International Labour Conference agenda*, 12 September 2023.

Background Paper for the Worker's proposal[2] which indicates the supporting governments, the Background Paper for the Employers' proposal should have been titled as follows "*Action to be taken on the request of the Employers' group and the government of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*".

Furthermore, the **IOE notes the unequal treatment of the two background reports and the two special sessions.** In particular, unlike the background report on the Workers' Proposal[3] which explicitly invites ILO member States to transmit comments before the set deadline of 6 October 2023, the background report on the Employers' Proposal does not invite comments from ILO tripartite constituents. Only the letter from the Director-General, sent out separately on the same day, indicates that any comments should be addressed to the NORMES department.[4] However, the letter did not include a specific deadline, and indicated that the comments would only be made available in their original language without a summary. The Employers consider that, despite the short time available before the special session of the Governing Body, a deadline should have been set for comments on the Employers' proposal, and that the Office should in any case prepare a summary of the comments received. The Employers would stress that the Governing Body must be equally informed of the ILO constituents' views on both proposals in order to be able to take a meaningful decision, in particular because both proposals represent related, but mutually exclusive approaches to the issue of the right to strike.

III. Proposed standard-setting on the right to strike

1. Standard-setting is part of ILO's core mandate and has been the preferred way to create clear and binding rules on labour and social topics

The ILO Centenary Declaration declares that "*[t]he **setting**, promotion, ratification and supervision of international labour standards is of fundamental importance to the ILO. This requires the Organization to have and **promote a clear, robust, up-to-date body of international labour standards** and to further enhance transparency.*"[5]

Almost every year, the ILC deals with standard setting, either the revision or the adoption of new international standards related to the world of work. Over the past centenary, ILO has adopted in total 405 instruments comprising of 191 Conventions, 6 Protocols and 208 Recommendations. **Standard setting is considered a well-established procedure for creating authoritative rules on important topics in the world of work.**

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[2] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023.

[3] ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 24.

[4] ILO, Director General Letter to all member States of the ILO dated 11 October 2023.

[5] ILO, *ILO Centenary Declaration for the Future of Work*, p. 8.

All tripartite constituents and the ILO standards supervisory bodies have acknowledged that there is currently no ILO instrument providing for the right to strike.[6] This means that there may be a regulatory gap to be filled in the ILO body of standards on the right to strike, and the only way to address this gap is through standard setting in the ILC.

In line with this understanding, the Government of Colombia proposed standard setting on the right to strike for the first time in 1992. The Government of Morocco agreed stating that "*[s]ince no instrument existed on the subject, there was a legal gap which had to be filled. […] It was essential to define the notion of the right to strike, since there was no such thing as an absolute right to strike. It was therefore important to define its limits, which concerned in particular the essential services."*[7] Similarly, the Government of Venezuela stated that "*An international instrument on the right to strike was therefore essential."*[8]

Moreover, the experience with the Night Work (Women) Convention, 1919 (No. 4) indicates that **standard setting is the first and logical step to address interpretation disputes**. In this case, there was a divergence of views regarding the meaning of the term "women" in Article 3 of the Convention, regarding whether the protection provided in the Convention applied to women manual workers only or to all women, including salaried employees. To solve the dispute, a standard setting item was placed on the agenda of the 15th session of the ILC in 1931 to discuss a revising Convention. Ultimately, the revising Convention failed to be adopted as it did not reach the two third majority in the final vote.[9] Only after the ILC had tried to find a solution in this way, the matter was then referred for an advisory opinion to the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ.[10]

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[6] ILO, *Agenda of the 81st (1994) Session of the Conference*, GB.253/2/3(Rev.), Appendix I, p. 21-22; ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13; ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/16; ILO, *Record of Proceedings*, ILC 54th Session, 22 June 1970, p. 580 & 583, paras 12 & 25; ILO, *Record of Proceedings*, ILC 58th Session, 22 June 1973, p. 544, para 26-27; ILO, *Minutes of the 251st Session*, GB.251/PV(Rev.), 12 November 1991, p. III/8; ILO, *Record of Proceedings*, ILC 72nd Session, 21 June 1986, p. 31/33; ILO, *Freedom of Association and Protection of the Right to Organise: Report VII*, ILC 31st Session, 29 June 1948, p. 87; ILO, *Freedom of association and collective bargaining*, ILC 81st Session, 1994, p. 62, para 142; ILO, *Minutes of the 131st Session of the Governing Body*, 1956, Appendix XXII, p. 188. Regarding the Fact-Finding and Conciliation Commission *see* ILO, *Action to be taken on the request of the Workers' group and 34 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*, 31 August 2023, para 67. *See also* ILO, *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Summary of the comments received from constituents*, GB.349*bis*/INS/2, 10 November 2023, p. 4, para 14.

[7] ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/12- I/13.

[8] ILO, *Minutes of the 253rd Session*, GB. 253/PV(Rev.), 28 May 1992, p. I/16.

[9] League of Nations, *International Labour Conference*, 15th Session, 1931, p. 478.

[10] ICJ, *Advisory Opinion Interpretation of the Convention of 1919 concerning Employment of Women during the night, 15 November 1932*, p.366. The question asked to the PCIJ was whether the Convention concerning employment of women during the night, adopted in 1919 by the International Labour Conference, apply, in the industrial undertakings covered by the said Convention, to women who hold positions of supervision or management and are not ordinarily engaged in manual work.

2. Only standard setting can provide legal certainty and set out legally binding rules on the right to strike for ratifying countries.

The Employers firmly oppose the Office's view that

> "*the only two mechanisms that can offer such certainty are explicitly set out in article 37. A consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution as the consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute for as long as they are not in a position to ratify the newly adopted Convention or Protocol.*"[11]

Referral to the ICJ is not a solution as **Article 37(1) is silent on the binding nature of ICJ advisory opinions**. Article 37(1) reads as follows: "*Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice*." Nowhere in the provision is provided that specifically ICJ advisory opinions are legally binding.

Moreover, Article 37(2) provides that "*Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph.*" From the absence of a corresponding formulation in Article 37(1) can be concluded that the binding nature of an ICJ advisory opinion is limited to any established tribunal under Article 37(2), and there is no binding effect for ICJ advisory opinions in the case of Article 37(1). This is also the view of the former ICJ President, Roberto Ago, who states that *"As regards the ILO, however, the tribunal in question has never seen the light of day, and any request by the ILO Governing Body to the International Court of Justice could accordingly lead only to an advisory opinion, which, as such, would not have decisive effect* .[12]

Furthermore, the Office itself has questioned the binding effect of ICJ advisory opinions for the ILO and its constituents back in 2007. In particular, the Office pointed out that

> *"However, apart from a question relating to the interpretation of the Convention, there are other questions that the Governing Body may wish to consider in the event that an advisory opinion is sought from the International Court of Justice. The first would concern the interpretation of the ILO Constitution. To the extent that the Governing Body decides to refer any question of interpretation to the International Court of Justice,* ***it would be logical to submit the complementary question as to whether such interpretation sought in the form of an advisory opinion could or should be recognized as binding for all Members under article 37(1) of the Constitution****. This question, which has for some time posed a theoretical issue, would immediately become of great practical significance*

[11] ILO, *Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*, GB.*349ter/*INS/1, 11 November 2023, Appendix, para 57.

[12] Roberto Ago, "Binding" Advisory Opinions of the International Court of Justice, p.449, footnote 44.

should the Governing Body decide to submit a request for an advisory opinion to the Court."[13]

On another occasion, the Office also noted that "*[t]hought could also be given to* ***whether the Court could interpret article 37(1) as providing a basis for an advisory opinion on a question of interpretation to be considered as binding on the ILO and on the States parties to the Convention involved***".[14]

These remarks demonstrate the uncertainty regarding a binding effect of ICJ advisory opinions for the ILO and its constituents, and thus put into question the ability of an ICJ advisory opinion to bring about an effective resolution to the dispute over the right to strike in C.87.

On the other hand, through the adoption of a Convention or Protocol, the ILC can authoritatively provide legal certainty on a particular issue. The Protocol to the Forced Labour Convention (P29) is an excellent example on this point. Article 7 of P29 determined that "*The transitional provisions of Article 1, paragraphs 2 and 3, and Articles 3 to 24 of the Convention shall be deleted.*".[15] Accordingly, when P29 entered into force, these transitional provisions were deleted from the text of C29. In other words, P29 clarified with legal certainty that the transitional provisions no longer apply to any country, neither to countries that have ratified P29, nor to countries that have only ratified C29.

It is therefore suggested that the proposed Protocol to the Convention 87 (P87) could contain language either in the Preamble or in a subsequent Article explicitly stating that the purpose of the Protocol is to settle definitively the dispute over the interpretation of C87 on the right to strike and that the right to strike is regulated by P87 and not by C87 or any other ILO Convention. In this way, a P87 could provide with authority and legal certainty that with the entry into force of P87, namely i) only the rules on the right to strike in P29 apply to countries that have ratified P29 and ii) the interpretations on the right to strike in C29 cease to exist at the same time.

It can be assumed that the CEACR would need to follow the new provisions on the right to strike in C87. The CEACR itself argued that it developed its rules on the right to strike to fill a regulatory gap.[16] With the adoption of P87, this gap would be filled and even in the CEACR's logic the justification for its own interpretations would no longer apply.[17]

Finally, it is also not unreasonable to assume that a well-designed P87 on the right to strike would be ratified quickly by many member States, given its high visibility due to its linkage to the fundamental Convention C87.

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[13] ILO, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29),* GB 298, March 2007, INS/5/2, para. 5.
[14] ILO, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)*, GB 297, November 2006, INS 8/2, para 9.
[15] ILO, Protocol of 2014 to the Forced Labour Convention, 1930.
[16] International Labour Conference, 81st Session, 1994, Report III (Part 4B), Freedom of association and collective bargaining, para. 145 *"In the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject."*
[17] Similarly, when P29 entered into force, the Committee of Experts in essence ended its interpretation on human trafficking in the context of C29 as the topic was from then on covered by P29.

3. Standard setting aligns with the ILO fundamental values of social dialogue and tripartism

The ILO Centenary Declaration declares that it is incumbent on the ILO to strengthen the capacity of its **tripartite constituents** to "*address all fundamental principles and rights at work, at all levels, as appropriate, through* ***strong, influential and inclusive mechanisms of social dialogue***." Given that C87 expresses and develops in the form of specific rights and obligations one of the fundamental principles and rights at work in the 1998 Declaration, namely freedom of association, it is imperative that the solution to resolve the interpretation dispute must be based on social dialogue.[18] **Standard-setting is the most advanced and developed form of social dialogue at the ILO.**

Many governments also agree that social dialogue is the preferred option to resolving the right to strike. For example, during the 2014 GB discussion, the Government representative of Lesotho also noted that social dialogue as "a central pillar of the ILO" should be given a chance and emphasized that "*[r]eferring the matter to the ICJ would signal the erosion of the spirit of tripartism. Existing mechanisms should be used, and internal solutions exhausted before turning to external remedies*".[19] Similarly, the Government representative of Botswana supported *"an approach that would emphasize social dialogue as the ideal means of resolving disputes*".[20] Similarly, the Government representative of China speaking on behalf of ASPAG also indicated that dispute resolution was best achieved through tripartite discussion in the Governing Body or the ILC.[21] Furthermore, the Government of India supported for the continuation of a tripartite process considering that decisions regarding the Organization should be taken by ILO Constituents. The Government representative of Indonesia also noted that *"[p]roblems within the ILO should be resolved using available mechanisms and the Organization should avoid creating a precedent by referring the question of the right to strike in relation to C87 to the ICJ*".[22] The Government representative of Iran and the Government representative of Jordan also stressed that tripartism should be given a real opportunity based on mutual trust and willingness among constituents.[23]

Special reference should be also made to the Statement of the Government Group in 2015, whereby governments indicated their readiness to discuss the right to strike within the ILO framework.[24] It reads as follows:

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[18] ILO, Social dialogue "*All types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy"*.

[19] ILO, *Draft minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, 30 October-13 November 2014, p. 29, para 114.

[20] ILO, *Draft minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, 30 October-13 November 2014, p. 28, para 112.

[21] ILO, *Draft minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, 30 October-13 November 2014, p. 21, para 70.

[22] ILO, *Draft minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, 30 October-13 November 2014, p. 28, para 108.

[23] ILO, *Draft minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, 30 October-13 November 2014, p. 26, para 101, and p. 29, para 116.

[24] Other frameworks in the ILO include tripartite meetings, expert meetings, technical meetings, informal consultations etc.

> *"**We are ready**, right from this Tripartite Meeting, **to consider discussing, in the forms and framework that will be considered suitable, the exercise of the right to strike.** We believe that the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource for such discussions, which will also be informed by the **multi-faceted regulations that States and some regions have adopted to frame the right to strike**."*[25]

It is important to highlight that while a background report on the right to strike and the modalities and practices of strike action at national level was prepared by the Office in 2014, a substantive discussion to determine the common ground on the scope and limits of the strike never took place. Therefore, contrary to the arguments of some groups, **social dialogue has not yet been exhausted.**

Most recently during the March 2023 GB session, the Government of China speaking on behalf of majority of countries in ASPAG stated that any dispute in the world of work should be resolved through tripartite social dialogue where possible, including matters relating to the interpretation of ILO Conventions. Article 37 was a last resort and should only be used with caution.[26] The Government representative of China also reiterated that **social dialogue was the only channel for resolving disputes** and ensuring the functioning of the supervisory mechanism, by strengthening cooperation and avoiding confrontation. [27]

Moreover, the Government of Brazil noted that while the ILO Constitution provided for alternatives to that process, social dialogue had long been the preferred method of dispute resolution at the ILO and no attempts should be made to block that process.[28]

Similarly, in their comments to the background report on the Workers' proposal, some governments have indicated their preference for continuing social dialogue, namely the Governments of Indonesia, Kenya and Turkey.[29]

IV. Standard-setting in the form of a Protocol

The Employers propose a Protocol as a supplementary treaty to C87 to definitively end the interpretation dispute on the right to strike in the context of C87. The purpose of this Protocol is not to amend C87, which does not have language on the right to strike, but rather to define in a separate instrument the scope and the limits of right to strike from a global perspective. Like other protocols, only ratifying member States of C87 would be able to ratify P87 and only those ratifying P87 would be bound by its provisions.

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[25] ILO, *Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level*, TMFAPROC/2015/2, 23 February 2015, Appendix II, para 5.

[26] ILO, *Minutes of the 347th Session of the Governing Body of the International Labour Office*, GB.347/PV, 13–23 March 2023, p. 61, para 251.

[27] ILO, *Minutes of the 347th Session of the Governing Body of the International Labour Office*, GB.347/PV, 13–23 March 2023, p. 62, para 258.

[28] ILO, *Minutes of the 344th Session of the Governing Body of the International Labour Office*, GB.344/PV, March 2022, p. 46, para 155.

[29] ILO, Summary of the comments received from constituents, GB. 349th *bis*/INS/1/2, 13 October 2023, para 4.

Although none of the existing ILO Protocols adopted so far was aimed at settling a dispute with respect to the interpretation of provisions of the related Convention,[30] this does not mean that the Governing Body cannot adopt a new Protocol to C87 that would do just that.

In fact, the Employers consider that the experience with the Protocol to the Forced Labour Convention (P29) are similar to the present situation concerning the right to strike and the lessons learnt should be considered by the Governing Body for the following reasons.

First, the Forced Labour Convention (C29) was adopted in 1930 and it does not contain expressly or impliedly any reference to human trafficking in the preamble or the body of the text.[31] Despite the absence of any references to human trafficking in C29, the CEACR over time made comments on human trafficking when examining the Convention.[32] Similar to this case, over time the CEACR developed detailed interpretations on the right to strike when examining C87 even though the right to strike is not mentioned in the text and expressly excluded by the drafters of the instrument.

Second, P29 was proposed to fill a gap identified in the body of ILO standards by adding regulatory content to the standards of C29. During the Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation in February 2013 ('2013 Tripartite Meeting of Experts'), the experts agreed that there was a gap in the ILO body of standards to address human trafficking and agreed the adoption of supplementary measures to address effectively eradication of forced labour in all its forms.[33] Similarly, there is agreement by all ILO stakeholders that C87 nor any ILO instruments provide for the right to strike.[34] In other words, there may be a gap in the ILO body on standards on the right to strike. This gap should not be filled by CEACR interpretations, but rather through standards that are negotiated and adopted by the ILC.

Third, P29 showed that standard setting is the normal internal approach to address gaps in the ILO body of standards. During the 2013 Tripartite Meeting of Experts, the Experts agreed that gaps should be addressed through standard setting action by the ILO.[35] In particular, the Workers' spokesperson stressed that "*This standard-setting approach was essential and could contribute to the adoption of systematic, coherent and coordinated methods at the international level."* Furthermore, the Workers' spokesperson stated that "*It would be damaging to the ILO, as a tripartite organization, not to act in a field which came within its mandate, thereby running the risk of having obligations imposed on States by other*

[30] ILO, *Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*, GB.*349ter/*INS/1, 11 November 2023, Appendix, para 62.
[31] ILO, *Final report*, TMELE/2013/7, 11-15 February 2013, p. 11-12, para 47.
[32] ILO, *Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation*, TMELE/2013, 11-15 February 2013, p. 39, para 138.
[33] ILO, *Final report*, TMELE/2013/7, 11-15 February 2013, p. 41, paras 26-27.
[34] ILO, *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Summary of the comments received from constituents*, GB.349*bis*/INS/2, 10 November 2023, p. 4, para 13.
[35] ILO, *Final report*, TMELE/2013/7, 11-15 February 2013, p. 41, para 27.

international or regional organizations outside of the tripartite framework."[36] Applying the same logic, the solution for filling a gap on the right to strike in the ILO body of standards is not through referral to the ICJ and running the risk of having obligations imposed on member States by the ICJ, but rather through standard setting by the ILC.

V. Placing a standard-setting item on the agenda of the ILC

1. Placing a standard-setting item in 2024 ILC is legally feasible under the statutory framework

To respond to the sense of urgency expressed by the Workers and regional government groups for solving the dispute on the right to strike to the ICJ, the Employers have proposed that the Governing Body place an item on the right to strike on the agenda of the ILC at the earliest possible date, which is 2024. This may be difficult to realize in practice but contrary to the Office's analysis of the statutory framework,[37] there are no legal obstacles for doing so.

First, the decision to place a standard setting item on the right to strike on the agenda of the ILC can be taken by simple majority and does not require unanimous consent. Article 5.1.1 of the Governing Body Standing Orders does not apply. It reads as follows:

> "*When a proposal to place an item on the agenda of the Conference is discussed for the first time by the Governing Body, the Governing Body cannot, without the unanimous consent of the members present, take a decision until the following session*."[38]

This is not the first time the Governing Body is proposing a standard setting item on the right to strike in the Governing Body. Already at the 253rd session of the Governing Body in 1992, on the proposal of the Government of Colombia, the possible inclusion of an item on the right to strike in the agenda of the ILC was discussed.

Second, the Governing Body can approve a standard-setting item with a programme of reduced intervals like past practices for other protocols under two provisions,[39] if a question has been included in the ILC agenda for a standard setting under the double discussion procedure less than 18 months before the opening of the ILC session.[40] Therefore, it is entirely feasible for the Governing Body to decide on a programme of reduced intervals for a standard-setting item to be placed for the 2024 ILC session.

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[36] ILO, *Final report*, TMELE/2013/7, 11-15 February 2013, p. 31, para 122.

[37] ILO, *Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*, GB.*349ter/*INS/1, 11 November 2023, Appendix, paras 1-4.

[38] It should be noted that Article 5.1.1 does not require that a proposal "*must be discussed at two successive sessions*" of the Governing Body. Paragraph 54 of the Introductory note, which contains such wording cannot overrule Article 5.1.1 given that the Introductory note itself provides that it "*reflects certain practices without fixing them as legal rule*", See ILO, Governing Body Standing Order, Introductory Note, para. 1.

[39] ILO, *Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference*, GB.*349ter/*INS/1, 11 November 2023, Appendix, para 10. *See* Protocol of 2014 to the Forced Labour Convention 1930 (No. 29) and Protocol to the Seafarers' Identity Documents Convention 1958 (No. 108).

[40] *See* ILO, International Labour Conference Standing Orders, Article 46(5) and similar Article 45(4).

Third, Article 5.1.1 of the Governing Body Standing Orders seems only relevant in case an urgent item is to be referred to the ILC for a single discussion.[41] However, it appears that if the Governing Body decides to refer an urgent standard-setting item to the ILC for a double discussion, a majority of three fifths of votes would not be required, so simply majority would suffice.

If the Governing Body considers that the right to strike needs to be addressed as a matter of priority and urgency, it could place it on 2024 ILC agenda and defer an item already on the ILC agenda to a subsequent ILC. For instance, the Governing Body could decide to postpone the standard setting item on the occupation safety and health protection against biological hazards until a later date (ie 2026). Unlike the right to strike issue that may require urgent attention to end the interpretation dispute, none of the groups have expressed an urgent need for standards on biological hazards. It is important to indicate that the Governing Body always has the prerogative to make changes to its past decisions where it deems necessary.

2. A referral of the right to strike to the ICJ would hardly bring earlier results

For a referral to the ICJ of the complex issue on right to strike, the Governing Body would also need time to carry out possibly several rounds of consultations, collection and assessment of various documents. Following this, for proper governance, the ILC would also need to approve the referral questions either in June 2024 or 2025. Based on advisory procedure before the ICJ which the Office prepared, the ICJ procedure would also take some time, probably 12 – 18 months. [42] Following this, the ILC may then need to discuss again appropriate steps to take following this opinion, which the earliest opportunity would then be 2025 or 2026 ILC. It is important to note that there has been no agreement for this advisory procedure to date.

3. In order to enable thorough preparation, placing an item on the right to strike on the agenda of a later ILC could be considered

If the Governing Body decides that more preparation time is necessary, then placing a standard-setting item in a later conference could also be considered. For instance, the Governing Body could, at its March 2024 session, place an item on the right to strike on the 2025 or 2026 ILC agenda for standard setting under the double-discussion procedure, which would provide sufficient time for preparation, and which could be done without having to remove items already on the ILC agenda.

In any case, any difficulties of placing the matter on the 2024 ILC agenda must not be used as a pretext to discard this option altogether and to decide in favour of a referral to the ICJ under Article 37(1) of the ILO Constitution.

[41] ILO, Governing Body Standing Orders, Article 5.1.5 reads "*In the cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation*."

[42] ILO, *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Summary of the comments received from constituents*, GB.349*bis*/INS/2, 10 November 2023, Annex III.

VI. Concluding observations

The Employers firmly believe that standard setting is the most appropriate tripartite social dialogue-based solution that will ensure that all ILO constituents could actively engage in the process, that any solution achieved would be based on consensus or at least a broad majority, and finally that any outcome adopted is universally relevant and accepted.

The aim and purpose of the proposed protocol to C87 would be to determine the scope and limits of the right to strike at the international level, as far as is possible and fill the regulatory gap that currently exists in the ILO body of standards. In doing so, the Protocol would make it clear that rules on the right to strike are only contained in P87 and not in C87.

In the same way as the tripartite constituents can decide on the scope and limits of the right to strike, they can determine the sources for their consideration. The Employers would stress that the starting point and most important source should be, as is the case for any standard-setting discussion, the national law and practice on the right to strike in ILO member States.

Once the ILC decides to adopt a Protocol on the right to strike, it can be expected that the CEACR faithfully follows the authoritative decision of the ILC and the intentions of the drafters of P87. There would be no room whatsoever for the CEACR to maintain its own views on the right to strike in C87.

There are no legal obstacles to putting a standard-setting item on the right to strike on the 2024 ILC agenda under a programme of reduced intervals. The Employers proposed standard setting in 2024 to accommodate the urgency of the requests from certain groups. However, the Employers have not opposed to a later standard-setting on the condition that there would be no referral to the ICJ on the interpretation dispute and if preference is given to the standard-setting option on a later date could facilitate the preparations.

Finally, the Employers have expressed their commitment to social dialogue and tripartism, which are the cornerstones of the ILO, and they look forward to the substantive discussions during the two Governing Body special sessions that will take place on 10 and 11 November 2023.

Document No. 26

ITUC, Comments to the Office background report on "Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference", dated 27 October 2023

ITUC CSI IGB

ITUC International Trade Union Confederation
CSI Confédération syndicale internationale
CSI Confederación Sindical Internacional
IGB Internationaler Gewerkschaftsbund

Akiko Gono
President
Présidente
Präsidentin
Presidenta

Luc Triangle
Acting General Secretary
Geschäftsführender Generalsekretär
Secretario General en Funciones
Secrétaire général par intérim

Mr Gilbert Houngbo
Director-General
International Labour Office
Route des Morillons, 4
CH – 1211 Geneva
Switzerland

ITUC/Lex 27 October 2023

Re: ACTION TO BE TAKEN ON THE REQUEST OF THE EMPLOYERS' GROUP TO URGENTLY INCLUDE A STANDARD-SETTING ITEM ON THE RIGHT TO STRIKE ON THE AGENDA OF THE 112TH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE

Dear Director General,

I am writing with reference to your letter of 11 October 2023 informing us of the availability of an Office background report concerning the special Governing Body meeting on action to be taken on the request of the Employers' group to urgently include a standard setting item on the right to strike on the 112th session of the International Labour Conference.

Your letter also indicated that any comments we have on the report should be addressed to NORMES@ilo.org.

Please, find below ITUC comments in this regard.

We expect, in due course, that you will bring this to the attention of Governing Body and further processes in relation to this dispute.

Yours sincerely,

Luc Triangle
Acting General Secretary

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COMMENTS BY THE INTERNATIONAL TRADE UNION CONFEDERATION (ITUC) TO THE OFFICE BACKGROUND REPORT ON "ACTION TO BE TAKEN ON THE REQUEST OF THE EMPLOYERS' GROUP TO URGENTLY INCLUDE A STANDARD-SETTING ITEM ON THE RIGHT TO STRIKE ON THE AGENDA OF THE 112TH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE"

(See Office background paper (GB. 349ter/INS/1))

Introduction and chronology

1. At the 347th Session of the Governing Body meeting of 13-23 March 2023, the Vice Chairperson of the Workers Group gave notice regarding the interpretation dispute on the right to strike, stating that *"It was already clear that any Member of the Organization could raise an issue of interpretation and submit a request to the Director-General to ask him to put the issue before the Governing Body for referral to the ICJ. One specific issue of interpretation had been waiting long enough and her group could not wait much longer for it to be resolved. Indeed, it was considering submitting a request to the Director-General in the coming months to put the issue before the Governing Body at its 349th Session and hoped to receive the support of governments in this respect. There needed to be a debate on that specific issue as soon as possible.[1]"*

2. Following this notice, on 12 July 2023, the Workers Vice Chairperson of the Governing Body addressed a letter to the Director-General, formally requesting that the long-standing dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike be referred urgently to the International Court of Justice for decision, in accordance with article 37(1) of the ILO Constitution, and therefore to include the matter for discussion and decision on the agenda of the Governing Body of November 2023. This request was supported with letters to the DG by initially 32 and in the meantime 37 Governments.

3. The Workers' group request was challenged by the Employers' group without any legal basis. Following the efforts of the Employers' group to block the request of the Workers' group for a discussion at the Governing Body regarding the referral of the long-standing interpretation dispute on the right to strike to the ICJ, on 9 August 2023 the Workers' group submitted a request to the Chairperson of the Governing Body for a special meeting on the matter, in accordance with the constitution of the ILO and the standing orders of the Governing Body. The Workers' group has always acted in good faith in its endeavours to have this long-standing dispute settled, in order to provide legal certainty to Member States and constituents and avoid further damage to the ILO's supervisory system.

[1] See Para 345 here https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_884393.pdf

4. Regrettably, on this matter, the Employers' group has, in the view of the ITUC, not been constructive nor acted in good faith, trying to prevent any step in the direction of having this interpretation dispute addressed, in disregard of the ILO's institutional framework and rule of law. We say this for a number of reasons. First, in spite of the fact that the Workers' group invoked a request under article 37(1) of the ILO constitution which is akin to an ILO constitutional complaint, the Employers' group blocked its automatic referral to the Governing Body of November for discussion and decision, trying to exercise a veto power over this constitutional request. Second, when the Workers' group realised that the Employers' group would not allow the normal procedures to be followed, and decided to proceed under article 7(8) of the ILO Constitution in conjunction with paragraph 3.2.2 of the Standing Orders of the Governing Body by requesting a special meeting of the Governing Body, the Employers' group continued to challenge both the legality and legitimacy of the process and made every effort to prevent any decision regarding the scheduling of the meeting.

5. In view of the compulsory nature of the request by the Workers' group under article 7(8) of the constitution and paragraph 3.2.2. of the Standing orders of the GB, and after the decision taken by the GB Chair that such a meeting therefore should take place, a screening group meeting was called to determine the modalities for the special meeting requested by the Workers' group.

6. At that meeting, held on 13 September 2023, the Employers group suddenly submitted a request under paragraph 3.2.2 of the Standing Orders of the Governing Body for a special meeting to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference. This, while they were still challenging the legality and legitimacy of the procedure they were now also using themselves. More concretely, the Employers' group proposed that the Conference adopt in June 2024 a Protocol to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) on the right to strike. The Employers' group also insisted that their request should be discussed before the other special meeting, ignoring the constitutional nature of the request tabled by the Workers' Group and a considerable number of governments and the fact that the GB Chair had already decided on the special meeting requested by the Workers' group that this special meeting should take place, whereas their request had just been tabled and clearly required further decision making.

7. The Screening group decided on 13 September 2023 that the special meeting to discuss the ICJ referral would take place on Friday, November 10th. In a next meeting on 28 September, the Screening group decided that the special meeting to discuss the proposal regarding the addition of a standard setting item on the right to strike to the ILC agenda of 2024 would be discussed the day after (Saturday, November 11th).

8. While recognizing that the Standing Orders in 3.2.2. do not require any conditions to be in place in order to be granted a special meeting, it is important to emphasize however the difference between the two requests, one invoking the Constitution, under articles 7(8) and pursuant to settling an interpretation dispute under article 37(1), and the other clearly not. And in this regard, one wonders why the Employers' group put forward their request to add an item to the ILO's standard setting agenda in the form of a special meeting instead relying on the normal Governing Body process for including items on the Conference agenda.

9. In our view, this proposal by the Employers' group for a Protocol to C87, given all the legal, technical and practical infeasibility and unsoundness, must be seen and discussed in light of all the past and present efforts by the Group to prevent any discussions on the dispute in a manner that would bring about legal certainty and stability as well as strengthen the supervisory system while at the same time, continuing to permanently attack the key bodies in the supervisory system, i.e. the CEACR, CAS and CFA, for their guidance which ensures consistency in the scope, meaning and application of C87 with regard to the right to strike and thereby weakening the supervisory system and undermining its important work on freedom of association and right to organize.

10. It is worth recalling that, so far, Governments, the Employers' group and the Workers' group all agree that this dispute on the right to strike regarding C87 is an interpretation dispute. This means that we cannot disregard the clear and authoritative language of article 37(1) which expressly and unambiguously obliges the Governing Body, once it has come to the determination that a dispute is one of an interpretation of a Convention or the Constitution (noting, as a reasonable first step, that dialogue was not able to settle the dispute), to resort to the International Court of Justice (ICJ) for the settlement of the dispute. The constitution does not provide standard setting as the remedy in that circumstance. The authoritative and conclusive nature of the ***decision*** of the ICJ in this regard is not in doubt whether looking at it from the perspective of precedent, good governance or the hierarchy of norms and judicial decisions, taking into account the effect of such an ICJ decision on a judicial tribunal (a lower body to the ICJ) of the kind proposed under article 37.2[2]. In view of the respect ILO constituents have for the rule of law, it is our view that the decision of the ICJ will settle this dispute and enable the ILO to find a path forward from it.

11. The ITUC emphasises the need to act in the interest of the institutional objectives of the ILO and its constitutional purpose of protecting workers and of living up to the spirit of good faith and constructive social dialogue. Good faith social dialogue also requires the understanding that when social partners are unable to agree, for reasons of an underlying dispute on the legal aspects of a situation, it is logical to resort to an available dispute settlement mechanism. In the context of the ILO this is the obligatory recourse to the ICJ based on art 37 (1) of the Constitution.

[2] The hierarchy of any such tribunal vis-à-vis the ICJ must also be seen in light of article 9(2) of the UN-ILO Agreement of 1946.

Rationale for rejecting the Employers' group request to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference

12. The proposal of the Employers' group for a standard setting activity in the form of a Protocol to C87 is in our view legally, technically and politically impossible and an unfeasible idea, which is not suitable for nor capable of achieving the necessary legal certainty and stability, for the following reasons;

A Protocol on the right to strike would not resolve the interpretation dispute

13. Protocols are international treaties attached to existing Conventions. A Protocol can only be ratified by those States which are already bound by the Convention to which the Protocol is attached.

14. The origin of Protocols in the ILO context dates back from the 1979 report of the Ventejol Working Party on the Revision of Standards. Prior to 1982, the only method for both total and partial revision of Conventions had been the drafting of a new Convention based on either a single or double Conference discussion.

15. To date, six Protocols have been adopted by the ILO. Based on past practice, as indicated in the Office background paper (para 41), Protocols adopted so far had the following purpose:

- introducing flexibility and potentially reducing the scope of the Convention with a view to facilitating ratification (Protocol to Convention No. 110);

- expanding the scope and coverage of the Convention (Protocol to Convention No. 81);

- allowing for a widening of exemptions to facilitate a transition towards standards that reflect changing circumstances in the world of work (Protocol to Convention No. 89)

- updating certain regulatory aspects in the Convention they partially revise (Protocol to Convention No. 147)

- adding regulatory content to the standards in the Convention they partially revise with a view to closing implementation gaps (Protocols to Conventions Nos 29 and 155).

16. None of the six Protocols adopted so far aimed at settling a dispute with respect to the intepretation of provisions of the related Convention (see para 62 of the Office background paper).

17. It should be noted that, as rightly indicated in the Office background paper as well as in the March 2022 GB Paper [3], the adoption of a *"consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution as the consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute, for as long as they are not in a position to ratify the newly adopted Convention or Protocol" (para 55).*Therefore, a Protocol on the right to strike would generate more legal uncertainty, as it would create "alternative legal regimes" on the right to strike, based on whether Member States have ratified Convention No. 87 and whether they have additionally ratified the proposed Protocol.

18. Such a Protocol would also lead to further uncertainty regarding its impact on the review by the Committee of Experts and other supervisory bodies of the application of Convention No. 87 by those Member States that would eventually decide not to become parties to the said Protocol. While the Committee of Experts would have to take fully into account the provisions of the Protocol vis-à-vis the Member States that have ratified it, it will have to decide, as an independent body, how to proceed vis-à-vis Member States which have not ratified the Protocol and are bound only by the Convention.

19. In this context, and most importantly, it should be added that Protocols create legal obligations for ratifying States without retroactive effect. This means that the guidance of the Committee of Experts will continue to apply to those Member States who have ratified the Convention and not the Protocol. The legal uncertainty will therefore remain in the body of international labour standards linked to Convention 87 and the principle of freedom of association.

20. In the ILO, there is a reality of reliance on freedom of association as including the right to strike which is inherent in the Constitution of the ILO. There is also a reality of reliance on the coherent application of Convention 87 by the supervisory bodies as protecting the right to strike for over 70 years. The proposal of the Employers' group that such protection for workers can be removed by standard-setting enters uncharted territory and is out-of-place in the context of the institutional objectives and constitutional theory and framework of the ILO. Such an action will turn the raison d'être of the ILO and its Conventions on its head[4].

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[3] GB paper entitled "Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan", para. 65.

[4] The preamble of the ILO Constitution is clear as to the institutional purpose of the ILO "Whereas universal and lasting peace can be established only if it is based upon social justice; And *whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled;* ***and an improvement of those conditions is urgently required;*** … ***recognition of the principle of freedom of association***…"(emphasis added).

21. It must be emphasized that C87 plays a pivotal role in the ILO's institutional set up as a fundamental convention, which moreover has been characterized together with C98 as providing for enabling rights that are of key importance to workers around the world to ensure that other labour rights are respected. The current long-standing legal uncertainty with regard to its scope and meaning in such a fundamental area as the right of workers to collective action is very detrimental to all ILO's constituents.

There is no clarity on the questions to be addressed by a Protocol on the right to strike

22. The denial by the Employers' group that Convention 87 protects the right to strike raises the following fundamental question: since Protocols aim at partially revising existing Conventions, which provisions of Convention No. 87 would need to be revised, how would they be identified and what role will the existing guidance of the supervisory system play?

23. As recalled by the Office in the background paper (para. 65), it appears from the review of the six existing Protocols that at least two Protocols – those linked to Conventions Nos 29 and 147 – explicitly built on the Committee of Experts comments and general surveys to update and add regulatory content to the provisions of the Conventions concerned.

24. The comments and observations of the ILO supervisory bodies constitute fundamental guidance for ILO constituents when considering the revision of Conventions through Protocols. Therefore, given that for decades both the Committee of Experts and the Committee on Freedom of Association have progressively developed "a number of principles relating to the right to strike" on the basis of Convention No. 87, the proposed Protocol normally would consolidate the guidance of the ILO supervisory bodies.

25. However, given the Employers' repeated opposition to the comments of the Committee of Experts on the right to strike, the Employers' group expects the content of the proposed Protocol to reverse the Experts comments on the issue, which would not only create even further legal uncertainty but also create in fact a legal 'monstrum', as they basically argue in favour of adopting a Protocol to a Convention with the sole objective of undoing the authoritative guidance of the ILO's supervisory system, developed over the last 70 years, on that Convention.

26. Finally, the Employers' rationale[5] to adopt a Protocol on the right to strike to circumscribe and limit the interpretive authority of the Committee of Experts is also from a technical perspective totally flawed. In line with its mandate to determine the scope, meaning and content of Conventions, the Committee of Experts would have to review the implementation of the Protocol and therefore determine the legal scope, content and meaning of its provisions. Again, the Employers' proposed Protocol defeats the purpose of ensuring definitive legal certainty on the matter.

27. In sum, it is our strong view that a Protocol on the right to strike would not resolve the interpretation dispute, as the discussion on possible standard setting would expose the same fundamental and persistent disagreement on interpretation, thus preventing consensus. In addition, it would lead to even more legal uncertainty and is in essence legally unsound.

The timeframe put forward for the adoption of the proposed standard setting activity for a Protocol to C87 is <u>not</u> feasible

The standard setting process and the applicable timeframe

28. The standard setting procedure is regulated by the Standing Orders of the International Labour Conference (in articles 45 and 46) which provide for statutory time limits for the preparatory stages of a double or single discussion.

29. These preparatory stages include:
    - the preparation of a preliminary report on the national law and practice with a questionnaire (to be sent to the governments not less than 18 months before the opening of the Conference at which the discussion will take place)
    - the communication of replies by constituents (to be received by the Office not less than 11 months before the opening of the Conference at which the discussion will take place)
    - and the preparation of a further report of the Office with draft conclusions which in principle serve as a basis for the first Conference discussion (to be communicated not less than 4 months before the opening of the Conference at which the discussion will take place)

30. These arrangements apply in cases in which the question has been included in the agenda of the Conference not less than 26 months before the opening of the session of the Conference at which it is to be discussed in respect of a single discussion, or not less than 18 months before the opening of the session of the Conference in the case of a double discussion. When the standard-setting item is placed on the agenda of the Conference less than 26 months for a single discussion or less than 18 months for a double discussion, a programme of reduced intervals must be approved by the Governing Body.

[5] As recalled in the Office background paper (para. 59), the Employers' declared objective is "to ensure that the Committee of Experts does not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute."

31. It is clear that the Employers' proposal would not allow for the respect of the requirements set out in the standing orders, as in practical terms it would mean that the time available between the placing of the item of the ILC agenda (Nov 2023) and the first discussion in June 2024 would be only seven (7) months.

32. Even if one would then try to argue in favour of the GB approving a programme of reduced intervals, in our view this would not be feasible, taking into account the need to respect procedural requirements that are there to ensure the full participation and contribution of the tripartite constituents in the preparatory process, as well as past practice and the amount of preparatory work that would be required from the Office (Law and Practice report, Report with draft conclusions and draft text). It would be absolutely impossible to complete all this preparatory work within 7 months.

33. As indicated in the Office background paper (para. 72), all ILO Protocols were placed on the agenda of the Conference between 15 and 19 months before the opening of the session at which they would be discussed, except for the Protocol to Convention No. 147. However, this had been prepared in the context of an earlier technical meeting. A programme of reduced intervals was adopted for the preparation of the two most recent Protocols to Conventions Nos 155 and 29 in line with article 38, paragraph 3 (now article 45, paragraph 4) of the Standing Orders of the Conference.

34. Reduced intervals only work when there is broad consensus on the issue(s) and the preparation for standard setting.

35. In addition, four of the six Protocols adopted by the Conference have been preceded by technical or tripartite meetings of experts which facilitated the preparatory work of the Office, and ensured the involvement of tripartite constituents in the process. This preparatory work, consisting in in-depth technical analyses and tripartite debates, has been demonstrated to be essential in developing sound and well-informed standards.

36. It is clear that no preparatory work on any regulatory approach to the right to strike has been conducted. The existing technical analysis and guidance of the supervisory system, which would normally form a consensus basis for the preparatory work, is rejected by the Employers' group. Taking into account the existing statutory timeframes, past practice, the need to respect tripartite involvement as well as practical considerations, the Employers' proposal to have a Protocol on the right to strike discussed at the 2024 ILC is simply not feasible. This is in addition to the fact that in our view as argued above the proposal is legally unsound.

There is no space in the already approved agendas of the forthcoming sessions of the International Labour Conference (See GB 349/INS/2)

37. The responsibility for setting the agenda of the Conference lies with the Governing Body. Proposals to place an item on the Conference agenda must be considered at two successive sessions of the Governing Body, unless there is unanimous consent to place a proposed item on the agenda of the Conference when it is discussed for the first time by the Governing Body (paragraph 5.1.1 of the Governing Body Standing Orders).

38. The Agenda of the 2024 ILC has already been decided by the GB in previous sessions, and the following items, in additional to the standing items, have been placed on the agenda:

    - Occupational safety and health protection against biological hazards – **standard-setting (first discussion) [***decided in March 2021***]**

    - Recurrent discussion on the strategic objective of fundamental principles and rights at work.

    - Decent work and the care economy – general discussion. [*decided in March 2022***]**

    - Abrogation of Conventions Nos 45, 62, 63 and 85. [*decided in November 2021***]**

39. According to the established practice of having three technical committees plus the General Affairs Committee (GAC - to be convened when necessary), there is therefore no possible slot for an additional standard setting item in the 2024 ILC Agenda.

40. For all the reasons stated above, the Employers' proposal to adopt a Protocol relies on a flawed rationale and defeats its own declared purpose of providing an easier path to consensus and more legal certainty on the right to strike. A Protocol would not resolve the interpretation dispute regarding the right to strike as it is legally, practically and politically impossible.

41. Preserving the unique nature of the ILO as a normative tripartite organization requires that legal certainty is restored to ILO constituents and the supervisory system with regard to this long-standing dispute on the interpretation of C87. Therefore the Governing Body must decide now to resolve this dispute by referring it to the ICJ under article 37(1) of the ILO Constitution and not through the adoption of a Protocol to C87 (see text in box below).

Taking the unique tripartite governance structure of the ILO into account

The Employers' group has argued that their request for standard setting as the preferred way to settle the interpretation dispute is based on the fact that standard setting is the only social dialogue based solution in the ILO or the highest form of social dialogue in the ILO. This is erroneous.

The ILO is according to its Constitutional mandate a tripartite social dialogue based normative organization with a sound system of interrelationships between its governance, legislative and supervisory systems aimed at protecting workers, achieving social justice and realising universal peace.

In view of the dialogue that takes place between tripartite social partners at the national level and the regular supervisory system at the ILO through reporting under article 19, 22 and 23 of the ILO constitution aimed at better implementing ratified Conventions, it is improper to suggest that this supervisory system is not social dialogue based.

Also, given the role that the International Labour Conference and the Governing Body play regarding the work of the supervisory bodies under the Constitution of the ILO; and the role specifically played by the Governing Body (which is also a tripartite structure) regarding the deliberations and decision to refer a question or dispute to the ICJ under article 37(1), it is equally improper to suggest that the process to refer a dispute to the ICJ does not inherently include social dialogue.

The advisory opinion of the ICJ, when delivered, will also not constitute an external imposition on the ILO and its constituents. Iin order to ensure legal certainty and predictability associated with the rule of law, the ILO will deal with the advisory opinion of the ICJ on the basis of its constitution and precedents, which prescribe the need to bring a dispute of interpretation to the ICJ for decision and therefore consider the outcome to be conclusive and binding on the organisation.

It is worth noting that social dialogue systems in many ILO Member States also include dispute settlement mechanisms, on the basis of the law or agreed in advance by social partners, which provide for resorting to judicial settlement of disputes of a legal nature arising in social dialogue.

The ILO is a normative organization founded on a culture of social dialogue which includes its dispute settlement mechanism, and this makes it unique. It must also be emphasised, that the ILO's uniqueness is equally in the fact that its supervisory system does not impose decisions on Member States. The CEACR as an independent body undertakes an impartial and technical analysis of how ratified Conventions are applied in law and practice by Member States, while cognizant of different national realities and legal systems, and provides non-binding guidance through continuing dialogue with governments taking into account information provided by employers' and workers' organizations. The CFA arrives at conclusions and makes recommendations to Member States on a tripartite basis. These bodies, in continuing dialogue with Member States and constituents, work to guide the actions of national authorities in the application of international labour standards and principles, in law and practice. Member States, in voluntarily becoming members of the ILO by ascribing to its constitution, and in voluntarily ratifying ILO conventions, engage in this dialogue with the supervisory bodies.

It is therefore misleading to caricature the supervisory system as external to and imposing its will on Member States and constituents. It is also misleading to caricature any decision of the ICJ in such a manner as 'an imposition' or 'foreign to the ILO' for the same reasons already stated above.

Finally, arguing that social dialogue would have to be preferred over any dispute settlement mechanism would lead to a situation where a deadlock in social dialogue would persist ad infinitum, giving the party that blocks access to dispute settlement in practice a veto. This would certainly not be in line with basic principles of social dialogue and the tripartite governance structure of the ILO.

Document No. 27

GB.349/INS/18/5(Rev.1), Fifth Supplementary Report of the Director-General: Arrangements for the 349th *bis* and 349th *ter* Special Sessions of the Governing Body, November 2023

International Labour Organization

▶ GB.349/INS/18/5(Rev.1)

Governing Body

349th Session, Geneva, 30 October–9 November 2023

Institutional Section **INS**

Date: 1 November 2023
Original: English

Eighteenth item on the agenda

Report of the Director-General

Fifth Supplementary Report: Arrangements for the 349th *bis* and 349th *ter* Special Sessions of the Governing Body

▶ Introduction

1. At the screening group meeting of 28 September 2023, the Office was requested to provide information on the practical modalities of the two upcoming special meetings of the Governing Body scheduled for 10–11 November 2023 in the event the Governing Body were to decide at its 349th Session (October–November 2023) to meet, in part, as a Committee of the Whole. This document has been prepared in response to this request with a view to facilitating the Governing Body's consideration and decision.

2. It is recalled that in accordance with article 7(8) of the ILO Constitution and paragraph 3.2.2 of the Standing Orders of the Governing Body, two special meetings of the Governing Body shall be held on 10 and 11 November 2023; the 349th *bis* Special Session on the possible referral of the dispute concerning Convention No. 87 in relation to the right to strike to the International Court of Justice for decision, as requested by the Workers' group and 36 governments, and the 349th *ter* Special Session on the inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the Conference, as requested by the Employers' group. In discussing the date and duration of the special meetings, some constituents have expressed the view that in the interest of inclusiveness, the Governing Body should meet as a Committee of the Whole.

3. The possibility for the Governing Body to meet as a Committee of the Whole is provided for in article 4.3.1 of its Standing Orders, which reads as follows:

> The Governing Body may decide to meet as a Committee of the Whole in order to hold an exchange of views, in which representatives of governments that are not represented on the Governing Body may, in the manner determined by it, be given an opportunity to express their views with respect to matters concerning their own situation. The Committee of the Whole shall report to the Governing Body.

4. Should the Governing Body decide to convene either or both special meetings, in part, as a Committee of the Whole, consideration could be given to the following practical arrangements, it being understood that the Chairperson, in consultation with the Vice-Chairpersons, may decide on any adjustments as may be necessary for the efficient conduct of the discussion:

- During the morning sitting (10.30 a.m. to 1.00 p.m.), the Governing Body shall hold an exchange of views on the agenda item with the full participation of governments which are not represented in the Governing Body and which will be entitled to make no more than one statement not exceeding three minutes.
- Governing Body members representing governments will be entitled to make no more than one statement not exceeding three minutes.
- The following time limits could apply to other participants: 15 minutes for the opening and closing statements of the Employer and Worker spokespersons; and 5 minutes for the statements made on behalf of government groups.
- The Chairperson may reduce the time limits where the situation warrants it, for instance if there is a very long list of speakers.
- Delegates wishing to take the floor during the morning sitting should be registered at least 24 hours in advance at governingbody@ilo.org.
- In the afternoon (3.30 p.m. to 6.30 p.m.), the Governing Body shall meet in plenary sitting to conclude the discussion and take a decision on the agenda item. The plenary sitting will begin with an oral report by the Chairperson on the exchange of views held in the Committee of the Whole. The afternoon sitting may be extended into the evening, if necessary.

▶ Draft decision

5. **The Governing Body approved the arrangements for its 349th *bis* and 349th *ter* Special Sessions as set out in paragraph 4 of GB.349/INS/18/5(Rev.1) and requested that those arrangements be promptly brought to the knowledge of all Member States and be published on the public webpage of the Governing Body.**

Document No. 28

Draft Minutes of the 349th Session of the Governing Body, paras 686-737

Governing Body

349th Session, Geneva, 30 October–9 November 2023

Institutional Section

INS

Draft minutes of the Institutional Section

Contents

- **Follow-up to the Fifth Global Conference on the Elimination of Child Labour in Durban (GB.349/POL/INF/1);**
- **Agreements concluded with other international organizations (GB.349/LILS/INF/1);**
- **Voluntary contributions and gifts (GB.349/PFA/INF/1);**
- **Update on the headquarters building renovation project (GB.349/PFA/INF/2);**
- **Update on the premises for the ILO Regional Office for Africa and Country Office for Côte d'Ivoire, Benin, Burkina Faso, Mali, Niger and Togo in Abidjan (GB.349/PFA/INF/3).**

(GB.349/INS/18/4, paragraph 3)

18.5. Fifth Supplementary Report: Arrangements for the 349th *bis* and 349th *ter* Special Sessions of the Governing Body (GB.349/INS/18/5 and GB.349/INS/18/5(Rev.1))

686. **The Chairperson** invited the members of the Governing Body to indicate in their statements whether they supported the first option of the draft decision, of holding the morning sittings of each special session as a Committee of the Whole, or the second option, of conducting both special sessions as normal sittings of the Governing Body.

687. **The Employer Vice-Chairperson** thanked the Government of Switzerland for having proposed the format of the Committee of the Whole in order to make the discussion inclusive and representative, which her group considered absolutely necessary. However, the time frame should be flexible, as half a day might be insufficient to allow all governments that wished to speak to take the floor. As the decision on a referral to the ICJ could be incompatible with the decision on a Protocol to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Employers' group proposed that the Governing Body should meet as a Committee of the Whole for the entire day for both special sessions to ensure full transparency and representativeness. The proposed time limits for non-members of the Governing Body, a maximum of two statements of two minutes each, were sufficient. The afternoon sitting of each special session should not exceed normal working hours; if the discussions did not reach a conclusion by the end of normal working hours on 11 November 2023, they should be continued at the next Governing Body session, in March 2024. In any event, the Committee of the Whole format could not replace a discussion and decision by the International Labour Conference. As Convention No. 87 was a fundamental Convention, the outcome of any decision on the interpretation dispute would affect all ILO constituents, including employers and workers who would not participate in the Committee of the Whole. It was therefore crucial for the sound, democratic governance of the Organization that the final decision on whether to refer the issue of the right to strike to the ICJ should be taken by the Conference, not the Governing Body.

688. The Employers' group could support the first option of the draft decision, provided that the following changes were made to paragraph 4 of document GB.349/INS/18/5: "During the morning sitting (10.30 a.m. to 1.00 p.m.)" should be replaced with "During the morning and afternoon sittings"; "In the afternoon (3.30 p.m. to 6.30 p.m.)" should be replaced with "At the end of each session"; and the last sentence, "The afternoon sitting may be extended into the evening, if necessary", should be deleted. The words "as amended" should then be inserted in the draft decision, after the reference to "paragraph 4 of GB.349/INS/18/5".

689. **The Worker Vice-Chairperson** sought clarification from the Office on whether amendments could be proposed to the body of the document, as opposed to the draft decision.

690. **A representative of the Director-General** (Legal Adviser) clarified that amendments could be proposed to the draft decision only. For any possible changes to be made to the document itself, for instance on the proposed modalities set out in paragraph 4, the Office would need to issue a revised version for the Governing Body's consideration the following day. The draft decision could then be adopted without the words "as amended".

691. **The Worker Vice-Chairperson** noted that, as the Committee of the Whole format affected the participation of Governments and not Employers and Workers, she would reserve her position on it until the Government members had spoken. As to the remaining issues, she recalled as background that, in July 2023, the Workers' group had sent a letter requesting an urgent discussion and decision on a referral to the ICJ of the issue of the right to strike, and had requested the Office to prepare a background report and seek the views of all Member States to ensure that the process was inclusive. The group was therefore in favour of inclusivity. However, limited numbers of contributions had been received from governments and employers' organizations. The group doubted the need to convene a Committee of the Whole, as the Governing Body had received the mandate to refer matters of interpretation of international labour standards to the ICJ in 1949. While improvements were still possible to the democratic composition of the Governing Body, it was already much more democratic than it had been 100 or 50 years ago. The Employers' group's proposal to hold both special sessions entirely in the Committee of the Whole format was intended to prevent any decision-making and the Workers' group was strongly opposed to it. As to the time frame, the Workers' group supported decent working hours; however, as two special sessions had now been organized, and given the urgency of the decisions to be taken, the possibility of having extended sittings should not be ruled out in advance.

692. **Speaking on behalf of GRULAC**, a Government representative of Mexico restated the group's support for inclusive discussions in all areas of the ILO, without undermining the decision-making capacity of the Governing Body. On that understanding, GRULAC agreed to applying the Committee of the Whole format for the morning sittings of both special sessions. As appropriate time management was important, the group proposed that the speaking time limits of individual Governments for both members and non-members of the Governing Body should be harmonized to be one statement of three minutes, rather than two statements of two minutes each. GRULAC supported the proposal to convene a Committee of the Whole in the morning sitting, followed by an afternoon sitting with an oral report by the Chairperson to the Governing Body and a discussion and decision on the item on the agenda of each special session. Subject to the change it had proposed, GRULAC could support the first option of the draft decision.

693. **Speaking on behalf of ASPAG**, a Government representative of the Islamic Republic of Iran said that, considering the importance of inclusiveness and the broad impact of the decisions on all Member States of the ILO, her group supported the format of a Committee of the Whole, as an exceptional practice. She encouraged participants to exercise effective time management. The oral report by the Chairperson on the exchange of views should be considered at the sitting of the Governing Body in the afternoon, to ensure inclusiveness in decision-making on such crucial issues. A majority of ASPAG supported the proposal for the International Labour Conference to make a decision at its 2024 session on both a potential referral to the ICJ and standard-setting, to ensure that all views were considered.

694. **Speaking on behalf of the Africa group**, a Government representative of Algeria stated that her group supported the decision to convene a Committee of the Whole in the mornings of the special sessions. That option was provided for in the Standing Orders of the Governing Body, and would ensure inclusivity and transparency, and therefore the credibility of the process. Member States who so wished should be involved in the discussion to make for greater diversity in opinions and perspectives, leading to more balanced decisions on a very important issue for all Member States, especially for those who had ratified Convention No. 87 but were not members of the Governing Body and could not otherwise participate in decision-making. Accordingly, the Africa group supported the first option of the draft decision.

695. **Speaking on behalf of the EU and its Member States**, a Government representative of Spain said that Albania, Bosnia and Herzegovina, North Macedonia, Republic of Moldova, Montenegro, Serbia, Georgia, Iceland, Norway and Armenia aligned themselves with his statement. He recalled that on 14 July 2023, the EU and its Member States and Iceland and Norway had sent the Director-General a letter requesting that, as a matter of utmost importance, an item be placed on the agenda of the Governing Body on the referral to the ICJ of the dispute regarding the interpretation of Convention No. 87 in relation to the right to strike and indicating that legal clarity was urgently required after more than a decade of failed attempts to find a solution. He commended the Office for its impartial and transparent management of the process, and the inclusive approach of providing all constituents with an opportunity to submit written comments. Given the shortage of time available for the special sessions, the EU and its Member States supported the second option of the draft decision, of holding the sessions as normal sittings under the Standing Orders of the Governing Body. They did not support the proposed amendments of the Employers' group.

696. **A Government representative of Bangladesh** noted that as long as the 1986 Instrument for the Amendment of the ILO Constitution was not in force, the Governing Body could not be considered to be truly representative of ILO Member States. As any interpretation or standard-setting concerning Convention No. 87 would have an impact on all ILO Member States, all Governments should participate actively in the discussions to reach a consensus-based, tripartite decision. He supported the convening of both special sessions as a Committee of the Whole.

697. **A Government representative of Switzerland**, who had been authorized to speak by the Officers of the Governing Body in accordance with paragraph 1.8.3 of the Standing Orders, said that as Convention No. 87 was a fundamental Convention and therefore binding on all ILO Member States, all governments – or at least all which had ratified the Convention – could be invited to participate in the proceedings before the ICJ. Accordingly, all Member States should be actively involved in discussions on whether to refer the issue to the ICJ and, if so, the question to be put to the Court, and also on whether to include a standard-setting item on the agenda of a session of the International Labour Conference. Written submissions were insufficient. His Government therefore supported the first option, of convening a Committee of the Whole, which had been proposed by the Office at the March 2023 session of the Governing Body. Those arrangements would ensure that the discussions were inclusive and representative, while enabling the available time to be managed appropriately. The Government of Switzerland had been advocating for greater democracy within the Governing Body for many years. The number of ILO Member States had increased significantly since 1949, when the Governing Body had received the mandate to submit requests to the ICJ for advisory opinions. It therefore seemed appropriate that that authority should now be returned to the Conference.

698. **The Worker Vice-Chairperson** cautioned against using the argument of democratization in the context of the current discussion. The Workers' group fully supported the democratization of the Governing Body and the abolition of the status of countries of chief industrial importance. However, the arguments were unconvincing in relation to the question of who should discuss a possible referral to the ICJ. The Conference had given the Governing Body a mandate in 1949, which remained in force and which formed the legal basis for the potential referral to the ICJ. There was no need to have the decision of the Governing Body discussed or validated by the Conference; indeed, that would provide an opportunity for constituents to lobby against the Governing Body's decision. Nor would a Conference discussion be more inclusive. Governing Body members were representatives, who participated in group meetings so as to represent the views of the groups before the Governing Body. There was no reason why the Governing Body should be incapable of taking a decision on the items to be discussed at the special sessions on the basis of its formal mandate, which it should be trusted to exercise responsibly. Although the Workers' group did not support convening a Committee of the Whole, it could agree to it, given that many, though not all, Governments favoured it to allow for broader contributions. However, as a Committee of the Whole would increase the number of Governments that could participate, but not the number of representatives of the social partners, it would not necessarily be more democratic. There was also a risk that much time would be devoted to repeated positions. Moreover, as only ten Governments had submitted comments in writing, there might be limited interest in participating among Governments that were not members of the Governing Body. In that case, the Chairperson should have the discretion to assess the situation, with the help of the Office, in the 24 hours prior to the start of each special session and to shorten the Committee of the Whole to allow the Governing Body more time for decision-making. In any event, the Committee of the Whole should not extend beyond the morning sitting. The suggestion made by the representative of GRULAC to allow Governments to make one statement not exceeding three minutes would be helpful, but the group could also accept the approach of two two-minute statements. The Workers' group could accept the first option of the draft decision.

699. **The Employer Vice-Chairperson** stated that responsible decisions were those which strengthened the ILO as a tripartite organization of social dialogue, which was why the Employers' group had advocated for a tripartite and inclusive discussion of the item at a session of the International Labour Conference. No discussion on the substance of the matter had ever taken place at the Conference, nor had the 2015 meeting of experts on the right to strike, where participation was very limited, discussed the substance. The Government group of that meeting of experts had adopted a statement, supported by the social partners, that they were ready to undertake inclusive discussions on the substance, but those discussions had never taken place. Hence, the only responsible decision would be to discuss the substance of the matter through social dialogue at the Conference.

700. As to the special sessions, strict time management for all speakers was important, provided that all Governments wishing to speak during the Committee of the Whole were allowed to do so. However, her group's position was not dogmatic; the sitting could be longer or shorter than planned, and the reference to 10.30 a.m. to 1 p.m. could be removed from paragraph 4 of the document to allow for more flexibility.

701. **The Worker Vice-Chairperson** noted that the most important principle was that there would be a Committee of the Whole at the morning sitting of each special session. If there were many speakers, they would have shorter speaking times and if there were fewer speakers, they could have more time. In any event, the Committee of the Whole would end by 1 p.m. to allow the Governing Body, as the only decision-making organ for the issues at hand, to hold its sitting.

The remaining issues raised by the Employers' group would be discussed at the special sessions.

702. **The Chairperson** observed that there was convergence on convening a Committee of the Whole. If necessary, the speaking times could be adjusted depending on the number of speakers. It was also important to leave sufficient time for the preparation of the oral report before each Governing Body sitting in the afternoon.

703. **Speaking on behalf of the EU and its Member States**, a Government representative of Spain said that Albania, North Macedonia, Montenegro, Iceland, Norway and Armenia aligned themselves with the statement. While they originally supported the holding of a normal session of the Governing Body, with a view to achieving consensus the EU and its Member States could support the option of convening a Committee of the Whole in the morning sittings. They also supported the proposal of the representative of GRULAC to allow all individual Governments to make one statement of up to three minutes.

704. **The Worker Vice-Chairperson** sought clarification on whether the proposal made by GRULAC to have one statement of three minutes could be adopted.

705. **The Employer Vice-Chairperson** said that, on the understanding that all Governments wishing to speak would be allowed to do so, a decision on the time limits for individual governments did not yet need to be made.

706. **Speaking on behalf of GRULAC**, a Government representative of Mexico clarified that, as it had been unclear which Governments would have the opportunity to speak twice, her group had suggested a harmonized limit of one statement of three minutes for all member and non-member Governments, which should allow sufficient time for everyone to participate in the Committee of the Whole.

707. **The Employer Vice-Chairperson** agreed that, during the meetings of the Committee of the Whole, no distinction should be made between Governing Body members and non-members. However, further consideration should be given to the number and duration of their statements.

708. **The Director-General** noted that Governments who were not members of the Governing Body needed to be informed of the arrangements for the Committee of the Whole, therefore a prompt decision was required. A degree of flexibility was needed with regard to time limits. Given that the overall timings would depend on the number of speakers in a given sitting, the Chairperson should have the discretion to reduce the time limits, if required; however, a minimum of two minutes would be necessary. In that respect, three minutes in total could be more appropriate than two statements of two minutes. Unless the Governing Body decided that the sitting must end at 1 p.m., it could be extended slightly beyond that time, without jeopardizing the normal sitting of the Governing Body in the afternoon.

709. **The Worker Vice-Chairperson** said that, as a Committee of the Whole would allow more Governments to participate but not additional Employers' and Workers' groups, the speaking times were a matter for the Government representatives to decide. She agreed that the Chairperson should be given the flexibility to arrange the morning sitting to allow all participants to contribute; the main concern for the Workers' group was that nothing should jeopardize the smooth running of the normal Governing Body sitting in the afternoon.

710. **A Government representative of India** agreed that all Member States should be given equal time to speak during the meetings of the Committee of the Whole, whether they were Governing Body members or not, but was flexible on the exact time limits. Governments

should avoid repetition in their statements; allocating one speaking slot to each would allow the sitting to finish on time.

711. **The Chairperson** observed that there was clear support for harmonizing the time limits for members and non-members of the Governing Body during the meetings of the Committee of the Whole, and proposed that one statement of three minutes would be preferable to two statements of two minutes, which would be four minutes for each Government. The Chairperson would be allowed some flexibility in reducing the time limits if necessary. He asked whether the Governing Body was ready to reach agreement on the draft decision.

712. **A representative of the Director-General** (Legal Adviser) recalled that, before the draft decision could be adopted, it was first necessary to change paragraph 4 of document GB.349/INS/18/5 to reflect the wishes of the Governing Body on the number of interventions, speaking times and the additional flexibility. The Office would make the change and circulate a revised version of the document.

713. **The Employer Vice-Chairperson** agreed that paragraph 4 should be amended to reflect the Governing Body's discussion. It should provide for flexibility on the timings and remove the distinction between Governing Body members and non-members.

714. **The Worker Vice-Chairperson** said that once the revised version of the document had been published, the Governing Body could easily approve the draft decision. She emphasized, however, that the afternoon sitting must remain a normal sitting of the Governing Body.

715. **The Chairperson** noted that the Office had prepared a revised version of the document, in which paragraph 4 had been amended to reflect the consensus on the practical arrangements for the two special sessions and to specify that the Chairperson could make adjustments as necessary. He invited the Governing Body to adopt the draft decision.

716. **The Employer Vice-Chairperson** recalled that her group had made three proposals, namely: to extend the Committee of the Whole into the afternoon sitting to allow all Governments that wished to take the floor to do so; to allow Governments to make two statements of no more than two minutes; and to set a time limit for the afternoon sitting of 8 p.m. to ensure decent working conditions. However, the revised version of the document did not take those proposals into account. It did not provide for an extension of the Committee of the Whole and stated that, at each afternoon sitting, the Governing Body should conclude the discussion and take a decision on the agenda item, which was not what had been agreed. She insisted that the full Conference should make the final decision on whether to refer the matter of the right to strike to the ICJ, given the impact of the issue on all constituents. The lack of compromise and openness from the Office to consider the Employers' group's concerns had not resulted in a balanced and constructive document, and had set an unhelpful tone for the difficult discussions to come during the special sessions. The problem could have been avoided if the Office had enabled the screening group to discuss the practical arrangements prior to the present session of the Governing Body. The Employers' group could not accept the arrangements as reflected in paragraph 4 of the revised version of the document and wished to continue the discussion in order to reach consensus.

717. **The Worker Vice-Chairperson** said that the draft decision – to which no amendments had been proposed – should have been adopted when the matter was first discussed. As had been made clear in the discussion on the Programme and Budget for 2024–25 at previous sessions, the Governing Body could not make amendments to the Office document. The revised version issued by the Office was a fair attempt to reflect the discussion that had taken place, notably the agreement that the Chairperson, in consultation with the Vice-Chairpersons, would enjoy

a degree of flexibility on arrangements for the morning sittings. Her group had stated clearly that such flexibility could not extend to arranging an entire day of the Committee of the Whole; it was extremely important that the afternoon sittings should be normal sittings of the Governing Body.

718. The objection to the wording in paragraph 4 on the need to conclude the discussion and take a decision on the agenda item was misplaced, as the Office had explained that, however a special session was conducted, it had to result in a decision. The wording did not prejudice the outcome of the special sessions in any way. Furthermore, convening a Committee of the Whole required a decision by the Governing Body to do so; if the Employers' group did not agree on the arrangements for it, the Governing Body could not decide to convene a Committee of the Whole and the special sessions would therefore have to be held as normal sittings of the Governing Body. The Workers' group would not agree to anything other than the arrangements reflected in the revised version of the document.

719. **The Employer Vice-Chairperson** clarified that her position was that the wording of the last bullet point under paragraph 4 of the revised document was very open, whereas her group had stated clearly that it must not mean that a vote would be taken in order to conclude the discussion. There was no reference in the revised version of the document to ending the meeting at a reasonable time or to the flexibility for the Chairperson to accommodate requests for the floor, including in the event that Governments wished to speak a second time. The arrangements related not only to the format of the Committee of the Whole, but to the entirety of the special sessions. She asked to hear the views of the Chairperson, including on whether he wished to have such flexibility on time management, and whether a commitment could be made to ensure that the special sessions finished at a reasonable time.

720. **The Worker Vice-Chairperson** emphasized that she had stated clearly that the flexibility on time management was limited by the need to hold both a Committee of the Whole and a normal sitting of the Governing Body. Moreover, it was for the Governing Body, under the leadership of the Chairperson, to determine whether to make a decision or hold a vote. The Workers' group was certainly very much in favour of decent working hours, but the discussions might become difficult and would require time; limiting that time in advance was seemingly an attempt to prevent any decision from being made.

721. **The Chairperson** observed that the Governing Body had previously appeared to be close to reaching consensus. The Office had reflected the elements discussed in the revised document. He suggested that, while the document might not be perfect in the view of the Employers' group, the wording reflected the agreements reached on how the special sessions should be run. Moreover, it was the Chairperson's prerogative to make decisions concerning time management.

722. **The Director-General** emphasized that to accommodate the desires to hold both a Committee of the Whole and a normal sitting of the Governing Body, flexibility was required on the speaking times and on the timing of the afternoon sitting. The Chairperson needed the flexibility to reduce or extend speaking times in order to accommodate the number of requests for the floor, and the start time for the normal sitting of the Governing Body would depend on when the Committee of the Whole finished, and would need to take into account the time required to prepare the oral report. The afternoon sitting was therefore likely to be an extended sitting by default. Furthermore, the reference in the document to a decision did not state which kind of decision would be made. It was nevertheless necessary to have an outcome of each special session.

723. **The Employer Vice-Chairperson** noted that it was not usual to state that a meeting had to conclude a discussion, since the decision made could be to continue the discussion. Her group read the phrase "to conclude the discussion and take a decision on the agenda item" as an intention to force a vote, and it was therefore not neutral wording. If that phrase were deleted, and agreement reached that any extension of the normal sitting into the evening would be within reasonable time limits, her group stood ready to accept the draft decision.

724. **The Worker Vice-Chairperson** reiterated that the changes proposed by the Employers' group constituted amendments to a part of the document that was not open to amendments. A decision to continue a discussion was clearly also a decision; if the Governing Body were to refer the matter to the Conference – as desired by the Employers' group – that would also require a decision to be made. The issue of whether there would be enough time for Governments that wished to take the floor was indeed an area of concern, particularly since many Governments had stated their interest in holding the debate urgently, in November. Since the request to place the item on the agenda of the ordinary session of the Governing Body as a matter of urgency had not been granted, the Workers' group had requested a special session to discuss the matter and make a decision. She cautioned against becoming mired in issues of wording.

725. **The Employer Vice-Chairperson** replied that the request to add an item to the agenda of the ordinary session of the Governing Body had not been submitted to the screening group, which would have had time to determine the arrangements. The current wording on the arrangements for the special sessions did not contemplate the possibility of a decision to continue the discussion. A conclusion of a discussion could not be forced. The rules applicable to the Governing Body obliged the Chairperson to seek consensus, which normally meant at least two normal sessions at which to discuss controversial issues without undue pressure. The Employers' group objected to the wording on the conclusion of the meeting, which pre-empted a scenario requiring a vote.

726. **Speaking on behalf of the EU and its Member States**, the Government representative of Spain recalled that his group's strong preference had originally been for the special sessions to be conducted as normal sessions of the Governing Body, but it had agreed to a Committee of the Whole in the morning in the interest of consensus. The Governing Body had endeavoured to fine-tune the aspects set out in paragraph 4 of the document, and the consensus reached had been reflected in the revised version. He urged the Governing Body to adopt the decision.

727. **A Government representative of Namibia** decried the absence of trust among participants. The Governing Body had to be given a fair opportunity to discuss the important substantive matters of a potential referral to the ICJ and potential standard-setting. She implored members to find a way to enable it to discuss those matters.

728. **The Chairperson** expressed the view that, although there needed to be an outcome of the special sessions, the reference in the document to a decision in no way pre-empted what that decision would be.

729. **The Employer Vice-Chairperson** sought assurances from the Chairperson that he would be flexible on speaking times, that there would be an inclusive discussion, that the substance would be discussed, that he would seek consensus and that, if no consensus was reached, the Governing Body could decide to continue the discussion.

730. **The Worker Vice-Chairperson** observed that it was inappropriate to seek such guarantees from the Chairperson. It would be difficult to reach consensus on the complex matters at hand,

but the Chairperson would endeavour to achieve it. Any member was entitled to request a vote, even if there was a clear majority, but the Governing Body had never been forced to hold a vote. She sought clarification as to whether the absence of a decision by the Governing Body on the arrangements for the Committee of the Whole would mean that the meeting must take the form of a normal Governing Body session.

731. **The Chairperson** assured the Governing Body that the meeting would be run fairly and that everyone would be heard. It was impossible to predict in advance precisely how the meeting would unfold, but the discussion would need to be concluded at some point. It would be for the members of the Governing Body to determine, together and on the basis of the discussion, any decision to be taken.

732. **The Employer Vice-Chairperson** noted that a vote had indeed been forced in the past. In March 2023, a vote was to be taken regarding the referral to the ICJ, against the strongly expressed wishes of the Employers' group and a significant number of Governments, but was ultimately not conducted. She therefore sought assurances that the Chairperson would avoid a repetition of that situation and would seek consensus before any vote was held. Once her group had received such assurances, it could agree to the draft decision.

733. **A representative of the Director-General** (Legal Adviser), responding to the Worker Vice-Chairperson's question, recalled that as per standard practice, the new draft decision included in the revised version of the document had to be either adopted or modified, as the Governing Body deemed appropriate. He added that a decision on the specific practical arrangements was required, as the Director-General needed to inform all Member States of those specific modalities in advance of the special sessions. He explained that the Office had prepared a revised version of the document to reflect the discussion. The flexibility clause allowing the Chairperson to make any necessary adjustments, in consultation with the Vice-Chairpersons, applied to both the morning and afternoon sittings, and thus covered the possibility of extending the Committee of the Whole to the beginning of the afternoon sitting as well as any adjustments to speaking times. The Office had considered that, in the light of the flexibility provided for, no further textual amendments would be necessary.

734. **The Worker Vice-Chairperson** said that the document was adequate for managing the arrangements for the special sittings. She reiterated that it was the prerogative of each member of the Governing Body to request a vote. The Workers' group would prefer to avoid a vote, as a decision should be able to be taken where a clear majority was evident.

735. **The Employer Vice-Chairperson** conceded that, as the Chairperson had provided assurances that he would conduct the meeting fairly, including with respect to speaking times, and would seek consensus and a constructive atmosphere based on trust, her group could accept the draft decision.

736. **The Chairperson** reiterated that consensus remained the common objective and urged all members of the Governing Body to work towards that goal.

Decision

737. **The Governing Body approved the arrangements for its 349th *bis* and 349th *ter* (Special) Sessions as set out in paragraph 4 of document GB.349/INS/18/5(Rev.1) and requested that those arrangements be promptly brought to the knowledge of all Member States and published on the public web page of the Governing Body.**

(GB.349/INS/18/5(Rev.1), paragraph 5)

Document No. 29

GB.349*bis*/INS/1/1, Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution – Office background report, September 2023

International Labour Organization

▶ GB.349*bis*/INS/1/1

Governing Body

349th *bis* (special) Session, Geneva, 10 November 2023

Institutional Section **INS**

Date: 14 September 2023
Original: English

First item on the agenda

Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution

Office background report

Purpose of the document

This document has been prepared for the purposes of the special meeting of the Governing Body convened under article 7(8) of the ILO Constitution following the request of the Workers' group and of 36 governments to refer urgently the dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution. A background report is appended that provides factual information on the origins and scope of the long-standing dispute in order to facilitate the discussion and decision-making of the Governing Body. The Governing Body is invited to take note of the background report and provide guidance on action to be taken in relation to the referral requests (see the draft decision in paragraph 27).

Relevant strategic objective: None.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision.

Policy implications: None.

Legal implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: Office of the Legal Adviser (JUR).

Related documents: GB.347/PV(Rev.); GB.347/INS/5; GB.323/INS/5/Appendix III; GB.322/INS/5.

▶ Introduction

1. Under the ILO Constitution and the Standing Orders of the Governing Body, a special meeting of the Governing Body may be convened when a minimum number of regular members of the Governing Body so request in writing, or when the Chairperson of the Governing Body considers it necessary.

2. Concretely, article 7(8) of the Constitution provides that: "… A special meeting [of the Governing Body] shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body."

3. In addition, paragraph 3.2.2 of the Standing Orders of the Governing Body provides as follows:

> Without prejudice to the provisions of article 7 of the Constitution of the Organization, the Chairperson may also convene after consulting the Vice-Chairpersons, a special meeting should it appear necessary to do so, and shall be bound to convene a special meeting on receipt of a written request to that effect signed by sixteen members of the Government group, or twelve members of the Employers' group, or twelve members of the Workers' group.

4. Accordingly, the holding of a special meeting is either compulsory, when a written request is made by 16 regular members regardless of group, by 16 regular Government members or by 12 regular Employer members or 12 regular Worker members, or voluntary when convened at the Chairperson's discretion. [1]

5. To date, special meetings have been convened on three occasions, in September 1932, October 1935 and May 1970, all under the discretionary authority of the Chairperson of the Governing Body. [2]

▶ Chronology

6. By a letter dated 12 July 2023 addressed to the Director-General, the Worker Vice-Chairperson of the Governing Body formally requested that the long-standing dispute over the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike be referred urgently to the International Court of Justice for decision, in accordance with article 37(1) of the ILO Constitution. To this end, the Worker Vice-Chairperson requested the Office to take all necessary steps to place an item on the agenda of the 349th Session of the Governing Body (October–November 2023), for discussion and decision, regarding the request to the International Court of Justice for an advisory opinion, and also requested the Office to prepare a comprehensive report to facilitate an informed decision by the Governing Body at that session.

7. In the days and weeks following the receipt of the Worker Vice-Chairperson's letter, the Director-General received similar letters on behalf of the Governments of the Member States

[1] For more information, see the Office note on the origin and evolution of rules on convening special Governing Body sessions.

[2] For more information, see the Office note on past practice on special Governing Body sessions.

of the European Union and Iceland and Norway, and from the Governments of Angola, Argentina, Barbados, Brazil, Colombia, Ecuador and South Africa requesting that the matter be discussed urgently at the next session of the Governing Body with a view to deciding on whether to refer it to the International Court of Justice for an advisory opinion. Echoing the request of the Workers' group, the aforementioned Governments asked the Office to prepare and circulate ahead of the Governing Body's discussion a background report with all the necessary elements and to bring their letters to the attention of all constituents of the Organization.

8. By circular letter dated 17 July 2023, the Director-General informed all Member States of the referral requests that had thus far been received and indicated that, pending confirmation by the Officers of the Governing Body, the Office was looking into all necessary arrangements, including preparing a comprehensive report to be circulated well in advance of the next Governing Body session.

9. The referral requests were transmitted to the Officers of the Governing Body for confirmation that the matter would be discussed at the 349th Session, on the understanding that the tripartite screening group should subsequently be convened to agree on any necessary adjustments to the agenda. In transmitting the requests to the Officers, the Office clarified that, as the request at hand related to the implementation of a constitutional procedure, it should be directly and immediately transmitted to the Governing Body for its consideration and that the Officers and the other members of the screening group had no authority to block or delay the transmission of the request to the Governing Body. It also clarified that any substantive objections to the referral in general, or to the questions to be put to the Court in particular, could and should be raised during the Governing Body discussion, and not at the level of the Officers, whose only task at that stage was to confirm that the matter would be discussed at the next Governing Body session.

10. By letters dated 18 July and 2 August 2023 addressed to the Director-General, the Employer Vice-Chairperson of the Governing Body expressed her group's opposition to the requests and made reference to paragraph 3.1.3 of the Standing Orders of the Governing Body, which requires consultations with the tripartite screening group before the provisional agenda is updated. Accordingly, the Employer Vice-Chairperson requested the Director-General to place an item on the agenda of the 350th Session (March 2024) regarding proposals on further steps to ensure legal certainty on the interpretation of the "right to strike" in the context of Convention No. 87. She also asked the Office to prepare a note that examines in detail all possible proposals to resolve the existing interpretation issue through social dialogue within the framework of established ILO procedures and rules. In his reply dated 3 August 2023, the Director-General indicated that since the proposal of the Employers' group did not invoke a constitutional procedure but rather sought to add a new item to the agenda of the March 2024 Governing Body session, it would need, as per standard practice, to be considered by the screening group when it reviewed the provisional agenda of that session.

11. By circular letter dated 4 August 2023, the Director-General informed all Member States of one additional referral request, of the letter of 2 August of the Employer Vice-Chairperson and of the Office note dated 13 July 2023 containing legal clarifications on the procedure to be followed.

12. The Officers held two meetings, on 2 and 9 August 2023, regarding the process. At the second meeting, the attention of the Officers was drawn to the fact that the conditions of article 7(8) of the Constitution had been met, thus rendering any continued discussion about process unnecessary, since in essence, the referral request related to the implementation of a

constitutional procedure set out in article 37(1) and, therefore, the Officers had no authority to withhold or delay its transmission to the Governing Body for examination and decision. At the same meeting, the Chairperson received a letter dated 9 August 2023 signed by the 14 regular Worker members of the Governing Body requesting him to convene a special meeting in accordance with paragraph 3.2.2 of the Standing Orders in the event that the Officers were unable to reach agreement.

13. In light of these considerations, it was determined that a special meeting would be held in late autumn in conjunction with the 349th Session of the Governing Body, in accordance with the original request of the Workers' group and of a number of governments that an additional item be included on the agenda of that session. [3]

14. By a circular dated 10 August 2023, the Director-General informed all Member States of two additional referral requests and of the decision taken at the end of the second Officers' meeting to hold a special meeting in late autumn, in conjunction with the 349th Session of the Governing Body, regarding the referral request of the Workers' group and of a number of governments. The Director-General further indicated that the Office's comprehensive report to facilitate the forthcoming Governing Body discussion was expected to be circulated to all Member States by 8 September and that any comments received by 6 October would be summarized and made available ahead of the special meeting.

15. Between 25 August and 15 September, the Office received identical letters from six national employers' organizations drawing its attention to the failure of their respective governments to undertake tripartite consultations, as required under the Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144), with respect to the referral request addressed to the ILO, and requesting that the Director-General intervene urgently to remind the respective governments of the need to comply with their obligations under that Convention. The Office forwarded copies of those communications to the governments concerned with the indication that, in accordance with established practice, the observations of the employers' organizations, as well as any comments that the governments might wish to make on the matters raised in those observations, would be brought to the attention of the Committee of Experts on the Application of Conventions and Recommendations at its next session (November–December 2023). One of those employers' organizations subsequently withdrew its communication.

16. By email dated 20 August 2023, the Secretary-General of the International Organisation of Employers transmitted a "Note on procedural matters regarding the inclusion of an urgent item in the agenda of the Governing Body" detailing the Employers' group's position as follows:

(a) placing an urgent item on the agenda can only be done through the screening group and therefore the screening group procedure should not be bypassed;

(b) article 37 matters cannot be treated in the same way as representations under article 24 and complaints under article 26;

(c) article 7(8) of the Constitution for special sessions is not applicable to article 37(1) matters, and in any case there is no real urgency or necessity for a special meeting;

[3] Confirmation was subsequently sought and received from those governments that their requests should be understood as referring to an urgent Governing Body discussion regardless of the specific format this discussion might take for procedural reasons.

(d) convening a special meeting under paragraph 3.2.2. of the Standing Orders is not justified or appropriate, and in any case there must be agreement on the agenda of that special session by the screening group;

(e) the past referrals under article 37(1) are so different that they are not at all comparable.

17. In its reply dated 29 August 2023, the Office provided clarifications on the following points:

(a) the authority of the Officers and of the tripartite screening group is limited in relation to the implementation of constitutional procedures;

(b) the compulsory holding of a special meeting under article 7(8) of the Constitution and paragraph 3.2.2 of the Standing Orders is self-triggered and the only condition to which it is subject is the minimum number of members submitting the request;

(c) the six referrals to the Permanent Court of International Justice are relevant and could unquestionably be considered to serve as a precedent.

The Office concluded by indicating that the applicable legal framework had been scrupulously observed, that the compulsory holding of a special meeting had been confirmed by the Officers on the basis of article 7(8) of the Constitution since the threshold of 16 regular members making such a request had been attained, and that the Chairperson was bound to convene a special meeting since the 14 regular Worker members had made a written request to that effect, as provided for in paragraph 3.2.2 of the Standing Orders.

18. By circular letter dated 12 September 2023, the Director-General informed all Member States of two additional referral requests, and of a communication received from the Government of the Swiss Confederation in which it recalled that its position with regard to the possible referral of the dispute around Convention No. 87 to the International Court of Justice was that the International Labour Conference should approve the referral and the question or questions to be put to the Court, that the relevant discussions should be open to all Member States, and that the States parties to Convention No. 87 must be involved in the discussions concerning the question or questions to be put to the Court. Moreover, the Swiss Government requested that the Officers of the Governing Body schedule a discussion at the Governing Body in the form of a Committee of the Whole.

19. At a meeting held on 13 September 2023, the tripartite screening group decided that the special meeting would be held on 10 November 2023, immediately after the closure of the 349th Session, with only one item on its agenda: *Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution*.

20. At the meeting of the screening group, the Employer Vice-Chairperson of the Governing Body handed the Chairperson of the Governing Body a letter dated 12 September and signed by the 14 regular members of the Employers' group requesting a special meeting under paragraph 3.2.2 of the Standing Orders of Governing Body on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the International Labour Conference. The purpose of the special meeting would be to pave the way for the adoption of a Protocol to Convention No. 87 on the right to strike, or on industrial action more broadly, which would authoritatively determine the scope and limits of the right to strike in the context of Convention No. 87 and would thus settle the ongoing dispute.

21. By circular letter dated 15 September 2023, the Director-General informed all Member States that the 349th *bis* (special) Session of the Governing Body would be held on 10 November 2023

to discuss the referral request of the Workers' group and of 36 governments, and also that a request had been received from the 14 regular Employer members of the Governing Body for a special meeting for the urgent inclusion of a standard-setting item on the right to strike on the agenda of next year's Conference.

▶ Office background report

22. As specifically requested in the referral request of the Workers' group and of a number of governments, the Office has prepared a background report to facilitate the deliberations of the Governing Body. The report, which is appended, describes the origins and scope of the dispute and the legal and procedural aspects of a possible referral to the International Court of Justice for an advisory opinion. [4] Its sole purpose is to provide information and explain the various aspects of the matter to enable the tripartite constituents to make an informed decision on a possible referral to the International Court of Justice. It does not provide substantive answers to the long-standing controversy concerning the right to strike, nor does it assess the merits of the opposing views, or express any views on the advisability of a referral to the Court.

23. The background report focuses on the two key aspects of the dispute – the interpretation of Convention No. 87 and the mandate of the Committee of Experts on the Application of Conventions and Recommendations – and provides the factual context for the ongoing debate. It also offers brief explanations of the questions that might be put to the Court for an advisory opinion and the procedural steps that that would entail.

24. The report was communicated to all ILO Member States on 31 August 2023, together with an invitation to transmit before 6 October 2023 any comments they may wish to make in respect of the issues at hand after consulting the most representative employers' and workers' organizations. A summary of the comments received will be published as a separate document.

▶ Next steps

25. Against this background, the special meeting of the Governing Body will examine the request for the urgent referral of the interpretation dispute to the International Court of Justice, that is, whether or not it is necessary to bring the matter before the Court with a view to obtaining an advisory opinion and, if so, which question or questions should be put to the Court with a view to settling the dispute. Accordingly, the special meeting will offer an opportunity for a full exchange of views and an informed decision on what, if anything, needs to be done, including but not limited to a request for an advisory opinion from the International Court of Justice.

26. It is believed that as currently worded, the item on the agenda of the special meeting invites reflection and allows scope to debate all possible outcomes, for instance: a referral to the International Court of Justice, whether immediate or conditional; the continuation of the

[4] The report should be read in conjunction with the following documents: *The Standards Initiative – Appendix III: Background Document for the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the Right to Strike and the Modalities and Practices of Strike Action at National Level (revised) (Geneva, 23–25 February 2015)*, GB.323/INS/5/Appendix III, paras 1–59; GB.322/INS/5, paras 7–53 and GB.347/INS/5, paras 9–27.

discussion and postponement of a decision until a future meeting; or agreement on means of pursuing a settlement of the interpretation dispute other than a referral to the Court.

▶ Draft decision

27. Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to

[decision to be taken at the end of the special meeting]

▶ Appendix

The dispute on the interpretation of Convention No. 87 in relation to the right to strike – Background report

Executive summary

For over 70 years, the ILO Committee of Experts on the Application of Conventions and Recommendations, consisting of independent experts responsible for monitoring the application of ratified Conventions by Member States, has taken the view that the right to strike is a corollary to the right to freedom of association, and that, as such, it is recognized and protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

In around 1989, the Employers' group began to question the Committee of Experts' interpretation of Convention No. 87 and to challenge the Committee's authority to interpret Conventions.

The controversy gradually intensified and in 2012 gave rise to a major institutional crisis, with the Conference Committee on the Application of Standards being prevented for the first time from exercising its supervisory functions.

There is a widespread sentiment that the persistent disagreement over such key aspects of the ILO's normative mandate impacts negatively on the credibility of the supervisory system and the ILO's reputation as a standard-setting organization.

Under the applicable rules, a legal question arising within the scope of ILO activities, such as the interpretation of an international labour Convention, may be referred to the International Court of Justice for an advisory opinion either by the International Labour Conference or by the Governing Body, which has been specifically authorized by the Conference to make such a referral.

The legal questions on which the two non-governmental groups of the ILO disagree and which could potentially be put to the Court are: first, whether the right to strike may be considered to flow from Convention No. 87 as an internationally recognized workers' right even though not explicitly provided for in the Convention; and second, whether the Committee of Experts has been acting within its powers when affirming that the right to strike is inherent to freedom of association and thus protected by Convention No. 87 or when reviewing whether limits or conditions for the exercise of the right to strike may be such as to impede the exercise of the right to freedom of association contrary to the Convention.

If the Governing Body decides to refer the matter to the International Court of Justice, this would be the seventh time that the ILO has requested an advisory opinion under article 37 of its Constitution but only the second time with regard to the interpretation of an international labour Convention.

This report provides an overview of the underlying issues to help the tripartite constituents to make an informed decision on a possible referral to the International Court of Justice.

Contents

Annexes

I. Understanding the long-standing dispute

I.1. The two opposing views at a glance

1. The dispute between the ILO Employers' and Workers' groups, which has lasted more than 30 years, has two dimensions: one relates to the interpretation per se – whether literal or dynamic – of certain provisions, in particular Articles 3 and 10, of Convention No. 87, and the other concerns the authority of the Committee of Experts to engage in such interpretation and the limits of any such authority.

2. On the question of the interpretation of Convention No. 87, the Employers' group advances two main arguments: first, that Convention No. 87 does not contain any provision whose ordinary or literal meaning would imply – in accordance with the customary rule of treaty interpretation enshrined in article 31 of the Vienna Convention on the Law of Treaties – the existence of a right to strike; and, second, that the preparatory work that led to the adoption of Convention No. 87 – which, under article 32 of the Vienna Convention, may serve as supplementary means of interpretation – confirms that the intention of the drafters was clearly not to include the right to strike within the scope of Convention No. 87. [5]

3. As regards the competence of the Committee of Experts to interpret Conventions, the Employers' group's position is that, despite the Committee's attempts to de facto widen its mandate, since its establishment its tasks have been purely technical and not judicial. Moreover, the Employers' group contends that the Committee's findings cannot be regarded as binding pronouncements since, under article 37 of the ILO Constitution, only the International Court of Justice may give a binding interpretation of international labour standards. The Employers' group therefore consistently objects to what it considers a "dogmatic" acceptance by the Committee of Experts of a universal, explicit and detailed right to strike and the Committee's attempts to produce new "jurisprudence" despite lacking law-making power or the authority to issue binding rulings on the application of national laws and regulations. [6] According to a publication of the International Organisation of Employers:

> [A] right to strike is not provided for in ILO Conventions 87 or 98 – nor did the tripartite constituents intend there to be one at the time of the instruments' creation and adoption … Despite this background, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) maintains that the right to strike is based on Art. 3 of Convention No. 87 … and Art. 10 … On the basis of this interpretation, every year, the CEACR looks into numerous cases involving specific national provisions or practices restricting strike action. In approximately 90 to 98 per cent of these cases, the Experts conclude that restrictions on strike action, be they de facto or de jure, are not compatible with the Convention. Thus they have formulated a comprehensive corpus of minutely-detailed strike law which amounts to a far-reaching, almost unrestricted, freedom to strike. [7]

4. The Workers' group defends diametrically opposite positions on both issues. While agreeing that the interpretation rules set out in the Vienna Convention represent customary international law and therefore apply to Convention No. 87, the Workers' group focuses on the possibility for "dynamic" interpretation afforded by article 31 of the Vienna Convention, insofar

[5] International Labour Conference (ILC), 81st Session, 1994, *Record of Proceedings*, 25/31–35. See also Alfred Wisskirchen, "The standard-setting and monitoring activity of the ILO: Legal questions and practical experience", *International Labour Review* 144, No. 3 (2005): 283–285.

[6] ILC, 81st Session, 1994, *Record of Proceedings*, 28/8–10. See also Wisskirchen, 271–273.

[7] IOE, *Do ILO Conventions 97 and 98 recognise a right to strike?*, October 2014, pp. 1–2.

as it requires treaty provisions to be interpreted in their context and in the light of the object and purpose of the treaty. Accordingly, the Workers' group contends that the terms of Convention No. 87 guaranteeing the right to organize must be understood in the context of the relevant provisions of the Preamble to the ILO Constitution and of the Declaration of Philadelphia and taking into account any subsequent practice that establishes general agreement regarding their interpretation, such as the consistent case law of the bodies responsible for overseeing the application of the Convention. In addition, the Workers' group argues that no recourse to the preparatory work is needed, as the conditions of the Vienna Convention are not met; that is to say, the interpretation suggested in accordance with article 31 does not leave the meaning ambiguous or obscure nor does it lead to a result that is manifestly absurd or unreasonable. [8]

5. With respect to the mandate of the Committee of Experts, the Workers' group considers that all ILO bodies involved in supervision necessarily interpret the meaning of standards, and that therefore the Committee of Experts – as well as Commissions of Inquiry examining article 26 complaints, tripartite committees examining article 24 representations and the Committee on the Application of Standards – may occasionally perform interpretative functions, subject to any binding interpretation being issued by the International Court of Justice. [9]

6. As for the possible way forward, the Employers' group often recalls that it "proposed to discuss the question of whether a right to strike should be included in an ILO instrument at the [International Labour Conference] [but] there was no follow up" and notes that this is "despite the fact that, with its unique tripartite structure, the ILO would be the appropriate and legitimate arena for solving this issue". [10] At the 344th Session of the Governing Body (March 2022), while discussing the work plan on the strengthening of the supervisory system and proposals to ensure legal certainty, the Employer spokesperson stated that:

> [A]rticle 37 [did not provide] a viable way forward, as the right to strike was a multifaceted and complex issue that could not be separated from the widely diverging industrial relations systems and practices in ILO Member States. It was doubtful that recourse to the options under article 37 could achieve legal certainty, as it was unclear how external and judicial bodies could possibly develop a solution that would be widely accepted by ILO constituents on such a complex matter … There was significant room for dialogue and cooperation among those stakeholders to move closer to consensus. Referral to external and judicial bodies, the International Court of Justice or an ILO tribunal should not occur unless all possibilities of dialogue between the main ILO actors competent with respect to ILO standards had been exhausted, which was not currently the case. [11]

7. Addressing the same question of legal certainty one year later at the 347th Session of the Governing Body (March 2023), the Employer spokesperson reiterated that "referral to the International Court of Justice should be a last resort. It would be preferable to seek internal solutions that received wide support from the constituents". [12]

8. In contrast, the Workers' group argues that those who wish to continue challenging the right to strike have two options under the ILO Constitution: to seek a referral of the matter by the ILO Governing Body to the International Court of Justice for an advisory opinion (article 37(1) of

[8] ITUC, *The right to strike and the ILO: The legal foundations*, March 2014, pp. 74–88.

[9] ITUC, pp. 35–40.

[10] IOE, p. 11.

[11] *Minutes of the 344th Session of the Governing Body of the International Labour Office*, GB.344/PV, para. 139.

[12] GB.347/PV(Rev.), para. 231.

the ILO Constitution) or to agree to the establishment of an internal, independent tribunal to provide for the expeditious determination of the dispute or question relating to the interpretation of Convention 87 (article 37(2)). [13] When the question of implementing article 37 of the Constitution came before the Governing Body in March 2022, the Worker spokesperson indicated that "[t]he only way to solve the persisting interpretation dispute concerning Convention No. 87 and the right to strike, in a manner that provided legal certainty and was in line with the ILO Constitution, was to refer it to the International Court of Justice". [14] A year later, at the March 2023 session of the Governing Body, the Worker spokesperson stated that:

> The ILO had a conflict resolution mechanism in its own Constitution. … [T]oo much time had already been devoted to the matter and [there was] no merit in continuing social dialogue on the matter when consensus had not been achievable. Consensus could not be achieved if positions were mutually exclusive: members either accepted there was a relationship between Convention No. 87 and the right to strike – as previously established not only by the Committee of Experts, but also by the tripartite Committee on Freedom of Association – and respected the authority of the ILO's supervisory system and the Committee of Experts – or they did not. Some disagreements could not be resolved through dialogue but only by turning to an authority. The ILO had such an authority in its Constitution, and that was the ICJ. … The ILO should make good use of the conflict resolution it had in its system. [15]

I.2. Chronology of the legal dispute

9. Although the dispute over the interpretation of Convention No. 87 in relation to the right to strike is commonly believed to have emerged in the last ten years, in reality it has fuelled political and legal debate for over half a century, mainly within the Conference Committee on the Application of Standards. It is characterized by firm and uncompromising positions that put to the test the basic principles of the ILO's supervisory system and constitutional order.

10. The first instance of the scope of Convention No. 87 in relation to the right to strike being questioned can be traced back to 1953, when the Employer spokesperson of the Committee on Freedom of Association stated that there was "no international instrument regulating the right to strike which would authorise bodies related to the I.L.O. to pass judgment on the national regulations in force in any given country". [16] This point was next raised during the discussions of the Committee on the Application of Standards at the 58th Session of the Conference (1973) concerning the right to strike in the public sector. The Worker member of Japan indicated that, "while it was often stated that the right to strike was not protected by international labour Conventions, Convention No. 87 did provide for the right of trade unions to organize their activities and formulate their programmes, and thus implicitly guaranteed the right to strike". In contrast, the Employer member of Japan stated that "in no case had the

[13] ITUC, p. 4.

[14] GB.344/PV, para. 145. In the same vein, the representative of the group of industrialized and market economy countries expressed the view that "[t]ripartite consensus-based modalities had thus far only generated temporary political consensus and could not provide the requisite legal certainty to ensure the effective and efficient functioning of the supervisory system. Efforts should therefore be made to seek a resolution under article 37 of the Constitution. … [The] group looked forward to engaging in a tripartite process on the formulation of a balanced question to be referred to the International Court of Justice and on the process for compiling the dossier" (paras 150–151).

[15] GB.347/PV/(Rev.), para. 278. Along the same lines, the representative of the European Union and its Member States considered that "[t]he protracted disagreement on the right to strike, in the context of Convention No. 87, should be resolved under the provisions of article 37(1). The ICJ was well placed to examine that dispute, and … the Governing Body [should] refer the dispute without delay." (para. 254). Similar views were expressed by the representatives of the group of Latin American and Caribbean countries (para. 247) and the group of industrialized and market economy countries (para. 250).

[16] *Minutes of the 121st Session of the Governing Body* (March 1953), p. 38.

Committee on Freedom of Association ever referred to the right to strike as an absolute right, particularly in essential services and in the public service", while the Government member of Switzerland indicated that the right to strike was not covered under Convention No. 87, as shown by the preparatory work leading to its adoption. [17]

11. In 1986, in the context of a discussion concerning the application of Convention No. 87 by the Syrian Arab Republic, the Government member of the German Democratic Republic recalled that:

> [N]o mention was made of the right to strike in any of the provisions of the Convention. Further, the Committee of Experts had noted that the prohibition of strikes was not in conformity with Article 3 of the Convention. This conclusion was not based on the text of the Convention but rather should be considered as a personal interpretation of the Committee of Experts. Such a method of work should be rejected because it was in direct contradiction with the principle which required governments to report upon the instruments they had ratified. Any other conclusion would lead to uncertainty and legal insecurity which would dissuade new ratifications because States would be unable to know in advance the interpretations which would be given to the Conventions. [18]

12. In 1989, the Employer member of Sweden of the Committee on the Application of Standards observed that:

> [O]nly one body – the International Court of Justice – could make authoritative interpretations of international labour Conventions. … [T]he role of the International Court of Justice as the ultimate arbiter should always be borne in mind. A Convention had to be interpreted in line with the principles laid down in the Vienna Convention on [the Law of] Treaties (1969). … [T]his year's report of the Committee of Experts unfortunately contained a number of over-interpretations, especially regarding basic human rights Conventions and in particular Convention No. 87. [19]

13. At the closure of the general discussion at the same session, the representative of the Secretary-General stated, inter alia, that:

> [I]t was within the power of governments disagreeing with the interpretations given by the supervisory bodies to have recourse to the International Court of Justice. In two cases, the Committee of Experts had drawn attention to this option. On the questions of the right to strike and essential services, it could be said that the jurisprudence of the supervisory bodies was consistent. On the right to strike, both the Committee of Experts and the Committee on Freedom of Association had considered this right to be one of the essential means available to workers and their organisations to promote and to defend their economic and social interests. This principle had always been supported by both supervisory bodies which, over time, had fixed the conditions in which this right could be exercised. [20]

14. In 1990, part of the general discussion at the Committee on the Application of Standards was devoted to the relationship between the supervisory bodies and the interpretation of Conventions. In reacting to the Committee of Experts' position that its views on the content and meaning of provisions of Conventions should be considered as valid and generally recognized insofar as they were not contradicted by the International Court of Justice, and that

[17] ILC, 58th Session, 1973, *Record of Proceedings*, p. 544, para. 26.

[18] ILC, 72nd Session, 1986, *Record of Proceedings*, 31/33.

[19] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6, para. 21.

[20] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6–7, para. 23.

the acceptance of those considerations was indispensable for the certainty of law and the principle of legality, the Employer members considered that:

> [T]he opinion of the Committee of Experts that its evaluations are binding unless corrected by the International Court of Justice, could not be correct. … A legal reason was that this was contradicted by the ILO Constitution and by the Standing Orders of the Conference concerning the submission of governments' reports and the terms of reference of the Conference Committee, which had an independent competence to examine reports.
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> …
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> In this connection, the Employers' members recalled that they had a different interpretation from the Experts, for instance on the question of the right to strike. Although this question was not expressly settled by any Convention or Recommendation (except the very special case dealt with in the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92)), the Experts had progressively deduced from Convention No. 87 a right to strike which was hardly limited. The Employers' members could not accept this, not only because they considered the Experts' opinion questionable in law but also because the issue touched directly on employers' interests. [21]

15. In the following three years, the Employer members of the Committee on the Application of Standards regularly put on record their principled objection to the interpretative function of the Committee of Experts, in particular as regards Convention No. 87 and the right to strike. For instance, in 1991, the Employer members stated that:

> [T]he Experts were required to follow the criteria of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties. The criteria of interpretation contained in this instrument cannot be set aside by simply recognising that there is a similarity of opinion between different ILO bodies, as is done for instance with the Committee on Freedom of Association … The application of the Vienna Convention was uncontested in international law … Another uncontested principle of international law was *in dubio mitius* (i.e. if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted). The Employers' members did not insist on this principle for its own sake, but because of its concrete bearing on the manner in which important issues are interpreted and applied in practice, such as the right to strike, which was not even written into the relevant Convention but had become the subject of minutely elaborated principles derived by way of interpretation. [22]

In the same vein, the Employer member of the United States noted that:

> [I]t was inappropriate for the Experts to function as a supranational legislature if their interpretation was not within the contemplation of the tripartite Committee which drafted the Convention. It was in acting without restraint that the Committee of Experts might introduce the very legal uncertainty which it considered as undermining the "proper functioning of the standard-setting system of the ILO". … It was inappropriate for the Committee of Experts to adopt in full the decisions of the Committee on Freedom of Association, which were founded on general principles and were not limited to the terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), thus extending the scope of these Conventions beyond what was intended by their drafters, as reflected in their texts and legislative history. [23]

[21] ILC, 77th Session, 1990, *Record of Proceedings*, 27/6, paras 22–23.

[22] ILC, 78th Session, 1991, *Record of Proceedings,* 24/6, para. 26.

[23] ILC, 78th Session, 1991, *Record of Proceedings*, 24/6, para. 28.

16. At the same session, the Government member of Denmark, speaking on behalf of the Nordic Governments, expressed the view that:

> [P]erhaps the Committee of Experts went too far when it suggested that a government which did not agree with its interpretation would have to obtain a legally binding opinion from the International Court of Justice, [since] this obligation was not within the spirit of article 37 of the ILO Constitution. [24]

17. In 1993, during a discussion of the advisability of setting up an in-house tribunal under article 37(2) of the Constitution, the Employer members of the Committee on the Application of Standards recalled that "[t]he report of the Conference Committee that had led to the creation of the Committee of Experts stated that it would have no judicial capacity or competence to give interpretations of Conventions" and also indicated that their position had remained consistent, because as early as 1953 the "Employers' spokesman, Pierre Waline, had clearly rejected the deduction of a detailed right to strike from Conventions Nos. 87 and 98". Further, they reiterated that "Convention No. 87 does not regulate the right to strike [as] [t]he text of the Convention did not mention it, and the preparatory work showed the Conference had reached no consensus on the matter". [25]

18. Also at the 1993 session, the Worker members expressed the view that:

> [T]he ordinary meaning of the terms of a Convention concerning human rights (such as Convention No. 87) must be found in their context and in the light of the object and purpose of the Convention. Human rights Conventions must necessarily be interpreted progressively as living instruments. [26]

and observed that:

> The right to strike was inseparable from the notion of freedom of association … [V]arious principles of freedom of association were regarded as part of customary law; the Committee of Experts' interpretation of the right to strike in Convention No. 87 had been accepted over many years, and this made it relevant under article 31 (3) (c) of the Vienna Convention. … [T]he right to strike had to be seen in the light of the principle of *ubi jus ibi remedium* as a last resort means of exercising the substantive rights of Conventions Nos. 87 and 98. [27]

19. In 1994, the publication of the Committee of Experts' General Survey on Conventions Nos 87 and 98 provided an opportunity for a fresh exchange of views on the right to strike within the Committee on the Application of Standards. [28] The Employer members indicated that "they absolutely could not accept that the Committee of Experts deduced from the text of the Convention a right so universal, explicit and detailed". [29] Making specific references to the Conference proceedings that had led to the adoption of Conventions Nos 87 and 98 and of Recommendation No. 92, the Employer members stated that:

> [I]t was incomprehensible to the Employers that the supervisory bodies could take a stand on the exact scope and content of the right to strike in the absence of explicit and concrete provisions on the subject. … The Committee of Experts had put into practice here what was called in mathematics an axiom and in Catholic theology a dogma: that is complete, unconditional acceptance of a certain and exact truth from which everything else was

[24] ILC, 78th Session, 1991, *Record of Proceedings*, 24/7, para. 33.

[25] ILC, 80th Session, 1993, *Record of Proceedings*, 25/5, paras 20, 21; 25/9, para. 58.

[26] ILC, 80th Session, 1993, *Record of Proceedings*, 25/5, para. 23.

[27] ILC, 80th Session, 1993, *Record of Proceedings*, 25/10, para. 61.

[28] ILC, 81st Session, 1994, *Record of Proceedings*, 25/31–41, paras 114–148.

[29] ILC, 81st Session, 1994, *Record of Proceedings*, 25/32, para. 116.

> derived. … [T]he right to strike had not been forgotten during the elaboration of these instruments: attempts had been made to incorporate this right into the Conventions but had been rejected in the absence of a majority in favour. … As regards the statement of the Workers' member of Poland that Conventions should be interpreted in a dynamic and functional manner, the Employers' members saw in this an admission that there was no legal basis for the right to strike in ILO instruments. [30]

20. Countering those arguments, the Worker members stated once again that:

> [T]he right to strike was an indispensable corollary of the right to organize [that was] protected by Convention No. 87 and by the principles enunciated in the ILO Constitution. Without the right to strike, freedom of association would be deprived of its substance. It was enough to go through the preparatory works of Convention No. 87, the multiple conclusions and recommendations of the Committee on Freedom of Association and the successive general surveys elaborated by the Committee of Experts on this subject to be convinced of this. In its 1994 survey, the Committee of Experts formally and unambiguously confirmed this relationship by dedicating a separate chapter to the principles and modalities of the right to strike. [31]

21. In the ensuing 15 years, the Employer members continued to systematically raise reservations on the Committee of Experts' interpretation of Convention No. 87 in relation to the right to strike. For instance, in 1999, the Employer members of the Committee on the Application of Standards stated that:

> [T]hey entertained substantial doubts concerning the interpretation of the Conventions, which had deviated widely from their wording. It was therefore small consolation that the only binding interpretation of legal texts could be made by the International Court of Justice. In view of the absence of any decision by that Court, there was therefore no generally binding interpretation of the two Conventions. [32]

22. In 2002, the Employer members expressed the view that:

> [I]t was misleading in many respects to think that the individual recommendations made by the Committee on Freedom of Association could create a jurisprudence on the right to strike. The Employer members had repeated throughout the last 12 years, but also going back to 1953, that a right to strike in labour disputes could not be derived from Conventions Nos. 87 and 98 concerning freedom of association and collective bargaining. This view was based on three grounds: the wording of the standards, the correct application of binding rules of interpretation concerning international treaties, and the documents containing evident declarations on their scope when the standards or instruments were elaborated and adopted. [33]

23. In the same vein, in 2004, the Employer members recalled that:

> [N]othing should be interpreted which was not to be interpreted. The International Court of Justice had also found that the Vienna Convention upheld this principle. The basis of interpretation was the text itself, i.e. the wording of a Convention according to its usual and natural meaning under the so-called "ordinary meaning rule". The preparatory materials *(travaux préparatoires)* to a Convention were only of importance if the wording of a text remained unclear. [34]

[30] ILC, 81st Session, 1994, *Record of Proceedings*, 25/32–35, paras 119, 124–125.

[31] ILC, 81st Session, 1994, *Record of Proceedings*, 25/38, para. 136.

[32] ILC, 87th Session, 1999, *Record of Proceedings*, p. 23/37, para. 114.

[33] ILC, 90th Session, 2002, *Record of Proceedings*, p. 28/14, para. 48.

[34] ILC, 92nd Session, 2004, *Record of Proceedings*, 24/20, para. 79,

while in 2010, they "once again asked the Committee of Experts to reconsider their interpretation on the right to strike that had progressively expanded since 1959 and that had no basis in Conventions Nos 87 and 98". [35]

24. In 2012, the persistent disagreement over the Committee of Experts' interpretation of Convention No. 87 in relation to the right to strike caused an institutional crisis. For the first time since the establishment of the Committee on the Application of Standards, the Employers' and Workers' groups could not agree on the list of cases of non-compliance to be examined by the Committee. The Employer members objected in the strongest terms to the interpretation by the Committee of Experts of Convention No. 87 and the right to strike in its General Survey of 2012, and indicated that "their views and actions in all areas of ILO action relating to the Convention and the right to strike would be materially influenced". [36] Accordingly, without any clarification regarding the mandate of the Committee of Experts with respect to the General Survey, "they could not accept the supervision of Convention No. 87 cases that included interpretations by the Committee of Experts regarding the right to strike". [37] However, the Workers' group considered that this was not acceptable, [38] and as a result, the Committee on the Application of Standards ended its work without discussing any cases of non-compliance. [39]

25. In November–December 2012, in view of the direct challenge to its authority and the Employers' group's request that the report of the Committee of Experts should include a disclaimer regarding the right to strike, the Committee of Experts presented its views regarding its mandate. It considered, in particular, that monitoring the application of Conventions:

> logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention. … The Committee's combination of independence, experience, and expertise continues to be a significant further source of legitimacy within the ILO community. … [I]t has been consistently clear that its formulations of guidance … are not binding. … The Committee's non-binding opinions or conclusions are intended to guide the actions of ILO member States by virtue of their rationality and persuasiveness [and] their source of legitimacy …. [40]

The Committee concluded that a disclaimer was not necessary, as it "would interfere in important respects with its independence". [41]

26. At the 102nd Session of the Conference (2013), a note was inserted in the conclusions of all individual cases examined by the Committee on the Application of Standards in relation to the application of Convention No. 87 stating: "The Committee did not address the right to strike in

[35] ILC, 99th Session, 2010, *Provisional Record*, Part I/18, para. 57.

[36] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/22, para. 82.

[37] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/36, para. 150.

[38] ILC, 101st Session, 2012, *Record of Proceedings*, Part I/41, para. 171.

[39] On the institutional crisis of 2012, see, among others: Françis Maupain, "The ILO supervisory system: A model in crisis?", *International Organizations Law Review* 10, No. 1 (2013): 117–165; Lee Swepston, "Crisis in the ILO Supervisory System: Dispute over the Right to Strike", *International Journal of Comparative Law and Industrial Relations* 29, No. 2 (2013): 199–218; Janice R. Bellace, "The ILO and the right to strike", *International Labour Review* 153, No. 1 (2014): 29–70; Keith D. Ewing, "Myth and Reality of the Right to Strike as a 'Fundamental Labour Right'", *International Journal of Comparative Labour Law and Industrial Relations* 29, No. 2 (2013): 145–166; and Paul Mackay, "The Right to Strike: Commentary", *New Zealand Journal of Employment Relations* 38, No. 3 (2014): 58–70.

[40] ILC, 102nd Session, 2013, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 33–36.

[41] ILC, 102nd Session, 2013, *Report of the Committee of Experts,* para. 36.

this case as the Employers do not agree that there is a right to strike recognized in Convention No. 87". [42]

27. In November–December 2013, the Committee of Experts discussed again the question of a disclaimer and decided to insert the following paragraph, which has since become a standard paragraph of its report:

> Mandate
>
> The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions. [43]

28. At the 103rd Session of the Conference (2014), the Committee on the Application of Standards was unable to adopt conclusions in 19 individual cases due to the disagreement on the question of the right to strike. [44]

29. In view of the impasse, the Governing Body considered at its October–November 2014 session a document on the modalities, scope and costs of action under article 37 of the Constitution. [45] During the discussion, the Worker spokesperson indicated that the group "had reached the inescapable conclusion that referral of the interpretation dispute to the International Court of Justice for an advisory opinion, as a matter of urgency, was the necessary way forward if the ILO supervisory system was to remain relevant and continue to function". [46] However, the Employer members did not support a referral to the Court and favoured a resolution through tripartite discussions, as it "was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the [International Court of Justice], which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute." [47] Among the Governments, the group of Latin American and Caribbean countries, the group of industrialized market economy countries and the European Union and its Member States supported the proposed referral to the International Court of Justice, while the Asia and Pacific

[42] ILC, 102nd Session, 2013, *Record of Proceedings*, 16, Part I.

[43] ILC, 103rd Session, 2014, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), para. 31.

[44] ILC, 103rd Session, 2014, *Record of Proceedings* 13, Part I/50–56, paras 201–219.

[45] ILO, *The Standards Initiative: Follow-up to the 2012 ILC Committee on the Application of Standards*, GB.322/INS/5, Appendix I.

[46] ILO, *Minutes of the 322nd Session of the Governing Body of the International Labour Office*, GB.322/PV, para. 50.

[47] GB.322/PV, para. 58.

group preferred tripartite discussions and the Africa group was of the view that recourse to the International Court of Justice should be a last resort. [48]

30. Against this background, the Governing Body decided to convene a tripartite meeting, which would report to it at its March 2015 session, on the question of Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at the national level. The meeting took place from 23 to 25 February 2015. At the meeting, the Workers' and Employers' groups presented a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system. [49] This joint statement acknowledged that the right to take industrial action by workers and employers in support of their legitimate industrial interests is recognized by the constituents of the International Labour Organization and that this international recognition by the International Labour Organization requires the Workers' and Employers' groups to address specific systemic questions, such as the mandate of the Committee of Experts and the working methods of the Committee on the Application of Standards (adoption of the list and of conclusions). The joint statement did not include specific follow-up on the question of Convention No. 87 in relation to the right to strike. The Government group issued two statements. In the first, it expressed its common position on the right to strike, recognizing that "the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO. … [W]ithout protecting a right to strike, Freedom of Association, in particular the right to organize activities for the purpose of promoting and protecting workers' interests, cannot be fully realized". It also noted, however, that the right to strike "is not an absolute right [and] the scope and conditions of this right are regulated at the national level". In its second statement, the Government group acknowledged the joint statement of the Employers' and Workers' groups and called for a comprehensive discussion in the Governing Body. [50]

31. The three statements were presented to the Governing Body at its March 2015 session as constituting the outcome of the tripartite meeting. At the session, the Employer members reiterated their view that the "right to strike" was not recognized in Convention No. 87, and that the joint statement was considered as a commitment to continue to work together to strengthen the supervisory system despite the differences of view. The Worker members confirmed that the joint statement was only intended to allow the ILO to resume the supervision of standards. They maintained that the right to strike was protected by Convention No. 87. In the light of the outcome of the tripartite meeting, the Governing Body decided "not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike". At the same time, the Governing Body took a number of decisions in relation to the supervisory system and the establishment of the Standards Review Mechanism. [51]

32. At the 104th Session of the Conference (2015), only one of the conclusions of the Committee on the Application of Standards relating to the application of Convention No. 87 included views on the right to strike. The absence of any reference to the right to strike is the *modus vivendi* which has prevailed to date in the Committee. The Employer members have nonetheless

[48] GB.322/PV, paras 64, 70, 78, 82.

[49] ILO, *The Standards Initiative: Addendum*, GB.323/INS/5(Add.); ILO, *The Standards Initiative – Appendix I*, GB.323/INS/5/Appendix.I, Annex I.

[50] GB.323/INS/5/Appendix I, Annex II and Annex III.

[51] ILO, *Minutes of the 323rd Session of the Governing Body of the International Labour Office*, GB.323/PV, paras 51, 52, 84.

continued to raise their objections to the comments of the Committee of Experts addressing the conditions for the exercise of the right to strike. [52]

33. In conclusion, the following observations can be made. First, at the heart of the legal challenge is both whether the right to strike is a legitimate means of defending workers' interests that is recognized and protected by Convention No. 87 and whether the Committee of Experts is empowered to develop, while carrying out its supervisory functions, an expanded and elaborate framework for reviewing and commenting upon the conditions of the exercise of that right. Second, more generally, the main focus of the disagreement has been whether the Committee of Experts has the authority to create new legal obligations for States that have ratified international labour Conventions through its incidental, or functional, interpretation of those Conventions when carrying out its supervisory responsibilities. Third, there is broad agreement that Convention No. 87 should be interpreted in accordance with the principles of treaty interpretation under customary international law codified in the 1969 Vienna Convention on the Law of Treaties, and also that the power to make authoritative and binding pronouncements on the interpretation of international labour Conventions lies exclusively with the International Court of Justice.

II. The core elements of the dispute

34. To better understand the deeply divided views of the Employers' and Workers' groups on the issue, it is important to examine more closely, first, Convention No. 87, its negotiating history and the manner in which it has been interpreted by the ILO supervisory bodies and, second, the Committee of Experts, especially how its mandate and working methods have evolved in matters related to the interpretation of international labour Conventions.

II.1. ILO Convention No. 87 and the right to strike

II.1.1. The negotiating history of Convention No. 87

35. Convention No. 87 originated from a request made in 1947 by the United Nations Economic and Social Council in accordance with the 1946 Agreement between the United Nations and the International Labour Organization. [53] As a result, at its 30th Session (1947), the International Labour Conference held a first discussion on the question of freedom of association and industrial relations, and adopted a resolution concerning freedom of association and protection of the right to organize and to bargain collectively, which defined the fundamental principles on which freedom of association should be based. [54] The Conference also decided to place on the agenda of its 31st Session (1948) the questions of freedom of association and of the protection of the right to organize, for consideration under the single-discussion procedure. [55]

36. The Office prepared a summary report on the proceedings of the 30th Session of the Conference, together with a questionnaire seeking constituents' views on the form and content

[52] For instance, ILC, 110th Session, 2022, *Records of Proceedings 4A, Part One*, paras 113–114, 127, 233. See also ILC, 110th Session, 2022, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 17, 20.

[53] ECOSOC adopted a resolution transmitting to the ILO documents submitted by the World Federation of Trade Unions and the American Federation of Labor, with a request that an item on trade unions rights be placed upon the agenda of the forthcoming session of the International Labour Conference; see ECOSOC, fourth session, 1947, Resolution 52/IV.

[54] ILC, 30th Session, 1947, *Record of Proceedings*, Appendix XIII, pp. 587–588.

[55] ILC, 30th Session, 1947, *Record of Proceedings*, Appendix XIII, p. 589.

of possible international regulations concerning freedom of association and the protection of the right to organize. The questionnaire invited comments on, among other things, whether "it would be desirable to provide that the recognition of the right of association of public officials by international regulation should in no way prejudge the question of the right of such officials to strike". [56] Several respondents (Australia, Austria, Belgium, Bulgaria, Canada, Denmark, Ecuador, Finland, France, Hungary, India, Switzerland, the Union of South Africa and the United States) were in favour, one country (Mexico) opposed it, and two countries (the Netherlands and Sweden) considered that the Convention should not be concerned with questions relating to the right to strike. [57]

37. Based on the views expressed, the Office concluded that:

> Several Governments … have … emphasised, justifiably it would appear, that the proposed Convention relates only to the freedom of association and not to the right to strike, a question which will be considered in connection with Item VIII (conciliation and arbitration) on the agenda of the Conference. In these circumstances, it has appeared to the Office to be preferable not to include a provision on this point in the proposed Convention concerning freedom of association. [58]

38. As a result, there was no focused or substantive discussion on the right to strike during the negotiations that led to the adoption of Convention No. 87. In fact, the only explicit references to the right to strike throughout the Conference proceedings were in relation to a draft amendment submitted by the Government representative of India in 1947 with a view to excluding the police and the armed forces from the field of application of freedom of association "because they were not authorised to take part in collective negotiations and had not the right to strike" [59] and to a statement of the Government representative of Portugal in 1948 expressing support for those countries that had "stated more or less explicitly that we should avoid any drafting which might imply the idea that we were granting public servants the right to strike". [60]

39. Indeed, the record shows that, from its inception, Convention No. 87 was intended to affirm and codify general principles pertaining to freedom of association and not to provide a detailed regulatory framework. As the Office explained in its first report to the Conference:

> The documentary enquiry on freedom of association had disclosed the fact that the legislation concerning trade associations differed considerably in detail and in form from country to country, but that the fundamental questions were dealt with on a fairly uniform basis.
>
> The Office therefore preferred, instead of submitting to the Conference a draft scheme of detailed regulations which would have obliged the majority of countries to amend their legislation, to frame the essential elements of the problem in a number of precise formulae,

[56] ILC, 31st Session, 1948, *Freedom of Association and Protection of the Right to Organise: Questionnaire*, p. 15.

[57] ILC, 31st Session, 1948, *Freedom of Association and Protection of the Right to Organise: Report VII*, p. 67.

[58] ILC, 31st Session, 1948, Report VII, p. 87. Indeed, the law and practice report on industrial relations contained a section on strikes and lockouts in the context of conciliation and arbitration procedures; see ILC, 31st Session, 1948, *Industrial Relations,* Report VIII(1), pp. 111–118.

[59] The amendment was ultimately rejected; see ILC, 30th Session, 1947, *Record of Proceedings,* p. 570. At the next session of the Conference, the Government of India presented a new amendment aiming at excluding the armed forces and the police from the scope of the Convention "on the ground that most countries would not find it possible to ratify a Convention which required absolute freedom of association and organisation to be granted to members of the armed forces and the police, having regard to the responsibility of Governments for defending the law and assuring the maintenance of public order". The clause was modified during the discussion and finally adopted as Article 9 of Convention No. 87; see ILC, 31st Session, 1948, *Record of Proceedings,* p. 478.

[60] ILC, 31st Session, 1948, *Record of Proceedings*, p. 232.

> the adoption of which would have constituted a sufficient guarantee for the free functioning of employers' and workers' associations.
>
> The draft submitted to the Conference was limited to a guarantee, on the one hand, of the freedom of workers and employers to organise for the collective defence of their occupational interests and, on the other hand, of the freedom of trade associations to pursue their objects by all means not contrary to law or to the regulations enacted for the maintenance of public order. [61]

40. It is precisely because of this intended level of generality of Convention No. 87 that reference is often made to Article 3, which lays down the principle that workers' and employers' organizations are free to choose the means of action for defending their interests, and which has therefore been interpreted to also cover the right to strike. Article 3 reads as follows:

> 1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

41. The Office questionnaire explained that the object of this Article was to supplement the guarantee with regard to the establishment of organizations with a guarantee of the right of such organizations to organize their internal and external life in full autonomy; the word "lawful" in the text aimed to declare that employers' and workers' organizations were bound, in the exercise of their rights, to respect the general laws of the country. [62]

42. During the discussion at the 1948 session of the Conference, all proposed amendments to Article 3 to include references to national legislation setting minimum conditions for the constitution or operation of organizations were withdrawn after the Chairman of the Conference Committee stated that "the Convention was not intended to be a 'code of regulations' for the right to organise, but rather a concise statement of certain fundamental principles". [63]

43. Another oft-cited provision in the debate on the interpretation of Convention No. 87 in relation to the right to strike is Article 10, which reads: "In this Convention the term *organisation* means any organisation of workers or of employers for furthering and defending the interests of workers or of employers." This provision was the outcome of discussions of various proposals to insert a definition of "workers' and employers' organisations". It originated from an amendment submitted by the Government of the United Kingdom of Great Britain and Northern Ireland to define the term "organisation" as "any organisation of workers or of employers for furthering or defending the interests of workers and employers respectively, except any trust or cartel as defined by national law or regulations". The reference to trusts and cartels was eventually deleted. It was generally understood that trade union activity was not limited to the professional field alone and that the definition should not be interpreted as restricting the right of trade union organizations to take part in political activities. [64]

44. Four other developments after Convention No. 87 was adopted provide additional context. First, in 1953, the Director-General informed the Governing Body that he had considered that it would be inappropriate to express an opinion on the interpretation of Conventions Nos 87

[61] ILC, 30th Session, 1947, *Freedom of Association and Industrial Relations: Report VII*, pp. 16–17.

[62] ILC, 31st Session, 1948, Questionnaire, pp. 8–9. See also ILC, 31st Session, 1948, Report VII, pp. 24–31, 90–91.

[63] ILC, 31st Session, 1948, *Record of Proceedings*, p. 477.

[64] ILC, 31st Session, 1948, *Record of Proceedings*, p. 476.

and 98, owing to the existence of a special procedure laid down by the Governing Body for dealing with complaints concerning alleged infringements of freedom of association. [65] Second, in 1956, the Governing Body decided against revising the report form on the application of Convention No. 87 with a view to adding specific questions on restrictions to the right to strike for public employees, as it considered that Convention No. 87 did not cover the right to strike. [66] Third, in 1987, the Conference issued a resolution concerning the 40th anniversary of the adoption of Convention No. 87, in which no mention was made of the right to strike. [67] Fourth, in 1991, the Governing Body discussed a proposal to place a standard-setting item concerning the right to strike on the agenda of the Conference but ultimately decided against it. [68]

II.1.2. Subsequent practice: ILO supervisory bodies and the right to strike

45. In the 75 years since the adoption of Convention No. 87, various ILO supervisory bodies entrusted with either regular supervision or special procedures have spoken to the linkages between the right to strike and the principle of freedom of association enshrined in Convention No. 87. As outlined below, they have invariably affirmed that the right to strike is intrinsically linked to the principle of freedom of association and is thus protected under Convention No. 87.

Committee of Experts on the Application of Conventions and Recommendations

46. The Committee of Experts first expressed a view on the right to strike in relation to Convention No. 87 in its General Survey of 1959. In commenting on the right of employers' and workers' organizations to organize their activities and to formulate their programmes under Article 3(1) of Convention No. 87, the Committee observed that:

> [T]he prohibition of strikes by workers other than public officials acting in the name of the public powers … may run counter to Article 8, paragraph 2, of [Convention No. 87], according to which "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for" in the Convention, and especially the freedom of action of trade union organisations in defence of their occupational interests. [69]

47. The Committee of Experts made further comments on the right to strike in subsequent General Surveys. For instance, in 1973, the Committee expressed the view that:

> A general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interests of their members (Article 10 of Convention No. 87) and of the right of trade unions to organise their activities (Article 3); it should be recalled, in this connection, that Article 8 of the Convention establishes that the law

[65] ILO, *Minutes of the 122nd Session of the Governing Body (May–June 1953)*, p. 110.

[66] ILO, *Minutes of the 131st Session of the Governing Body*, March 1956, Appendix XXII, p.188.

[67] See Resolutions adopted by the International Labour Conference at the 73rd Session (1987). In contrast, the 1957 Resolution concerning the Abolition of Anti-Trade Union Legislation in the States Members of the International Labour Organisation makes reference to the "unrestricted exercise of trade union rights, including the right to strike, by the workers", while the 1970 Resolution concerning Trade Union Rights and Their Relation to Civil Liberties calls for systematic studies of the law and practice in matters concerning freedom of association and trade union rights, including the right to strike.

[68] See ILO, *Agenda of the 81st (1994) Session of the Conference*, GB.253/2/3(rev.), paras 14 and 35–38 and Appendix I.

[69] ILC, 43rd Session, 1959, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), pp. 101–29, para. 68.

of the land shall not be such as to impair nor shall it be so applied as to impair the guarantees provided for in the Convention, including the right of trade unions to organise their activities. [70]

48. Furthermore, citing the Committee on Freedom of Association, the Committee of Experts indicated that "the conditions which have to be fulfilled, under the law, in order to render a strike lawful, should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organisations". [71]

49. In 1983, the Committee of Experts stated that "the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests". [72] It reiterated the position it had expressed in 1973 with respect to the right to strike and Articles 3 and 10 of the Convention, and stressed that "[a] general ban on strikes … is … not compatible with the principles of freedom of association". [73]

50. In 1994, the Committee of Experts described the right to strike as a "basic right" and as a "general principle". [74] It noted that "[a]lthough the right to strike is not explicitly stated in the ILO Constitution or in the Declaration of Philadelphia, nor specifically recognized in Conventions Nos. 87 and 98, it seemed to have been taken for granted in the report prepared for the first discussion of Convention No. 87" but that, "during discussions at the Conference in 1947 and 1948, no amendment expressly *establishing* or *denying* the right to strike was adopted or even submitted". [75] According to the Committee of Experts, "[i]n the absence of an express provision on the right to strike in the basic texts, the ILO supervisory bodies have had to determine the exact scope and meaning of the Conventions on this subject". [76]

51. The Committee explained that the position it had expressed since 1959 was "based on the recognized right of workers' and employers' organizations to organize their activities and to formulate their programmes for the purposes of furthering and defending the interests of their members (Articles 3, 8 and 10 of Convention No. 87)". [77] In particular, from a combined reading of Articles 3 and 10 of the Convention, the Committee concluded that strike action is included within the concepts of "activities" and "programmes" of organizations pursuant to Article 3. [78] As such, the Committee "confirm[ed] its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87". [79]

52. In 2012, the Committee of Experts noted that, "[i]n the absence of an express provision in Convention No. 87", both it and the Committee on Freedom of Association had for decades

[70] ILC, 58th Session, 1973, *General Survey on the Application of the Conventions on Freedom of Association and on the Right to Organise and Collective Bargaining*, Report III (Part 4B), para. 107.

[71] ILC, 58th Session, 1973, General Survey, para 108. The Committee also addressed cases where, under certain conditions, the right to strike could be prohibited or limited (paras 109–111).

[72] ILC, 69th Session, 1983, *Freedom of Association and Collective Bargaining: General Survey*, Report III (Part 4 B), paras 200–201.

[73] ILC, 69th Session, 1983, General Survey, para. 205. The Committee of Experts continued also to develop its views on conditions for the prohibition or limitation of the right to strike (paras 204–226).

[74] ILC, 81st Session, 1994, *Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4B), paras 137, 159.

[75] ILC, 81st Session, 1994, General Survey, para. 142.

[76] ILC, 81st Session, 1994, General Survey, para. 145.

[77] ILC, 81st Session, 1994, General Survey, para. 147.

[78] ILC, 81st Session, 1994, General Survey, paras 148–149.

[79] ILC, 81st Session, 1994, General Survey, para. 151. At the same time, the Committee emphasized that "the right to strike cannot be considered as an absolute right", and went on to describe prohibitions and restrictions applicable to the right to strike; paras 151–179.

progressively developed "a number of principles relating to the right to strike" on the basis of Articles 3 and 10 of that Convention. [80] In response to the views expressed by the Employers' group in the Committee on the Application of Standards at the 99th Session (2010) of the Conference, the Committee asserted that "the absence of a concrete provision [on the right to strike in Convention No. 87] is not dispositive" and that while "the preparatory work is an important supplementary interpretative source when reviewing the application of a particular Convention in a given country, it may yield to the other interpretative factors, in particular, in this specific case, to the subsequent practice over a period of 52 years (see Articles 31 and 32 of the Vienna Convention on the Law of Treaties)". [81] Accordingly, the Committee "reaffirm[ed] that the right to strike derives from [Convention No. 87]" [82] and went on to specify "a series of elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise". [83]

53. In the same General Survey, the Committee reiterated that its position on the right to strike "lies within the broader framework of the recognition of this right at the international level", citing provisions of the International Covenant on Economic, Social and Cultural Rights; the Charter of the Organization of American States; the Charter of Fundamental Rights of the European Union; the Inter-American Charter of Social Guarantees; the European Social Charter; the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights; and the Arab Charter on Human Rights. [84] In addition, it noted that other international labour standards – such as the Abolition of Forced Labour Convention, 1957 (No. 105), and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) – and resolutions adopted in different contexts at the ILO also made reference to the right to strike. [85]

54. In addition to the General Surveys cited above, the Committee of Experts has, over the past 65 years, made numerous country-specific comments on the right to strike in the context of regular supervision and the examination of reports submitted under article 22 of the Constitution. As part of its monitoring of the application of Convention No. 87, in the last two years, the Committee addressed 75 observations to Member States concerning the exercise of the right to strike. [86]

Committee on Freedom of Association

55. By and large, the Committee of Experts' comments concerning the right to strike reflect relevant pronouncements of the Governing Body's Committee on Freedom of Association, which has, over the years, developed a body of detailed decisions to ensure that legislation and practices reviewed in relation to the scope and conditions of exercise of that right comply

[80] ILC, 101st Session, 2012, *Giving Globalization a Human Face: General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report III (Part 1B), para. 117.

[81] ILC, 101st Session, 2012, General Survey, para. 118.

[82] ILC, 101st Session, 2012, General Survey, para. 119.

[83] ILC, 101st Session, 2012, General Survey, paras 122–161.

[84] ILC, 101st Session, 2012, General Survey, para. 120.

[85] ILC, 101st Session, 2012, General Survey, para. 121.

[86] ILC, 110th Session, 2022, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part A), pp. 97–318, and ILC, 111st Session, 2023, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part A), pp. 101–342.

with the principles of freedom of association and collective bargaining. [87] In fact, the Committee on Freedom of Association was the first supervisory body that recognized the right to strike as a trade union right; when examining a complaint lodged against the Government of Jamaica (Case No. 28) in March 1952, it stated that "[t]he right to strike and that of organising union meetings are essential elements of trade union rights, and measures taken by the authorities to ensure the observance of the law should not, therefore, result in preventing unions from organising meetings during labour disputes". [88]

56. Among its numerous decisions, the Committee on Freedom of Association has affirmed that "[p]rotests are protected by the principles of freedom of association only when such activities are organized by trade union organizations or can be considered as legitimate trade union activities as covered by Article 3 of Convention No. 87". [89]

57. The Committee has further stated that "[w]hile [it] has always regarded the right to strike as constituting a fundamental right of workers and of their organizations, it has regarded it as such only in so far as it is utilized as a means of defending their economic interests". [90] As regards Convention No. 87, the Committee has regularly taken the view that "[t]he right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87" and that "[t]he prohibition on the calling of strikes by federations and confederations is not compatible with Convention No. 87". [91]

58. In addition, the Committee has found that "[t]he dismissal of workers because of a strike constitutes serious discrimination in employment on grounds of legitimate trade union activities and is contrary to Convention No. 98" and that "[i]n certain cases … it is difficult to accept as a coincidence unrelated to trade union activity that heads of departments should have decided, immediately after a strike, to convene disciplinary boards which, on the basis of service records, ordered the dismissal not only of a number of strikers, but also of members of their union committee". [92]

[87] The mandate of the Committee "consists in determining whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the relevant Conventions". In cases where countries have ratified one or more Conventions on freedom of association, the Committee of Experts is normally entrusted with the examination of the effect given to the recommendations of the Committee on Freedom of Association, which draw the attention of the Committee of Experts to discrepancies between national laws and practice and the terms of the Conventions, or to the incompatibility of a given situation with the provisions of these instruments; see *Compendium of rules applicable to the Governing Body*, Annex II, Special procedures for the examination in the International Labour Organization of complaints alleging violations of freedom of association, paras 14 and 72.

[88] See *Sixth report of the Committee on Freedom of Association*, para. 68. In its *Eighth report* , when examining a complaint against the Government of Japan (Case No. 60), the Committee presented a synthesis of its views at the time on the right to strike:

> 53. The Committee considers that it is not called upon to give an opinion on the question as to how far the right to strike in general – a right which is not specifically dealt with in the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), or in the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – should be regarded as constituting a trade union right. In several earlier cases and, in particular, in that relating to Turkey, the Committee has observed that the right to strike is generally accorded to workers and their organisations as an integral part of their right to defend their collective interests. In another case … the Committee recommended the Governing Body to draw the attention of the Government of Brazil to the importance which it attached, in cases in which strikes were prohibited in essential occupations, to ensuring adequate guarantees to safeguard to the full the interests of the workers thus deprived of "an essential means of defending occupational interests".

[89] See *Compilation of decisions of the Committee on Freedom of Association*, Sixth edition, 2018, paras 204, 210.

[90] Compilation of decisions, para. 751.

[91] Compilation of decisions, paras 754, 757.

[92] Compilation of decisions, paras 957 and 1110.

59. Moreover, the Committee on Freedom of Association has developed an extensive set of decisions in specific cases on various aspects of strike action, including the objective of the strike, the types of strike action, the prerequisites, cases in which strikes may be restricted or even prohibited and the related compensatory guarantees to be afforded to the workers concerned or the questions of sanctions, both in the event of a legitimate strike and in the event of abuse while exercising the right to strike. [93]

Fact-Finding and Conciliation Commission on Freedom of Association

60. Another mechanism competent to examine alleged violations of freedom of association, the Fact-Finding and Conciliation Commission on Freedom of Association, expressed similar views in relation to the right to strike in two cases. [94] The first case concerned allegations of infringements of trade union rights by Japan. In its report published in January 1966, the Commission:

> endorse[d] the principles established by the Governing Body Committee on Freedom of Association … that, where strikes by workers in essential services or occupations are restricted or prohibited, such restriction or prohibition should be accompanied by adequate guarantees to safeguard to the full the interest of the workers thus deprived of an essential means of defending occupational interests. [95]

61. The second case concerned allegations brought against South Africa (which, at that time, was not a Member of the ILO). In its report published in May 1992, the Commission summarized the situation as follows:

> While in international law the right to strike is explicitly recognised in certain texts adopted at the international and regional levels, the ILO instruments do not make such a specific reference. Article 3 of Convention No. 87, providing as it does for the right of workers' organisations "to organise their administration and activities and to formulate their programmes", has been the basis on which the supervisory bodies have developed a vast jurisprudence relating to industrial action. In particular they have stated as the basic principle that the right to strike is one of the essential means available to workers and their organisations for the promotion and protection of their economic and social interests. The exercise of this right without hindrance by legislative or other measures has been consistently protected by the ILO principles. At the same time certain restrictions have been seen as acceptable in the circumstances of modern industrial relations. [96]

Article 26 complaints and article 24 representations

62. In three instances, Commissions of Inquiry set up to examine complaints concerning the observance of Convention No. 87 have addressed whether the right to strike is protected under

[93] It has been noted that "[a] reading of the reports of the Committee of Experts and the [Committee on Freedom of Association (CFA)] since 1952 reveals that the CFA, not the Committee of Experts, has taken the lead role in delineating the meaning of the right to strike". See Janice R. Bellace, "The Committee on Freedom of Association: Making freedom of association a reality, in Karen Curtis, Oksana Wolfson (eds), *70 Years of the ILO Committee on Freedom of Association: A Reliable Compass in Any Weather*, 2022, p. 16.

[94] The Commission was originally the first body established by the Governing Body in January 1950, under the procedure for the examination of allegations concerning the infringement of trade union right agreed between the ILO and ECOSOC; see *Minutes of the 110th Session of the Governing Body*, Appendix VI. Unlike the complaints submitted to the Committee on Freedom of Association, no allegations could be communicated to the Commission without the consent of the Government concerned.

[95] ILO, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons Employed in the Public Sector in Japan*, *Official Bulletin*, Special supplement, Vol. XLIX, No.1, January 1966, p. 516.

[96] ILO, *Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*, GB.253/15/7, June 1992, para. 303.

the Convention. In 1968, the Commission of Inquiry appointed to examine complaints concerning the observance by Greece of Conventions Nos 87 and 98 noted that:

> Convention No. 87 contains no specific guarantee of the right to strike. On the other hand, … an absolute prohibition of strikes would constitute a serious limitation of the right of organisations to further and defend the interest of their members (Article 10 of the Convention) and could be contrary to Article 8, paragraph 2, of the Convention, under which "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention", including the right of unions to organise their activities in full freedom (Article 3). [97]

63. Similarly, in its report published in 1984, the Commission of Inquiry instituted to examine a complaint on the observance by Poland of Conventions Nos 87 and 98 concluded that:

> Convention No. 87 provides no specific guarantee concerning strikes. The supervisory bodies of the ILO, however, have always taken the view – which is shared by the Commission – that the right to strike constitutes one of the essential means that should be available to trade union organisations for, in accordance with Article 10 of the Convention, furthering and defending the interests of their members. [98]

64. Lastly, in 2009, the Commission of Inquiry established to examine complaints concerning the observance by Zimbabwe of Conventions Nos 87 and 98, while reviewing the national law and practice in relation to the right to strike, "confirm[ed] that the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87". [99]

65. Moreover, to date, four representations under article 24 of the Constitution have pertained to the exercise of the right to strike. In examining those representations, the Committee on Freedom of Association reaffirmed that the right to strike is a legitimate means of defending the workers' interests [100] and that nobody should be deprived of their liberty or subjected to penal sanctions for the mere fact of organizing or participating in a peaceful strike. [101] The Committee also had occasion to recall that the right to strike could be restricted or prohibited in the public service only for public servants exercising authority in the name of the State or in essential services in the strict sense of the term. [102] Furthermore, the Committee concluded that excessive restrictions on the right to strike imposed on workers constitute a serious

[97] ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the complaints concerning the observance by Greece of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 261.

[98] ILO, *Report of the Commission of Inquiry instituted under article 26 of the Constitution of the International Labour Organization to examine the complaint on the observance by Poland of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 517.

[99] ILO, *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by the Government of Zimbabwe of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, para. 575.

[100] Case No. 1364 (1987), Representation against the Government of France pursuant to article 24 of the Constitution made by the General Federation of Labour, para. 140.

[101] Case No. 1304 (1985), Representation made by the Confederation of Costa Rican Workers (CTC), the Authentic Confederation of Democratic Workers (CATD), the Unity Confederation of Workers (CUT), the Costa Rican Confederation of Democratic Workers (CCTD) and the National Confederation of Workers (CNT), under article 24 of the ILO Constitution, alleging the failure by Costa Rica to implement several international labour conventions including Conventions Nos. 11, 87, 98 and 135, para. 99.

[102] Case No. 1971 (1999), Representation against the Government of Denmark presented by the Association of Salaried Employees in the Air Transport Sector (ASEATS) and the Association of Cabin Crew at Maersk Air (ACCMA) under article 24 of the ILO Constitution alleging non-observance by Denmark of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), para. 55.

violation of the principles of freedom of association and that such limitations would be justifiable only if the strike were to lose its peaceful character. [103]

II.1.3. Rules and practice of treaty interpretation

66. At the heart of the controversy, there is a divergence of views on the method of interpretation that should be used to determine whether the right to strike is protected under Convention No. 87. As noted above, the Employers' group seems to strongly favour a *textual* or *literal* interpretation based on the natural meaning of the terms of the Convention, whereas the Workers' group supports a *dynamic* interpretation, along the lines followed by the Committee of Experts and other ILO supervisory organs, that gives precedence to the effective achievement of the declared or apparent object and purpose of the provisions of Convention No. 87.

67. Under a textual approach, the aim and focus of interpretation should be limited to determining or confirming the ordinary meaning of the terms of a treaty. In contrast, according to a dynamic (often called teleological or evolutive) method of interpretation, [104] treaty provisions need to be understood in the light of their purpose and the goals that they aim to achieve. Both methods are reflected in article 31 of the 1969 Vienna Convention on the Law of Treaties, which is generally recognized to embody customary international law. [105]

68. Article 31 of the Vienna Convention advocates a good-faith search for the ordinary meaning of the terms of a treaty, read in their context. [106] At the same time, the reference to the "object and purpose" of a treaty in article 31(1) opens up the possibility for dynamic, extra-textual

[103] Case No. 1810 (1996), Representation made by the Confederation of Turkish Trade Unions (TURK-IS) under article 24 of the ILO Constitution alleging non-observance by Turkey of the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), para. 61.

[104] The rationale of this type of interpretation is that certain terms are not static but may be given a meaning that changes over time so as to adapt to evolving realities. The advisory opinion of the International Court of Justice in the *Namibia* case and the judgment of the European Court of Human Rights in the *Tyrer* case are often cited as prominent examples; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970), Advisory Opinion of 21 June 1971, ICJ Reports 1971*, para. 53, and *Tyrer v United Kingdom*, *Judgment of 25 April 1978*. See also *Aegean Sea Continental Shelf Case*, *Judgment of 19 December 1978*, *ICJ Reports 1978*, para. 80; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment of 13 July 2009, ICJ Reports 2009*, para. 64; *Case concerning Pulp Mills on the River Uruguay, Judgment of 20 April 2010*, *ICJ Reports 2010*, para. 204.

[105] The International Court of Justice stated for the first time in 1991 that "Articles 31 and 32 of the Vienna Convention ... may in many respects be considered as a codification of existing customary international law on the point"; see *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Judgment, ICJ Reports 1991*, para. 48. More recently, the Court confirmed the same in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007*, para. 160; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010*, para. 65. Accordingly, as articles 31 and 32 are universally binding as customary international law, they apply to all treaties outside the scope of the Vienna Convention, namely treaties concluded before 1969 and also treaties between States non-parties to the Vienna Convention.

[106] In the only advisory opinion requested thus far with respect to an international labour Convention, the Permanent Court of International Justice noted with regard to Article 3 of Convention No. 4: "The wording of Article 3, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity ... If, therefore, Article 3 ... is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words". The Court went on to say that an examination of the preparatory work also confirmed the textual interpretation and that, therefore, "there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words"; see *Interpretation of the Convention of 1919 concerning employment of women during the night, Advisory opinion*, 15 November 1932, pp. 373, 380.

interpretation and the application of the principle of effectiveness. [107] In relation to the "general rule" of interpretation set out in article 31, it has been observed that:

> This provision merges the principles of textuality, ordinary meaning, and integration, as well as the teleological principle of "object and purpose" (which is itself generally regarded as incorporating the principle of "effectiveness"), into a single rule. Even though they are presented in an order that may accord some primacy to the text, if only as a starting point, a hierarchy among the various components of the rule is far from categorically, or even clearly, expressed. [108]

69. Furthermore, article 31(3) of the Vienna Convention provides that, for the purpose of the interpretation of a treaty, in addition to the context, account should be taken of any subsequent agreement and subsequent practice of the parties. [109] "Subsequent agreement" refers to an agreement reached after the conclusion of a treaty on the interpretation or application of the treaty, whereas "subsequent practice" consists of conduct which establishes the agreement of the parties regarding the interpretation of the treaty. Subsequent agreement and subsequent practice offer objective evidence of the understanding of the parties as to the meaning of the treaty. A subsequent agreement must reflect unequivocally a "meeting of the minds"; therefore, conflicting positions regarding interpretation expressed by different parties to a treaty preclude the existence of an agreement. Subsequent practice may consist of any conduct (actions or omissions) of the organs of a State, whether in the exercise of executive, legislative, judicial or other functions, official statements, judgments, enactment of domestic legislation or conclusion of international agreements. The interpretative weight of a subsequent agreement or subsequent practice depends on criteria such as its clarity and specificity, and on whether and how it is repeated.

70. Of particular interest is the weight that the pronouncements of expert bodies responsible for monitoring the application of a treaty may carry in interpreting that treaty. Although these pronouncements, views or comments cannot in and of themselves constitute a subsequent agreement or subsequent practice, they may give rise to a subsequent agreement or practice of the parties themselves that may in turn be reflected in, for instance, resolutions of organs of international organizations or of Conferences of States parties. In the *Diallo* case, the International Court of Justice considered that, in the interest of clarity, consistency and legal security, "it should ascribe great weight to the interpretation adopted by this independent body [the Human Rights Committee] that was established specifically to supervise the application of that treaty [the International Covenant on Civil and Political Rights]". [110] Regional

[107] The principle of effectiveness *(ut res magis valeat quam pereat)* is based on the assumption that a treaty is meant to achieve something and therefore needs to be interpreted in a manner that advances its aims.

[108] Malgosia Fitzmaurice, "Interpretation of Human Rights Treaties", in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, p. 746. In the words of the European Court of Human Rights, under the general rule of article 31 of the Vienna Convention, "the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article". *Golder v. United Kingdom Judgment,* 21 February 1975, para. 30. See also Richard Gardiner, *Treaty Interpretation*, 2008, pp. 161–202.

[109] See Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary*, 2012, pp. 552–560; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2011, Vol. I, pp. 825–829; Gardiner, *Treaty Interpretation,* pp. 203–249. See also United Nations International Law Commission, "Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries", 2018, pp. 23–33.

[110] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment*, *ICJ Reports 2010*, para. 66. In another case, the Court made reference to the "constant practice" of the Human Rights Committee to support its own interpretation of the extraterritorial applicability of the International Covenant on Civil and Political Rights; see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion, ICJ Reports 2004*, para. 109.

human rights courts also draw on pronouncements of expert bodies when interpreting the relevant human rights treaties. [111]

71. Moreover, article 32 of the Vienna Convention provides that, as supplementary means of interpretation, the preparatory work of the treaty and the circumstances of its conclusion may be used to determine the meaning of the terms of a treaty when the result of an interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result. [112] In this connection, under a general reservation clause in article 5 of the Vienna Convention, the basic rules of interpretation are without prejudice to any specific rules, practices or procedures applicable to treaties adopted within international organizations. In the case of the ILO, such specific rules could include the special importance attached to the preparatory work in view of the tripartite inputs and negotiations involved in standard-setting.

72. Against this background, and without pre-empting the Governing Body's decision on whether to refer the matter to the International Court of Justice, the points relating to the recognition of the right to strike under Convention No. 87 that the Court might consider it necessary to look into could include the following:

(a) Should terms and expressions such as "right to organize", "guarantees" and "defending the interests", used in Articles 3, 8 and 10 of Convention No. 87, be understood textually or evolutively?

(i) Can the ordinary meaning of any of those terms and expressions in their context and in the light of their object and purpose be considered to cover industrial action, and in particular, strike action?

(ii) What is the legal effect of the preparatory work that led to the adoption of Convention No. 87 and how decisive is the intention of the drafters in relation to the interpretation of the provisions in question?

(b) What is the legal weight of subsequent practice, especially in the form of comments and conclusions of supervisory organs such as the Committee of Experts, in the interpretation of Convention No. 87?

II.2. The mandate of the Committee of Experts

II.2.1. Establishment and evolution of the Committee's responsibilities

73. The Committee of Experts, together with the Committee on the Application of Standards, was established in 1926 by a resolution of the International Labour Conference, [113] in which the Conference requested the Governing Body to appoint "a technical Committee of experts,

[111] For instance, the Inter-American Court of Human Rights has drawn on the findings of the Human Rights Committee to confirm its view that corporal punishment is incompatible with international guarantees against cruel, inhuman or degrading treatment; see *Caesar v. Trinidad and Tobago*, *Judgment of March 11, 2005*, paras 60–63. The European Court of Human Rights has referred to the ILO Committee of Experts' role as "a point of reference and guidance for the interpretation of certain provisions of the Convention [for the Protection of Human Rights and Fundamental Freedoms]"; see *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, *Judgment*, 8 April 2014, para. 97.

[112] See Dörr and Schmalenbach, pp. 571–578; Corten and Klein, pp. 846–859.

[113] ILC, Eighth Session, 1926, *Record of Proceedings*, Appendix VII, p. 429. The draft resolution submitted to the Conference provided for the establishment of the Committee of Experts by the Governing Body. During the Conference, it was also decided that the Conference would appoint at each of its session its own Committee to examine the summary prepared by the Director-General and the report of the Committee of Experts.

consisting of six or eight members, for the purpose of making the best and fullest use of this information [summary of reports from Member States] and of securing such additional data as may be provided for in the forms approved by the Governing Body". [114] In relation to the nature and scope of the Committee's competence, in particular as regards the interpretation of Conventions, the Conference agreed that:

> [It] would have no judicial capacity nor would it be competent to give interpretations of the provisions of the Conventions nor to decide in favour of one interpretation rather than of another. It could not therefore encroach upon the functions of the Commissions of Enquiry and of the Permanent Court of International Justice in regard to complaints regarding the non-observance of ratified Conventions or in regard to their interpretation. … It will note the cases where the information supplied appears to be inadequate for a complete understanding of the position either generally, or in a particular country. … Its examination will certainly reveal cases in which different interpretations of the provisions of Conventions appear to be adopted in different countries. The Committee should call attention to such cases. … [I]t would present a technical report to the Director, who would communicate this report … to the Conference. [115]

74. The Committee of Experts was appointed by the Governing Body at its 33rd Session (October 1926) for an initial trial period of two years, and became a permanent body in 1928. [116] Eight experts were initially appointed for the duration of the two-year trial period. As from 1934, the experts were appointed for a period of three years. [117] In 1939, the Committee of Experts had 13 members: nine from European countries and four from non-European countries.

75. In its early years, the Committee of Experts merely identified divergences in the interpretation of Conventions, and usually invited the Office to contact the Government concerned. When the difficulties were considered to be substantial – for instance, where they affected the national legislation of several countries – the Committee brought them to the Governing Body's attention. The Committee on the Application of Standards could also note the difficulties, and in turn, bring them to the attention of the Conference. The Committee on the Application of Standards and the Governing Body could also call on the Committee of Experts to pay special attention to differences of interpretation.

76. In 1947, the respective mandates of the Committee on the Application of Standards and of the Committee of Experts were broadened, further to the adoption of the constitutional amendment of 1946. [118] This was a major institutional development for both Committees, not only because their mandate had been expanded to include the examination of additional

[114] The Conference also considered that the Committee members "should essentially be persons chosen on the ground of expert qualifications and on no other ground whatever" and that "the sort of qualifications that [it] had in mind was knowledge of international legislation and experience of international labour conditions"; ILC, Eighth Session, 1926, *Record of Proceedings*, p. 239. This reflected the proposal set out in a note prepared by the Office for the discussion of the Conference, which provided that: "Members should be chosen who possess intimate knowledge of labour conditions and of the application of labour legislation. They should be persons of independent standing, and they should be so chosen as to represent as far as possible the varying degrees of industrial development and the variations of industrial methods to be found among the States Members of the Organisation." (Appendix V, p. 401).

[115] ILC, Eighth Session, 1926, *Record of Proceedings*, Appendix V, pp. 405–407.

[116] ILO, *Minutes of the 42nd Session of the Governing Body*, October 1928, p. 546.

[117] ILO, *Minutes of the 68th Session of the Governing Body*, September 1934, pp. 292, 409.

[118] Under the 1946 constitutional amendment, the obligations of Governments to submit reports were extended to include reports on measures taken to bring standards adopted by the Conference before the competent authorities, and on the difficulties which prevented or delayed more widespread ratification of Conventions and acceptance of Recommendations. In addition, Governments were required to communicate copies of their report to representative organizations of employers and workers.

standards-related reports submitted by Member States, but also because this expansion reflected an explicit acknowledgment of the importance of their work for the Organization. [119]

77. At its 102nd Session (June–July 1947), when the Governing Body decided to transmit to the Conference an amendment to its Standing Orders to broaden the terms of reference of the Committee on the Application of Standards, it noted that "the proposed extension of the terms of reference of the Conference Committee on the Application of Conventions will render necessary a corresponding extension of the terms of reference of the Committee of Experts on the Application of Conventions, which prepares the ground for the work of the Conference Committee". [120] The Conference broadened the terms of reference of the Committee on the Application of Standards at its 30th Session (June–July 1947). At its 103rd Session (December 1947), the Governing Body adopted the "corresponding widening of the terms of reference of the Committee of Experts". [121]

78. From the early 1950s, the sessions of the Committee of Experts were lengthened to an average of one and a half weeks and its composition was increased from 13 to 17 members. The Committee's composition was increased again in 1979 to its current level of 20 experts, while the current duration of its annual session is four weeks. [122]

79. The mandate of the Committee of Experts has remained unchanged since 1947. Nevertheless, its working methods have developed considerably, in particular concerning the interpretation of international labour Conventions. As was noted before the Governing Body:

> By comparison with this original mandate, it is clear that the Committee has taken on a more independent role regarding interpretation, as it also has in other fields, without raising objections of principle. This enlarged role is in fact a response to the inherent needs of its work and to the conditions in which it is called upon to examine a constantly increasing number of reports concerning Conventions that are also growing in number. [123]

80. This evolution resulted in no small measure from the requirement for Governments to submit reports on the effect given to unratified Conventions and Recommendations, which gave rise to the General Surveys of the Committee of Experts and their subsequent consideration by the Committee on the Application of Standards. [124] In the first General Surveys, the Committee of

[119] ILO, *Minutes of the 102nd Session of the Governing Body*, June–July 1947, p. 234. The extension of the scope of the constitutional supervisory procedures was suggested by the Committee on the Application of Standards in the form of a resolution adopted in 1945; see ILC, 27th Session, 1945, *Record of Proceedings*, p. 441.

[120] ILO, *Minutes of the 102nd Session of the Governing Body*, p. 233.

[121] ILO, *Minutes of the 103rd Session of the Governing Body*, December 1947, pp. 56–59 and 172–173. At that time, it was recognized "from the outset that the technical examination of the annual reports carried out by the Experts is an indispensable preliminary to the over-all survey of application conducted by the Conference through its Committee on the Application of Conventions".

[122] ILO, *Minutes of the 344th Session of the Governing Body,* para. 729.

[123] ILO, *Article 37, paragraph 2, of the Constitution and the Interpretation of International Labour Conventions*, GB.256/SC/2/2, para. 26.

[124] In November 1955, the Governing Body decided that the Committee of Experts should undertake a study of general matters, such as positions on the application of certain Conventions and Recommendations by all governments, to provide the basis for the discussion by the Committee on the Application of Standards. Such studies were intended to cover the Conventions and Recommendations selected for the submission of reports under article 19 of the Constitution. As the reports requested under article 19 were grouped around one or two central themes each year, it was proposed that the reports provided under article 22 of the Constitution might also be taken into consideration; see *Minutes of the 129th Session of the Governing Body*, May–June 1955, pp. 90–91, and *Minutes of the 130th Session of the Governing Body*, November 1955, pp. 44, 134–135.

Experts continued to limit itself to highlighting divergences in the interpretation of certain provisions of Conventions, but it progressively began to clarify their meaning in greater detail.

81. Before long, the interpretative function of the Committee of Experts came under scrutiny. In particular, from 1962 to 1989 the socialist countries raised concerns, pointing out that the Constitution did not authorize "judgments and condemnations" or "the interpretation of the provisions of Conventions". [125] In response, on the occasion of its 50th anniversary, the Committee of Experts recalled that its "terms of reference do not require it to give interpretations of Conventions, competence to do so being vested in the International Court of Justice by article 37 of the Constitution" but that "to carry out its function of evaluating the implementation of Conventions, [it had] to consider and express its views on the meaning of certain provisions of Conventions". [126]

82. In its 1987 report, [127] the Committee of Experts returned to the subject of interpretation, making a similar statement, which led to a number of comments by members of the Committee on the Application of Standards. The socialist countries, in particular, considered that the Committee of Experts had gone beyond its terms of reference and had "converted itself into a kind of supra-national tribunal", [128] and proposed the establishment of a set of rules for the Committee. This proposal was rejected by the Employer spokesperson, the Worker members and by a number of Member States, who recalled that the report of the Committee of Experts "in which it evaluates the effect given to Conventions from a strictly legal point of view, is a basis for the dialogue which takes place in the Conference Committee". [129] Nonetheless, as from 1989 the Employer members began to voice concerns regarding the tendency of the Committee of Experts to "over-interpret" Conventions despite the fact that, under the ILO Constitution, only the International Court of Justice could make authoritative interpretations of international labour Conventions. [130]

83. When explaining the rationale and limits of its interpretative function, the Committee of Experts has always acknowledged that the International Court of Justice is the competent body under the Constitution to interpret international labour Conventions. At the same time, it has consistently emphasized that the fulfilment of its mandate requires it to clarify the meaning of the provisions of Conventions, building on the expertise of its members and guided by the key principles of independence, objectivity and impartiality. The report of its 81st Session (November–December 2010) sets out clearly the Committee's position:

> In accordance with the mandate given to it by the Governing Body, its task consists of evaluating national law and practice in relation to the requirements of international labour Conventions … [Its members] are appointed in a personal capacity and are selected on the basis of their independent standing, impartiality and competence. The members are drawn from all parts of the world and possess first-hand experience of different legal, economic and social systems. …
>
> Against this background, the Committee reiterates the functional approach that it has followed with regard to its role when examining the meaning of the provisions of Conventions. Although the Committee's mandate does not require it to give definitive interpretations of Conventions,

[125] ILC, 46th Session, 1962, *Record of Proceedings*, p. 417; ILC, 66th Session, 1980, *Record of Proceedings*, 37/3, para. 8; ILC, 69th Session, 1983, *Record of Proceedings*, 31/40; ILC, 71st Session (1985), *Record of Proceedings*, 30/5, para. 25.

[126] ILC, 63rd Session, 1977, *Summary of Reports on Ratified Conventions*, Report III (Part 1), General Report, para. 32.

[127] ILC, 73rd Session, 1987, *Summary of Reports*, Report III (Parts 1, 2 and 3), para. 21.

[128] ILC, 73rd Session, 1987, *Record of Proceedings*, 24/6, para. 26.

[129] ILC, 73rd Session, 1987, *Record of Proceedings*, 24/6, para. 27.

[130] ILC, 76th Session, 1989, *Record of Proceedings*, 26/6, para. 21.

> it has to consider and express its views on the legal scope and meaning of certain provisions of these Conventions, where appropriate, in order to fulfil the mandate with which it has been entrusted of supervising the application of ratified Conventions. The examination of the meaning of the provisions of Conventions is necessarily an integral part of the function of evaluating and assessing the application and implementation of Conventions. …
>
> [T]he Committee reiterates that it constantly and consistently bears in mind all the different methods of interpreting treaties recognized under international public law, and in particular under the Vienna Convention on the Law of Treaties, 1969. In particular, the Committee has always paid due regard to the textual meaning of the words in light of the Convention's purpose and object as provided for by Article 31 of the Vienna Convention, giving equal consideration to the two authentic languages of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition, and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the Organization's practice of examining the preparatory work leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role that the tripartite constituents play in standard setting. [131]

II.2.2. Interpretative functions of ILO supervisory bodies and secretariat

84. Without recourse to the International Court of Justice under article 37 of the Constitution, the ILO supervisory bodies, and even the International Labour Office, the Organization's secretariat, have occasionally exercised what might be called "interpretative functions". In the case of the supervisory organs, interpretation is incidental to the exercise of their responsibilities for monitoring the application of ratified Conventions, whereas in the case of informal opinions of the Office, interpretative explanations are normally sought by governments, usually prior to the ratification of a Convention. As the Office noted in a 1993 report, an interpretation machinery "has developed in parallel to fill the gaps … which to a certain extent makes it possible to settle day-to-day difficulties without having to go through the complex procedure of requesting an advisory opinion of the Court". [132]

85. The interpretative pronouncements of supervisory bodies are invariably based on the premise that a degree of interpretation is inherent in any function responsible for monitoring compliance. As stated above, the Committee of Experts has noted that monitoring the application of ratified Conventions "logically and inevitably requires an assessment, which in turn involves a degree of interpretation of both the national legislation and the text of the Convention". [133] The pronouncements of supervisory organs, such as the Committee of Experts or a Commission of Inquiry, carry considerable moral force due to the stature of their members and the quasi-judicial nature of their function. They may vary from practical guidance seeking to clarify the meaning of abstract terms and flexibility clauses to dynamic interpretation of key provisions of Conventions. [134]

[131] ILC, 100th Session, 2011, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 10–12.

[132] GB.256/SC/2/2, para. 10. However, as the same report concludes, despite the "rare degree of diversity and richness" of the different types of interpretation machinery, "none of them meets all the conditions necessary to enable it to provide a definitive settlement of controversies concerning the meaning to be given to the provisions of a Convention" (para. 33).

[133] ILC, 102nd Session, 2013, Report III (Part 1A), para. 33.

[134] See Claire La Hovary, "The ILO's supervisory bodies' 'soft law jurisprudence'" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law,* 2015, pp. 316–328.

86. Examples of such guidance include the explanations of the Committee of Experts of the meaning of "substantial equivalence" under Article 2(a) of Convention No. 147, [135] its clarification of the concept of "consultation" in Convention No. 169, [136] and its guidance on the conditions under which labour of prisoners in private prisons may be compatible with Convention No. 29. [137] Further examples include the finding of the Commission of Inquiry concerning Myanmar that the prohibition of forced labour had become a peremptory norm in international law, [138] and the conclusion of a tripartite committee examining an article 24 representation as to what should be understood by "reasonable duration" under Article 2(2) of Convention No. 158. [139]

87. The views and findings of ILO supervisory bodies have been directly invoked by international courts. For example, the European Court of Human Rights considered that "in defining the meaning of terms and notions in the text of the [Convention for the Protection of Human Rights and Fundamental Freedoms], [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values" [140] and has taken into account the position of the ILO supervisory mechanism regarding the right to strike. [141] Concerning the disclaimer included in the reports of the Committee of Experts, the European Court of Human Rights "[did] not consider that this clarification requires it to reconsider this body's role as a point of reference and guidance for the interpretation of certain provisions of the Convention". [142]

88. Similarly, the Inter-American Court of Human Rights has stated that it would take into consideration, in its interpretation of the American Convention on Human Rights, additional sources of international law, "as well as opinions and recommendations from the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations, to develop a harmonious interpretation of international obligations established under these [international instruments of labor law]". [143] Observations of the Committee of Experts have also been used by different human rights treaty bodies [144]

[135] ILC, 77th Session, 1990, *Labour standards on merchant ships: General Survey of the Reports on the Merchant Shipping (Minimum Standards) Convention (No. 147) and the Merchant Shipping (Improvement of Standards) Recommendation (No. 155), 1976*, Report III (Part 4B), paras 65–79.

[136] ILC, 100th Session, 2011, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), pp. 783–788.

[137] ILC, 89th Session, 2001, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), paras 82–146.

[138] ILO, *Official Bulletin*, Vol. LXXXI, 1998, Series B, Special Supplement, para. 203.

[139] ILO, GB.300/20/6, paras 65–72.

[140] *Demir and Baykara v. Turkey, Judgment*, 12 November 2008, para. 85.

[141] *Enerji Yapi-Yol Sen v. Turkey, Judgment*, 21 April 2009, para. 24.

[142] *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, Judgment, 8 April 2014, para. 97.

[143] Inter-American Court of Human Rights, Advisory Opinion OC-27/21, *Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to other Rights, with a Gender Perspective*, 5 May 2021, paras 52, 98. See also *Former Employees of the Judiciary v. Guatemala*, Judgment of 17 November 2021, (Preliminary Objections, Merits and Reparations), paras 107, 109.

[144] United Nations Human Rights Committee, *Views*, 31 October 2005, CCPR/C/85/D/1036/2001, paras 4.7 and 4.8; United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 27 April 2016, E/C.12/GC/23, para. 19, footnote 15.

and National Contact Points for the OECD Guidelines for Multinational Enterprises, [145] while views of the Committee on Freedom of Association have been used by arbitrators, among others. [146]

89. Informal opinions have always been considered part of the administrative assistance that Member States may receive from the Office, subject to the understanding that the Constitution does not confer upon the secretariat any special competence to interpret international labour Conventions. [147] As such, informal opinions have no binding legal effect and are without prejudice to the views of the ILO supervisory bodies. [148] Until 2002, a total of 147 unofficial interpretations by the Office were communicated to the Governing Body and published in the *Official Bulletin*, but this practice has since been discontinued. Informal opinions of the Office have sometimes been taken into account or confirmed by the Committee of Experts. [149]

II.2.3. Implied powers of human rights monitoring bodies: A broader debate

90. The dispute over the interpretative powers of the ILO Committee of Experts is reminiscent of a much broader debate concerning the supervision of international human rights law, and in particular the role and function of the UN human rights treaty bodies.

91. At present, there are ten international human rights treaty bodies (committees) tasked with monitoring compliance with their respective treaties. These committees are composed of independent experts and are responsible for examining reports from States parties and adopting "General Comments" and country-specific "Views". The General Comments of the committees that monitor compliance with the two international covenants on human rights – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – have given rise to highly diverging views on their legitimacy. In the relevant literature, some authors consider that the committees' authority is part of their inherent competence, or "implied powers", in accordance with the dictum of the

[145] See, for instance, Norwegian National Contact Point, *Norwegian United Federation of Trade Unions (Fellesforbundet) v. Kongsberg Automotive*, Final Statement, 28 May 2009; French National Contact Point, *SHERPA and European Centre for Constitutional and Human Rights v. Devcot*, Final Statement, 21 September 2012.

[146] See, for instance, Arbitral Panel Established Pursuant to Chapter Twenty of the Dominican Republic–Central America–United States Free Trade Agreement in the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report, 14 June 2017, para. 427; Report of the Panel of Experts: Proceeding constituted under article 13.15 of the EU–Korea Free Trade Agreement, 20 January 2021, para. 138.

[147] See C.W. Jenks, "The interpretation of international labour Conventions by the International Labour Office", *British Yearbook of International Law*, 20, 1939, pp. 132–141; C.H. Dillon, *International Labor Conventions – Their Interpretation and Revision,* 1942, pp.135–149.

[148] It has been argued, however, that continuous, unchallenged practice has established the Office as the principal organ for rendering authoritative opinions concerning the interpretation of international labour standards and that those opinions, once communicated to the Governing Body and published in the Official Bulletin, are tacitly accepted and presumed binding; see J.F. McMahon, "The legislative techniques of the International Labour Organisation", *British Yearbook of International Law*, 41, 1965–66, pp. 90, 99; E. Osieke, *Constitutional Law and Practice in the International Labour Organisation*, 1985, pp. 207–210. The practice was reviewed on two occasions, with a view to enhancing the formality of Office interpretations, including through the approval of the Governing Body, but no change was introduced; see *Minutes of the Ninth Session of the Governing Body*, October 1921, p. 309, and *Minutes of the 57th Session of the Governing Body*, April 1932, p. 345.

[149] One recent example is the Committee of Experts' general observation, published in 2019, that under the Maritime Labour Convention, 2006, as amended, a seafarer's continuous shipboard service without leave may not exceed 11 months, which draws upon an informal opinion provided by the Office in 2016. See also ILC, 87th Session, 1999, *General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, Report III(Part 1B), para. 168; ILC, 93rd Session, 2005, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), p. 387; ILC, 97th Session, 2008, *General Survey concerning the Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and Recommendation (No. 84)*, Report III(Part 1B), para. 70.

International Court of Justice in the *Reparations for Injuries* case of 1949, while critics regard General Comments as an attempt to attribute to treaty provisions a meaning which they do not have. [150]

92. An important aspect of this debate concerns the limits of "functional" interpretation, that is, any interpretation exercise necessary for the meaningful discharge of supervisory responsibilities, or, in other words, tracing the boundaries between interpretation *stricto sensu* and law-making through interpretation. [151] This aspect is gaining in importance as international and domestic courts are increasingly referencing the pronouncements of expert bodies, often according them determinative legal weight. [152]

III. The question(s) to be put to the Court

93. As indicated above, the last time the ILO considered in detail the procedure for referring the dispute to the International Court of Justice for an advisory opinion was in November 2014. The document submitted to the Governing Body at that time noted:

> There are clearly two questions that dominate the relevant discussions: (1) the substantive question as to whether the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), can be interpreted as protecting the right to strike; and (2) whether the Committee of Experts' mandate gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle. It would appear that both of those questions need to be answered to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again. [153]

[150] The extensive literature on the subject includes: Dinah Shelton, "The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies" in *Coexistence, Cooperation and Solidarity*, 2012; Philip Alston, "The Historical Origins of the Concept of 'General Comments' in Human Rights Law", in Laurence Boisson de Chazournes and Vera Gowland-Debbas (eds), *The International Legal System in Quest of Equity and Universality,* Liber amicorum *Georges Abi–Saab*, pp. 763–776; Laurence R. Helfer, "Pushback Against Supervisory Systems: Lessons for the ILO from International Human Rights Institutions" in George P. Politakis, Tomi Kohiyama, Thomas Lieby (eds), *ILO100: Law for Social Justice*, pp. 257–278; Linos-Alexandre Sicilianos, "Le dialogue entre la Cour européenne des droits de l'homme et les autres organes internationaux, juridictionnels et quasi-juridictionnels" in Linos-Alexandre Sicilianos, Iulia A. Motoc, Róbert Spanó, Roberto Chenal (eds), *Intersecting Views on National and International Human Rights Protection*, Liber amicorum *Guido Raimondi*, 2019, pp. 871–893; Helen Keller and Leena Grover, "General Comments of the Human Rights Committee and their legitimacy" in Helen Keller, Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy*, 2012, pp. 116–133.

[151] It has been observed that, while there are limits marking the difference between norm interpretation and norm creation that need to be respected, "international human rights law is formulated invariably as principles and general norms, which necessarily require further development when applying them to specific circumstances. Thus it is inherent in the interpreter's task to elaborate, detail, and develop the norm."; Cecilia Median, "The role of international tribunals: Law-making or creative interpretation?" in Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* 2013, p. 651. For others, "disregard for rules of interpretation raises the question of where a committee draws the line between interpreting a treaty and developing new law for which it does not have a mandate. Although playing a general promotional role is part of a treaty body's overall mandate ..., a conflation of the promotion and the interpretation of rights and obligations endangers the credibility and significance of the treaty body monitoring system, which depends on the persuasiveness of its output." Kerstin Mechlem, "Treaty Bodies and the Interpretation of Human Rights", in *Vanderbilt Journal of Transnational Law* 42(3) (2009): 946.

[152] For more on the use of treaty body findings by international courts and tribunals, see International Law Association, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies,* 2004, pp. 29–38. The International Law Commission has found that expert pronouncements could be considered as subsequent agreement or subsequent practice within the meaning of article 31(3) of the Vienna Convention on the Law of Treaties, as judicial decisions or teachings for the purpose of identifying customary international law, or as subsidiary means for the determination of rules of international law; see International Law Commission, Draft conclusions on identification of customary international law, with commentaries, 2018; International Law Commission, *First report on subsidiary means for the determination of rules of international law*, 13 February 2023, A/CN.4/760.

[153] GB.322/INS/5, para. 49.

94. These key aspects of the interpretation dispute do not appear to have changed substantially over the past ten years. Indeed, the proposed questions in the referral request presented by the Workers' group on 12 July 2023 retain the same wording of those proposed for the purposes of the Governing Body's discussion in November 2014:

> 1. Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?
> 2. Was the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the ILO competent to:
>
> (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and
>
> (b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?

95. Recent position statements of the Workers' and Employers' groups seem to confirm that the contentious issues remain the same. For instance, at the March 2023 session of the Governing Body, the Worker spokesperson affirmed that "[t]here was currently only one serious and persistent problem of interpretation within the Organization, namely on Convention No. 87, in relation to the right to strike, and the competence of the Committee of Experts to provide guidance on the matter", [154] while the Employer spokesperson declared that her group's objective was "to ensure that the Committee of Experts did not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute". [155]

96. Without prejudice to the Governing Body's decision on the question or questions to be put to the Court, a number of observations may be made at this juncture. First, from a procedural point of view, the question must be legal in nature and must have arisen within the sphere of competence of the Organization. As the Court has noted, questions framed in terms of law and raising problems of international law are by their very nature susceptible of a reply based on law and are questions of a legal character. [156] The case law of the Court confirms that the term "legal question" is not to be interpreted narrowly and that the Court may give an advisory opinion on any legal question, whether abstract [157] or even purely academic or historical. [158] To date, there has been only one case in which the Court has declined to give the requested opinion, on the ground that the question fell outside the competence of the organization concerned and that, therefore, "an essential condition of founding its jurisdiction in the present case [was] absent". [159]

97. Second, the question needs to capture the different aspects of the dispute concisely and directly. The Court has taken the view that a lack of clarity in the drafting of a question does

[154] GB.347/PV(Rev.), para. 238.

[155] GB.347/PV(Rev.), para. 230.

[156] *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion, ICJ Reports 1996*, para. 13, citing *Western Sahara*, *Advisory Opinion, ICJ Reports 1975*, para. 15.

[157] *Admission of a State to the United Nations*, *Advisory Opinion, ICJ Reports 1948*, p. 61.

[158] *Western Sahara,* paras 18–19.

[159] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion, ICJ Reports 1996*, para. 31.

not deprive it of jurisdiction and has recalled, in this respect, that it has often been required to broaden, interpret and even reformulate the questions put. [160]

98. Third, the fact that a referral may be politically motivated is not in itself an obstacle to the Court's jurisdiction. The Court has observed on several occasions that "the fact that a legal question also has political aspects (as, in the nature of things, is the case with so many questions that arise in international life) does not suffice to deprive it of its character as a 'legal question'". [161] It has also considered that "the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction". [162] The Court has even taken the view that "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate". [163]

99. Fourth, while the Court may, at its discretion, decline to reply to a question put to it for reasons of judicial propriety, it has noted that it is mindful that its answer to a request for an advisory opinion represents its participation in the activities of the organization, and that it should not, in principle, refuse to give an advisory opinion unless compelling reasons dictate otherwise. [164] In recent cases, the Court has not accepted as a compelling reason any of the arguments supporting the view that the Court should decline to give an advisory opinion. For instance, the Court has dismissed arguments concerning the motives behind the request; the vague or abstract nature of the question asked; and the fact that the opinion might adversely affect ongoing negotiations, could impede a negotiated solution, or would lack any useful purpose.

IV. Possible next steps

100. The advisory jurisdiction of the Court is open to those specialized agencies authorized to this effect by the United Nations General Assembly. This includes the ILO, which received such authorization under article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organization. The question put to the Court must be legal in nature, directly related to the activities of the organization and refer to issues falling within its sphere of competence.

101. As has been explained on previous occasions, advisory proceedings are initiated by a request for an advisory opinion, which has to be made in writing and transmitted to the Court. [165] According to article 65(2) of the Statute of the Court, "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and

[160] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, para. 38; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010*, para. 50.

[161] *Threat or Use of Nuclear Weapons*, para. 13; *Wall*, 2004, para. 41; *Kosovo*, 2010, para. 27.

[162] *Threat or Use of Nuclear Weapons*, para. 13.

[163] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980*, para. 33.

[164] *Threat or Use of Nuclear Weapons*, para. 14; *Wall*, 2004, para. 44.

[165] ILO, GB.322/INS/5, paras 14–15 and GB.347/INS/5, para. 10. General information on the advisory jurisdiction of the International Court of Justice can be found in *The International Court of Justice: Handbook*, 2019, pp. 81–93, and the Registry's Note for States and international organizations on the procedure followed by the Court in advisory proceedings. See also Khawar Qureshi, Catriona Nicol and Joseph Dyke, *Advisory Opinions of the International Court of Justice*, 2018; Hugh Thirlway, "Advisory Opinions" in *Max Planck Encyclopedia of Public International Law*, 2006.

accompanied by all documents likely to throw light upon the question". [166] To date, all requests submitted to the Court have taken the form of a formal resolution adopted by the competent organ of the requesting organization. These resolutions follow a common pattern consisting of preambular paragraphs providing the context of the problem on which advice is sought, followed by the question or questions to be answered by the Court. [167]

102. Accordingly, if the Governing Body decides to proceed with the request for an advisory opinion, it would need to adopt in the normal manner – either by consensus or by a majority vote – a resolution formally submitting to the International Court of Justice the legal question or questions on which its authoritative guidance is requested. A draft Governing Body resolution is included in Annex I. The request would be addressed to the Court by the Governing Body pursuant to the 1949 resolution authorizing the Governing Body to request advisory opinions of the Court on legal questions arising within the scope of the activities of the Organization. [168]

103. Participation in advisory proceedings consists in submitting written statements and, if the Court decides to hold hearings, presenting oral arguments. The Court is prepared to expedite the advisory proceedings in accordance with Article 103 of the Rules of Court, if expressly requested to do so. In deciding which States, international organizations or other entities should be invited to participate in advisory proceedings under article 66(2) of its Statute, the Court seeks to ensure that all actors likely to provide information that may not otherwise be available to the Court are involved in the proceedings. Adopting a pragmatic approach, the Court is prepared to accept the participation of actors other than intergovernmental organizations and States, if this is in the interest of obtaining the most accurate and factual information possible or if the special circumstances of the case necessitate it. Requests for advisory opinions carry very limited costs (document reproduction and mission costs for participation in any oral proceedings), as the expenses of the Court are borne by the United Nations.

104. In the event that the matter is referred to the International Court of Justice, it would be the seventh time that the Organization has had recourse to the procedure provided for in article 37(1) of the Constitution with a view to resolving an interpretation dispute and the second time that an advisory opinion has been requested with respect to the interpretation of a Convention. A summary of the six requests made to the Permanent Court of International Justice under article 14 of the Covenant of the League of Nations in the period 1922–32 is in included in Annex II. A graphic representation of the advisory procedure before the International Court of Justice is included in Annex III.

[166] According to Rule 104, the documents, or dossier, must be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry. The Court is not officially seized of the case until the transmission letter is received by the Registry.

[167] From 1948 to 2022, the International Court of Justice rendered a total of 27 advisory opinions in response to requests submitted by the United Nations and four specialized agencies: the United Nations Educational, Scientific and Cultural Organization; the International Maritime Organization; the World Health Organization and the International Fund for Agricultural Development. The full text of all advisory opinions is available at https://icj-cij.org/decisions. The most recent request for an advisory opinion was made by the United Nations General Assembly through resolution 77/276 of 29 March 2023, which was transmitted to the President of the Court by letter of the United Nations Secretary-General dated 12 April 2023.

[168] ILC, 32nd Session, 1949, Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions.

V. Concluding observations

105. As indicated in the introduction, the purpose of the present report is not to address the substance of the dispute, but merely to set out the various aspects of it, with a view to assisting constituents in making an informed decision as to whether, on account of the institutional importance of the question, a referral to the International Court of Justice for an advisory opinion in accordance with article 37(1) of the Constitution is warranted. In the light of the preceding analysis, a number of concluding observations may be made:

(a) There is a serious and persistent disagreement within the ILO's tripartite constituency concerning the interpretation of Convention No. 87 with respect to the right to strike, and as a result, legal uncertainty prevails in this respect. Constituents' positions are entrenched and there are no prospects for convergence.

(b) The long-standing dispute may be summed up in two questions: whether Convention No. 87 may be interpreted as recognizing or protecting the right to strike; and whether, and to what extent, the Committee of Experts may, in the discharge of its supervisory functions, engage in incidental interpretation of Convention No. 87, in particular regarding the permissible conditions for the exercise of the right to strike.

(c) Both questions are legal in nature, are directly related to the activities of the Organization and refer to issues falling within its sphere of competence.

(d) Authoritative guidance may be requested from the International Court of Justice on both questions, under article 37(1) of the ILO Constitution and article IX(2) of the Agreement between the United Nations and the International Labour Organization. The authoritative legal answers of the Court could have implications beyond the ILO, as they would address questions such as treaty interpretation and the system of monitoring of compliance with international human rights instruments.

(e) The request for an advisory opinion may be validly addressed to the Court by the Governing Body pursuant to the delegated authority it has received from the Conference.

(f) In considering a possible referral, constituents may wish to pay particular attention to:

(i) the advantages and disadvantages of maintaining the status quo;

(ii) the impact of the current state of affairs on the supervisory system;

(iii) the prospect for ensuring legal certainty through judicial settlement;

(iv) the potential for the governments of all Member States and for the secretariats of the two non-governmental groups to participate fully and autonomously in the advisory proceedings of the Court;

(v) the significance of having recourse to article 37 of the Constitution some 90 years after having last done so, in particular having regard to governance and the principle of the rule of law.

Annex I

Draft Governing Body resolution

The Governing Body,

Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning the long-standing position of the Committee of Experts on the Application of Conventions and Recommendations that the right to strike is protected under Convention No. 87, and whether the Committee of Experts has exceeded its authority in taking such a position,

Noting that not only the Committee of Experts but also the tripartite Committee on Freedom of Association have maintained the view that the right to strike is a corollary to the fundamental right to freedom of association, and that the findings of these supervisory bodies have been widely echoed in judgments of international human rights courts,

Seriously concerned about the implications that this dispute has on the functioning of the ILO's supervisory machinery and the credibility of its system of standards,

Affirming the necessity of resolving the dispute definitively and restoring legal certainty in accordance with the Organization's constitutional theory and practice,

Recalling that under article 37, paragraph 1, of the ILO Constitution, "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice",

Convinced that seeking the Court's authoritative legal guidance is the only viable option available, since attempts to reach a generally acceptable understanding through tripartite dialogue have failed,

Acknowledging the final and binding nature of any advisory opinion so obtained,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

1. Decides, in accordance with article 96, paragraph 2, of the Charter of the United Nations; article 37, paragraph 1, of the Constitution of the International Labour Organization; article IX, paragraph 2, of the Agreement between the United Nations and the International Labour Organization, approved by resolution 50(I) of the General Assembly of the United Nations on 14 December 1946; and the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, adopted by the International Labour Conference on 27 June 1949, to request the International Court of Justice to render urgently an advisory opinion on the following questions:

[1. Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

2. Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent:

(a) to determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and

(b) in examining the application of that Convention, to specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?]

2. Instructs the Director-General to:

(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the questions, in accordance with article 65, paragraph 2, of the Statute of the Court;

(b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;

(c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;

(d) inform the United Nations Economic and Social Council of this request, as required under article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.

Annex II

Interpretation requests filed with the Permanent Court of International Justice (1922–32) under article 14 of the Covenant of the League of Nations

1. Designation of the Workers' delegate for the Netherlands at the third session of the International Labour Conference

Advisory opinion of 31 July 1922

Request introduced by a Conference resolution of 18 November 1921.

Referral decided by unanimous Governing Body agreement (January 1922).

Duration of proceedings: 2.5 months (from 22 May to 31 July 1922).

Three international organizations were invited to participate:

- International Association for the Legal Protection of Workers;
- International Federation of Christian Trades Unions;
- International Federation of Trades Unions.

Two organizations provided oral statements.

2. Competence of the ILO in regard to international regulation of the conditions of labour of persons employed in agriculture

Advisory opinion of 12 August 1922

Request introduced through a motion submitted by the Government of France directly to the Council of the League of Nations (January 1922).

Request discussed by the Governing Body based on an oral report from the Director, but no decision was made.

Duration of proceedings: 3 months (22 May to 12 August 1922).

Eight international organizations were invited to participate:

- International Federation of Agricultural Trades Unions;
- International League of Agricultural Associations;
- International Agricultural Commission;
- International Federation of Christian Unions of Landworkers;
- International Federation of Land-workers;
- International Institute of Agriculture;
- International Federation of Trades Unions;
- International Association for the Legal Protection of Workers.

Several organizations submitted written statements and also participated in the oral proceedings.

3. Competence of the ILO to examine proposals for the organization and development of the methods of agricultural production

Advisory opinion of 12 August 1922

Request introduced by the Government of France through a letter addressed directly to the Secretary-General of the League of Nations on 13 June 1922.

The Office submitted a report to the Governing Body (July 1922) but there was no discussion or decision.

Duration of proceedings: 24 days (from 18 July to 12 August 1922).

One international organization was invited to participate: the International Institute of Agriculture, which sent a separate communication.

4. Competence of the ILO to regulate, incidentally, the personal work of the employer

Advisory opinion of 23 July 1926

Request introduced by the Employers' group to the Governing Body through a letter of 8 January 1926.

Referral was discussed by the Governing Body and decided by vote (30th Session, January 1926).

Duration of proceedings: 4 months (from 20 March to 23 July 1926).

Three international organizations were invited to participate:

- International Organization of Industrial Employers;
- International Federation of Trades Unions;
- International Confederation of Christian Trades Unions.

Two submitted written memoranda and all three participated in the hearings.

5. Free City of Danzig and the ILO

Advisory opinion of 26 August 1930

Request introduced by the Office following a letter from the Government of Poland of 20 January 1930 requesting that the Free City of Danzig be admitted to the ILO.

Referral was discussed by the Governing Body and decided by vote (48th Session, April 1930).

Duration of proceedings: 4.5 months (from 15 April to 26 August 1930).

No international organizations were invited to participate.

6. Interpretation of the Night Work (Women) Convention, 1919 (No. 4), concerning employment of women during the night

Advisory opinion of 15 November 1932

Request introduced by the Government of the United Kingdom of Great Britain and Northern Ireland through a letter addressed to the Governing Body Chairman on 20 January 1932.

Referral was discussed by the Governing Body and decided by vote (57th Session, April 1932).

Duration of proceedings: 6 months (from 10 May to 15 November 1932).

Three international organizations were invited to participate:

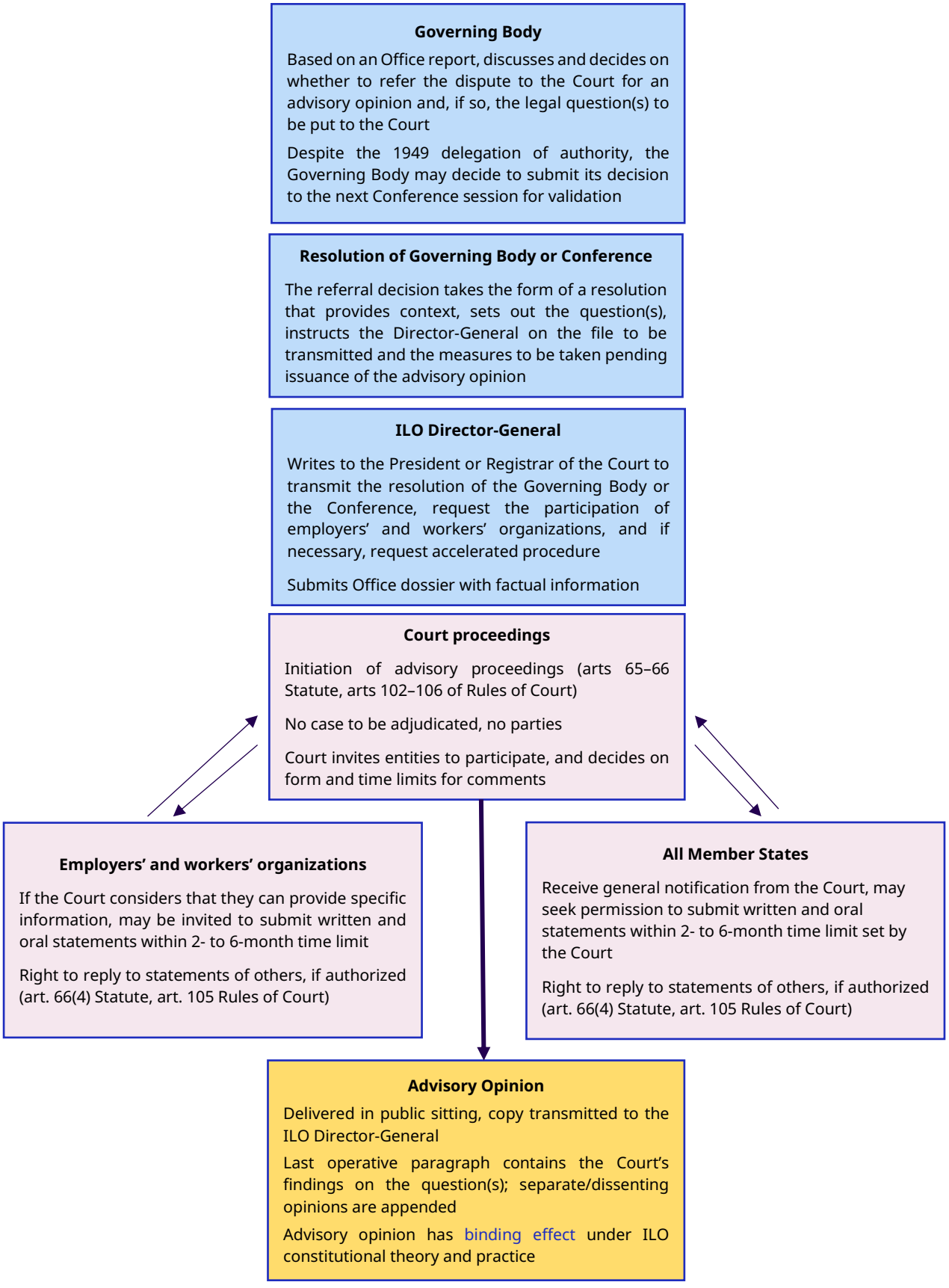
- International Federation of Trades Unions;
- International Confederation of Christian Trades Unions;
- International Organization of Industrial Employers.

Two submitted written statements and also participated in the oral proceedings.

The full text of the advisory opinions of the Permanent Court of International Justice and the pleadings, oral arguments and documents submitted to the Court may be consulted on the International Court of Justice website.

Annex III

Advisory procedure before the International Court of Justice



Document No. 30

GB.349*bis*/INS/1/2, Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the ILO Constitution – Summary of the comments received from constituents, October 2023

International Labour Organization

▶ GB.349*bis*/INS/1/2

Governing Body

349th *bis* (special) Session, Geneva, 10 November 2023

Institutional Section **INS**

Date: 13 October 2023
Original: English

First item on the agenda

Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the ILO Constitution

Summary of the comments received from constituents

▶ Introduction

1. In circulating the Office Background report (GB.349*bis*/INS/1/1, Appendix) to inform the special session of the Governing Body on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice (ICJ), the Director-General invited Member States and, through them, the national employers' and workers' organizations concerned, to transmit any comments they might wish to make on the issue. The intention was to facilitate inclusive deliberations on a matter of particular institutional significance, including by offering the opportunity to Members not currently represented in the Governing Body to express their views.

2. As of 11 October 2023, the Office had received communications from 10 governments, the secretariats of 2 non-governmental groups, 14 national employers' organizations and 101 national workers' organizations. The names of the constituents that sent comments appear in the appendix. The full text of all the comments received is posted on the web page of the 349th *bis* (special) Session of the Governing Body.

▶ Summary of the constituents' comments

3. On the principal question of whether or not the Organization should refer the interpretation dispute to the ICJ for decision under article 37(1) of the ILO Constitution, three governments (*Eritrea, Niger* and *Somalia*) [1] expressed support for the proposal of the Workers' group. The main reason cited was the need for governments to have legal certainty about the obligations arising from their ratification of ILO Conventions. They also noted that the ongoing controversy impacted negatively on the ILO's standard-setting system.

4. Three Governments (*Indonesia,* Kenya and *Türkiye*) did not support a referral to the ICJ and expressed their preference for continuing dialogue. *Indonesia*, while recognizing the right to strike as a fundamental human right and recognizing the authority vested in the Committee of Experts on the Application of Conventions and Recommendations ("Committee of Experts") to interpret Conventions, took the view that the most prudent course of action was to seek tripartite consensus and urged the Governing Body to consider including an item to this effect on the agenda of the 112th Session (June 2024) of the International Labour Conference. The aim would be to examine the issue comprehensively and the potential development of a framework or standard that would delineate the boundaries and provisions of the right to strike within the context of Convention No. 87. Should achieving tripartite consensus prove unattainable, the route to the ICJ remained available in accordance with article 37(1) of the ILO Constitution. Similarly, *Türkiye*, while noting that the right to strike was an integral part of fundamental principles and rights at work but not an absolute right, expressed support for the pursuit of a resolution within the existing structures of the ILO, promoting active engagement and open dialogue. This approach would be conducive to yielding a balanced, globally acceptable outcome. Kenya expressed the wish that the dispute be brought to an amicable resolution, recalling that it recognized and promoted freedom of association and the right to strike although it had not yet ratified Convention No. 87.

5. *Costa Rica* stated that it was in favour of the proposal of the Workers' group that the matter be referred to the ICJ, without prejudice to other possible solutions, such as holding a discussion at the next session of the International Labour Conference on the possible adoption of a protocol, or any other alternative which might arise out of the forthcoming 349th *bis* and 349th *ter* special Sessions of the Governing Body.

6. *Switzerland* reiterated its continuous preference for the establishment of an in-house tribunal under article 37(2) of the ILO Constitution to resolve interpretation disputes. As far as the possible referral to the ICJ was concerned, *Switzerland* expressed doubts as to whether the two questions proposed by the Workers' group were indeed questions of interpretation. In any event, States parties to Convention No. 87 should be thoroughly involved in the discussions concerning the content of the question to be put to the Court. As for the referral decision,

[1] The names of Members that have ratified Convention No. 87 appear in italics.

Switzerland considered that, notwithstanding the Governing Body's delegated authority, and for reasons of inclusivity and representativeness, it would be for the International Labour Conference to take the decision. The composition of the Governing Body no longer reflects the current composition of the ILO as was the case in 1949 when the resolution under which the Governing Body was authorized by the Conference to request an advisory opinion from the Court was adopted.

7. Similarly, Malaysia took the view that while article 37(1) of the ILO Constitution provides an avenue to resolve interpretation disputes, the referral to the ICJ should be undertaken only when all other efforts to resolve the dispute have failed. It was preferable to seek solutions within the ILO, notably through the establishment of an internal, independent tribunal to provide for the expeditious determination of interpretation disputes.

8. *Japan* considered that it was essential to first have a discussion among tripartite constituents and that referral to the ICJ should be considered only as a last resort. As regards the question to be put to the Court, it should reflect the fact that the right to strike was not an absolute right. No question should be submitted to the Court as regards the competence of the Committee of Experts as it should be discussed further by ILO constituents. Accordingly, the Government proposed some modifications to the draft resolution included in Annex I of the Background report.

9. The employers' organizations indicated that they did not support a referral of the dispute to the ICJ even though the Constitution did provide an avenue for a referral to the Court to resolve interpretation disputes. In essence, three reasons were put forward: firstly, the possibilities for resolving the dispute internally had not been exhausted, such as, for instance, holding a debate at the Conference with a view to adopting an international labour standard; secondly, an advisory opinion would tend to create additional legal uncertainty as regards the scope of the right to strike, and would be detrimental to "social peace" in general within the ILO; and thirdly, an advisory opinion would adversely affect the reputation and the credibility of the ILO. The right to strike is a multifaceted issue that requires thorough discussion by the tripartite actors in the world of work. Consensus-based solutions would enable all constituents to actively engage in the process and would lead to an outcome that would be acceptable to all.

10. While generally recognizing the existence of the right to strike, the employers' organizations reiterated their position that Convention No. 87 does not include the right to strike within its scope neither explicitly nor implicitly. The legislative history documents that the right to strike was intentionally excluded from the scope of the Convention. The Committee of Experts has no mandate to change the Convention in relation to the right to strike or to interpret the Convention as if it contained such a provision and create a body of interpretations outside the tripartite decision-making structure. The Committee on Freedom of Association does not have a mandate to interpret the scope or supervise Convention No. 87.

11. For their part, the workers' organizations expressed support for a referral of the dispute to the ICJ, emphasizing the paramount importance of the right to strike for workers and their organizations as well as for labour rights in general, arguing that legal certainty through a binding advisory opinion of the Court is urgently required. The inability of the ILO to supervise the application of the right to strike under Convention No. 87 due to the ongoing dispute, has had an adverse impact on labour relations at the national level. The proposed protocol to Convention No. 87 would not have any added value given that, as elaborated by the ILO supervisory bodies, Convention No. 87 already guarantees the right to strike as a fundamental principle and right at work. The adoption of a protocol would not bring legal certainty and would, on the contrary, exacerbate the dispute.

12. For the workers' organizations, the protection of the right to strike is inherent in the ILO's constitutional mandate and, as such, it was included within the scope of Convention No. 87. More broadly, the right to strike is an integral part of international law and its protection at the international level is critical. Convention No. 87 and the views expressed by the Committee of Experts and the Committee on Freedom of Association had gained resonance, notably through national and international court decisions, multinational enterprises' codes of conduct and free trade instruments, and this could explain the change in the position of the Employers' group after more than 60 years of those views remaining unchallenged.

▶ Comments submitted by the International Organisation of Employers

13. The International Organisation of Employers (IOE) considers that the source of the dispute lies in the broad interpretation of the right to strike made by the Committee of Experts, and noted the role the Office has played in that respect. The Employers acknowledge that the right to strike exists at the national level but are firmly of the view that neither Convention No. 87 nor any other Convention for that matter, provide for the right to strike or regulated its exercise. While the referral to the ICJ of any question or dispute on interpretation was set forth in article 37(1) of the Constitution, ILO constituents had repeatedly favoured tripartite solutions with the single exception concerning the interpretation of the Night Work (Women) Convention, 1919 (No. 4). An important point is that the ICJ is not the only competent body and in fact, it can only provide limited legal certainty as regards interpretation disputes as its advisory opinions are inherently not legally binding. On the other hand, standard-setting action would provide more legal certainty as regards the right to strike and would ensure inclusivity and democracy by allowing all constituents to actively participate in the process. This option was consistent with the mandate of the ILO and upheld the principles of tripartism and social dialogue.

14. With regard to Convention No. 87 and the right to strike, the IOE stated that the legislative history of Convention No. 87 was indisputably clear; when developing the Convention, the tripartite constituents intentionally did not include that right, either explicitly or implicitly. Many official documents of governments, employers, workers, and also the ILO supervisory bodies, acknowledge that neither Convention No. 87 nor any other Convention addressed the right to strike. The rules of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969, should be fully respected. In particular, the ordinary meaning of the relevant provisions was clear and left no room for vague concepts such as "dynamic" interpretation. Convention No. 87 does not contain the term "right to strike" or similar terms. Neither could it be argued that there had been agreement between the parties to Convention No. 87 on the interpretation of the right to strike established through subsequent agreement or practice, as demonstrated by the fact that several ratifying States had at different points in time stated that neither Convention No. 87 nor any other ILO instrument provided for the right to strike. On the other hand, recourse to supplementary means of interpretation, such as the preparatory work, could be made to confirm the meaning resulting from the application of Article 31.

15. With respect to the mandate of the Committee of Experts, it was clear that it was limited to an impartial and technical analysis and that its opinions and recommendations were non-binding. Further, when it was established in 1926, the Conference had clarified that the Committee

would not be competent to interpret Conventions. Yet, the Committee of Experts gradually built a comprehensive body of broad, extensive and detailed interpretations that provided for far-reaching, almost unrestricted freedom to strike.

16. With respect to the questions to be put to the Court, the IOE considered that reference should have been made to Articles 31 and 32 of the Vienna Convention as both the interpretation of Convention No. 87 in relation to the right to strike and the competence of the Committee of Experts should be decided having regard to the requirements of these provisions. In any event, the two questions proposed by the Workers were insufficient as, among other things, the ICJ should be asked to clarify the role of the Conference both as regards the Committee of Experts and on the competence of the Conference to settle authoritatively interpretation disputes through standard-setting.

17. With regard to the possible next steps, the IOE considers that no decision to refer an interpretation dispute to the ICJ should be made without the support of the State parties to the Convention and that this support should be expressed within the framework of the International Labour Conference. Referral to the Court should not be considered until all possibilities for dialogue between the main ILO actors competent in the area of ILO and international labour standards have been exhausted.

18. The full text of the comments submitted by the IOE is posted on the web page of the 349th *bis* (special) Session of the Governing Body.

▶ Comments submitted by the International Trade Union Confederation

19. The International Trade Union Confederation (ITUC) recalled that since the institutional crisis broke out in 2012, the governments and social partners have engaged unsuccessfully in several efforts to resolve the interpretation dispute through social dialogue. It is of the view that further dialogue will not break this impasse. The dispute and the lack of legal certainty has undermined the functioning of the supervisory system. Settling the legal question of the scope of Convention No. 87 regarding the right to strike and affirming the authoritative guidance of the Organization's supervisory organs should be prioritized as the most reasonable, efficient and effective way to proceed. The Constitution provides for an efficient and available mechanism to resolve this legal dispute through article 37(1).

20. The Employers' group is the only group which disputes the legal validity of the guidance of the supervisory organs regarding the right to strike and the scope of Convention No. 87. Yet this guidance was based on the long-standing view that the right to strike for workers and their organizations is a fundamental and intrinsic corollary of freedom of association and the right to organize. This legal interpretation had been consistently applied and had informed national legislation and practice but also international courts, multilateral organizations as well as national, international and regional human rights bodies.

21. The rationale for invoking article 37(1) was that as the interpretation question would impact the exercise of a fundamental right and the smooth functioning of the supervisory system of the ILO and beyond, it would be most prudent and appropriate to have recourse to the constitutional procedure set out in article 37(1). Unless the Employers' group recognized the widely held legal interpretation and principle regarding the fundamental link between the right to strike and freedom of association and right to organize and their protection under

Convention No. 87 as well as the authoritativeness of the body of legal guidance of the supervisory bodies including the Committee of Experts, it was necessary to seek legal certainty through recourse to article 37(1).

22. There is no constitutional basis for the suggestion of the Employers' group that the dispute should be discussed at the Conference. With respect to the proposed adoption of a protocol, any effort to address this interpretation dispute through a standard-setting activity, while the uncertainty remained, would not effectively address the scope of Convention No. 87 in relation to the right to strike.

23. With respect to the two proposed questions to be put to the Court, the intention was to cover all aspects of the interpretation dispute. Obtaining an affirmative answer to the first question but also legal certainty on the mandate of the Committee of Experts would be critical to resolving the dispute.

24. With regard to the role of the preparatory work that led to the adoption of Convention No. 87, the ITUC recalled the position of the Committee of Experts that the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose.

25. The ITUC supported the draft resolution appended to the Background report contending that the ICJ is the only mechanism that could provide the necessary legal certainty and clarity to an issue with such broad implications.

26. The full text of the comments submitted by the ITUC is posted on the web page of the 349th *bis* (special) Session.

▶ Conclusion

27. Despite the early circulation of the Background report, the response rate, especially on the part of governments, has been low.

28. The comments confirm that the dispute is not so much about the recognition of the right to strike but rather on the interpretation of Convention No. 87 and the authority of the Committee of Experts to develop authoritative guidance with respect to the conditions for the exercise of the right to strike and the limits to that right.

29. As might be expected, the comments from national employers' and workers' organizations reflect the clear division of opinion between the Employers' group and the Workers' group on the advisability of referring the dispute to the International Court of Justice for decision under article 37(1) of the ILO Constitution.

▶ Appendix

Governments

Costa Rica

Eritrea

Indonesia

Japan

Kenya

Malaysia

Niger

Somalia

Switzerland

Türkiye

Employers' organizations

International Organisation of Employers (IOE)

Confederación de Cámaras Industriales de los Estados Unidos Mexicanos (CONCAMIN)

Confederación Patronal de la República Mexicana (COPARMEX)

Confederation of Danish Employers (DA)

Confederation of Finnish Industries (EK)

Confederation of Norwegian Enterprise (NHO)

Confederation of Portuguese Business (CIP)

Confederation of Swedish Enterprise (SN)

Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (CACIF) (Guatemala)

Fédération des entreprises de Belgique (FEB)

Hellenic Federation of Enterprises (SEV)

Japan Business Federation (Keidanren)

Malaysian Employers Federation (MEF)

Union patronale suisse (UPS)

Union tunisienne de l'industrie, du commerce et de l'artisanat (UTICA)

Workers' organizations

International Trade Union Confederation (ITUC)

All Indonesian Trade Union Confederation (KSBSI)

All Nepal Federation of Trade Unions (ANTUF)

All-Poland Alliance of Trade Unions (OPZZ)

Australian Council of Trade Unions (ACTU)

Bangladesh Free Trade Union Congress (BFTUC)

Bangladesh Jatiyatabadi Sramik Dal DAL-BJSD

Bangladesh Labour Federation (BLF)

Botswana Federation of Trade Unions (BFTU)

Canadian Labour Congress (CLC)

Central Autónoma de Trabajadores del Perú (CATP)

Central Autónoma de Trabajadores Salvadoreños (CATS)

Central de Trabajadores/as de la Argentina Autónoma (CTA-A)

Central Organisation of Finnish Trade Unions (SAK)

Central Organization of Trade Unions – Kenya (COTU-K)

Central Unitaria de Trabajadores/as de Chile (CUT-Chile)

Central Unitaria de Trabajadores del Perú (CUT-Perú)

Confederação Geral dos Trabalhadores Portugueses (CGTP)

Confederación Auténtica de Trabajadores de la República Mexicana (CAT)

Confederacíon Autónoma Sindical Clasista (CASC) (Dominican Republic)

Confederación de Trabajadores de México (CTM)

Confederación de Unificación Sindical (CUS) (Nicaragua)

Confederación General del Trabajo de la República Argentina (CGT-RA)

Confederación Intersindical Galega (CIG) (Spain)

Confederación Nacional de Unidad Sindical (CNUS) (Dominican Republic)

Confederación Nacional de Unidad Sindical Independiente (CONUSI) (Panama)

Confederación Sindical de Comisiones Obreras (CCOO) (Spain)

Confederația Națională Sindicală (Cartel Alfa) (Romania)

Confédération des syndicats autonomes du Sénégal (CSA)

Confédération des Travailleurs des Secteurs Publique et Privé (CTSP) (Mauritius)

Confédération française démocratique du travail (CFDT)

Confédération générale autonome des travailleurs en Algérie (CGATA)

Confédération libre des travailleurs de Mauritanie (CLTM)

Confédération luxembourgeoise des syndicats chrétiens (LCGB)

Confédération nationale des travailleurs du Burkina (CNTB)

Confédération nationale des travailleurs du Sénégal (CNTS)

Confederation of Autonomous Trade Unions of Serbia (CATUS)

Confederation of Ethiopian Trade Unions (CETU)

Confederation of Free Trade Unions of Macedonia (KSS)

Confederation of Free Trade Unions of Ukraine (KVPU)

Confederation of Independent Trade Unions in Bulgaria (CITUB)

Confederation of Progressive Trade Unions of Turkey (DISK)

Confederation of Public Employees' Trade Unions (KESK) (Türkiye)

Confederation of Trade Unions of Albania (KSSH)

Confederation of Trade Unions of Montenegro (CTUM)

Confederation of Turkish Trade Unions (TÜRK-İŞ)

Confederation of Unions for Professionals (Unio) (Norway)

Confédération syndicale des travailleurs du Togo (CSTT)

Confédération syndicale du Congo (CSC) (Democratic Republic of the Congo)

Confédération syndicale indépendante du Luxembourg (OGBL)

Consejo Nacional del Trabajadores Organizados (CONATO) (Panama)

Construction and Building Materials Industry Workers' Union of Ukraine (PROFBUD)

Czech Moravian Confederation of Trade Unions (ČMKOS)

Federación Sindical de Trabajadores Independientes (FSTIES) (El Salvador)

Fédération nationale des syndicats des ouvriers et des employés du Liban (FENASOL)

Federation of Independent Trade Unions of Russia (FNPR)

Federation of Iraq Trade Unions (FITU)

Federation of Korean Trade Unions (FKTU)

Federation of Somali Trade Unions (FESTU)

Federation of Trade Unions of Macedonia (SSM)

Federation of Trade Unions of the Republic of Kazakhstan (FPRK)

Federation of Trade Unions of Ukraine (FPU)

General Federation of Bahrain Trade Unions (GFBTU)

General Workers' Union (UGT) (Portugal)

Georgian Trade Union Confederation (GTUC)

German Confederation of Trade Unions (DGB)

Greek General Confederation of Labour (GSEE)

Hind Mazdoor Sabha (HMS) (India)

Independent and Self-Governing Trade Union Solidarność (NSZZ “Solidarność”) (Poland)

Independent Trade Unions of Croatia (NHS)

Italian Confederation of Workers’ Trade Unions (CISL)

Italian General Confederation of Labour (CGIL)

Italian Labour Union (UIL)

Japanese Trade Union Confederation (JTUC–RENGO)

Kilusang Mayo Uno (KMU) (Philippines)

Korean Confederation of Trade Unions (KCTU)

Liberia Labour Congress (LLC)

National Trade Union Confederation (NTUC) (Mauritius)

Netherlands Trade Union Confederation (FNV)

Pakistan Workers’ Federation (PWF)

Pan-Cyprian Federation of labour (PEO) (Cyprus)

Randrana Sendikaly USAM-SVS (Madagascar)

Singapore National Trades Union Congress (SNTUC)

Swedish Confederation of Professional Associations (SACO)

Swedish Confederation of Professional Employees (TCO)

Swedish Trade Union Confederation (LO)

Syndicat des enseignants du supérieur solidaires (SESS) (Algeria)

Swiss Trade Union Confederation (SGB/USS)

Trade Union Congress (TUC) (United Kingdom of Great Britain and Northern Ireland)

Trade Union Congress of Namibia (TUCNA)

Trade Union Congress of Swaziland (TUCOSWA)

Trade Union Confederation “Nezavisnot” (Nezavisnost) (Serbia)

Trade Union Confederation of the Republic of Srpska (Bosnia and Herzegovina)

Unión General de los Trabajadores del Brazil (UGT)

Unión General de Trabajadoras y Trabajadores de España (UGT-E) (Spain)

Unión Nacional de Trabajadores (UNT) (Mexico)

Union nationale des syndicats des travailleurs du Bénin (UNSTB)

Union nationale des travailleurs de Guinée-Bissau (UNTG-CS)

Union of Autonomous Trade Unions of Croatia (UATUC)

Union of Free Trade Unions of Montenegro (UFTUM)

Union of Independent Trade Unions of Albania (BSPSH)

Zimbabwe Congress of Trade Unions (ZCTU)

Document No. 31

Draft Minutes of the 349th *bis* (Special) Session of the Governing Body, November 2023

Governing Body

349th *bis* (Special) Session, Geneva, 10 November 2023

Draft minutes of the 349th *bis* (Special) Session of the Governing Body of the International Labour Office

Contents

▶ Institutional Section

1. Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution (GB.349*bis*/INS/1/1 and GB.349*bis*/INS/1/2)

Committee of the Whole

1. **The Chairperson** recalled that the 349th *bis* (Special) Session of the Governing Body had been convened pursuant to article 7(8) of the Constitution of the International Labour Organization and paragraph 3.2.2 of the Standing Orders of the Governing Body. At its 349th Session, the Governing Body had approved the arrangements for the special session. They included a sitting as a Committee of the Whole, in accordance with article 4.3 of the Standing Orders, to hold a broad exchange of views with the participation of governments not represented on the Governing Body, on the understanding that any decisions would be made by the Governing Body in its ordinary plenary composition after the Committee of the Whole had been concluded.

2. The 349th *bis* (Special) Session was devoted to an in-depth discussion with a view to making an informed decision on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice (ICJ) for decision in accordance with article 37(1) of the ILO Constitution. He called on participants not to address the substance of the disagreement concerning Convention No. 87 and the right to strike, but to focus on the advantages or disadvantages of referring the dispute to the ICJ for decision, which was the subject of the request under consideration.

3. He noted that the following amended draft decision and draft resolution had been proposed by a group of 44 countries from various regions and circulated by the Office: [1]

> **Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to adopt the following resolution:**
>
> The Governing Body,
>
> Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the

[1] Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Chile, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87,

Noting that ILO supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,

Seriously concerned about the implications that this dispute has on the functioning of the ILO and the credibility of its system of standards,

Affirming the necessity of resolving the dispute consistent with the Constitution of the ILO,

Recalling that under article 37, paragraph 1, of the ILO Constitution, "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice",

Recalling the consensual decision of the 320th Governing Body in March 2014, welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> "The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions".

Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,

Emphasising that Article 37.1 of the Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,

1. To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:

Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

2. Instructs the Director-General to:

(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with article 65, paragraph 2, of the Statute of the Court;

(b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;

(c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;

(d) inform the United Nations Economic and Social Council of this request, as required under article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.

4. **The Worker Vice-Chairperson** noted that freedom of association was at the heart of the ILO's 100-year mandate, enshrined in its Constitution and reaffirmed in the Declaration of Philadelphia. It had been further developed in Convention No. 87, and in 1951 the Committee on Freedom of Association had been established to supervise its application. It was an enabling right and, together with the right to collective bargaining, was essential for achieving all other rights. Yet, it was the most frequently violated fundamental right.

5. The right to strike had long been recognized both in the ILO and beyond as an intrinsic corollary of freedom of association. That right must be available as a last resort, providing organized workers with a countervailing power to that of their employer. However, during the 2012 session of the International Labour Conference, the Employers' group had challenged the competence of the Committee of Experts on the Application of Conventions and Recommendations to derive the right to strike from Convention No. 87 and refused to cooperate in the Committee on the Application of Standards when it discussed any cases concerning Convention No. 87 in which the Committee of Experts had made observations on the right to strike. That had caused the Committee on the Application of Standards to fail to adopt conclusions for the first time since its establishment in 1926. Despite numerous efforts by the Office and the tripartite constituents, the dispute had remained unresolved, thus calling into question the existence and protection of a fundamental right, eroding the supervisory capacity of the ILO and creating legal uncertainty for Member States that had ratified Convention No. 87. It had also engendered an atmosphere of antagonism within the ILO, hampering its effectiveness.

6. Exchanges between the Workers' group and governments in recent months had revealed a general recognition of the importance of freedom of association, with the right to strike as a corollary, and the understanding that there was indeed an urgent need to resolve the outstanding conflict in the interest of all constituents. However, positions diverged as to how. As all other attempts to resolve it had failed, the Workers' group believed that there was no alternative to referring the dispute to the ICJ. The group had therefore written to the Director-General on 12 July 2023 invoking article 37(1) of the ILO Constitution, which recognized the ICJ as the organ with exclusive jurisdiction to interpret authoritatively the ILO Constitution and Conventions, and which unambiguously established an obligation for the ILO to submit any interpretation dispute to the ICJ for decision. The Workers' group reiterated its commitment to accept, in accordance with the ILO's constitutional theory and practice, the decision of the ICJ as authoritative and final. The group expected the ICJ to confirm the law and

practice in the ILO, in which case the ILO supervisory system would continue its work, including by providing authoritative guidance to Member States and social partners at the national level on how to interpret and implement Convention No. 87. The Workers' group did not seek to change the status quo regarding the right to strike, which, it recognized, was not an absolute right.

7. In response to the argument put forward by the Employers' group and some governments that the matter should be resolved by social dialogue as a referral to the ICJ would be viewed as a failure of tripartism, the Workers' group contended that there was no realistic chance of consensus in a situation of mutually exclusive positions that were so persistent. The Employers' group's proposal to include on the agenda of the 2024 session of the Conference a standard-setting item on a Protocol to Convention No. 87 was fundamentally flawed, as it was legally, technically and politically unsound and untenable. First, it was unclear whether the legal starting point would be that the right to strike was or was not covered by Convention No. 87. Second, it was legally contradictory for the Employers' group to maintain both that Convention No. 87 did not enshrine a right to strike and that that a Protocol to the Convention could be developed to govern the right to strike. Third, in advocating such a Protocol, the Employers' group's stated aim was to annul the existing authoritative guidance of the supervisory bodies. That would create a two-tier legal system, thus reducing legal certainty. Fourth, the effect of the proposal of the Employers' group would be to eliminate fundamental rights, which it would then offer to renegotiate afresh. Fifth, the proposal of the Employers' group to include the contentious item on the Conference agenda for 2024 would violate all existing rules and procedures in the ILO designed to safeguard full tripartite involvement in the development of standards. Finally, as discussed by the Governing Body at its 344th Session (March 2022), the only way to achieve legal certainty was through legal means, which involved invoking article 37 of the Constitution. That discussion had also shown that there was very little support in the Governing Body for the further development of a possible internal tribunal on the basis of article 37(2).

8. As to the legal question or questions that the ICJ should address, the Worker Vice-Chairperson said that, as the Employers' group had challenged both the existence of a right to strike under Convention No. 87 and the opinion of the Committee of Experts that the right to strike derived from Convention No. 87, those two aspects of the conflict were closely linked. Furthermore, the interpretation dispute challenged the validity of the guidance of the supervisory bodies regarding the constitutional principle of freedom of association and the right to strike, seen as its intrinsic corollary and therefore covered by Convention 87. It was therefore sufficient that one question be put to the ICJ: whether the right to strike of workers and their organizations was protected under Convention No. 87. The Workers' group expected the Governing Body to request the ICJ to allow the autonomous participation of the International Trade Union Confederation (ITUC) and the International Organisation of Employers (IOE) in the proceedings.

9. As to whether the Governing Body had the mandate to decide on the referral, the Workers' group considered that there could be no doubt that it did, and that it was the most appropriate structure to make any such decision. Article IX(2) of the 1946 agreement between the United Nations and the ILO explicitly authorized the ILO to request an advisory opinion from the ICJ on legal questions arising within the scope of its activities. Furthermore, at its 32nd Session (1949), the Conference had mandated the Governing Body, through the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, to decide on requests for referral to the ICJ, and that delegated authority

remained valid. It was also the Governing Body that had been following up on the matter since 2012.

10. The proceedings since the Workers' group's submission in July had been inclusive. The dispute was also urgent, since the legal uncertainty about governments' obligations under Convention No. 87 left doubt as to the extent of the protection of workers. A referral to the ICJ by the Governing Body was the only practical, efficient, quick, decisive, inclusive, fair and reasonable way forward. The argument that the Conference should play a role by validating the decision of the Governing Body on the basis that it was purportedly undemocratic was unsound, as the Governing Body had been making decisions for over 100 years; it was inappropriate to challenge selective decisions as being undemocratic. Adding another layer of decision-making could create further confusion and delay, and the precedent thus set might erode the recognition of the authority and competencies of the Governing Body.

11. The role of the Governing Body was to govern, and a decision was needed that day. It would be preferable for the decision to be reached by consensus, but a vote might be required. In that event, Governing Body members should not vote against the protection of a fundamental workers' right and certainly not against the exercise of a constitutional obligation. Future generations would hold the members of the Governing Body accountable for their decision on the matter. For social justice to prevail, the judiciary was occasionally required to provide authoritative guidance on the legal basis underlying the Organization's important work.

12. The Workers' group supported the amended draft decision proposed by the group of 44 countries.

13. **The Employer Vice-Chairperson** said that she profoundly disagreed with how the item had found its way onto the Governing Body agenda; the special session had not been convened in accordance with established governance rules and practice. Furthermore, the information and guidance provided by the Office was biased in favour of the referral of the dispute to the ICJ, which was not the position of all constituents. The Office had failed in its duty to be impartial and had colluded with one group, which did not bode well.

14. She noted that although the Worker Vice-Chairperson had said that there was no alternative to requesting a referral to the ICJ as no solution had been found through dialogue, it was the Workers' group that had continually refused to hold a substantive discussion on the scope and limits of the right to strike. The Government group had stated during the tripartite meeting held in February 2015 that it was ready to consider discussing the exercise of the right to strike, and the Employers' group had consistently called for social dialogue on the topic. Universally applicable rules and boundaries defining the right to strike had never been discussed or adopted by the International Labour Conference. Several international legal instruments stated that a right to strike existed, but was defined by national law; there were no universally applicable definitions or rules.

15. The Employers' group strongly opposed a referral to the ICJ. According to article 37(1) of the ILO Constitution, referrals to the ICJ required an interpretation dispute. However, there could be no dispute over the interpretation of Convention No. 87, as it did not include any reference to a "right to strike" or even the term "strike". The drafters of the Convention had deliberately excluded the subject from its scope, as they considered that it had to be regulated in a separate standard.

16. At issue was the illegitimate interpretation of Convention No. 87 by the Committee of Experts, which had used the terms "activities" and "defending the interests of workers" in Articles 3 and 10 to justify its development of comprehensive and excessive rules on the scope and conditions

of the right to strike. The detail and length of the catalogue of rules – 44 paragraphs of the 2012 General Survey on Convention No. 87 – demonstrated that it was not an interpretation, but an extension of the scope of the Convention to fill a regulatory gap. However, only the Conference was competent to fill normative gaps.

17. Not only would a referral to the ICJ not resolve the dispute, it would have negative effects for the ILO and its supervisory mechanism. Any finding that Convention No. 87 did provide for the right to strike – despite the fact that its drafters had expressly excluded it and many governments had recognized that it was not included – would have implications for ratification of standards. Confidence in the reliability of obligations under ratified ILO Conventions would be lost, and constituents might be reluctant to set new standards. It would set a very bad precedent, undermining efforts to resolve differences of opinion through social dialogue and mutual agreement.

18. An advisory opinion from the ICJ would bring into sharper focus the many incompatibilities between national law and practice, on the one hand, and the excessive rules of the Committee of Experts, on the other. One example was that the Committee of Experts had stated that political strikes, sympathy strikes and strikes by public service officials must be allowed, and that essential services had to be defined extremely restrictively. Governments with national regulations and practices prohibiting certain types of strikes would face strong pressure to align their national laws, or even their constitutional law, with the so-called interpretations of the Committee of Experts or risk a complaint being brought before one of the supervisory bodies. In addition, an ICJ referral could further deter countries that had not yet ratified the Convention from doing so.

19. An ICJ referral would also send a very negative message to the public about the ILO's ability to settle divergences on important substantive matters, which could suggest that difficult matters would be decided through litigation rather than consensus. Irrespective of an advisory opinion, the Employers' group would not agree with broad, detailed and excessive opinions of the Committee of Experts on the right to strike, so the problem would remain unresolved.

20. There were also procedural questions that remained open. The Employers' group believed that the Conference played a crucial role in the governance process by ensuring the participation of all States parties to a given Convention. Although the 1949 resolution had authorized the Governing Body to request advisory opinions, fewer than one third of the current 187 Member States had been party to that decision, which therefore lacked democratic legitimacy and should be revisited. The Employers' group also expressed concern that the International Labour Standards Department might not be impartial, given that the dispute originated in a report of the Committee of Experts, which the department played a key role in preparing.

21. The group was convinced that a referral to the ICJ for an advisory option could not resolve the dispute, irrespective of the questions put to it. The right to strike was a multifaceted and complex issue that could not be separated from the widely diverging and deeply rooted industrial relations systems and practices in all ILO Member States. Any determination of international rules on the right to strike would have to take those differences into account. That could only be done by the tripartite constituents, within the framework of established ILO procedures, at the Conference.

22. Furthermore, advisory opinions from the ICJ were inherently not legally binding, and it was highly doubtful whether article 37(1) of the Constitution made them so for the ILO and its constituents. Doubts in that regard had previously been raised by the Office itself, and also by a former President of the ICJ; many governments had also shared those doubts. While the Employers' group respected the crucial role of the ICJ in settling disputes between countries

and the persuasive power of its advisory opinions, the group would not accept an advisory opinion that recognized a right to strike in Convention No. 87 and approved the interpretations of the Committee of Experts, as those had never been discussed and approved in a tripartite standard-setting process. The Employers' group would continue to refuse to adopt conclusions on the right to strike in the Committee on the Application of Standards and other supervisory bodies.

23. It would be highly problematic to impose a referral to the ICJ by means of a vote when opinion was so divided. In its note on the binding legal effect of ICJ advisory opinions, the Office had stated that the ILO should be "ready to follow or be guided by the Court's advisory opinion", otherwise "it must not ask for the opinion in the first place". Given that many constituents did not believe that a referral to the ICJ was the appropriate way to resolve the dispute, the option should be abandoned.

24. Comprehensive, inclusive social dialogue at the Conference was the only way to achieve a sustainable and legally sound solution. In the past, the adoption of a Recommendation, Convention, Protocol or resolution had been the only recognized way to develop international rules on labour matters that were clear and transparent, based on tripartite participation and support, and that respected national sovereignty by allowing Member States the choice of whether to ratify them or not. In 1992, Colombia, supported by Germany, Morocco and Venezuela, had proposed standard-setting on the right to strike. Many other Governments had voiced support for tripartite social dialogue solutions on the topic of the right to strike, as well as some workers' organizations.

25. Article 37 was intended to be used only as a last resort, once all tripartite social dialogue procedures had been exhausted, which was not yet the case. A discussion at the Conference, taking into account some of the views of the Committee of Experts, would lead to a solid tripartite consensus on universally applicable rules regarding the right to strike and its basic principles and boundaries. Such a fresh approach would be the best way forward and would provide a legal certainty that could no longer be challenged. The Governing Body could not replace the Conference, as it had limited representation. She therefore urged all constituents to reach consensus to refer the matter to the International Labour Conference as the supreme decision-making body of the ILO, and not the ICJ.

26. **Speaking on behalf of the group of 44 countries**, a Government representative of Colombia noted with appreciation the amount and quality of the work of the Office aimed at facilitating the important discussion and expressed the hope that the proposal would open a path towards resolving the dispute. As the ongoing dispute fell within the scope of article 37(1) of the ILO Constitution, the amended draft decision proposed that the Governing Body should request the ICJ urgently to render an advisory opinion on the question.

27. **Speaking on behalf of the European Union (EU) and its Member States**, a Government representative of Spain said that North Macedonia, Montenegro, Georgia, Norway and Iceland aligned themselves with her statement. She recalled that on 14 July 2023, the EU and its Member States had sent the Director-General a letter requesting that, as a matter of utmost importance, an item be placed on the agenda of the Governing Body on the referral to the ICJ of the dispute regarding the interpretation of Convention No. 87 in relation to the right to strike and indicating that legal clarity was urgently required after more than a decade of failed attempts to find a solution. The group recognized the Committee of Experts as an independent body established by the Conference to analyse the application of Conventions by Member States, and that the opinions and recommendations of the Committee were non-binding. The group agreed that the advisory opinions of the ICJ were judicial statements on the legal

questions submitted by authorized organizations and that, in the case of the ILO, such advisory opinions were binding pursuant to article 37(1) of the ILO Constitution. The group supported referral of the dispute to the ICJ to ensure legal certainty. In so doing, it also sought to uphold the authority of the Committee of Experts, as agreed by the Governing Body in 2014, and to safeguard the supervisory system. The group was thankful to the Office for all the support provided in preparation of the special session and stood ready to decide on the adoption of a resolution on the referral to the ICJ.

28. **Speaking on behalf of the Association of Southeast Asian Nations (ASEAN)**, a Government representative of Indonesia stated that her group had chosen to address the dispute through the internal mechanism provided by the ILO, rather than resorting to the ICJ. However, that should not be misconstrued as a denial of the fundamental right to strike. The provision under the ILO Constitution allowing for a referral to the ICJ in cases of differing interpretations of a Convention must be a last resort. The dispute should be resolved through internal channels to arrive at a comprehensive, agreeable and inclusive resolution. The group was confident in the collective capacity of the Conference to reach consensus internally, thereby achieving a credible solution that would enhance the ILO supervisory system.

29. Her group proposed agreeing on a time frame during which all stakeholders would seek a common and thorough understanding through tripartite meetings. Only if there was no resolution after the time frame had elapsed should the matter be referred to the ICJ. The outcomes of the two special sessions should be presented to the International Labour Conference for further deliberation and determination. There had been profound changes in the 74 years since the Conference resolution had authorized the Governing Body to request an advisory opinion of the ICJ. As the supreme and the most representative body of the tripartite constituency of the ILO, the Conference was the most suitable platform to hold a comprehensive, substantive and in-depth discussion of the interpretation of the Convention in the spirit of democratization and fair representation.

30. **Speaking on behalf of the Arab group**, a Government representative of Qatar said that the holding of two special sessions of the Governing Body on the interpretation of Convention No. 87 in relation to the right to strike reflected the importance of the matter and the intent of the ILO's tripartite constituents to resolve the long-standing dispute. Dialogue within the ILO was the best way to achieve legal certainty for any dispute on the interpretation of ILO Conventions; therefore, all internal means should be exhausted before referring the matter to the ICJ. There was still an opportunity to achieve consensus through social dialogue at the International Labour Conference. All Member States should be given the necessary time to consider the alternatives, including the option of standard-setting to be discussed the following day. In any case, the Conference should have the final word on the matter.

31. **A Government representative of Bulgaria** said that, as no consensus-based solution had been found to the long-standing dispute on the interpretation of the fundamental Convention No. 87 with regard to the right to strike, the matter should be referred to the ICJ. The ongoing dispute had a negative impact on the functioning of the ILO as a whole, especially its supervisory bodies, and the credibility of its body of standards. Adopting a Protocol to the Convention would not provide the necessary legal certainty, as it would only have legal effect on States that ratified the Protocol, thereby risking the creation of a two-tier system and greater legal uncertainty. A constructive spirit must be maintained, as the effective implementation of international labour standards was the common goal of all constituents.

32. **A Government representative of Egypt** said that it was important to have legal certainty on the interpretation of Convention No. 87 in relation to the right to strike, but tripartite dialogue

within the ILO took precedence; referring the matter to the ICJ should be a last resort, after exhausting all other means and examining all points of view discussed during both special sessions of the Governing Body. It was important to allow sufficient time for all constituents to examine the proposal, and further consultations should be conducted on the formulation of the referral and the question or questions it would include, which should then be presented to the Conference for adoption. Approval from the Conference would ensure the participation of all ratifying countries in the decision-making. The mandate granted to the Governing Body by the 1949 resolution was aimed at dealing with matters that could not wait until the next session of the Conference. Since the current dispute had been ongoing for more than 12 years, another six months should not be an obstacle.

33. **A Government representative of the Netherlands** said that, as a founding Member of the ILO, his country supported finding solutions through social dialogue. However, that had proved to be impossible in the issue at hand, so it was time to turn to the ICJ for legal clarity. It was important to prevent the ongoing dispute from undermining the ILO's credibility, its supervisory functions and its reputation as a standard-setting body. Article 37(1) of the ILO Constitution empowered the Organization to ask the ICJ for a decision on any dispute relating to the interpretation of a Convention, which was precisely what was required. Any Protocol that the Conference might adopt to address the issue would apply only to Member States that ratified it, and thus would not provide the necessary legal certainty or universality.

34. **A Government representative of Norway** said that her Government had maintained the position since 2014 that the dispute should be referred to the ICJ and that there was no need for supplementary action. Principles relating to the right to strike had been progressively developed by the Committee on Freedom of Association and the Committee of Experts, and all the ILO's supervisory bodies had operated within their mandates. To promote and defend their interests, workers required a means by which they could apply pressure in order to have their demands met. It was natural that the right to strike could be derived from Convention No. 87. In addition, the ILO and its supervisory bodies did not exist in isolation: several international covenants regulated the right to strike, providing a broader legal framework within which to interpret the Convention. It would be paradoxical if the United Nations specialized agency for labour did not recognize the right to strike in its own Conventions.

35. **A Government representative of Panama** noted that an ICJ decision would have an impact not only on the implementation of other Conventions, but also on the supervisory system as whole. Care must be taken not to set a precedent by immediately having recourse to the ICJ without first exhausting other means. Freedom of association was based on three inseparable rights: the right to organize, the right to collective bargaining and the right to strike. Strikes were a powerful instrument of trade union negotiation as a means of resolving conflicts, but should be used with care and responsibility. If there was no other way forward than to refer the question to the ICJ, the standards supervisory system must remain active at the same time.

36. **A Government representative of Paraguay** said that the right to strike or engage in work stoppages was explicitly recognized in his country's constitution for both public and private sector workers, and also for employers, but did not extend to members of the armed forces, the police or essential public services. It was important to resolve any disputes within the Organization through social dialogue. He therefore urged the Governing Body to continue efforts to promote cooperation on tripartite initiatives.

37. **A Government representative of South Africa** said that his Government was driven by the desire to rectify the legal ambiguity regarding the interpretation of Convention No. 87 with respect to the right to strike and by its unwavering commitment to strengthening the ILO's

supervisory systems. Referring the matter to the ICJ would bring legal certainty, which would in turn empower the supervisory systems to fulfil their duties without their authority being called into question. The right to strike could not be divorced from the broader notion of freedom of association.

38. **A Government representative of Switzerland** said that her Government respected the request made by the Workers' group. It was regrettable that the document submitted by the Office had not contained a critical analysis of the questions raised by that group, particularly as they were the same as those raised by the Office in 2014 in document GB.322/INS/5; her Government could not, therefore, accept that an analysis thereof threatened the Office's neutrality and impartiality. For constituents to make an informed decision, all necessary information must be provided in a transparent, objective and comprehensive manner. Neither the wording nor the substance of the question to be put to the ICJ had ever been discussed by the Governing Body. In the interest of tripartism and the cohesion of the Governing Body, the suggested questions must be discussed in an inclusive manner.

39. The first question was not sufficiently precise and did not reflect the problem at hand, as a decision on whether or not Convention No. 87 protected the right to strike would not shed light on the conditions for its exercise. If it was decided that the Convention protected the right to strike without regulating it, it would then be necessary to ask who determined how that right could be exercised, which would be a matter concerning the interpretation of the ILO Constitution, not the Convention. The ICJ should instead be asked whether it was for tripartite legislators, the supervisory bodies, the ICJ's judges or domestic court judges to make a binding decision on the conditions for the exercise, and possible limits of, the right to strike when those elements were not addressed in existing legislation. The second question did not constitute a question relating to the interpretation of the Convention as envisaged in article 37 of the Constitution.

40. If the decision of the ICJ was to be legally binding, all tripartite constituents should be involved in the discussion of the matter and in decision-making. As such, once the contents of the question to be put to the ICJ had been agreed, the International Labour Conference should have the opportunity to make the final decision on referring the matter to the ICJ.

41. **A Government representative of Tunisia** underscored the importance of permitting all Member States, in particular those that had ratified Convention No. 87, to express their views on the matter. The Governing Body should ask itself whether all avenues for dialogue had truly been exhausted and whether it was appropriate for the Organization to press for a decision from the ICJ in the light of the differences in opinion displayed and the implications of that divergence in opinion on the eventual acceptance and ownership of a decision of the ICJ.

42. Dialogue was an effective way to arrive at consensual decisions, which were more likely to be accepted and applied. The matter should therefore be included on the agenda of the forthcoming session of the International Labour Conference, which would allow discussions to continue in an inclusive manner. The Conference must have the opportunity to give its view on any Governing Body decision. While the 1949 resolution authorized the Governing Body to request an opinion from the ICJ, it did not prevent the Conference from making decisions on whether to refer matters thereto. In highlighting that fact, she was not intending to cast doubt on the legitimacy of the Governing Body's role in the process, but pointing out that some issues were of such importance that they deserved to be examined by all Member States. It would be crucial to bear in mind that it was not for the ICJ to make judgments on matters beyond the scope of article 37(1) of the Constitution.

43. **A Government representative of Türkiye** expressed satisfaction with the decision to discuss the matter in a Committee of the Whole. While his Government recognized the importance of safeguarding the right to strike as a fundamental labour right, it had reservations regarding the interpretation of Convention No. 87 in that respect. Social dialogue was a proven and effective approach to dispute resolution and ensured that robust and sustainable solutions could be achieved with the participation of all parties. His Government therefore supported the idea of resolving the dispute through the ILO's existing mechanisms and structures rather than referring it to the ICJ, which could potentially weaken the Organization's tripartite mechanisms.

44. **A Government representative of Zimbabwe** said that her Government noted the legitimate request of the Workers' group and wished to obtain legal certainty regarding the matter, which had negatively affected the smooth functioning of the ILO's supervisory system since 2012, and would be interested in hearing the advisory opinion of the ICJ, particularly since the supervisory system had not been objective in its analysis of cases for many years.

45. The legal advice provided by the Office was appreciated. However, the authority delegated to the Governing Body in the 1949 resolution was outdated, and the Organization and its membership, as well as that of the Governing Body, had evolved since its adoption. The decision-making power should therefore rest with the Conference as the body that had delegated that authority. Moreover, the Governing Body was not currently representative of the ILO membership, given that countries of chief industrial importance remained permanent members. It was concerning that some members of the Governing Body had not ratified Convention No. 87 yet had the right to vote on the matter, while some ratifying countries were not permitted to vote as they were not Governing Body members. The Conference, which comprised all Member States of the ILO, should therefore make the final decision.

46. **A Government representative of Algeria** said that engaging in tripartite dialogue on an issue of such importance would help to prevent institutional crises and ensure legal certainty within the ILO. Any question to be put to the ICJ must focus on whether the right to strike was recognized under Convention No. 87, as broadening the scope of that question would only accentuate the differences in opinion and would not reflect the essence of article 37(1) of the Constitution. Decisions to refer to the ICJ any cases concerning the interpretation of a fundamental Convention must be approved by the Conference, as that was the only way of including all Member States in decision-making and ensuring that the positions of all parties would be taken into consideration. Securing the approval of the Conference would strengthen the credibility of the referral process and restore trust among constituents.

47. **A Government representative of Australia** said that the uncertainty caused by the dispute could not continue, and referral of the matter to the ICJ was the appropriate way to deliver legal certainty. Her Government did not support consideration of standard-setting on the subject while the dispute remained unresolved.

48. **A Government representative of Bangladesh** said that, under the ILO Constitution, standard-setting was the mandate of the International Labour Conference. The 1949 resolution had not permanently delegated authority on matters relating to international labour standards to the Governing Body, and there was considerable doubt as to whether the word "activities" in the resolution included direct or indirect standard-setting. The Conference must have full jurisdiction; the Governing Body could not presume a permanent authority in that regard. Referral to the ICJ was a last resort and should not be invoked at present. The inherent authority of the Conference on matters of standard-setting must not be diluted. The 1949 resolution did not require the Conference to approve the Governing Body's decision to

refer a matter to the ICJ since the Governing Body's mandate in that regard had been bestowed by the Conference itself. The ILO's internal dispute resolution procedures had not yet been exhausted; it would therefore be necessary to resort to the supreme authority of the Conference. The right to strike was not explicitly mentioned in Conventions Nos 87 or 98. Legal obligations must be explicitly stated in legislation or in a Convention; if there was no such statement, therefore, the legal obligation did not exist.

49. **A Government representative of Barbados** said that, during consultations held earlier in the year, his Government had added its voice to the call for article 37 of the ILO Constitution to be invoked, noting that social dialogue did not always lead to consensus. It was unacceptable that the ILO could not speak authoritatively to Member States on issues relating to Conventions and on a matter as important as the right to strike. Indeed, the ILO's normative function was weakened by that shortcoming. The uncertainty surrounding the situation had lasted far too long; the matter should now be referred to the ICJ.

50. **A Government representative of Cameroon** said that tripartism, the principle at the heart of the ILO, remained the best way to resolve the dispute and secure legal certainty regarding the interpretation of Convention No. 87 and the right to strike. Her Government was convinced that there was still scope to resolve the issue internally. Referral to the ICJ should be a measure of last resort once all internal avenues for tripartite dialogue had been exhausted, and would thus be a premature move at the present juncture. In the interest of peace, social justice and democracy, all Member States – especially those that had ratified Convention No. 87 – should be able to participate in discussions and decision-making on whether to refer the matter to the ICJ. The matter should therefore be placed on the agenda of the forthcoming session of the International Labour Conference, which should make the final decision.

51. **A Government representative of Canada** expressed concern about the negative implications that the dispute was having on the functioning of the ILO's supervisory system. It would be important to have clarity on the scope of Convention No. 87 so that governments that had ratified, or were considering ratifying, the Convention were aware of the nature and extent of obligations arising from ratification and could adapt national law and practice accordingly. The dispute must therefore be resolved without further delay.

52. Her Government was a strong supporter of social dialogue and had previously advocated for a tripartite, negotiated resolution to the dispute. However, after careful consideration, it was now of the view that all avenues for social dialogue had been exhausted, given that the impasse had persisted for over a decade and the views of ILO constituents on the subject were diametrically opposed. Her Government therefore supported, on an exceptional basis and as a last resort, referral to the ICJ. An authoritative advisory opinion would allow constituents to move forward with legal clarity on the matter.

53. **A Government representative of Chile** emphasized his Government's support for the ILO's normative function. The right to strike had been recognized in Chilean legislation and jurisprudence as an integral element of freedom of association in the scope of Convention No. 87. His Government therefore believed that the ILO should request the ICJ to urgently issue an advisory opinion on protection of the right to strike in the context of Convention No. 87.

54. **A Government representative of China** said that the International Labour Conference should make the final decision on any recommendations or conclusions reached by the Governing Body at its current session. His Government maintained the position that disputes should be resolved through consultation and dialogue. Referring the dispute to the ICJ was not the only option for the Organization, much less the best option. The ILO should further improve its

internal mechanisms in a spirit of tripartism and inclusive social dialogue to reach comprehensive workable solutions that addressed the concerns of all parties.

55. **A Government representative of Colombia**, welcoming the decision to allow all governments to express their views on the matter, said that the way forward would be to refer the dispute to the ICJ. The matter had been addressed in compliance with the norms and regulations guiding the Governing Body, which was therefore within its rights to take a decision, and the Office had acted impartially in enforcing that normative framework. The Governing Body's mandate should not be called into question, nor should that of the Committee of Experts, and the legitimacy of the ILO's supervisory bodies must not be jeopardized as all constituents benefited from their decisions, considerations and recommendations. Their role was crucial to the promotion of tripartism, which contributed towards successful social dialogue and was an example to other organizations in the United Nations system. His Government was confident that the ICJ would be able to settle the dispute and that, once a decision had been handed down, the Organization would find a way to address the matter to the satisfaction of all parties and in line with international labour standards. If necessary, the Organization could then pursue other avenues.

56. **A Government representative of Eswatini** said that the right to strike had never been challenged at the national level in Eswatini. However, he recognized that the long-standing international dispute had serious repercussions on the work of the ILO's supervisory bodies. The urgency of current efforts to resolve the interpretation dispute went against the ILO's ideals of social dialogue and consultation. Furthermore, making a decision within the Governing Body excluded many who would be affected by the outcome of the discussion, especially those Member States that had ratified Convention No. 87. He urged the Governing Body to utilize all available options, including tripartite consultations, and defer its decision to March 2024.

57. **A Government representative of India** said that the matter in question was not just about freedom of association, but rather about setting precedent for future issues. She recalled that the Committee of Experts had interpreted Convention No. 87 as including the right to strike. Moreover, in terms of process, the current dispute clearly lay within the jurisdiction of the International Labour Conference; so that those who were not members of the Governing Body would not be excluded from decision-making that would affect them. She therefore called for a discussion at the International Labour Conference; the dispute should only be referred by the Conference to the ICJ if it was not resolved. The ILO must uphold the principle of democratic decision-making.

58. **A Government representative of Mexico** said that his Government had repeatedly stated the need to guarantee legal certainty and to strengthen the ILO's supervisory system. It was important to appropriately implement the provisions set out in the ILO Constitution, especially article 37(1). Referring the ongoing dispute to the ICJ would provide legal certainty and strengthen human rights, labour rights and the principles of tripartism and social dialogue. The outcome would provide a strong basis for the implementation of Convention No. 87 and protect workers' rights. He therefore supported the amendments to the draft decision proposed by the Government representative of Colombia on behalf of a cross-regional group of countries.

59. **A Government representative of Namibia** recalled that the persistent dispute over the right to strike and the interpretation of Convention No. 87 had undermined the ILO's normative mandate and the credibility of its supervisory system. No resolution had been attained through social dialogue. It was clear that the ongoing discussion constituted a "question or dispute" as

provided for in article 37(1) of the ILO Constitution, and as such should be referred to the ICJ without delay. Such a decision would be an act of good faith and would provide legal certainty for the supervisory system.

60. **A Government representative of Niger** said that it was deplorable that the long-standing dispute had not been resolved through social dialogue and had been allowed to affect the operation of the ILO's supervisory system. He supported referring the dispute to the ICJ because the resulting advisory opinion would be recognized as definitive and binding by all parties. However, given the importance of the subject matter, the decision to make such a referral should be made by the International Labour Conference in 2024, irrespective of the authority granted to the Governing Body in 1949. All constituents should agree to implement the ICJ's opinion with mutual respect. He commended the support provided to constituents by the Office of the Legal Adviser in preparing for the current discussion. In light of the differing approaches to the application of article 37(1) of the ILO Constitution, he requested the Director-General to prepare rules of procedure for the application of that provision and others of a similar nature. He supported the draft resolution but would prefer that paragraphs 2 and 3 were deleted prior to its adoption.

61. **A Government representative of Nigeria** said that embarking on a strike without following agreed procedures and without recourse to dispute resolution had a negative impact on the economy and the enterprises concerned. In his country, questions of legislative interpretation and ambiguity were referred to an independent body. Thus, the provision contained in article 37 of the ILO Constitution to refer the dispute to the ICJ could serve to resolve the current dispute. It was time for the Governing Body to decide which ILO governance body should make the decision for such a referral, and to adopt an updated version of the draft resolution originally presented in 2014.

62. **A Government representative of Pakistan** stressed the importance of tripartism and dialogue within the ILO. He asked whether an international norm recognized by one legal instrument, such as the right to strike within the International Covenant on Social, Economic and Cultural Rights, should be recognized by others without further consideration. As a human rights standard, the right to strike should be considered as a labour standard. In terms of implementation and supervision, he said that the supervisory system guided the implementation of such standards, but that the stipulations made by supervisory bodies were advisory, and they were unable to create new obligations. He expressed the hope that the current dispute could be resolved through negotiation and dialogue.

63. **A Government representative of the Russian Federation** said that the use of external measures to resolve internal differences should only be considered as a last resort, and that internal social dialogue mechanisms had not yet been exhausted in the current case. The dispute had not been considered by the International Labour Conference, and as such a majority of Member States had been unable to participate in discussions on the matter. While he recognized that the Governing Body had been authorized to request advisory opinions of the ICJ, it was also true that the membership and decision-making procedures of the ILO had evolved significantly and as such the 1949 resolution did not automatically provide grounds for such action. Moreover, no time frame had been set for dialogue, and the dispute had gone beyond interpretation to encompass institutional aspects of the functioning of the ILO. Finally, he did not agree that an advisory opinion of the ICJ would provide legal certainty. Such an opinion was, by nature, advisory, and would inevitably lead to future disputes about its legal nature. He therefore did not support the proposal to refer the dispute to the ICJ and he did not support the amendments to the draft decision proposed by the Government representative of Colombia on behalf of a cross-regional group of countries.

64. **A Government representative of Sudan** noted the request of the Workers' group to seek an advisory opinion from the ICJ on the interpretation of Convention No. 87 and the right to strike. He said that a referral to the ICJ should only be made when all other mechanisms had been exhausted, including a discussion at the International Labour Conference in which all Member States could participate. He expressed the hope that such a discussion would provide legal clarity and certainty and protect the principle of social dialogue. He proposed that the Governing Body should set a time frame for those discussions so that further steps could be taken if necessary.

65. **A Government representative of the United States of America** said that the right to strike was protected by Convention No. 87. That said, given the long-standing disagreement with respect to that interpretation, and the damaging impact of that dispute on the integrity of the ILO supervisory system, her Government was open to referring the matter to the ICJ. However, it was not necessary or appropriate to refer the question of whether the Committee of Experts was competent to determine the scope and derivation of the right to strike. Her Government fully supported the work of the Committee of Experts as a key part of the supervisory system, especially its work to provide non-binding observations and recommendations addressing the protection, scope and parameters of the right to strike. She expressed the hope that the current discussion would lead to a clear plan to resolve the dispute.

66. **The Worker Vice-Chairperson** said that she welcomed the information provided by Member States and noted the widespread commitment to finding a solution to the ongoing dispute.

67. **The Employer Vice-Chairperson** said that using the Committee of the Whole format had led to rich discussion, despite prior opposition to it. She noted that no Government had denied that the right to strike was a fundamental right and reiterated that the central issue was whether a Convention, which had explicitly excluded the right to strike, could be used as a basis for extensive interpretation of that right by one of the supervisory bodies – the Committee of Experts – and not the others. The issue was one of democratic legitimacy. Since adopting the 1949 resolution, the membership of the ILO had grown from 61 to 187 Members. Thus, in the opinion of her group, the 1949 resolution was not a democratically legitimate basis for action.

68. **The Director-General** said that disagreement between constituents and the Office was an expected part of the democratic process. However, using such disagreement as a basis for unfounded allegations of bias, partiality and even collusion by the Office was inexcusable; particularly in the light of the work done by the Office to prepare for the current discussions. He expressed the hope that those allegations would be withdrawn.

Governing Body

69. The Governing Body had before it a subamendment to the amendment to the draft resolution that had been proposed by the Government of Colombia on behalf of a group of 44 countries. The subamendment had been proposed by the Employers' group and circulated by the Office and read:

> Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to adopt the following resolution:
>
> The Governing Body,

Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87, and whether the Committee of Experts has exceeded its authority in providing non-binding opinions and recommendations on the right to strike.

~~Noting that ILO supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,~~

Noting that the issue under consideration is about the scope of C. 87 and the opinions expressed by the CEACR on the right to strike,

Seriously concerned about the implications that this dispute has on the functioning of the ILO and the credibility of its system of standards,

Affirming the necessity of resolving the dispute consistent with the Constitution of the ILO,

Recalling that under article 37, paragraph 1, of the ILO Constitution, "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice",

Recalling the consensual decision of the 320th Governing Body in March 2014, welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> "The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions".

~~Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,~~

Acknowledging the role of the International Labour Conference as the supreme body of the ILO composed of tripartite delegations of its Member States, that has the authority to adopt international labour standards and provide guidance on the world of work.

Emphasising that Article 37.1 of the Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to

participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court, if a referral were to be decided.

The Governing Body requests the Office to place an item at the 112th session of the International Labour Conference (2024), to discuss and decide about options to provide legal certainty, including through:

(A) appropriate measures to be taken by the International Labour Conference

(B) a referral to the International Court of Justice for an advisory opinion on the interpretation of Convention No. 87 in relation to the right to strike and if so required, decide on necessary follow-up actions after receiving the advisory opinion.

~~Decides, in accordance with article 37, paragraph 1, of the Constitution of the International Labour Organization,~~

~~1. To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:~~

~~Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?~~

~~2. Instructs the Director-General to:~~

~~(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with article 65, paragraph 2, of the Statute of the Court;~~

~~(b) respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;~~

~~(c) respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;~~

~~(d) inform the United Nations Economic and Social Council of this request, as required under article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.~~

70. **The Chairperson**, as required by article 4.3 of the Standing Orders and as reflected in the arrangements for the special session adopted by the Governing Body at its 349th Session, provided the following oral report on the exchange of views in the Committee of the Whole:

Pursuant to article 4.3. of the Governing Body's Standing Orders, and as reflected in the special arrangements adopted for this special session, I have the honour to report to the Governing Body on the exchange of views that took place this morning.

The Committee of the Whole offered the opportunity for a rich exchange of views that involved a total of 35 speakers, including 12 governments not represented in the Governing Body. A number of participants welcomed the Committee of the Whole format to ensure transparency and inclusiveness, which are crucial on a matter of great institutional significance.

On the principal question of whether or not the Organization should seek an urgent advisory opinion from the International Court of Justice (ICJ) under article 37(1) of the Constitution, the Employers' and Workers' groups reaffirmed their respective positions.

The Workers' group recalled that the dispute concerned a fundamental principle and right at work, and that the right to strike was an essential means – and in certain cases the only means – through which workers' organizations could defend their interests. The ILO was a fortress for the workers of the world, and the prolonged legal uncertainty was detrimental to the workers. To date, there was no other option but to refer the dispute to the ICJ. There was no realistic chance of resolving the dispute through social dialogue because the Employers' group did not recognize that the right to strike was included under Convention No. 87, nor the corresponding

authoritative legal guidance of the supervisory bodies. Settling the legal question of the scope of Convention No. 87 regarding the right to strike and affirming the authoritative guidance of the Organization's supervisory organs should be prioritized through the applicable constitutional means, namely article 37(1) of the Constitution.

With respect to the two proposed questions to be put to the Court, the Workers' group explained that the intention was to cover all aspects of the interpretation dispute. Yet, the group considered that the single question proposed by some governments on the right to strike would suffice to resolve the dispute, on the understanding that the ICJ would be provided with all relevant documentation. And finally, the 1949 delegation of authority was still valid, and thus the Governing Body had the authority to refer the dispute to the ICJ for decision. The group would accept any ICJ determination as final and authoritative.

The Employers' group reiterated its strong opposition to a referral of the dispute to the ICJ. There was no dispute of interpretation of Convention No. 87 since that Convention did not address the right to strike. The broad, detailed and extensive so-called "interpretations" of the Committee of Experts on the right to strike were the real issue at stake, as well as the fact that the Committee of Experts had filled a regulatory gap, a function that belonged only to the Conference. A referral to the Court would set a bad precedent as it would be a public admission by the ILO that it cannot resolve disputes internally.

The Employers' group reiterated the view that advisory opinions of the ICJ were inherently not binding and that they would not accept any advisory opinion of the ICJ, irrespective of its content. They would continue to disagree with the detailed and excessive views of the Committee of Experts and to refuse to discuss matters related to the right to strike in the context of the Conference Committee on the Application of Standards. The Employers' group further noted that the proposed questions were not sufficient and should include also the role of the Conference. The Conference should discuss and adopt international rules concerning the right to strike as it was the competent forum to find a solution. The right to strike was a multifaceted issue that required thorough discussion by the tripartite actors in the world of work. Standard-setting action by the Conference was the only way forward.

A wide majority of governments reaffirmed the importance of freedom of association and the right to strike, with many highlighting their national laws and practice in that regard.

An important number of governments expressed clear support for a referral of the interpretation dispute to the Court, underlining that governments needed legal certainty on the scope of the obligations resulting from the ratification of Convention No. 87. While reaffirming their support for solutions based on social dialogue, they considered that such solutions had not yielded results to resolve a dispute that had been going on for too long. The current deadlock concerning a fundamental principle and right at work should come to an end. It was necessary to prevent the ongoing dispute from further undermining the ILO's credibility, especially its standard-setting and supervisory functions. These governments expressed their strong belief that the recourse to the ICJ was the avenue for achieving legal certainty. In that connection, most recalled that the advisory opinion would be binding on the ILO. They further considered that the standard-setting proposed by the Employers' group and other governments could not provide legal certainty as non-ratifying members would still face the current uncertainty arising from the dispute under Convention No. 87. Some governments highlighted that room for social dialogue would exist in following up on the ICJ's decision, as might be necessary.

With regard to the questions to be put to the ICJ, support was expressed for the first question. No government expressed support for the second question included in the Workers' group's request. One government considered that the first question, on the right to strike, did not fully capture the dispute, while the second one, on the mandate of the Committee of Experts, could not be considered a question of interpretation under article 37(1) of the ILO Constitution.

A number of governments, while recognizing that the Constitution provided for a referral to the Court in case of an interpretation dispute, did not support a referral to the Court, which they believed should be a last resort to be contemplated only after all other means had failed.

For some of those governments, standard-setting action by the Conference was the most transparent, appropriate and logical method for formulating authoritative ILO regulations concerning the right to strike. Standard-setting reflected the ILO's core principles of tripartism and social dialogue and could deliver a well-balanced, globally acceptable outcome. Should a solution through tripartite dialogue prove impossible, the route to the ICJ remained available in accordance with article 37(1) of the ILO Constitution, in the last instance.

Regardless of whether they were in favour of, or against, the referral to the ICJ, many participants took the view that the matter should preferably be debated and decided at the International Labour Conference. They indicated that while the Governing Body was duly authorized in 1949 to request advisory opinions, changes in the ILO membership made it necessary that the issue be discussed by the supreme deliberative organ for reasons of legitimacy. An equally large number of speakers, including those sponsoring the amendment, considered that the Governing Body was an appropriate forum to take such a decision.

In closing, I think nobody would be surprised if I said that there seems to exist convergence on the diagnosis but not on the cure. The exchange of views brought to the forefront the diversity and divergence of views in this matter.

The openness of the exchange of views that the Committee of the Whole format offered was welcomed and appreciated by all participants. I hope that this report has done justice to the quality of the exchange of views and to the engagement and sense of responsibility shown by all three groups.

I trust that the Governing Body plenary will now be able to take over and engage in a constructive debate on the possible way forward.

71. **The Employer Vice-Chairperson**, responding to the oral report, clarified that although her group could not accept the Office's view that advisory opinions of the ICJ were legally binding, or accept or recognize the ICJ's approval of the opinions of the Committee of Experts on the right to strike, that did not mean that it would not accept any of the ICJ's advisory opinions. Moreover, her group had not stated that standard-setting was the only viable solution, although the International Labour Conference, as the Organization's supreme body, should have the freedom to decide on the forum for deliberations and decisions.

72. There were questions surrounding the Office's impartiality. As had been noted by the Government of Switzerland, although the referral questions proposed by the Workers' group were identical to those contained in document GB.322/INS/5, the Office had refused to undertake a legal analysis of them, citing reasons of neutrality. In recent months, the Office had bypassed procedural and governance rules to assist the Workers' group in its aims, sidelining the Employers' group and disregarding the ILO's tripartite balance. For example, the Office had allowed the Workers' group to place an item on the Governing Body's agenda without first submitting it to the Screening Group, while denying a similar request made by the Employers' group. Similarly, the background documents relating to the Employers' and Workers' groups did not contain the same level of detail; while the document relating to the proposal from the Workers' group contained letters of support from governments, such letters had been excluded from the document on her group's proposals. The Office had also sidelined the governments by failing to share all relevant information with them. The Office's unfair treatment of its constituents, which owed to its political leadership rather than unprofessionalism on the part of its staff, was completely unacceptable.

73. The original draft resolution was inappropriate and biased, reflecting only the position of the Workers' group and seeking to pre-empt the Governing Body's discussions. In the past, many governments had voiced the opinion that such a serious issue should be dealt with by the International Labour Conference, rather than the Governing Body. She disagreed with the assertion in the original draft resolution that the dispute's origins lay in a disagreement among

the tripartite constituents regarding whether the right to strike was protected under Convention No. 87; rather, it had been triggered by the gradual and unsolicited development by the Committee of Experts of rules on the right to strike that had referred to that Convention, despite the Conference's intentional exclusion of the right to strike from it during the drafting and adoption process. She also strongly disagreed with the statement in the that "the Court's authoritative legal guidance [was] the only viable option" and on "the final and binding nature of any advisory opinion so obtained". Although the amendments proposed by the group of 44 countries omitted those phrases, they had been used by governments in their statements.

74. The amendments to the draft resolution proposed by the group of 44 countries also made reference to the mandate of the Committee of Experts, and she wished to highlight that the Committee had exceeded its mandate by providing extensive opinions on the right to strike that could not be considered interpretation because they went beyond the scope of Convention No. 87. Furthermore, the proposed replacement of the reference to the Committee on Freedom of Association with "ILO standards supervisory bodies" was factually incorrect since those bodies included the Committee on Freedom of Association, which did not supervise the application of standards such as Convention No. 87, and the Committee on the Application of Standards, which did not agree that the right to strike was covered by that Convention.

75. While she supported the removal of the reference to restoring legal certainty, as proposed by the group of 44 countries, she disagreed with the proposed wording "despite protracted attempts, no consensus has been reached through tripartite dialogue" since there had been no attempts to discuss the right to strike at the Conference owing to the persistent refusal by the Workers' group to place a substantive discussion on its agenda. The resolution concerning the procedure for requests to the ICJ for advisory opinions was outdated because the Organization had changed significantly since its adoption in 1949. The Conference retained the right to request advisory opinions at any time, particularly with regard to such important matters as the right to strike. Her group could therefore not support the original resolution or the amendments proposed by the group of 44 countries. Her group's subamendments reflected the majority view in the Committee of the Whole that the matter should be put to the Conference.

76. **The Worker Vice-Chairperson** recalled that the task that faced the Governing Body was to decide whether it would refer the outstanding dispute to the ICJ, recognizing the relevance of article 37 in that context. She also recalled that the Director-General had launched a strong appeal to refrain from certain language, to wide support. He had requested the Employers' group to withdraw its allegation of collusion. That had not happened; quite the contrary. It was extremely problematic to challenge the stated impartiality of the Office simply because certain constituents adhered more closely to a certain view than others.

77. The Employers' group had stated earlier that the question to be resolved was not a matter of interpretation. However, the contribution of the IOE on 24 October 2023 had proposed standard-setting in 2024 with a view to the adoption of a Protocol. The Office had accordingly prepared a report on the proposal. More importantly, the document submitted by the Employers' group had expressed the conviction that solid and sustainable dialogue should be pursued to resolve the long-standing dispute on the interpretation of the right to strike, in the context of Convention No. 87. The Employers' group had therefore started with the recognition of an interpretation dispute, going on to state that standard-setting was the most obvious means of resolving the dispute. The Employers' group had then expressed a desire for a quick resolution rather than resorting to external means. That implied an awareness of urgency.

78. The Workers' group was not expecting the ICJ to create more obligations than were intended by the text of Convention No. 87. For over 70 years, the supervisory bodies had found that the right to strike was a corollary of freedom of association, embodied in the ILO Constitution and in Convention No. 87. The Workers' group merely wished the ICJ to affirm that long-standing view without amendment. Some countries had strong concerns that if a question were asked as to whether the right to strike was protected under Convention No. 87, it would create an absolute right to strike. The Workers' group asserted that, in its view, the ICJ would never overstep the practice in the ILO itself. The ICJ was simply being requested to affirm the propriety of the action of the ILO and the supervisory bodies on the basis of Convention No. 87. The ICJ was unlikely to create an absolute right to strike or grant more power to the Committee of Experts. The mandate of the Committee of Experts was decided by the ILO itself and not by the ICJ. The amendment proposed by the group of 44 countries referred to it solely to clarify that the mandate had been agreed to by all and underpinned current work in the supervisory system.

79. The Employers' group continued to refer to the fact that the right to strike had not been included in, or had been explicitly excluded from, the preparatory work prior to the adoption of Convention No. 87. According to that logic, the preparatory work of any legal text could be used to clarify and find evidence of the intent of its drafters. Nonetheless, the Vienna Convention on the Law of Treaties stated, and the ICJ had recently affirmed, that the history of a legal text only became relevant for the purposes of interpretation if the ordinary meaning of the provision in its context and in light of its object and purpose led to absurd results. The ICJ had also used the preparatory work as a secondary source to confirm its interpretation of a text where needed. The negotiating history of Convention No. 87 showed that the preparatory work was not conclusive. It could not help to resolve the dispute because it provided no evidence of whether the delegates to the Conference had expressly intended to exclude the right to strike from Convention No. 87. In contrast, the questionnaires administered by the Office had indicated that several governments, certainly not the majority, had preferred that Convention No. 87 only relate to freedom of association and not to the right to strike. The delegates to the Conference who had raised an issue in that regard were only concerned by the possible exercise of a right to strike in the public sector and not with a right to strike of workers in general. The Conference had finally decided to adopt general principles regarding freedom of association without any further detail. Accordingly, since the preparatory work did not show that the delegates to the Conference had intended to exclude the right to strike from Convention No. 87, it was not considered dispositive. Therefore, according to the Vienna Convention it was important primarily to consider the subsequent practice in the ILO and its Member States, as foreseen by the Vienna Convention. The subsequent practice in the ILO was the work of the supervisory bodies. Moreover, at the time of adopting Convention No. 87, the Constitution of the ILO and the Declaration of Philadelphia had already enshrined freedom of association. Furthermore, according to the Committee on Freedom of Association, whose mandate was based on the Constitution of the ILO, the right to strike was protected under the constitutional principle of freedom of association as well as under Convention No. 87. The jurisprudence contained in the *Compilation of decisions of the Committee on Freedom of Association* should be consulted.

80. The Worker Vice-Chairperson expressed concern that the issue of democratization or the level of democracy of the Governing Body was seeping into other debates, including that of the legal mandate to refer disputes to the ICJ. The Workers' group was strongly committed to democracy in general and to democratization as a process in the ILO. All other avenues having been exhausted, the time had come to refer the dispute to the ICJ. Tripartite debates should be engaged after a decision by the ICJ. As its social partner, the Workers' group was the

counterpart of the Employers' group for further dialogue, if that were desired, and consensus-seeking. There had been extensive debate on the issue, without resolution. Further debate was pointless.

81. The Employers' group had stated during the sitting of the Committee of the Whole that it would not respect the decision of the ICJ – which was an outrageous statement contrary to the principle of the rule of law – but it had fortunately later qualified its position. The Workers' group disagreed with all the amendments tabled by the Employers' group.

82. **Speaking on behalf of a majority of Asia and Pacific group (ASPAG) countries**, a Government representative of the Islamic Republic of Iran urged the Office and Governing Body to consider the fact that the States most affected by the potential consequences of any decision on the right to strike were not Governing Body members; her group would therefore prefer such a decision to be made by the Conference, and any outcome from the current meeting should be submitted for further consideration by the Governing Body before submission to the Conference for a final decision.

83. Tripartite consensus built on social dialogue should, nevertheless, remain the first port of call for resolving disputes linked to the world of work. Moreover, internal solutions, which were the only way to ensure that all ILO constituents engaged actively in the process, should be prioritized and exhausted before referrals were made to the ICJ. Internal ILO processes and tripartism must therefore be strengthened. Her group proposed that tripartite meetings should be convened urgently to reach a fair solution that addressed the request of the Workers' group as well as the concerns of the Employers' group and the Governments. A voluntary Protocol to Convention No. 87 could be developed to ensure that States that had adopted the Convention in 1948 were not obliged to accept new interpretations. Her group would not accept any amendments or decisions that were inconsistent with its position.

84. **Speaking on behalf of Argentina, Brazil, Chile and Colombia**, a Government representative of Chile expressed surprise that more than 100 years since its founding, the ILO continued to discuss whether the right to strike was covered by its normative framework. That right was inextricably linked to freedom of association, a universal right that protected both employers and workers. Although social dialogue should be used to resolve disputes linked to the interpretation of labour standards, the tripartite constituents had the right to make use of all available mechanisms to seek a solution when the limits of such dialogue were reached, including referrals to the ICJ. He supported such a step in the interests of gaining vital legal certainty on the right to strike. The Office had always acted professionally and impartially and in line with the Standing Orders of the Governing Body.

85. **Speaking on behalf of a group consisting of the Arab group countries, a majority of ASPAG countries, 17 African countries and 3 European countries**, a Government representative of Sudan said that tripartite dialogue within the ILO remained the best means of resolving the dispute. While referral to the ICJ was a constitutional right after all internal processes and tripartite dialogue had been exhausted, legal certainty should be reached through an inclusive process. Since it was necessary for all Member States to participate in discussions and in the decision-making process with regard to the proposed referral, that decision must be approved by the Conference. Moreover, the resolution that allowed for such referrals to be made by the Governing Body had been adopted in 1949, when there were significantly fewer Member States, and did not negate the Conference's right to adopt such decisions. Discussions of the issue should therefore continue at the Governing Body's next session, and the Office should convene tripartite meetings on the subject in the meantime. His group did not support the draft decision.

86. **Speaking on behalf of the EU and its Member States**, a Government representative of Spain expressed full support for the Office's exhaustive work to prepare for the discussions. The amendments proposed by the group of 44 countries were the way to garner the broadest possible support. The referral to the ICJ might result in confirmation that the right to strike was covered by Convention No. 87, in accordance with the interpretation of the ILO supervisory bodies. The involvement of the International Labour Conference in the referral decision risked prolonging an already long-standing dispute without providing new solutions, and he did not support, therefore, the subamendments proposed by the Employers' group.

87. **A Government representative of Argentina**, noting that the matter at hand was long standing and affected the functioning of the ILO supervisory bodies, supported the request of the Workers' group for an advisory opinion from the ICJ. That step was permitted under the ILO Constitution, which took precedence over all other normative or procedural provisions. Although there was no doubt that such an important right as the right to strike was covered in Convention No. 87, legal certainty on the matter was required to better uphold collective rights. He welcomed the recognition by the Workers' group that it was no longer necessary to address the second of its questions, and he supported the draft decision.

88. **A Government representative of Barbados** said that, until there was a change in the Constitution or the rules governing the Governing Body, the rules remained in place, including that of delegated authority. There was an inescapable inequality of power between employers and workers. The weaker party's right to associate would be essentially meaningless if that right did not also include the right to use the available tools to be seen, heard and respectfully engaged. Whether or not the Convention as it stood, and as many Member States had assumed, included the right to strike was a matter on which the ILO should provide guidance to its Member States.

89. The representative expressed concern about the credibility of the ILO's supervisory system. The ILO and its Member States should clearly understand the tenor of the ILO Conventions. The ILO had endeavoured in vain to resolve the dispute for many years. It therefore had to have recourse to the methods envisaged in its Constitution, unless the dispute resolution envisaged had clearly proven to be unreasonable, unreliable or unjust. Barbados did not believe that to be the case. It believed that the matter should be referred to the ICJ and supported the draft decision proposed by the group of 44 countries.

90. **A Government representative of Brazil** expressed his understanding that there was no doubt under article 37 of the ILO Constitution as to the legality of referring the dispute to the ICJ. The opposing views of the Workers' and Employers' groups appeared to be entrenched. However, obtaining legal certainty and clarity on the scope of Convention No. 87 was urgent. The draft resolution in the Office document focused on two crucial questions: the interpretation of Convention No. 87 and the mandate of the Committee of Experts. The referral to the ICJ was a last resort to guarantee legal certainty to all tripartite constituents and was consistent with the ILO's Constitution. Social dialogue, which Brazil favoured, had failed after 11 years. The essence of Convention No. 87 was closely related to democracy in the workplace establishing a balance of power between workers and employers. By not taking a decision on the right to strike, constituents had been perpetuating violations of that fundamental principle. The right to strike was interlinked with the right to freedom of association and collective bargaining, undeniable values that protected both workers and employers and ensured normative and social stability to governments. Brazil endorsed the amended resolution presented by Colombia on behalf of the group of 44 countries and strongly supported the mandate of the special session of the Governing Body.

91. **A Government representative of Colombia** said that the right to strike was intrinsic to freedom of association, the right to organize and collective bargaining – a principle upheld by the courts and legislation in democratic societies. It was an enabling right, to be used when there were no other options. In his country, various aspects governing strikes took into account the recommendations of the ILO. Governments therefore required legal certainty with regard to their obligations under Convention No. 87. The Committee of Experts was independent, impartial and objective and had to interpret standards as part of its supervisory duties. Questioning the mandate or findings of the Committee of Experts would undermine the credibility of the ILO and create a lack of legal certainty, in turn reducing its persuasive effect over States for the effective application of international labour standards. As various means to resolve the dispute had been attempted over several decades, the ILO must now have recourse to the procedure under article 37(1) of the ILO Constitution and request the ICJ to urgently issue an advisory opinion on whether the right to strike was protected under Convention No. 87. He had therefore submitted an amendment on behalf of a group of 44 countries with a resolution to that effect, and did not support the subamendment proposed by the Employers' group.

92. **A Government representative of Ecuador** said that, prior to referring the dispute to the ICJ if the Governing Body democratically decided to do so, all efforts to resolve it within the ILO through social dialogue must first be exhausted. Another option would be to establish a temporary quasi-judicial body to supervise the application of the provisions of Convention No. 87. Ecuador could also support the adoption of a Protocol for Member States to ratify. That would allow for more flexibility concerning Convention No. 87 or broaden its obligations.

93. **A Government representative of Gabon** said that her country supported the referral to the ICJ in order to obtain a definitive ruling on the long-running dispute. However, given the particular nature of such a procedure and the potential consequences for countries' legislation, a referral should be made only following a consideration of the matter at the next session of the International Labour Conference so as to secure a specific mandate from all constituents. She therefore supported a referral to the ICJ if the Conference, not the Governing Body, so decided.

94. **A Government representative of India** said that the fundamental disagreement had global implications and far-reaching consequences. As such, it would be neither equitable nor fair for the Governing Body to take the decision on a referral to the ICJ. The discussion should be widened to allow all Members of the ILO to participate, at the International Labour Conference. She therefore supported the statement made by the Government representative of Sudan on behalf of a group of countries.

95. **A Government representative of Japan** said that tripartite discussions should be exhausted before any referral to the ICJ. The ICJ should be a last resort, as a referral would set a precedent. Nevertheless, the dispute had been exhaustively discussed, as demonstrated by the statement of the Workers' group and in the amended draft decision introduced by Colombia on behalf of a group of countries. The right to strike was not an absolute right, as it was restricted for certain categories of workers and certain situations. Moreover, no provisions concerning the right to strike had been included in Convention No. 87 when it was adopted, and even after 158 Member States had ratified the Convention, there was still no consistent agreement among them on the scope of the right to strike. He sought clarification from the Office on whether the discussion was proceeding on the principle, outlined in the Government group statement at the 2015 tripartite meeting on Convention No. 87 in relation to the right to strike, that the right to strike was not absolute and that the scope and conditions of the right were regulated at the national level.

96. **A Government representative of Malaysia** supported an internal solution to resolving the dispute, with a referral to the ICJ only as a last resort. She urged the Office to establish an internal independent tribunal to provide for the expeditious determination of the dispute. The uncertainty had led to difficulties for constituents in regulating strikes. If the dispute continued, it could affect the supervisory system and the credibility of the ILO as a body that set international labour standards, as well as efficacy in the application of international standards.

97. **A Government representative of Mexico** emphasized the importance of implementing article 37(1) of the ILO Constitution, because it would provide legal certainty with regard to a long-standing controversy. An advisory opinion would strengthen international law, human rights, tripartism and social dialogue by providing a sound basis for the implementation of Convention No. 87, benefiting the rights of workers. The Governing Body was authorized to refer the dispute to the ICJ through the 1949 resolution, therefore it was unnecessary to channel the referral through the Conference. Mexico supported the amendment proposed by the group of 44 countries, without the subamendment proposed by the Employers' group.

98. **A Government representative of Namibia** said that the dispute over the interpretation of Convention No. 87 with respect to the right to strike had undermined the Organization's normative mandate and the credibility of its supervisory system. As the issue was legal, rather than political, it was appropriate to invoke article 37(1) of the ILO Constitution for a legal settlement. He therefore supported the amendment proposed by the group of 44 countries, but rejected the subamendment proposed by the Employers' group.

99. **A Government representative of Niger** supported a referral to the ICJ, while highlighting the importance of ensuring the participation of all parties concerned, in particular, States that had ratified Convention No. 87. He sought clarification on the potential consequences in the event that an advisory opinion recognized that the right to strike was protected by Convention No. 87 on States that had ratified the Convention but did not recognize the right to strike and, conversely, the potential consequences for States that had ratified the Convention and recognized the right to strike if the ICJ considered that the right was not protected under Convention No. 87.

100. **A Government representative of Nigeria** acknowledged the advantages of further dialogue, but stressed the need to resolve the current uncertainty by finding a way forward. He therefore suggested holding consultations with a view to continuing the discussion at the 350th Session (March 2024) of the Governing Body and the 112th Session (June 2024) of the International Labour Conference. His Government could be flexible on the modalities, as long as an agreement could be reached on how to resolve the issue. He requested more information on whether the Conference had the mandate to decide on a referral to the ICJ, and guidance on the potential intended and unintended consequences of the proposed resolution.

101. **A Government representative of the Russian Federation** said that, given the clear division within the Governing Body on the matter, continued social dialogue was the only way forward. He therefore did not support any decision on a referral to the ICJ that was not supported by at least a substantial proportion of participants, and agreed with the statements made on behalf of members of ASPAG, ASEAN and the group of countries represented by Sudan.

102. **A Government representative of the United Kingdom of Great Britain and Northern Ireland** agreed on the importance of social dialogue. However, in exceptional cases where repeated attempts at tripartite dialogue had proven unsuccessful for a long period of time, alternatives should be considered to move forward as an Organization. He therefore reiterated

his Government's support for the amendment proposed by the group of 44 countries, namely to pursue a referral to the ICJ under article 37(1) of the ILO Constitution.

103. **The Director-General**, replying to the question from the Government representative of Niger, said that it was not possible to speculate on the content or implications of any advisory opinion from the ICJ. As to the comments made by the Employers' group on what it viewed as a lack of impartiality by the Office, he said that the Office would provide a written and detailed response to all members of the Governing Body.

104. **A representative of the Director-General** (Director, International Labour Standards Department), responding to the question from the Government representative of Japan, confirmed that the Committee of Experts had always stated that the right to strike was not an absolute right.

105. **Another representative of the Director-General** (Legal Adviser), in response to the queries from the Government representative of Nigeria, explained that there were two concurrent legal bases, or "titles of jurisdiction", for seeking advisory opinions from the ICJ. The first was article 37(1) of the ILO Constitution – originally Article 423 of the Treaty of Versailles – which made provision for the Organization to seek advisory opinions from the ICJ regarding the interpretation of the Constitution or of international labour Conventions. The second was Article IX(2) of the 1946 Agreement between the United Nations and the International Labour Organization (also known as the UN–ILO relationship agreement), which provided that the UN General Assembly authorized the Organization to request advisory opinions of the ICJ on legal questions arising within the scope of its activities. Paragraph 3 of the same article provided that such requests could be addressed either by the International Labour Conference or by the Governing Body acting in pursuance of an authorization by the Conference. That authorization had been granted three years later, in 1949. The Conference and the Governing Body had, therefore, a standing authorization by the UN General Assembly, under article 96 of the UN Charter, to seek advisory opinions from the ICJ.

106. As to the implications of the amendment and subamendment, he said that the amendment proposed by the group of 44 countries, if adopted, would imply an immediate referral of the legal question or questions to the ICJ for an urgent advisory opinion. The subamendment proposed by the Employers' group, however, sought to place an item on the agenda of the 112th Session of the Conference (June 2024). Unless a decision to place an item on the Conference agenda achieved consensus, paragraph 5.1.1 of the Standing Orders required that a second discussion be held at the subsequent session of the Governing Body.

107. Concerning the query from the Government representative of Niger, he echoed the Director-General's view that it was not possible to speculate on the impact or legal ramifications of a future advisory opinion, especially when the Governing Body had not finalized the question or questions to be put to the ICJ. Once an advisory opinion had been issued, it would need to be analysed and to be brought before the Governing Body, which would be the requesting organ – or to the Conference – for debate and decision on possible next steps. The ICJ had clarified on numerous occasions that its role was to render legal assistance to the requesting organ, and that it was for each requesting organ to decide on the actions to be taken subsequently.

108. **The Worker Vice-Chairperson** said that the decision to request a referral to the ICJ had not been taken lightly. Indeed, a great deal of work had been done since the Employers' group had first started to challenge the interpretation of Convention No. 87 in 2012, including the development of the work plan on the strengthening of the supervisory system. Some Governments had expressed concerns regarding the impact of making such a referral to the

ICJ, but consideration should also be given to the enormous harm the ongoing dispute was causing to the exercise of a fundamental right by workers, and the insecurity that that generated in terms of union protection. In addition, the supervisory bodies had faced huge restrictions in giving guidance on that fundamental right. Since an agreement could not be reached, it was only natural to go to the ICJ. Nothing in the Constitution suggested that all other avenues must be exhausted before a referral to the ICJ; in any case, the issue had been under discussion for many years already. It was time for the Governing Body to take a decision, although that would not preclude any further discussions, as the democratic approach of the Organization could always be improved. She therefore requested that the amendment of the group of 44 countries containing a draft resolution be put to a vote.

109. **Speaking on behalf of the Arab group**, a Government representative of Morocco noted the explanation that the Conference, as well as the Governing Body, could decide to refer a matter to the ICJ. The Conference was a more inclusive forum than the Governing Body, so it made sense to submit such a fundamental issue there first; to refuse to take the issue to the Conference went against the image of the ILO as a place of dialogue.

110. The group therefore proposed a subamendment, to add at the beginning of the first operative paragraph of the resolution, the wording "to submit to the 112th Session of the International Labour Conference, for consideration, in accordance with article 37, paragraph 1, of the Constitution of the ILO, the question of whether", which would then continue "to request the International Court of Justice…"; and to subamend the chapeau of the second operative paragraph to read "According to the result obtained at the International Labour Conference, instructs the Director-General, if it is so decided, to:". The group was not calling into question the ILO Constitution or any other established legal basis for its governance, but merely seeking a way to move closer to consensus. In that context, he asked the Office what conditions would need to be fulfilled to place the item on the agenda of the Conference.

111. **The Worker Vice-Chairperson** asked whether subamendments could still be proposed, given that she had called for a vote.

112. **A representative of the Director-General** (Legal Adviser) clarified that requests for a vote were noted by the Chairperson, but, as per established practice, did not require an immediate decision. While it was the Chairperson's prerogative under the Standing Orders to determine if and when to put a question to a vote, the usual ILO practice was for the Chairperson to continue seeking convergence where possible, which might involve the submission of further subamendments, as in the current case.

113. **The Employer Vice-Chairperson** also noted that, as the Legal Adviser had made clear, the authorization granted to the Governing Body to request advisory opinions of the ICJ in 1949 did not take away the power of the Conference to do the same. The reason for the long-standing dispute was the consistent refusal of the Workers' group to discuss the matter at the Conference, even though it had been the intention of the drafters of Convention No. 87 to have a separate standard to regulate the right to strike, and proposals had been made throughout the years to hold a standard-setting exercise. Everyone recognized the value of the principle of freedom of association, and the Employers' group and the Workers' group had issued a joint statement in 2015 stating that the right to strike was a legitimate instrument to defend the interests of workers. The Employers' group had not sought a referral to the ICJ as it believed the matter should be settled in a standard-setting exercise through social dialogue at the Conference, which would allow all constituents to express their views. If the subamendment proposed by the Arab group would achieve consensus, the Employers' group

could support it. She urged other Governing Body members to support it in order to avoid further division and to prevent further harm to the work of the Organization.

114. **Speaking on behalf of a majority of ASPAG countries**, a Government representative of the Islamic Republic of Iran expressed support for the subamendment proposed by the Arab group and the call for a vote.

115. **The Worker Vice-Chairperson** said that the proposed subamendment appeared to suggest that all the work leading up to the special session had not been sufficient. Having an open discussion on the matter at the Conference would not produce a clear outcome. The dispute concerned a fundamental issue eroding the protection of a fundamental workers' right. The Governing Body had the responsibility and the mandate to decide to refer the matter to the ICJ. She therefore urged the Chairperson to call a vote.

116. **Speaking on behalf of the Arab group**, the Government representative of Morocco clarified that the subamendment that he had proposed simply requested that the decision be taken in the most inclusive way possible. He asked why the Governing Body was against an inclusive approach. Referring the decision to the Conference for approval would send a positive message to the outside world that the decision had been taken by a majority.

117. **The Worker Vice-Chairperson** said that the notion of inclusivity was highly complex. The ILO was a tripartite Organization, and the voices of workers and employers of all Member States were represented on the Governing Body by the spokespersons. While Governments wanted to participate in the discussion, the format of the Committee of the Whole was not necessarily more inclusive for workers. No consideration was being given to the serious concerns that the Workers' group had been voicing for the past 11 years.

118. Article 37(1) of the ILO Constitution obliged all bodies – whether the Governing Body or the Conference – to refer interpretation disputes to the ICJ. There would be no added value in asking the same question to the Conference. While the Workers' group was committed to discussing measures to improve inclusivity, it was not a good reason to further delay a decision by deferring the discussion to the Conference. She would therefore not support the subamendment proposed by the Arab group.

119. **The Employer Vice-Chairperson** said that the International Labour Conference was the only place where all governments, employers and workers were present and had a vote. Although the Committee of the Whole had been useful, only additional governments could speak, not additional representatives of the social partners; it could therefore not replace the Conference. She did not understand the Workers' group's objection to having the item discussed in the most representative forum.

120. There were now two proposals on the table to place an item on the agenda of the Conference, and, according to paragraph 5.1.1 of the Standing Orders of the Governing Body, when a proposal to place an item on the agenda of the Conference was discussed for the first time by the Governing Body, it could not, without the unanimous consent of the members present, take a decision until the following session. Therefore, if there was a divergence of views, there would need to be a further discussion at the next session of the Governing Body.

121. **A Government representative of India** first asked for clarification from the Legal Adviser as to whether the authorization from the Conference for the Governing Body to refer legal questions to the ICJ was an overarching approval for all cases and for all time, with no scope for any constitutional exceptions. Second, she noted that the jurisprudence suggested that when an issue impacted the principal organ, decisions taken in its absence by any body to which it delegated power might not be entirely valid or even ethical. The Governing Body could

not presume that ILO Members would not want to be part of the wider, more inclusive decision-making at the Conference. Moreover, if discussions at two sessions of the Governing Body were required before an item could be placed on the agenda of the Conference, she asked whether the discussion held at the March 2023 session of the Governing Body on a procedural framework for referral of interpretation disputes to the ICJ under article 37(1) of the Constitution would count as the first discussion. She supported the subamendment proposed by the Arab group.

122. **A representative of the Director-General** (Legal Adviser) said that Article IX of the UN–ILO relationship agreement of 1946 was very clear: the UN General Assembly authorized the ILO to request advisory opinions of the ICJ on legal questions arising within the scope of its activities and that such requests could be addressed to the ICJ by either the International Labour Conference or by the Governing Body acting in pursuance of an authorization by the Conference. There was no other qualification, so both bodies had explicit authorization and could validly refer interpretation disputes or questions to the ICJ. As to whether it could be presumed that the tripartite delegates at the annual session of the Conference would like to be part of the decision-making process, that was not a legal question and he should therefore refrain from expressing any view.

123. He confirmed that, according to paragraph 5.1.1 of the Standing Orders of the Governing Body, when a proposal to place an item on the agenda of the Conference was discussed for the first time by the Governing Body, the Governing Body could not, without the unanimous consent of the members present, take a decision until the following session. The discussion by the Governing Body at its 347th Session (March 2023) on the procedural framework set out in Appendix I to document GB.347/INS/5 for the referral of interpretation questions or disputes to the ICJ – which proposed non-binding guidelines for future use – did not address at all the possibility of referring to the ICJ the concrete dispute around the interpretation of Convention No. 87 in relation to the right to strike and could thus not qualify as the first discussion of the proposal to place an item on that matter on the agenda of the Conference.

124. Referring to the subamendment proposed by the Arab group, he observed that it was inaccurate to say that the Governing Body could decide, in accordance with article 37(1) of the Constitution, to submit a question for consideration by the Conference. That article related to the referral of questions for decision by the ICJ. As he understood it, the intention of the subamendment was to place an item on the agenda of the Conference and he therefore suggested that the text be redrafted accordingly.

125. **The Worker Vice-Chairperson** said that, since her group had first written to the Director-General in July 2023 invoking article 37(1), all Member States had been informed of the situation and invited to comment on the Office background report, in what could only be described as an inclusive process. The Committee of the Whole had been organized so that any Member State that wished to participate could do so. However, the whole of the ILO's constituency did not need to be involved in all the complexities of the Governing Body's work. Acknowledging that the Chairperson could continue to seek convergence following a request for a vote, she said that the continued discussions on the subamendment proposed by the Employers' group – which her group could not accept – were not leading to convergence.

126. **Speaking on behalf of the Arab group**, a Government representative of Morocco proposed that the subamendment put forward by his group could be edited to take into account the comments made by the Legal Adviser.

127. **A representative of the Director-General** (Legal Adviser) suggested that, for the sake of accuracy, the words "in accordance with article 37, paragraph 1, of the Constitution of the ILO" should be placed after the word "request".

128. **A Government representative of Namibia** noted that, according to paragraph 5.7.3 of the Standing Orders of the Governing Body, the Chairperson had the right to determine the order in which amendments would be discussed and decided upon. Taking a vote on the subamendment proposed by the group of 44 countries would be the most efficient way to proceed. It was important to avoid undemocratic manoeuvres that did not respect the procedures of the Governing Body. The cost for governments of sending delegations to meetings at which the substance of a matter was not discussed should be taken into consideration.

129. **A Government representative of Brazil** said that, although a decision by the Conference would no doubt be more democratic, the decision was on the agenda of the Governing Body and needed to be taken by the Governing Body. Given the high cost of his participation in the sessions of the Governing Body for his Government, he could not return to his country without a decision having been made. The matter should be put to a vote.

130. **The Employer Vice-Chairperson** said that the process to date had been far from inclusive; the Workers' group had written to the Director-General on the matter in July – when many people had been on holiday – giving her group and the Governments very little time to consult and take decisions. She recalled that taking a vote should be a mechanism of last resort. Indeed, taking a vote on such an important substantive matter would undermine the house. It would also not be a mechanism of last resort, because social dialogue on the matter had never taken place, as the Workers' group had refused to allow an item to be put on the agenda of the Conference to discuss the substance of the right to strike. It was precisely in the interest of social dialogue that the Employers' group now wanted to refer the matter to the Conference. She was opposed to the principle of voting on the matter and requested the Chairperson to continue working towards a convergence of views, even if that was not achieved until the 350th Session (March 2024) of the Governing Body.

131. **Speaking on behalf of a majority of ASPAG countries**, a Government representative of the Islamic Republic of Iran said that many Governments had not yet finalized their internal tripartite consultations on the matter. The Governing Body should refer the matter to the Conference for a final, inclusive, decision.

132. **Speaking on behalf of the group of 44 countries**, a Government representative of Colombia said, with reference to the subamendment proposed by the Arab group, that it would be a waste of time to include the item on the Conference agenda, as the only possible outcome would be for the Conference to refer the matter to the ICJ. He was not opposed to inclusivity or democratization. There had been enough discussion to take the decision under consideration and the Governing Body should not continue going around in circles. He therefore called for a vote.

133. **A Government representative of Bangladesh** said that, as the outcome of the dispute on interpretation would be applicable to all countries, an inclusive approach of taking the matter to the Conference would be preferable.

134. **A Government representative of China**, emphasizing that the principle of tripartism should be upheld, expressed support for the subamendment proposed by the Arab group, which was constructive, practical, impartial and inclusive, and likely to be the most acceptable solution.

135. **The Chairperson** observed that the Governing Body had before it one amendment and two subamendments and that, following lengthy discussions and unfruitful attempts to seek convergence or flexibility, the Workers' group and a number of Governments had called for a vote. Under the circumstances, taking a decision by vote appeared inevitable.

136. **The Clerk of the Governing Body** reiterated that, according to paragraph 5.7.3 of the Standing Orders, it was for the Chairperson to determine the order in which the amendments and subamendments should be discussed and decided upon. He suggested that the Governing Body could first decide on the subamendment proposed by the Employers' group. If that was not accepted, it could then decide on the subamendment proposed by the Arab group. If that was not accepted, it could then decide on the original amendment.

137. **The Chairperson** called a vote by show of hands on the subamendment proposed by the Employers' group.

138. **The Clerk of the Governing Body** explained the voting procedure, noting that no regular Government members were disqualified from voting by reason of arrears in the payment of contributions.

(The subamendment proposed by the Employers' group was rejected, with 14 votes in favour, 29 votes against and 10 abstentions.)

139. **The Clerk of the Governing Body** said that the Governing Body should proceed with a vote by show of hands on the subamendment proposed by the Arab group.

(The subamendment proposed by the Arab group was rejected, with 23 votes in favour, 29 votes against and 4 abstentions.)

140. **The Employer Vice-Chairperson** asked the Office to verify the number of votes in favour of the subamendment proposed by her group; she was under the impression that it had received a higher number of votes in favour.

141. **The Chairperson** said that, in the light of the concern raised by the Employers' group, the vote on the subamendment proposed by that group would be retaken in order to protect the integrity of the process.

142. **A Government representative of the United States**, raising a point of order, said that retaking the vote on the subamendment proposed by the Employers' group could prejudice the results of the votes on the amendment and other subamendments, and requested clarification on the process.

143. **The Legal Adviser** indicated that, according to paragraph 6.1.2 of the Standing Orders of the Governing Body, the Chairperson had the prerogative to request that a vote be retaken in case of doubt as to the result. However, if the Chairperson was satisfied that there was nothing demonstrably problematic in the manner in which the vote had been conducted or the votes had been counted, he could confirm the results already announced.

144. **The Worker Vice-Chairperson** requested clarification on the status of the vote on the subamendment proposed by the Employers' group.

145. **The Clerk of the Governing Body** said that, as per the Chairperson's decision, the Governing Body would proceed to retake the vote by show of hands on the amendment proposed by the Employers' group so that there would be no doubt about the transparency and integrity of the voting process.

(The subamendment proposed by the Employers' group was rejected, with 16 votes in favour, 30 votes against and 8 abstentions.)

146. **The Clerk of the Governing Body** said that the Governing Body would next proceed to take a vote by show of hands on the amendment proposed by the group of 44 countries.

(The amendment proposed by the group of 44 countries was accepted, with 33 votes in favour, 21 votes against and 2 abstentions.)

Decision

147. **Further to the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the Constitution, the Governing Body decided to adopt the following resolution:**

The Governing Body,

Conscious that there is serious and persistent disagreement within the tripartite constituency of the International Labour Organization (ILO) on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), with respect to the right to strike,

Recalling that at the origin of the dispute is a disagreement among the Organization's tripartite constituents concerning whether the right to strike is protected under Convention No. 87,

Noting that the ILO's supervisory bodies have consistently observed that the right to strike is a corollary to the fundamental right to freedom of association,

Seriously concerned about the implications that this dispute has on the functioning of the ILO and the credibility of its system of standards,

Affirming the necessity of resolving the dispute in a manner consistent with the Constitution of the ILO,

Recalling that, under article 37(1), of the ILO Constitution, "[a]ny question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice",

Recalling the consensual decision of the Governing Body at its 320th Session (March 2014), welcoming "the clear statement by the Committee of Experts of its mandate as expressed in the Committee's 2014 report":

> **"The Committee of Experts on the Application of Conventions and Recommendations is an independent body established by the International Labour Conference and its members are appointed by the ILO Governing Body. It is composed of legal experts charged with examining the application of ILO Conventions and Recommendations by ILO member States. The Committee of Experts undertakes an impartial and technical analysis of how the Conventions are applied in law and practice by member States, while cognizant of different national realities and legal systems. In doing so, it must determine the legal scope, content and meaning of the provisions of the Conventions. Its opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise. The Committee's technical role and moral authority is well recognized, particularly as it has been engaged in its supervisory task for over 85 years, by virtue of its composition, independence and its working methods built on continuing dialogue with governments taking into account information provided by employers' and workers' organizations. This has been reflected in the incorporation of the Committee's opinions and recommendations in national legislation, international instruments and court decisions",**

Noting that, despite protracted attempts, no consensus has been reached through tripartite dialogue,

Emphasizing that article 37(1) of the ILO Constitution establishes that any referral to the International Court of Justice is for decision on the question or dispute referred,

Expressing the hope that, in view of the ILO's unique tripartite structure, not only the governments of ILO Member States but also the international employers' and workers' organizations enjoying general consultative status in the ILO would be invited to participate directly and on an equal footing in the written proceedings and any oral proceedings before the Court,

Decides, in accordance with article 37(1) of the ILO Constitution,

1. **To request the International Court of Justice to render urgently an advisory opinion under Article 65, paragraph 1, of the Statute of the Court, and under Article 103 of the Rules of Court, on the following question:**

   Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

2. **Instructs the Director-General to:**

   (a) **transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with Article 65, paragraph 2, of the Statute of the Court;**

   (b) **respectfully request that the International Court of Justice allow for the participation in the advisory proceedings of the employers' and workers' organizations that enjoy general consultative status with the ILO;**

   (c) **respectfully request that the International Court of Justice consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of Court, so as to render an urgent answer to this request;**

   (d) **inform the United Nations Economic and Social Council of this request, as required under Article IX, paragraph 4, of the Agreement between the United Nations and the International Labour Organization, 1946.**

(GB.349*bis*/INS/1/1, paragraph 27, as amended by the Governing Body)

148. **The Employer Vice-Chairperson** thanked the Governments that had participated in the discussion, in particular those that had spoken in favour of social dialogue. It was disappointing that the Chairperson had forced a vote on the matter, despite the fact that the Governing Body would discuss a very similar matter at its 349th *ter* Session the following day. Furthermore, the vast majority of countries that had taken the floor earlier that day in the Committee of the Whole had spoken in favour of social dialogue and against referral of the matter to the ICJ. Many had also voiced doubts as to whether it was appropriate for the Governing Body to take a decision on the matter in the light of concerns regarding the democratic nature of its composition.

149. The 33 votes in favour of referring the matter to the ICJ represented a very small percentage – she estimated 4 or 5 per cent – of the number of potential votes that could have been cast had the decision been put to the International Labour Conference. The vast majority of the ILO's constituents had therefore been deprived of the opportunity to engage in dialogue and to take a decision on the matter with full legitimacy and inclusivity.

150. She noted with deep regret that the Governments that had led social dialogue in the past had lost the legitimacy to do so, as they had not involved the Employers' group in their

consultations or tried to achieve tripartite consensus, setting a new precedent in that regard. The adoption of the decision by force would prove to be a disaster for the Organization.

151. **The Worker Vice-Chairperson** objected to the suggestion that only the Governments supporting the position of the Employers' group were in favour of social dialogue. Neither did she accept that the Chairperson had been forced to call for a vote; the Workers' group had been within its right to ask for a vote to be taken in a situation where consensus had been unachievable. The members of the Governing Body had been delegated by those that they represented to speak and take decisions on their behalf. While it was clear that further discussion on the democratization of the Governing Body was needed, she disagreed with the suggestion that it lacked decision-making authority, which in effect constituted a challenge to the Organization's governance structure.

152. For the ILO to maintain its credibility, it was important not to allow conflicts to remain unresolved. She expressed hope that constituents on all sides of the debate would participate in an appropriate manner in the examination of the matter by the ICJ and that, after the conclusion of those proceedings, the Governing Body would hold serious discussions on how to follow up on the outcome of that process.

153. She thanked all Governments that had participated in the discussion and expressed appreciation for the commitment of those that had proposed the amendment. She welcomed the professionalism, expertise and commitment demonstrated by the Office and its staff in its efforts to organize and manage the special session, and thanked the Chairperson for leading the debate to a solid outcome.

154. **A Government representative of Pakistan**, speaking in explanation of vote, said that his delegation's position on the amendment proposed by the group of 44 countries should be viewed in the context of the declaration made by his Government on its acceptance of the jurisdiction of the ICJ regarding disputes arising under a multilateral treaty.

Document No. 32

GB.349*ter*/INS/1, Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference, October 2023

International Labour Organization

▶ GB.349*ter*/INS/1

Governing Body

349th *ter* (special) Session, Geneva, 11 November 2023

Institutional Section

INS

Date: 11 October 2023
Original: English

First item on the agenda

Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference

Purpose of the document

This document has been prepared for the purposes of the special meeting of the Governing Body convened under paragraph 3.2.2 of the Standing Orders of the Governing Body following the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the International Labour Conference. Its aim is to serve as a background report for the discussion. It contains information on the ILO statutory framework for placing a standard-setting item on the Conference agenda, ILO practice regarding the adoption of Protocols, an account of the origins of the standard-setting proposal on the right to strike and concluding observations summarizing the possible implications of the above for the proposed standard-setting item. The Governing Body is invited to take note of this background report and provide guidance on action to be taken in relation to the proposal for placing a standard-setting item on the agenda of next year's Conference (see the draft decision in paragraph 16).

Relevant strategic objective: Standards and fundamental principles and rights at work.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision.

Policy implications: None at this stage.

Legal implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: International Labour Standards Department (NORMES).

Related documents: GB.349*bis*/INS/1; GB.349/INS/2.

▶ Contents

▶ Introduction

1. Under the Constitution of the ILO and the Standing Orders of the Governing Body, a special meeting of the Governing Body may be convened when a minimum number of regular members of the Governing Body so request in writing, or when the Chairperson of the Governing Body considers it necessary.

2. In particular, article 7(8) of the Constitution provides that:

> A special meeting [of the Governing Body] shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body.

3. In addition, paragraph 3.2.2 of the Standing Orders of the Governing Body provides as follows:

> Without prejudice to the provisions of article 7 of the Constitution of the Organization, the Chairperson may also convene after consulting the Vice-Chairpersons, a special meeting should it appear necessary to do so, and shall be bound to convene a special meeting on receipt of a written request to that effect signed by sixteen members of the Government group, or twelve members of the Employers' group, or twelve members of the Workers' group.

4. Accordingly, the holding of a special meeting is either compulsory, when a written request is made by 16 regular members regardless of group, by 16 regular Government members, or by 12 regular Employer members or 12 regular Worker members; or voluntary when convened at the Chairperson's discretion. [1]

5. To date, special meetings have been convened on three occasions: in September 1932, October 1935 and May 1970, all under the discretionary authority of the Chairperson of the Governing Body. [2]

▶ Chronology

6. In a communication dated 12 September 2023 to the Chairperson of the Governing Body, the 14 regular Employer members of the Governing Body requested the holding of a special meeting under paragraph 3.2.2 of the Standing Orders of the Governing Body in order to decide on the urgent inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session (June 2024) of the International Labour Conference.

7. More concretely, the Employers' group proposed that the Conference adopt a Protocol to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The Protocol would concern the right to strike or more broadly, industrial action. [3] The adoption of the Protocol would authoritatively determine the scope and limits of the right to strike in the

[1] For more information, see the Office note on the origin and evolution of rules on convening special Governing Body sessions.

[2] For more information, see the Office note on past practice on special Governing Body sessions.

[3] It is recalled that in their 2015 joint statement, the Employers' and Workers' groups referred to the right to take industrial action. Based on a series of comments on the issue by ILO supervisory bodies and on several domestic laws, industrial action may be understood as a term that encompasses: (i) different types of strike actions carried out by workers and their organizations according to their modalities (including, for instance, down tools, go-slow, working to rule etc.); and/or (ii) both strike actions by workers and their organizations and lockouts by employers.

context of Convention No. 87. The obligations under the Protocol would become binding for those parties to the Convention that ratified the Protocol. In this way, the adoption of the Protocol would settle the ongoing dispute about the interpretations on the right to strike.

8. The communication by the Employer members also indicates that the adoption of a Protocol to Convention No. 87 on the right to strike would thus demonstrate that a lasting solution to the conflict over the interpretations of the right to strike is possible through dialogue within the tripartite structures of the ILO and that a referral to the International Court of Justice (ICJ) is not necessary.

9. The communication was handed to the Governing Body screening group by the Employer Vice-Chairperson at a meeting called on 13 September 2023 in order to discuss the convening of a special meeting to address a request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the ICJ for decision in accordance with article 37(1) of the Constitution. [4]

10. In their communication, the Employer members requested that a special meeting on a possible Protocol to Convention No. 87 on the right to strike be organized before the holding of the special meeting requested by the Workers' group and 36 governments, in order to ensure that the possibility of standard-setting on the right to strike is not rendered obsolete by a referral of the matter to the ICJ.

11. By circular letter dated 15 September 2023, the Director-General informed all Member States of the request of the Employers' group and of the screening group decision.

12. On 25 September 2023, the Office received a note verbale from the Permanent Mission of the Republic of Türkiye to the United Nations Office in Geneva welcoming the request for a special meeting to address the inclusion of a standard-setting item regarding the right to strike on the agenda of the 112th Session of the Conference and the preparation of a Protocol associated with Convention No. 87, and adding that the primary objective of the Protocol would be to establish precise and authoritative parameters governing the scope and limitations of the right to strike, thereby ultimately resolving the ongoing disagreement. The note verbale was communicated to all Member States by a circular letter of the Director-General dated 26 September 2023.

13. On 28 September 2023, the tripartite screening group decided that the special meeting to discuss the request of the Employers' group would be held on 11 November. The decision of the screening group was communicated to all Member States by a circular letter of the Director-General dated 29 September 2023.

▶ Office background report

14. Against this background, the special meeting of the Governing Body will examine the request of the Employers' group. The special meeting will offer an opportunity for a full exchange of views and an informed decision considering its aim, purpose and proposed timing.

15. Accordingly, the Office has prepared a background report to facilitate the deliberations of the Governing Body. The report provides information on: (i) the ILO statutory framework for placing a standard-setting item on the Conference agenda; (ii) ILO practice regarding

[4] The chronology of events is explained in detail in document GB.349*bis*/INS/1, paras 6–21.

Protocols; (iii) an account of the origins of the standard-setting proposal on the right to strike; (iv) final considerations on the possible implications of the proposed standard-setting item and (v) concluding observations.

▶ Draft decision

16. Further to the request of the Employers' group and of the Republic of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference (2024), the Governing Body decided to

[decision to be taken at the end of the special meeting]

▶ Appendix

Standard-setting on the right to strike in the form of a Protocol – Background report

I. The statutory framework for placing a standard-setting item on the agenda of the International Labour Conference

Placing a standard-setting item on the agenda of the International Labour Conference

1. The proposed inclusion of a standard-setting item on the agenda of the 112th Session of the International Labour Conference (June 2024) must be considered in light of the legal and procedural framework for placing a standard-setting item on the Conference agenda that is set out in the Constitution, the Standing Orders of the International Labour Conference and the Standing Orders of the Governing Body. [1]

2. The main responsibility for setting the agenda of the Conference lies with the Governing Body. Proposals to place an item on the Conference agenda must be considered at two successive sessions of the Governing Body, unless there is unanimous consent to place a proposed item on the agenda of the Conference when it is discussed for the first time by the Governing Body (paragraph 5.1.1 of the Governing Body Standing Orders).

3. Paragraphs 54–56 of the Introductory note of the Governing Body Standing Orders read as follows:

> 54. The items to be placed on the agenda of the Conference are considered at two successive sessions of the Governing Body, so that the decision is taken two years prior to the opening of the session of the Conference in question.
>
> 55. The first stage of the discussion, which takes place at the November session, consists in identifying the subjects from which a choice could be made. For this purpose the Governing Body bases its discussion on a paper containing all the information necessary on the items proposed by the Director-General.
>
> 56. The second stage, which takes place at the March session, consists in adopting a definitive decision. The paper serving as the basis for this discussion covers any additional items proposed by the Governing Body during the first stage of the discussion. If a decision cannot be taken at the March session, it is still possible to adopt a definitive decision at the following November session. However, to allow for full preparation by the Office, such third discussion should remain an exceptional practice.

4. Standard-setting items are regarded as having been referred to the Conference for a double discussion unless the Governing Body decides otherwise (paragraph 5.1.4 of the Governing Body Standing Orders). Paragraph 5.1.5 of Governing Body Standing Orders provides that in cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation. So far, all

[1] See ILO Constitution, art. 14(1); Standing Orders of the International Labour Conference, arts 44–52; Standing Orders of the Governing Body, art. 5.1; as well as the Introductory Note of the Compendium of rules applicable to the Governing, paras 54–to 56.

Protocols except for one (the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 (No. 89), were adopted on the basis of a single Conference discussion.

Preparing a standard-setting discussion on a Protocol

5. Standard-setting items are generally placed on the agenda of the Conference more than two years before the opening of the Conference session at which the item is discussed, by reason of specific time limits applicable to the preparatory stages of a double or single-discussion procedure set forth in the Standing Orders of the Conference (articles 45–46 of the Standing Orders of the Conference). As detailed below, these preparatory stages include the preparation of a preliminary report on the national law and practice with a questionnaire, the communication of replies by constituents, and the preparation of a further report of the Office with draft conclusions which in principle serve as a basis for the first Conference discussion.

6. As per articles 45 and 46 of the Standing Orders of the Conference, when a standard-setting item is placed on the agenda of the Conference for either a single or a double discussion, the Office shall prepare as soon as possible a preliminary report setting out the law and practice in the different countries and any other useful information, together with a questionnaire requesting the governments to consult the most representative organizations of employers and workers before finalizing their replies and to give reasons for their replies. The Office shall communicate the report and questionnaire to the governments so as to reach them not less than 18 months before the opening of the session of the Conference at which the first discussion is to take place. The replies should reach the Office as soon as possible and not less than 11 months before the opening of the session of the Conference at which the first discussion is to take place. On the basis of the replies received, the Office shall prepare a further report indicating the main questions which require consideration by the Conference. This report shall be communicated by the Office to the governments as soon as possible and every effort shall be made to ensure that the report reaches them not less than four months before the opening of the session of the Conference at which the first discussion is to take place.

7. A detailed flowchart presentation of the statutory timeline of a standard-setting discussion is available here.

8. These arrangements shall apply only in cases in which the question has been included in the agenda of the Conference not less than 26 months before the opening of the session of the Conference at which it is to be discussed in respect of a single discussion (article 45(4) of the Conference Standing Orders) or not less than 18 months before the opening of the session of the Conference in the case of a double discussion (article 46(5) of the Conference Standing Orders).

9. When the standard-setting item is placed on the agenda of the Conference less than 26 months for a single discussion or less than 18 months for a double discussion, a programme of reduced intervals shall be approved by the Governing Body.

10. The Governing Body last approved a programme of reduced intervals for a single discussion of a Protocol in March 2013 (GB.317/PV, paragraph 25(b)) when it decided to place on the agenda of the 2014 session of the Conference a standard-setting item to supplement the Forced Labour Convention, 1930 (No. 29), which led to the adoption of the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29). Another example was the approval by the Governing Body of reduced intervals in March 2002 (GB.283/PV, page I/7 and GB.283/16/3) when it decided to place on the agenda of the 2003 session of the Conference, a standard-setting item with a view to considering a Protocol to the Seafarers' Identity Documents

Convention, 1958 (No.108), that led to the adoption of the Seafarers' Identity Documents Convention (Revised), 2003, as amended (No. 185).

11. According to ILO records, no standard-setting leading to the adoption of a Protocol has been completed in a timeframe shorter than 14–15 months from the date the item was placed on the Conference agenda, except for the Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), which had been prepared in a prior technical conference.

Agendas of the forthcoming sessions of the Conference

12. Under the second item of its Institutional Section, the Governing Body considers proposals for the agenda of the Conference based on a strategic and coherent approach which it approved at its 322nd Session (October–November 2014). [2]

13. At its 341st Session (March 2021), the Governing Body placed on the agenda of the 112th and 113th Sessions (2024 and 2025) of the Conference an item related to occupational safety and health protection against biological hazards (standard-setting – double discussion). [3]

14. As indicated in the document GB.349/INS/2, which will be discussed at the 349th Session of the Governing Body (October–November 2023), the agenda of next year's Conference was completed by the Governing Body at its 344th Session (March 2022) when the Governing Body decided to place on it a general discussion item on decent work and the care economy. [4]

15. At its 347th Session (March 2023), the Governing Body completed the agenda of the 113th Session (2025) of the Conference with the addition of a standard-setting item on the platform economy and a general discussion item on innovative approaches to tackling informality and promoting transitions towards formality to promote decent work. [5]

16. The Governing Body is invited at its 349th Session (October–November 2023) to consider placing on the agenda of either the 114th Session (June 2026) or the 115th Session (June 2027) of the Conference a standard-setting item on the consolidation of instruments on chemical hazards based on a double discussion. In view of the statutory time limits recalled above, to place a standard-setting item on the consolidation of instruments on chemical hazards based on a double discussion on the agenda of the 114th Session (June 2026), the Governing Body should take a decision no later than at its 350th Session (March 2024). [6]

II. Standard-setting in the form of a Protocol

A. Protocols to international labour Conventions in general

A.1. Legal nature, purpose and effects of a Protocol

17. Protocols are international treaties, subject to ratification by ILO Member States. Each Protocol is linked to an existing Convention. Protocols enter into force in accordance with the conditions set out in their final provisions and create legal obligations for ratifying States without retroactive effect. Protocols are subject to the same reporting requirements as the

[2] GB.322/PV, para. 17, and GB.322/INS/2, paras 11–19.

[3] GB.341/INS/3/1(Rev.2)/Decision.

[4] GB.344/INS/3/1 and GB.344/INS/3/1/Decision.

[5] GB.347/INS/2/1 and GB.347/INS/2/1/Decision.

[6] GB.349/INS/2 para. 15.

Conventions to which they are attached and may give rise to complaint and representation procedures. [7]

18. A Protocol can only be ratified by those States which are already bound by the Convention to which the Protocol is attached. As for the States that decide not to ratify the Protocol, they remain bound by the provisions of the relevant Convention in its original reading. This is consistent with Article 40(4) of the Vienna Convention on the Law of Treaties, which provides that an "amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement".

19. The main advantage of a Protocol is that it has a circumscribed scope and that it preserves the ratifications of the Convention to which it is attached, which remains open to new ratifications. It is a simple and flexible instrument particularly useful for partially amending or supplementing a specific part or a limited number of provisions of an existing Convention.

20. To date, the ILO has adopted six Protocols to international labour Conventions. The first Protocol was adopted in 1982 and aimed at revising the Plantations Convention, 1958 (No 110). The intention was to introduce a limited amendment in a simplified format, avoiding the need for drafting a new Convention or reproducing the whole text of the Convention. [8]

21. This innovation originated in the 1979 report of the Ventejol Working Party on the Revision of Standards. Prior to 1982, the only method for both total and partial revision of Conventions had been the drafting of a new Convention based on either a single or double Conference discussion. In fact, all revision exercises since 1950 had followed the general procedure used for the adoption of new standards.

A.2. Overview of ILO Protocols

22. A short overview of the six Protocols adopted by the ILO is provided below. The purpose is to take stock of past practice with regard to the purpose and content of Protocols, as well as the time frame and process for their adoption. This review will inform the final considerations set out at the end of the report.

Protocol of 1982 to the Plantations Convention, 1958 (P110)

23. **Purpose and content:** The Protocol aims at amending the scope of application of Convention No. 110 by allowing Member States to exclude from the coverage of the Convention, after consultation with organizations of employers and workers, undertakings the area of which covers not more than 5 hectares, and which employ not more than ten workers at any time during a calendar year.

24. **Adoption process:** At its 214th Session (November 1980), the Governing Body decided to place on the agenda of the 68th Session (1982) of the Conference an item concerning the limited revision of Convention No. 110 under the single-discussion procedure. A law and practice report accompanied by a questionnaire were prepared so as to reach governments not less than 12 months before the opening of the 68th Session. Replies were to be sent not later than

[7] ILO, *Strengthening Action to End Forced Labour*, ILC.103/IV/1, 2014, 67, and *Records of Proceedings*, PR 9(Rev.), International Labour Conference,103rd Session, 2014, para. 580.

[8] ILO, *Revision of the Plantations Convention (No. 110) and Recommendation (No. 110), 1958*, Report VII(2), 24; and "Report of the Committee on Plantations", Provisional Record No. 18, International Labour Conference, 68th Session, 1982, para. 9

2 October 1981. No programme of reduced intervals was adopted as the item was placed on the agenda in accordance with the time limits set forth in the Conference Standing Orders. [9]

25. **Ratification:** To date, the Protocol has been ratified by two of the ten countries that are bound by Convention No. 110.

Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 (P89)

26. **Purpose and content:** The Protocol aims at broadening the possibilities for exemptions from the prohibition of the night work of women in industry and introduce variations in the duration of the night period provided, as envisaged in the Night Work (Women) Convention (Revised), 1948 (No. 89). This was considered necessary to accommodate the changing role of women in the world of work and the sharp increase in women's labour force participation in the 42 years that elapsed since the Convention's adoption. Exemptions rely on the elaboration of consensual policies aimed at striking a balance between on the one hand, measures which limit women's freedom of choice regarding working time and reduce their ability to compete with men in the labour market, and on the other hand, measures aimed at providing protection tailored narrowly to meet a demonstrated need for protection in certain contexts. [10] A meeting of experts which had preceded the adoption of the Protocol, had underlined the complexity of the subject involving conflicting values and competing legal doctrines on preventing discrimination in employment and ensuring the safety and health of workers. The Protocol was adopted in parallel to the Night Work Convention, 1990 (No. 171), in an attempt to reconcile the various perspectives and doctrines into a coherent policy. [11] The Protocol served to ease prohibitions on night work of women while maintaining restrictions still considered valid in certain contexts. For countries that were ready to move towards an approach focused on equal treatment between women and men, Convention No. 171 provided measures of protection for all night workers without discrimination including in relation to many aspects of special concern to women.

27. **Adoption process:** At its 238th Session (November 1987) the Governing Body decided to place on the agenda of the 76th Session (1989) of the Conference, the question of night work under the double-discussion procedure. A law and practice report accompanied by a questionnaire were prepared so as to reach governments not less than 12 months before the opening of the 76th Session. Replies were to be sent not later than 6 October 1988. No programme of reduced intervals was adopted as the item was placed on the agenda in accordance with the time limits set forth in the Conference Standing Orders.

[9] At the time, article 38, para. 1 which read as follows:

> When a question is governed by the single-discussion procedure the International Labour Office shall communicate to the governments, so as to reach them not less than 12 months before the opening of the session of the Conference at which the question is to be discussed, a summary report upon the question containing a statement of the law and practice in the different countries and accompanied by a questionnaire drawn up with a view to the preparation of Conventions or Recommendations. This questionnaire shall request governments to give reasons for their replies. Such replies should reach the Office as soon as possible and not less than eight months before the opening of the session of the Conference at which the question is to be discussed.

Article 38, para. 3 read as follows:

> These arrangements shall apply only in cases in which the question has been included in the agenda of the Conference not less than 18 months before the opening of the session of the Conference at which it is to be discussed.

[10] ILO, *Night Work for Women in Industry*, Report III (Part 1B), International Labour Conference, 89th Session, 2001, para. 24.

[11] ILO, *Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment*, MEPMW/1989/7, 1989, 1.

28. **Ratification:** The Protocol has been ratified by 3 of the 44 Member States that are still bound by Convention No. 89.

Protocol of 1995 to the Labour Inspection Convention, 1947 (P81)

29. **Purpose and content:** The Protocol brings within the scope of the Labour Inspection Convention, 1947 (No. 81), all categories of workplaces that are not considered as industrial or commercial. The need was felt to subject the non-commercial services sector to an "equally effective and impartial system of labour inspection", and to harmonize the scope of Convention No. 81 with that of the Occupational Safety and Health Convention, 1981 (No. 155), and the Occupational Health Services Convention, 1985 (No. 161), which cover all branches of economic activity. The experience following the Convention's adoption had demonstrated that many of the concerns expressed originally about the cost and difficulty of inspection in the non-commercial services sector had proved to be not insuperable or even unfounded. [12]

30. **Adoption process:** At its 258th Session (November 1993) the Governing Body decided to place on the agenda of the 82nd Session (1995) of the Conference the question of extension of Convention No. 81 to activities in the non-commercial services sector under the single-discussion procedure. A law and practice report accompanied by a questionnaire were prepared so as to reach governments not less than 12 months before the opening of the 82nd Session. Replies were to be sent not later than 30 September 1994. No programme of reduced intervals was adopted as the item was placed on the agenda in accordance with the time limits set forth in the Conference Standing Orders.

31. **Ratification:** To date, the Protocol has been ratified by 12 of the 148 Member States that are bound by Convention No. 81.

Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976 (P147)

32. **Purpose and content:** The Protocol aimed at updating the Convention through a partial revision of its Appendix drawing on the conclusions of a Tripartite Meeting on Maritime Labour Standards which had taken place two years earlier, in 1994. The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), listed in an Appendix the standards that ratifying States had to apply in the maritime context. It required "substantial equivalence" in applying the listed standards, insofar as Member States were not otherwise bound by their provisions, notably by having ratified these instruments. The Protocol replaced the list of Conventions in the Appendix with up-to-date Conventions concerning seafarers' social security, identity documents, repatriation and so on. The revision drew, among other things, on lessons learned from the regular supervision of implementation of the Convention by the Committee of Experts on the Application of Conventions and Recommendations in examining both article 22 reports and the article 19 reports submitted for the 1990 General Survey. [13]

33. **Adoption process:** At its 262nd Session (March–April 1995) the Governing Body examined the Report of the Tripartite Meeting on Maritime Labour Standards (November–December 1994) and decided to include on the agenda of the 84th (Maritime) Session of the Conference to be held in January 1996 an item on the partial revision of Convention No. 147. At the time, it was considered that the proposed agenda item had been the subject of a preparatory technical

[12] ILO, *Extension of the Labour Inspection Convention, 1947 (No. 81), to Activities in the Non-commercial Services sector*, Report VI(1), International Labour Conference, 82nd Session, 1995, 33.

[13] ILO, *Partial Revision of the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147)*, Report IV, International Labour Conference, 84th (Maritime) Session, 1996, 5–6.

Conference within the meaning of the applicable Conference Standing Orders provision. [14] As a result, rather than communicating a report and questionnaire to the governments, the Office was requested to draw up a final report on the basis of the work of the Tripartite Meeting. The 84th (Maritime) Session of the Conference took place in October 1996.

34. **Ratification:** Until the adoption of the Maritime Labour Convention, 2006 (MLC, 2006), that revised Convention No. 147 and its Protocol, the Protocol had received 24 ratifications among the 56 States parties to Convention No. 147. At its 111th Session (June 2023), the Conference decided to withdraw the Protocol which was no longer in force as it had in the meantime been denounced by all ratifying Member States following ratification of the MLC, 2006. [15]

Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (P155)

35. **Purpose and content:** The Protocol addressed an implementation gap in Convention No. 155, that is the "absence of reliable information about the incidence of occupational accidents and disease … a major obstacle to curbing the appalling toll of work-related deaths and injuries that continues to plague humankind". [16] Concretely, the Protocol complemented Article 11 which gives effect to Article 4 of Convention No. 155 by providing that each ratifying State must, in consultation with the most representative organizations of employers and workers, establish and periodically review requirements and procedures for the recording and notification of occupational accidents, occupational diseases; and as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases and must also publish compiled statistics on an annual basis. The relevance and importance of the questions addressed in the Protocol is illustrated by the fact that occupational injury rates currently serve as a target, monitoring progress made towards protecting labour rights and promoting safe and secure working environments in the context of the 2030 Agenda for Sustainable Development (target 8.8. and indicator 8.8.1 of the Sustainable Development Goals (SDGs)). When the Conference designated Conventions Nos 155 and 187 as fundamental instruments in 2022, it did not do the same for the Protocol to Convention No. 155, nor was the prospect of doing so considered at length in the discussions at the Conference.

36. **Adoption process:** At its 279th Session (November 2000) the Governing Body decided to place on the agenda of the 90th Session (2002) of the Conference an item on the recording and notification of occupational accidents and diseases under the single-discussion procedure. A law and practice report accompanied by a questionnaire were communicated to governments in February 2001 and replies were to be received by 30 September 2001. A programme of reduced intervals was endorsed by the Governing Body, as provided for in the Conference Standing Orders. [17]

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[14] Article 38, para. 4, read as follows:

> If a question on the agenda has been considered at a preparatory technical conference the Office, according to the decision taken by the Governing Body in this connection, may either (a) communicate to the governments a summary report and a questionnaire as provided for in paragraph 1 above; or (b) itself draw up on the basis of the work of the preparatory technical conference the final report provided for in paragraph 2 above.

[15] ILO, *Abrogation of One International Labour Convention and Withdrawal of Four Conventions, One Protocol and 18 Recommendations*, ILC.111/VII/1, 2023.

[16] ILO, *Recording and Notification of Occupational Accidents and Diseases and ILO list of Occupational Diseases*, Report V(1), International Labour Conference, 90th Session, 2002, 3.

[17] Following amendments to the Standing Orders adopted in 1994, article 38, para. 3 read as follows:

> These arrangements shall apply only in cases in which the question has been included in the agenda of the Conference *not less than 26 months* before the opening of the session to the Conference at which it is to be discussed. If the question has been included in the agenda less than 26 months before the opening of the session of the Conference at which it is

37. **Ratification:** To date, the Protocol has been ratified by 17 of the 75 Member States that are bound by Convention No. 155.

Protocol of 2014 to the Forced Labour Convention, 1930 (P29)

38. **Purpose and content:** The Protocol aims at reinforcing efforts to realize the elimination of forced labour by setting standards for prevention, protection and compensation measures, thereby closing implementation gaps identified. The Protocol drew on lessons learned from the supervision of the Convention's implementation by the Committee of Experts both through article 22 reports and article 19 reports submitted for the 2012 General Survey.[18] The conference discussion of the Protocol was preceded by a Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation held in Geneva on 11–15 February 2013, which itself resulted from a recurrent discussion on fundamental principles and rights at work at the 101st Session of the Conference.[19] A central objective of the Protocol has been to address contemporary forms of slavery and human trafficking which are the subject of widespread international concern despite near universal ratification of Convention No. 29. As indicated in the relevant Conference report, while forced labour imposed by state authorities continued to be a concern in certain countries, its scale had become dwarfed by the use of forced labour at the hands of private individuals and enterprises operating outside the rule of law.[20] The Protocol therefore provides that the definition of forced or compulsory labour includes trafficking and that "the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour". It also complements Convention No. 29 by adding provisions on the prevention of forced or compulsory labour, and the protection, rehabilitation, remediation and compensation of victims. The Protocol has been designated a fundamental instrument. It serves as a basis for a global alliance to eradicate forced labour, modern slavery, human trafficking and child labour under SDG target 8.7.

39. **Adoption process:** At its 317th Session (March 2013), the Governing Body decided to place on the agenda of the 103rd Session (2014) of the Conference an item on forced labour under the single-discussion procedure. A programme of reduced intervals was approved by the Governing Body as provided for in the Conference Standing Orders. A law and practice report accompanied by a questionnaire had to be sent by 15 July 2013; the replies to the questionnaire had to be received by 31 December 2013 and the final report had to be communicated by March 2014.

40. **Ratification:** To date, the Protocol has been ratified by 60 of the 181 countries that are bound by Convention No. 29.

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to be discussed, a programme of reduced intervals shall be approved by the Governing Body; if the Officers of the Governing Body do not consider it practicable for the Governing Body to approve a detailed programme, it shall be in their discretion to agree on a programme of reduced intervals with the Director-General.

[18] ILO, *Giving Globalization a Human Face: General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, ILC.101/III/1B, 2012. The 2014 law and practice report indicates that "The Committee of Experts has examined trafficking and forced labour of children under Convention No. 182 since that instrument entered into force in 2000. Since 2001, it has systematically examined the issue of trafficking in its comments under Convention No. 29 and has requested information on the measures taken by governments to prevent, suppress and punish trafficking in persons." ILO, *Strengthening Action to End Forced Labour*, ILC.103/IV/1, 2014, para. 37. See also, paras 57, 86, 126, 168 and 189 among numerous references.

[19] TMELE/2013/6.

[20] ILO, *Strengthening Action to End Forced Labour*, ILC.103/IV/1, 2014, para. 3.

41. In summary, Protocols have so far been adopted for different purposes, namely:

    (a) introducing flexibility and potentially reducing the scope of the Convention with a view to facilitating ratification (Protocol to Convention No. 110);

    (b) expanding the scope and coverage of the Convention (Protocol to Convention No. 81);

    (c) allowing for a widening of exemptions to facilitate a transition towards standards that reflect changing circumstances in the world of work (Protocol to Convention No. 89);

    (d) updating certain regulatory aspects in the Convention they partially revise (Protocol to Convention No. 147);

    (e) adding regulatory content to the standards in the Convention they partially revise with a view to closing implementation gaps (Protocols to Conventions Nos 29 and 155).

42. This points to the importance of determining the purpose of a Protocol to Convention No. 87 on the basis of any of the options mentioned above or any other purpose to be decided upon.

III. Proposed standard-setting on the right to strike: Origins of the proposal

43. With respect to the right to strike, the background report, prepared to discuss the request of the Workers' group and of 36 governments to urgently refer the matter to the ICJ for decision, provides a comprehensive account of the controversy which emerged as from 1989 around the view adopted by the Committee of Experts that the right to strike is an intrinsic corollary of the rights to organize protected by Convention No. 87. [21]

44. In relation to the request of the Employers' group to include a standard-setting item on the right to strike in the agenda of the next session of the Conference, this section of the document provides an account of previous Governing Body discussions on the right to strike during which the possibility of the inclusion of such a standard-setting item was raised.

45. A standard-setting item on the right to strike was proposed for the first time for inclusion in the agenda of the International Labour Conference at the Governing Body's 253rd Session, in May–June 1992. [22] The proposal originated in a letter from the Minister of Labour and Social Security of Colombia to the ILO Director-General requesting, on the basis of article 10, paragraph 1 and article 14, paragraph 1 of the Constitution, that the item be brought to the Governing Body's attention for its consideration. At the time, several governments and the Workers' group were categorically against the proposal while the Employers' group, who had initiated a parallel proposal for a general discussion on the resolution of industrial disputes, "thought that it was more appropriate to discuss this question in the wider framework of labour disputes. Neither strikes nor lockouts were desirable methods of solving labour disputes. It was preferable to explore all means that could lead to avoiding a strike, which inevitably had negative consequences. The Employers' group would like to focus on the exchange of experiences with a view to finding mechanisms which would resolve disputes without recourse to strike action, the legitimacy of which was not contested. They suggested that prior to proceeding to the adoption of an instrument, the Conference should have the opportunity to debate the matter in a general discussion. That might help to avoid the formalisation of the opposing views of the various parties." [23]

[21] GB.349*bis*/INS/1.

[22] GB.253/2/3(Rev.), paras 35–38 and Appendix I.

[23] GB.253/PV(Rev.), I/11.

46. Discussions on a possible general discussion or standard-setting item regarding the settlement of industrial disputes continued over the years including, from 1999, for a general discussion under the heading "New trends in the prevention and resolution of labour disputes". [24] The proposal was discussed for the last time by the Governing Body at its 303rd Session (November 2008) [25] and given the lack of interest, it was eventually taken off the list of potential items for a general discussion. [26]

47. The controversy over the right to strike intensified in 2012 when the Conference Committee on the Application of Standards was prevented for the first time from exercising its supervisory functions. This was followed by several informal tripartite consultations in 2013 and 2014 paving the way for the Governing Body discussion in November 2014 on "the standards initiative". [27]

48. Further to the wide-ranging discussion held under the fifth item on the agenda of the Institutional Section entitled *The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards*, the Governing Body [28] decided in November 2014 to:

    (1) convene a three-day tripartite meeting in February 2015, open to observers with speaking rights through their group, to be chaired by the Chairperson of the Governing Body and composed of 32 Governments, 16 Employers and 16 Workers with a view to reporting to the 323rd Session (March 2015) of the Governing Body on:

    - the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike; and
    - the modalities and practices of strike action at national level;

    (2) place on the agenda of its 323rd Session, the outcome and report from this meeting on the basis of which the Governing Body will take a decision on the necessity or not for a request to the International Court of Justice to render an urgent advisory opinion concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike;

    (3) take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference, and to this end reconvene the Working Group on the Working Methods of the Conference Committee on the Application of Standards to prepare recommendations to the 323rd Session of the Governing Body in March 2015, in particular with regard to the establishment of the list of cases and the adoption of conclusions;

    (4) defer at this stage further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution;

[24] see for instance, GB.276/PV and GB.303/3/2, 22.

[25] GB.303/PV. On that occasion, the Governments of Canada, China, Cuba, India, Mexico, the Russian Federation and Thailand expressed support for an item on new trends in the prevention and resolution of industrial disputes while neither the Employer nor the Worker groups referred to it.

[26] The more recent proposal for a general discussion on "access to labour justice: prevention and resolution of labour disputes" focuses on the functioning of the institutions responsible for the prevention and resolution of labour disputes, notably labour justice, and does not pertain to the right to strike.

[27] The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards: GB.322/INS/5, GB.322/INS/5(Add.), GB.322/INS/5(Add.1), GB.322/INS/5(Add.2), GB.322/INS/5(Add.3) and GB.322/PV.

[28] GB.322/INS/5(Add.2), para. 1, as amended according to the discussion.

(5) as part of this package, refer to the 323rd Session of the Governing Body the following:

(a) the launch of the Standards Review Mechanism (SRM), and to this effect establish a tripartite working party composed of 16 Governments, eight Employers and eight Workers to make proposals to the 323rd Session of the Governing Body in March 2015 on the modalities, scope and timetable of the implementation of the SRM;

(b) a request to the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association.

49. The Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), in relation to the right to strike and the modalities and practices of strike action at national level, took place from 23 to 25 February 2015. Part I of the background document prepared by the Office for that meeting provided factual background on the adoption and supervision of the application of Convention No. 87 in relation to the right to strike and the relevant rules of international law on treaty interpretation. Part II provided a broad overview of modalities concerning strike action at the national level in both law and practice. [29]

50. As reported to the Governing Body in March 2015, the Tripartite Meeting was conducted in a constructive atmosphere. [30] The Workers' and Employers' groups presented a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system. [31] In their statement, the Workers and Employers recognize the mandate of the Committee of Experts as defined in its report of 2015 (paragraph 29) according to which "[I]ts opinions and recommendations are non-binding, being intended to guide the actions of national authorities. They derive their persuasive value from the legitimacy and rationality of the Committee's work based on its impartiality, experience and expertise". They do not include any specific follow-up on the question of Convention No. 87 and the right to strike. The Government group expressed its common position on the right to strike in relation to freedom of association [32] and also delivered a second statement in response to the social partners' joint statement. [33]

51. Noting the outcome and report of the Tripartite Meeting, the Governing Body decided not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike. It further adopted the Standards Initiative which aimed at strengthening the supervisory system, including through legal certainty and at maintaining a clear, robust and up-to-date body of international labour standards through the Standards Review Mechanism.

52. In the framework of the implementation of the Standards Initiative, the Employers' and Workers' groups, while reaffirming their joint statement of 23 February 2015, observed in

[29] GB.323/INS/5/Appendix III.

[30] GB.323/INS/5/Appendix.I.

[31] See Annex I, GB.323/INS/5/Appendix.I.

[32] See Annex II, GB.323/INS/5/Appendix.I.

[33] See Annex III, GB.323/INS/5/Appendix.I.

March 2017 that "divergent views and disputes about the interpretation of Conventions continue to be a reality" and recognized that to advance legal certainty there could be value in a tripartite exchange of views on the elements and conditions necessary for the operation of an independent body under article 37(2) of the ILO Constitution. [34]

53. The Governing Body provided further preliminary guidance on the issue of legal certainty in November 2017 and March 2018. Some Government members underlined the need to pursue measures to enhance legal certainty based on article 37(2), while other Government members preferred to continue "exploring avenues for consensus-based interpretation of Conventions". The Worker and Employer members supported a proposal to have informal consultations on this first. [35]

54. In November 2018, the Governing Body decided to request the Office to provide concrete proposals to prepare the discussion on consideration of further steps to ensure legal certainty – including, but not limited to, organizing a tripartite exchange of views on article 37(2). In March 2019, the Governing Body decided to hold informal consultations in January 2020 and, to facilitate that tripartite exchange of views, requested the Office to prepare "a paper on the elements and conditions for the operation of an independent body under article 37(2) and of any other consensus-based options". [36]

55. On that occasion, in March 2019, the Employers' group made a statement supporting the proposal to hold informal tripartite consultations on the issue of legal certainty "… in a comprehensive manner, considering all options and not limiting the discussion to article 37(2)". For the Employers, "the Office document and the related consultations should focus on consensus-based options. The Office should explore approaches to address possible disagreements regarding the interpretation of Conventions before they developed into major controversies. The ILO constituents had the primary responsibility for the functioning of the standards supervisory system. Related decisions should not be easily outsourced to a new body, as would be the case if the chosen option were article 37(2). Nevertheless, the Employers were keen to engage in discussions regarding all possible options". [37] For their part, with regard to the parameters of a possible tripartite exchange of views on legal certainty, the Workers maintained that the Office document should focus on the necessary elements for the operation of an independent body under article 37(2), rather than on other possible solutions. It was necessary to fully explore options under articles 37(1) and (2) before considering other suggestions. [38] Some Government members considered that it was appropriate to explore consensus-based options. [39]

56. The Governing Body discussion on proposals on further steps to ensure legal certainty resumed in March 2022 informed by a paper on the elements and conditions for the operation of an independent body under article 37(2) and of any other consensus-based options, as well as the article 37(1) procedure. [40] Paragraphs 60 to 65 of the document GB.344/INS/5 addressed the role of tripartite consensus-based modalities as a modality to either: (i) attempt reconciling

[34] GB.335/INS/5, para. 47 and GB.329/PV, Appendix II, Joint Position of the Workers' and Employers' groups on the ILO Supervisory Mechanism, 194.

[35] GB.335/INS/5, para. 48.

[36] GB.335/INS/5, paras 48 and 84(g).

[37] GB.335/PV, para. 243.

[38] GB.335/PV, para. 241.

[39] GB.335/PV, paras 244, 247 and 248.

[40] GB.344/INS/5.

diverging views through tripartite discussion prior to referral of the matter for interpretation to the ICJ or an internal tribunal; or (ii) to follow-up on the advisory opinion of the ICJ or the award of an internal tribunal. It also clarified that if legal certainty in matters of interpretation is understood as the ability to obtain final pronouncements on the scope and meaning of conventional provisions, the only two mechanisms that can offer such certainty are explicitly set out in article 37. A consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution as the consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute for as long as they are not in a position to ratify the newly adopted Convention or Protocol. [41]

57. The Employers' group expressed views on these possible options and included a reference to normative action: "The Employers' group would have liked to have seen the option of tripartite consensus-based modalities addressed in greater depth … . They should be the first option to resolve diverging views on interpretation and would maintain the competence of the tripartite constituents to determine the content of international labour standards. The purpose of a consensus-based option would not be to find a legally binding solution based on legal process, but a solution based on the authority arising from the support of a majority of the tripartite constituents. A dispute over a particular interpretation of an ILO Convention could be placed on the agenda of the International Labour Conference, which could decide to discuss the matter in a committee which would make a recommendation on the interpretation or on further action to address the issue. Another possibility would be to organize a process whereby constituents would be requested to provide their views in writing on a contentious interpretation, which would indicate the level of acceptance of the interpretation and help settle the dispute. The Committee of Experts should then take into account the outcomes of those processes in its future comments on Convention No. 87. If such options did not lead to a settlement, a final possibility could be to consider the initiation of a standard-setting process which could establish a Protocol to the respective Convention setting out the interpretation considered to be the appropriate one, which would have to receive a two-thirds majority of the International Labour Conference. Such a Protocol would become binding only for those countries that ratified it". [42]

58. For their part, the Workers were categorically opposed to the suggestion that the ILO could adopt a new standard to address an interpretation dispute as, in their view, the same disagreement on interpretation would persist in the development of the new standard, thus preventing consensus. [43] As for the Governments, some emphasized the need to take measures to strengthen legal certainty based on article 37, while others reiterated their conviction that social dialogue could pave the way to consensus, recalling that responsibility for adopting and monitoring the application of standards lay primarily with the tripartite constituents. [44]

59. In March 2023, the Employers' group stressed once again that the core issue underlying discussions was the interpretation by the Committee of Experts of the right to strike in the context of Convention No. 87 and that it was necessary for the Office to provide the groups

[41] GB.344/INS/5, para. 65.

[42] GB.344/PV, para. 142.

[43] GB.344/PV, para. 148.

[44] GB.344/PV, paras 150 et seq.

with all possible means to resolve interpretation issues internally, such as a tripartite technical meeting or a dedicated discussion at the International Labour Conference: "... [t]he Employers' objective was to ensure that the Committee of Experts did not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute". [45] In their proposed amendments the Employers' group referred to "further proposals to ensure legal certainty and strengthen the supervisory system, including by placing an item for discussion on the agenda of the International Labour Conference". [46] The Workers' group reiterated that legal certainty could only be achieved through referral to the International Court of Justice and that the ILO should make good use of the conflict resolution mechanism laid down in its Constitution. They recalled that the situation had lasted too long and that the lack of consensus meant that an authoritative solution had now to be found. [47] Similar views were expressed by a number of Government representatives. [48]

IV. Final considerations

60. As indicated in the introduction, the purpose of the present report is to recap the background against which the request of the Employers' group to urgently include a standard-setting item on the right to strike in the form of a Protocol on the agenda of the Conference in June 2024 as well as to set out the various aspect of the request with a view to assisting constituents in making an informed decision thereon. In the light of the preceding analysis, a few final considerations may guide the discussion of the Governing Body.

Purpose and aim of an ILO Protocol on the right to strike

61. The purpose and aim of the proposed Protocol to Convention No. 87, as proposed by the Employer's group, would be to authoritatively determine the scope and limits of the right to strike in the context of Convention No. 87, thereby setting out the interpretation considered to be the appropriate one.

62. The review of the six Protocols adopted by the Organization to date points out that none of the Protocols adopted so far by the Conference aimed at settling a dispute with respect to the interpretation of provisions of the related Convention. [49]

63. As noted above, ILO Protocols need to be ratified by those Member States already bound by the Convention to which they are attached to have a binding effect. Consequently, Members States which do not ratify the Protocol remain bound by the Convention concerned in its original form and the Protocol does not affect the obligations arising from the ratification of

[45] GB.347/PV(Rev.), paras 229–230.

[46] GB.347/PV(Rev.), para. 235.

[47] GB.347/PV(Rev.), paras 278. See also GB.349*bis*/INS/1, Appendix, background report, para.8.

[48] GB.347/PV(Rev.), paras 247 et seq., and GB.349*bis*/INS/1, Appendix, background report, footnote 15.

[49] A possibility exists under general international law for parties to a treaty to adopt a Protocol of Signature as an instrument subsidiary to the treaty in order to address ancillary matters including the interpretation of particular clauses of the treaty. However, such Protocol is usually adopted at the same time as the treaty and ratification of the latter will ipso facto involve ratification of the Protocol. This naturally serves to ensure the treaty's coherent application among the parties: United Nations Treaty Collection (UNTC).

the Convention. Legal uncertainty would therefore persist in respect of those Member States that would decide not to ratify the newly adopted Protocol. [50]

64. This also raises the question of the extent to which consideration is given to the comments made by the Committee of Experts since the beginning of its examination of the application of Convention No. 87 by ILO Member States in relation to the right to strike. [51]

A synergetic relationship between the Committee of Experts' independent supervisory functions and the standard-setting function of the Conference

65. It appears from the review of the six existing Protocols that at least two Protocols – those linked to Conventions Nos 29 and 147 – explicitly drew on the Committee of Experts comments and general surveys, to update and add regulatory content to the provisions of the Conventions concerned.

66. The proposed purpose and aim of a Protocol on the right to strike or on industrial action may suggest that the Committee of Experts comments and the five general surveys on Convention No. 87 which reviewed the application by ILO Member States in relation to the right to strike would not inform the standard-setting discussion. In this respect, it is to be recalled that the Committee of Experts' comments by and large draw upon the conclusions of the Committee on Freedom of Association adopted through tripartite consensus, thereby ensuring coherence and consistency across supervisory bodies.

67. Another aspect to be considered is the incidence a Protocol on the right to strike or on industrial action would have on the review by the Committee of Experts and other supervisory bodies of the application of Convention No. 87 by those Member States that would eventually decide not to become parties to the said Protocol.

68. While the Committee of Experts would have to take fully into account the provisions of the Protocol vis-à-vis the Member States that have ratified it, it will have to decide, as an independent body, how to proceed vis-à-vis Member States which have not ratified the Protocol and are bound only by the Convention.

69. By way of example, reference may be made to the adoption of the 2014 Protocol to Convention No. 29 and its incidence on the supervision of the application of this Convention. The adoption of this Protocol in 2014 led to a differentiation by the Committee of Experts between Members that have ratified the Protocol and those that have not. Prior to the adoption of the 2014 Protocol, the Committee of Experts would systematically raise questions related to trafficking, prevention and compensation/remediation of victims in its comments under Convention No. 29, based on the acknowledgment in the *travaux préparatoires* of the Convention that these aspects are an integral part of the obligations entrenched in the Convention. By consolidating this interpretation, the Protocol of 2014 enabled the Committee of Experts to pursue a detailed examination of these questions in Member States bound by the Protocol while addressing comments of a more general nature vis-à-vis Member States bound only by the Convention.

[50] GB.344/INS/5, para. 65.

[51] With regard to the source of data and materials serving as background for the revision, an additional question is whether this would include the work of ILO supervisory bodies other than the Committee of Experts. These supervisory bodies include the Conference Committee on the Application of Standards, the Committee on Freedom of Association, the Fact-Finding and Conciliation Commissions on Freedom of Association, the ad hoc tripartite committees established for the examination of representations under article 24 of the ILO Constitution and Commissions of Inquiry established to examine complaints under article 26 of the ILO Constitution. These sources contain valuable guidance based on findings and recommendations including on the right to strike provided over several decades.

70. In one case, the Conference explicitly addressed a question related to the purpose of a Convention and effectively influenced the way in which the Committee of Experts exercised its supervision, by adopting a resolution, namely, the 2006 resolution concerning asbestos, at its 95th Session (2006). The Asbestos Convention, 1986 (No. 162), prioritizes prevention and control in the use of asbestos (Article 3) and does not require the outright ban of all types of asbestos. [52] At the same time, the Occupational Cancer Convention, 1974 (No. 139), requires Member States to periodically determine the carcinogenic substances and agents to which occupational exposure shall be prohibited (Article 1). Noting that all forms of asbestos, including chrysotile, are classified as human carcinogens by the International Agency for Research on Cancer (IARC), and expressing its concern that workers continue to face serious risks from asbestos exposure, the Conference underlined, among other things, that the ILO Convention concerning Safety in the Use of Asbestos, No. 162, should not be used to provide a justification for, or endorsement of, the continued use of asbestos.

71. Following up on the resolution adopted by the Conference, the Governing Body instructed the Office to continue encouraging Member States to ratify and give effect to Conventions Nos 162 and 139 and the Committee of Experts took the guidance contained in the resolution fully into account in exercising its supervisory function over the application of Convention No. 162. [53]

Adoption process and timeframe

72. As per the statutory timeline provided for in articles 45 and 46 of the Standing Orders of the Conference, all existing Protocols were placed on the agenda of the Conference between 15 and 19 months before the opening of the session at which they would be discussed, except for the Protocol to Convention No. 147 which had been prepared in the context of an earlier technical meeting. A programme of reduced intervals was adopted for the preparation of the two most recent Protocols to Conventions Nos 155 and 29 in line with article 38, paragraph 3 (now article 45, paragraph 4) of the Standing Orders of the Conference. The question of the feasibility of the current proposal for a discussion at the 112th Session of the Conference, that is in less than seven months from the date of the special meeting, must be debated in the light of those factual parameters.

73. In addition, it is to be noted that of the six Protocols adopted by the Conference, four have been preceded by technical or tripartite meetings of experts. This preparatory work, consisting in in-depth technical analyses and tripartite debates, has been demonstrated to be essential in developing sound and well-informed standards for the purpose of the protection of workers and taking into account the needs of sustainable enterprises.

V. Concluding observations

74. In considering the request of the Employers' group, constituents may wish to pay particular attention to:

(a) the advantages and disadvantages of a legislative process that may result in a negotiated instrument open to voluntary ratification;

[52] Art. 10 provides that Member States shall provide for total or partial prohibition in the use of asbestos where necessary to protect the health of workers and technically practicable and Art. 11 prohibits crocidolite.

[53] See for example, CEACR, Convention No. 162: Plurinational State of Bolivia, Observation, 2021; Montenegro, Direct Request, 2019; Portugal, Observation, 2017; and Brazil, Observation, 2015.

(b) the aim and purpose of the proposed Protocol on the right to strike or on industrial action vis-à-vis Convention No. 87. Questions that would have to be addressed include, for example: the exact provision or provisions of Convention No. 87 that the prospective Protocol would revise; the level of detail of the provisions to be inserted in the Protocol; the scope of the revision; the content of the regulatory provisions; the source of data and information for the revision, etc.;

(c) the extent to which consideration is given to the comments made by the Committee of Experts and other supervisory bodies in their examination of the application of Convention No. 87 by ILO Member States in relation to the right to strike;

(d) the incidence of a Protocol on the right to strike or on industrial action on the examination by the Committee of Experts and other supervisory bodies of the application of Convention No. 87 by Member States not bound by the said Protocol;

(e) the statutory timelines for placing a standard-setting item on the Conference agenda and preparing a draft instrument;

(f) the decisions previously taken by the Governing Body in respect of the agenda of the International Labour Conference.

Document No. 33

Draft Minutes of the 349th *ter* (Special) Session of the Governing Body, November 2023

Governing Body

349th *ter* (Special) Session, Geneva, 11 November 2023

Draft minutes of the 349th *ter* (Special) Session of the Governing Body of the International Labour Office

Contents

▶ Institutional Section

1. Action to be taken on the request of the Employers' group to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference (GB.349*ter*/INS/1)

Committee of the Whole

1. **The Chairperson** recalled that the 349th *ter* (Special) Session of the Governing Body had been convened pursuant to article 7(8) of the Constitution of the International Labour Organization and paragraph 3.2.2 of the Standing Orders of the Governing Body. At its 349th Session, the Governing Body had approved the arrangements for the special session. They included a sitting as a Committee of the Whole, in accordance with article 4.3 of the Standing Orders, to hold a broad exchange of views with the participation of governments not represented on the Governing Body, on the understanding that any decisions would be made by the Governing Body in its ordinary plenary composition after the Committee of the Whole had been concluded.

2. At its 349th *bis* (Special) Session, the Governing Body had decided to refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice (ICJ) for decision in accordance with article 37(1) of the ILO Constitution. The 349th *ter* (Special) Session was dedicated to a discussion of the request made by the Employers' group to urgently include an item on the agenda of the International Labour Conference concerning the adoption of a Protocol to Convention No. 87, with a view to authoritatively determining the scope and limits of the right to strike or, more broadly, industrial action, in the context of that Convention. The Office had prepared a document containing information on the ILO statutory framework for placing a standard-setting item on the Conference agenda, ILO practice regarding the adoption of Protocols, an account of the origins of the standard-setting proposal on the right to strike and concluding observations summarizing the possible implications of the foregoing for the proposed standard-setting item. Member States and national employers' and workers' organizations had been invited to submit their comments on the issues raised in the document, and those comments had been published on the Governing Body's website. The Governing Body was invited to provide guidance on action to be taken.

3. The Committee of the Whole had before it two amended versions of the draft decision, which had been circulated by the Office. The first, which had been proposed by the Employers' group, read:

> Further to the request of the Employers' group and of the Republic of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference (2024), the Governing Body decided to follow up on the outcome of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level that took place in 2015; and

1) place on the agenda of the 112th, 113th or 114th Session of the Conference (2024, 2025 or 2026) an item for standard setting (Protocol to Convention No. 87/Recommendation/Convention) on the right strike and/or industrial action;

OR

2) place on the agenda of the 112th, 113th or 114th Session of the Conference (2024, 2025 or 2026) an item for a general discussion on the right to strike and/or industrial action;

OR

3) convene a meeting of experts with the view to discussing the right to strike and/or industrial action at the earliest opportunity;

OR

4) continue to discuss all possible proposals on further steps to ensure legal certainty at the 350th session of the Governing Body with the view to reaching agreement on the way forward.

4. The second amended version of the draft decision had been proposed by the Workers' group and read:

> Further to the request of the Employers' group and of the Republic of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference (2024), the Governing Body decided ~~to~~ that no further action was needed.

5. **The Employer Vice-Chairperson** expressed profound disappointment at the outcome of the 349th *bis* (Special) Session of the Governing Body, which marked the beginning of what would be an extremely difficult period for the ILO. It was regrettable that, despite the Chairperson's assurances that he would strive to achieve consensus, he had been persuaded to force a vote on the matter under consideration. It was also regrettable that certain governments, while claiming to be champions of social dialogue, had refused to engage with her group. Some had even violated their obligations under the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), by not consulting national employer organizations on the matter.

6. Most of the governments participating in the Committee of the Whole had been in favour of resolving the dispute through social dialogue – which was the cornerstone of the ILO – in the context of the Conference, a state of affairs that had not been reflected in the vote, undermining the relevance of a large number of Member States that were not Governing Body members. As a consequence, her group would take further steps to enhance the democratization and inclusiveness of decision-making processes at the ILO, including by calling for further discussions on the issue at forthcoming sessions of the Governing Body and the Conference. A minority of governments should not be allowed to impose their political agenda on technical matters that had an impact on the rest of the world. Social dialogue had been seriously damaged and the Organization's values had been jeopardized, affecting the credibility and pertinence of many ILO initiatives. Furthermore, the refusal by the Workers' group to engage fully in tripartite social dialogue, to take action to fill the gap in the normative framework, and to engage in social dialogue on the right to strike set a worrying precedent for the work of the Organization.

7. The dispute would not be resolved through the referral of one question to the ICJ. The right to strike was a multifaceted and complex issue, and the different industrial relations systems and practices in place among Member States must be taken into account when determining international rules on the subject. Such rules should be developed by the tripartite constituents in the framework of the established procedures of the ILO. Therefore, regardless of the

advisory opinion to be issued by the ICJ, there would still be a need for standard-setting if the right to strike was to be regulated at the international level.

8. Her group remained of the view that standard-setting by the Conference was the most appropriate and logical way to definitively end the dispute. The tripartite constituents, as well as the ILO's supervisory bodies, had acknowledged that there was currently no ILO instrument expressly providing for the right to strike. The only way to address the regulatory gap was through regulatory means. Furthermore, standard-setting was a well-established procedure for creating authoritative rules on important topics in the world of work. It had been the first step towards addressing a dispute concerning the interpretation of the Night Work (Women) Convention, 1919 (No. 4), for example. The matter had been referred to the predecessor of the ICJ only after efforts had been made to resolve it by placing a standard-setting item on the subject on the agenda of the Conference. The Conference could authoritatively provide legal certainty on a particular issue, which a non-binding advisory decision of the ICJ could not. Only the standard-setting route would ensure that all ILO constituents would be able to actively engage in the process, that any solution would be based on consensus or a majority vote of all ILO constituents, and that any outcome would be universally relevant and accepted. Conversely, an advisory opinion of the ICJ would not stop her group and many governments from disagreeing with the excessive interpretations and opinions on the right to strike issued by the Committee of Experts on the Application of Conventions and Recommendations.

9. To resolve the dispute, the Employers' group was proposing the development of a Protocol to Convention No. 87. Its intention would not be to amend the Convention, but rather to define in a separate instrument the scope and limits of the right to strike from a global perspective. Her group would not be opposed to standard-setting through another type of instrument. However, on the basis of lessons learned from the development and implementation of the Protocol of 2014 to the Forced Labour Convention, 1930, a Protocol would be the most appropriate instrument with which to regulate the right to strike. Following the adoption of such an instrument, the Committee of Experts would be expected to faithfully comply with the decision of the Conference and the intentions of its drafters, and would be unable to continue issuing excessive and inappropriate views on the right to strike with reference to Convention No. 87.

10. Her group had requested the inclusion of a standard-setting item on the agenda of the Conference in 2024 to accommodate the urgency of the requests made by the Workers' group and a number of governments. There would be no legal obstacles to that measure if the Governing Body decided to adopt a programme of reduced intervals for the preparatory process. There was precedent for such a proposal, as one had been made in 1992. Her group was not opposed to including the item on the agenda of the Conference in 2025 or 2026 instead, if doing so would facilitate preparations. Challenges in respect of including the issue on the agenda of the Conference in 2024 must not be used as a pretext for discarding that option altogether.

11. The discussions at the 112th Session (2024) of the Conference would not be easy. Her group would be more vocal in its disagreement with the Committee of Experts and she anticipated that a request would be made to hold a special session of the Committee on the Application of Standards to discuss the matter. The decision taken by the Governing Body at its 349th *bis* (Special) Session would also have a negative impact on the recurrent discussion on the fundamental principles and rights at work and on the work of the Committee on Freedom of Association.

12. While standard-setting was the most appropriate solution to the problem, her group remained flexible regarding other options – such as holding a general discussion or a tripartite meeting of experts on the matter – and regarding the outcomes and timing of standard-setting action. Its proposals were fully aligned with the ILO's values of tripartism and social dialogue. She called on all governments to demonstrate their commitment to those values and to give their views on the options presented in her group's amended version of the draft decision.

13. **The Worker Vice-Chairperson** acknowledged that standard-setting was central to the ILO's mandate. Faithful to the ILO's mandate as set out in its Constitution, the Governing Body contributed to that work by constantly striving to improve standards. However, the proposal put forward by the Employers' group – set out in the Employers' group's comments on the Office document – would have the opposite effect, as it would involve adopting a Protocol with the sole objective of undoing the long-standing authoritative guidance of the ILO supervisory system regarding Convention No. 87. Moreover, the attempt to limit the interpretative authority of the Committee of Experts would not work in practice, as the Committee would still have to review the implementation of the Protocol and determine the legal scope, content and meaning of its provisions. The proposed Protocol would not therefore provide definitive legal certainty on the matter, and the discussion on standard-setting required to establish it would expose the same fundamental and persistent disagreements regarding interpretation.

14. There were no gaps in the protection and regulation of the right to strike at the international level. However, in order to address the disagreement between the Employers' group on the one hand, and the Workers' group and a large number of governments on the other, a decision had been taken to request the ICJ to render an advisory opinion on whether the right was protected under Convention No. 87. In view of the mutually exclusive and opposing positions on the issue, it would be impossible to advance any initiative of a normative nature without first having settled the issue through an authoritative and binding decision of the ICJ.

15. Protocols were generally introduced as a flexible way to partially revise certain provisions of existing Conventions, so in the current case it would be necessary to identify which provisions of Convention No. 87 required revision or clarification. However, if, as the Employers' group claimed, the right to strike was not in any way addressed in Convention No. 87, then it would neither be logical nor consistent with the ILO's constitutional theory and practice to link such a Protocol to that Convention.

16. It was legally and technically impossible to annul the authoritative guidance on Convention No. 87 provided under the supervisory system and replace it with binding provisions under the proposed Protocol, which would effectively silence the Committee of Experts. Moreover, it was deeply concerning that the Employers' group had expressed repeated opposition to the comments of the Committee of Experts on the right to strike and was proposing to reverse them; that would only create further legal uncertainty. It would also result in a two-tier system: one for countries that had ratified only Convention No. 87, and another for countries that had ratified both the Convention and its Protocol. The Committee of Experts would then have to provide guidance on both, which could lead to divergent outcomes.

17. The Workers' group objected to the argument by the Employers' group that standard-setting was the only viable solution to the dispute as that would allow a "a tripartite social dialogue-based solution" that was "based on consensus or at least a broad majority". Given the fundamental disagreement underlying the dispute, it was difficult to see how such a consensus or broad majority could be achieved. The Employers' group simply appeared to be attempting to take away the existing fundamental right and protection currently afforded to workers under Convention No. 87, forcing the ILO's constituents to renegotiate that fundamental

principle and right at work. That was unacceptable to the Workers' group and the wider international trade union movement, and was unlikely to be supported by Governments. The constitutional objective and mandate of the ILO was to protect the rights of workers; standard-setting to undo or reverse existing rights ran counter to that objective and mandate.

18. In practical terms, the proposal by the Employers' group to include a standard-setting item on the right to strike on the agenda of the 112th Session of the Conference in 2024, just seven months later, showed little respect for the procedures of the Organization. As explained in the Appendix to document GB.349*ter*/INS/1, such a move would be unfeasible, even if a programme of reduced intervals was approved, especially given the preparatory work required to ensure the full participation of the tripartite constituents. In making such a proposal, the Employers' group also showed scant respect for previous decisions of the Governing Body regarding the Conference agenda, which had been developed through consensus based on the recommendations of the Standards Review Mechanism Tripartite Working Group.

19. As well as rejecting the Employers' group's standard-setting proposal, her group also objected to its proposed amendment to the draft decision, which made little sense in the light of the decision to refer the dispute to the ICJ, and again failed to recognize the normal procedure for placing items on the Conference agenda. No debate should be held at the Conference until the ICJ had delivered its opinion on the matter. Convening a meeting of experts would also be counterproductive at the current stage and would not constitute a sufficiently inclusive procedure. The final element of the amendment, according to which the Governing Body would continue to discuss further steps to ensure legal certainty, was simply unnecessary. The Workers' group was of the view that the Governing Body should wait for guidance from the ICJ before taking any further action, and had proposed an amended version of the draft decision to that effect.

20. **Speaking on behalf of the European Union (EU) and its Member States,** a Government representative of Spain said that Montenegro, Iceland and Norway aligned themselves with his statement. He reiterated the importance of obtaining legal certainty on the question of whether Convention No. 87 provided for the right to strike, but stressed that standard-setting – including by introducing a Protocol to the Convention – would not help in that regard. Not only was the scope and added value of such a Protocol unclear, but it might also further challenge the authority of the ILO's supervisory bodies. Moreover, it did not seem possible to introduce a Protocol on the right to strike to a Convention that was the subject of an ongoing dispute in relation to that right. Scheduling a new standard-setting item for next year's session of the International Labour Conference would also leave insufficient time for the ILO constituents to prepare. His group did not therefore support the request to include a standard-setting item on the right to strike on the agenda of the 112th Session of the Conference.

21. **A Government representative of Austria** said that the current discussion was no longer necessary, as no further action should be taken until the advisory opinion from the ICJ had been received. Her Government did not support the request to hold a standard-setting discussion on the right to strike.

22. **A Government representative of Switzerland** said that her Government respected the request made by the Employers' group. However, in the light of the decision taken by the Governing Body at its 349th *bis* (Special) Session, which her Government respected, it would refrain from entering into consideration of any potential legal instrument regarding the right to strike until the ICJ had delivered its advisory opinion, as requested. Her Government maintained that establishing whether or not Convention No. 87 protected the right to strike

would not shed light on the conditions for its exercise. If it was decided that the Convention protected the right to strike without regulating it, it would then be necessary to ask who determined how that right could be exercised, namely whether that fell to the tripartite legislators, the supervisory bodies, the ICJ's judges or domestic court judges to make a binding decision on the conditions for the exercise. In conclusion, she recalled the common position expressed by the Government group in 2015: "[T]he right to strike, albeit part of the fundamental principles and rights at work of the ILO, is not an absolute right. The scope and conditions of this right are regulated at the national level." She also asked the Office what would happen to current cases concerning the right to strike before the Committee on Freedom of Association or the Committee of Experts, notably whether they would be suspended.

23. **A Government representative of Türkiye** emphasized the importance of safeguarding the right to strike as an integral element of labour rights and principles and reiterated that, while the right to strike was fundamental, it did not constitute an absolute right. The scope and conditions of that right should therefore be regulated at the national level. His Government maintained that disputes regarding the interpretation of Convention No. 87 should be resolved through the Organization's existing mechanisms. That said, while it would have been preferable to refer the issue to the Conference, it should nevertheless be possible to reach a positive outcome for all parties on the basis of the Governing Body's decision to refer the dispute to the ICJ. A constructive and collaborative approach within the ILO's tripartite framework should always be the first resort to find practical solutions and increase understanding of the diverse perspectives among its constituents.

24. **A Government representative of Algeria** expressed regret regarding the lack of consensus on the issue, which had divided the Organization and must be addressed in a constructive and pragmatic manner in accordance with the ILO's values, while maintaining the clarity and coherence of international labour standards. Any standard-setting discussion pertaining to Convention No. 87 should be carried out through a transparent, balanced and mutually beneficial process grounded in social dialogue and in accordance with the relevant procedures. Discussions on the development of a Protocol or similar instrument must ensure that relations between employers and workers would not be compromised. An in-depth discussion should be held on the implications of standard-setting actions on the scope of the Convention, which should provide an avenue for the resolution of the dispute.

25. **A Government representative of Colombia** said that it would have been preferable for the discussions held at the 349th *bis* (Special) Session of the Governing Body to have resulted in consensus. The right to strike was inextricably linked to the rights to collective bargaining and freedom of association. His Government was in the process of applying the recommendations of the Committee of Experts and the Committee on Freedom of Association on the right to strike in its labour legislation reform process and thus valued the legal certainty that could be provided by the ILO in that regard. Dialogue should continue to be strengthened as a pillar of the ILO; however, when consensus was unachievable, the Organization should make use of the mechanisms available to it. He thanked the Chairperson for his efforts to seek convergence among constituents, and the Office for enabling the discussion, noting that both had acted in an impartial manner. He expressed support for the draft decision as amended by the Workers' group, noting that no further action should be taken until the ICJ had issued an opinion on the matter.

26. **A Government representative of Japan** said that, in the light of the decision taken by the Governing Body at its 349th *bis* (Special) Session, it would be premature to evaluate the proposal made by the Employers' group given the uncertainty regarding the content of a

Protocol to Convention No. 87. His Government could therefore not support the draft decision as amended by the Employers' group. He suggested subamending the amendment proposed by the Workers' group to include "for the moment" at the end, since the Governing Body might need to consider its options after the ICJ had issued its opinion.

27. **Speaking on behalf of the group of Latin American and Caribbean countries (GRULAC)**, a Government representative of Mexico thanked the Office, under the leadership of the Director-General, for its work, which had been conducted with integrity and impartiality. She also recognized the skill of the Chairperson in guiding the discussions.

28. **The Government representative of Mexico,** speaking in her national capacity, said that the right to strike was an inherent part of the exercise of freedom of association. She welcomed the proposal from the Employers' group to adopt explicit provisions to regulate the right to strike on the basis of Convention No. 87. However, before agreeing to such a discussion, the ILO's tripartite constituents needed to have the legal certainty that would be provided by the advisory opinion of the ICJ. The various options contained in the Employers' group's proposed amendment were appreciated, and some of them could be helpful in the future, once the advisory opinion had been received. Having legal certainty regarding Convention No. 87 would strengthen the ILO's bodies, tripartism and social dialogue, and enable them to strengthen the fundamental rights of workers.

29. **A Government representative of the Russian Federation** began by thanking the Chairperson for his leadership in steering the Governing Body through difficult debates. The right to strike was recognized in the overwhelming majority of, if not all, Member States, including the Russian Federation. However, legal provisions regulating the right to strike varied from State to State, which meant that an international instrument would be unlikely to be able to consolidate all approaches. Therefore, he could not support the proposal to develop an international instrument, but did not rule out the possibility of working on one in the future. An item could be put on the agenda of a future session of the Conference, on the understanding that the discussions would not lead to the development of a legally binding instrument.

30. **A representative of the Director-General** (Director, International Labour Standards Department), responding to a question from the Government representative of Switzerland, referred back to document GB.347/INS/5, particularly to paragraph 27 in the main body of the document and paragraph 17 of the procedural framework contained in Appendix I, which said that "[t]he referral of an interpretation question or dispute to the Court and the ensuing advisory proceedings may not suspend, or otherwise affect, the supervision of the application of any Convention(s) which may be the subject of those proceedings." The supervisory bodies would of course remain free to decide the course of action they would deem appropriate in that regard.

31. **The Worker Vice-Chairperson** said that she was concerned that some of the issues raised by the Government representative of Switzerland might not have been developed in strong tripartite consensus, although, unlike the Employers' group, she did not want to suggest that any government was violating Convention No. 144. It was important to agree that the long-running dispute would not disrupt the work of the ILO supervisory bodies any more than it already had. The prevailing view was that the right to strike was covered by Convention No. 87, and it was only the Employers' group that had challenged that, without any broad support among governments, so the supervisory system should have been able to continue functioning on that basis. The disruptive effect of the dispute had, however, resulted in the need to take the matter to the ICJ. Hopefully, the question regarding the functioning of the

supervisory system had highlighted what a sensitive issue it was, but everybody needed to understand, as just clarified by the Office, that requesting an opinion from the ICJ did not stand in the way of the supervisory bodies continuing to work as usual, until told otherwise by the Court. The system should not be eroded any further.

32. **A Government representative of Switzerland** said that governments had a right to request clarifications from the Office and asking a question about whether a referral to the Court had a suspensory effect did not entail calling into question the ILO's supervisory system. Her Government's position, submitted to the Office in response to its background report, had been very clear from the start, and had been developed in consultation with Swiss social partners. Swiss social partners had also sent their own response to the Office. She therefore requested the Worker Vice-Chairperson to withdraw her comment casting doubt on their consultation with the Swiss social partners, and her comment suggesting that her query had called into question the ILO's supervisory system.

33. **The Worker Vice-Chairperson** said that if the Government of Switzerland had consulted on the matter recently, she would withdraw her suggestion that there had been no consultation. However, her group had heard during the early stages of the process that unions were not happy about what had been happening in Switzerland. She fully accepted everybody's right to ask the Office questions. She just wanted to make it very clear that the issue was very sensitive, and in that regard she thanked the Government representative of Switzerland for asking the question and said she appreciated the clarification from the Office.

34. **The Employer Vice-Chairperson** deplored the fact that the decision taken during the 349th *bis* (Special) Session the previous day had derailed the discussions at the 349th *ter* (Special) Session, and that both alternatives could not have been discussed calmly through social dialogue. Having heard mostly from non-Governing Body members during the Committee of the Whole, she would reserve her closing statement until she had heard from the Governing Body members.

Governing Body

35. The Governing Body had before it two amended versions of the draft decision, proposed by the Employers' group and the Workers' group, which had been discussed in the Committee of the Whole.

36. **The Chairperson,** as required by article 4.3 of the Standing Orders and as reflected in the arrangements for the special session adopted by the Governing Body at its 349th Session, provided the following oral report on the exchange of views in the Committee of the Whole:

> Pursuant to article 4.3 of the Standing Orders of the Governing Body, and as reflected in the special arrangements adopted for this special session, I have the honour to report to the Governing Body on the exchange of views that took place this morning.
>
> The Committee of the Whole offered the opportunity for a constructive exchange of views that involved a total of 11 speakers, including governments not represented in the Governing Body.
>
> On the principal question of whether or not the Organization should urgently include a standard-setting item on the right to strike on the agenda of the International Labour Conference at its 112th Session (June 2024), the Workers' and Employers' groups reaffirmed their respective positions.
>
> The Employers' group expressed its profound regret and disappointment at the outcome of the 349th *bis* (Special) Session of the Governing Body, as they considered that social dialogue had been severely damaged. Social dialogue, not litigation, was the cornerstone of the ILO.

The Employers' group also expressed its thanks for the support expressed by many governments for a solution based on tripartite dialogue in the context of the International Labour Conference and regretted that its views and those of many governments had not been taken into account and that a vote in favour of referral to the International Court of Justice (ICJ) had been forced. As a consequence, the Employers' group would take further steps at the next sessions of the Governing Body and International Labour Conference to enhance the democratization and inclusiveness of ILO procedures.

The Employers' group considered that the questions related to the right to strike were multifaceted and that neither the ICJ nor the Committee of Experts on the Application of Conventions and Recommendations were able to address such properly and conclusively.

In the light of the absence of ILO standards addressing the issue and the fact that the existing international instruments concerning the right to strike referred to the role of domestic legislation, there was a need to adopt an international regulation. That was fully consistent with the normative role of the ILO.

The Employers' group reiterated its view that a standard-setting process involving all ILO constituents was the only appropriate manner to solve interpretation disputes, which would result in legal certainty and authoritative rules that would have to be followed by the Committee of Experts. In contrast, ICJ advisory opinions were not legally binding and would not prevent the Employers' group from continuing to oppose the detailed positions developed by the Committee of Experts on the right to strike.

The proposed Protocol would not amend the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which did not include a right to strike, but would define rules applicable to that right, binding only those who would ratify it. The Employers' group would, however, not oppose other standard-setting options, such as a Recommendation or a Convention.

The Employers' group stated that it was possible for the Governing Body in March 2024 to put a standard-setting item concerning the right to strike on the agenda of the 112th Session (2024) of the International Labour Conference. Alternatively, it could be discussed at the 2025 and 2026 sessions of the Conference. The Employers' group was also open to other options, such as a general discussion or a tripartite meeting of experts.

The Workers' group recalled that standard-setting was at the heart of the ILO and that the Organization had been created to reduce poverty and to safeguard human dignity through the improvement of rights and working conditions. The Workers' group could therefore not accept proposals aimed at lowering standards on the right to strike and undermining or reversing the authoritative guidance of the Committee of Experts in this respect. A Protocol would not resolve the dispute at stake. On the contrary, it would lead to more legal uncertainty as a Protocol would create two separate legal regimes, one for those members having ratified Convention No. 87 only and the other for those ratifying both the Convention and the Protocol. No initiative would be relevant before the advisory opinion of the ICJ had been delivered. It was not clear either how a Protocol on the right to strike could be linked to a Convention which, according to the Employers, did not cover the right to strike.

The Workers' group stated that it would be difficult to reach tripartite consensus at the Conference, as dialogue had not resulted in consensus so far. The attempts to undo or take away existing fundamental rights were contrary to the objectives and mandate of the ILO and would never be acceptable to the trade union movement nor to many governments. The Workers' group also raised procedural issues in view of the items already decided by the Governing Body, as well as the preparatory standard-setting processes. The alternative options to the Protocol contained in the Employers' amendment were not valid either. In the opinion of the Workers' group, the only possible approach was to await the guidance of the ICJ, which would clarify whether the right to strike was covered by Convention No. 87. This could jeopardize the work of the ILO system or other discussions. On the contrary, that was the only means to put an end to the dispute.

All governments reaffirmed the importance of freedom of association and the right to strike. Many highlighted that the right to strike was an intrinsic corollary of freedom of association and a fundamental principle and right at work.

A significant number of governments was of the view that, following the decision to refer the dispute on the right to strike to the ICJ for an advisory opinion, it was premature to discuss the question of placing a standard-setting item on the agenda of the Conference. Some added that it was not possible to discuss standard-setting on the right to strike as long as the dispute on whether the right to strike was contained in Convention No. 87 was not resolved.

Some governments expressed regret at the decision to refer the dispute to the ICJ, which, in their view, precluded social dialogue as the normal means through which disputes should be settled in the ILO. Other governments were of the view that legal certainty was in the interest of the Organization as a whole, including the tripartite constituents and the supervisory bodies.

Some governments referred to the prospect of resuming tripartite dialogue, possibly through standard-setting at the Conference or through other means, once the advisory opinion from the ICJ was received. They expressed the wish that a solution garnering tripartite support would eventually be found.

Several speakers noted that the right to strike was not an absolute right and should be regulated at the national level. A view expressed in that regard was that the ICJ was not in a position to address the question of the modalities for the exercise of the right to strike. According to certain speakers, the modalities for the exercise of the right to strike could be addressed through social dialogue after the advisory opinion was delivered.

Some speakers expressed the wish to revert to the Conference at a later stage, with a view to arriving at a balanced outcome and pragmatic solutions, taking into account divergent views.

All the speakers emphasized the importance of social dialogue and expressed the hope that it would be safeguarded and shored up within the ILO.

Finally, in reply to a question from a government, the Office indicated that the referral of the dispute to the ICJ would not have a suspensive effect on the regular functioning of the ILO supervisory mechanism (see document GB.347/INS/5, paragraph 27, and paragraph 17 of the procedural framework in its Appendix I).

I hope that this report has done justice to the quality of the exchange of views and to the engagement and sense of responsibility shown by all three groups.

I trust that the Governing Body, meeting in plenary, will now be able to take over and engage in a constructive debate on the possible way forward.

37. **The Employer Vice-Chairperson** said that the Committee of the Whole was an important and useful format for the discussion of fundamental issues. She reiterated that her group's aim was to allow the International Labour Conference to discuss and decide on potential international regulations regarding the definition, scope and boundaries of the right to strike. Such regulations could be issued only by the tripartite constituents, within the framework of established ILO procedures, and not by the ICJ or the Committee of Experts.

38. In determining whether Convention No. 87 covered the right to strike, the ICJ should consider the continued refusal of the Workers' group and of certain governments to allow standard-setting on that right. A matter that the Workers' group did not wish to be explicitly regulated in an instrument could not be implicitly regulated in the Convention. In its amendment, the Employers' group had set out four different options for inclusive discussion on the right to strike. The key difference between the two proposed amendments was that while the Employers' group had proposed an unprecedented discussion at the Conference, the Workers' group had unilaterally forced its position, going against the spirit of social dialogue.

39. The first option proposed by her group was flexible standard-setting, whether in the form of Recommendations, Protocols or Conventions. Although her group had proposed that those

efforts should take place in 2024, that was only to take account of the urgency alleged by the Workers' group, and her group would be satisfied if they were deferred to a later session of the Conference in order to better prepare for the discussion. The second option was a general discussion on the right to strike and industrial action in the Conference which would be substantive and involve all Member States and social partners. The meeting of experts proposed in the third option would entail substantive discussion, unlike the meeting of experts held in 2015. The fourth option was to continue to discuss, at the next Governing Body session, all possible proposals on further steps to ensure legal certainty.

40. The amendment proposed by the Workers' group, meanwhile, indicated complete disregard for the Conference and for the ILO as a whole. The group's refusal to place the matter on the Conference's agenda demonstrated an unwillingness to resolve the issue, instead preferring to set a standard forcibly, through external means. Although the Workers' group claimed that the proposed Protocol would be substantially inferior to existing standards, that could not be true since the right to strike was not yet regulated at the global level. Moreover, while Convention No. 87 did not contain the word "strike", the Workers' group was opposed to filling that regulatory gap through standard-setting. Furthermore, all international treaties dealing with the right to strike referred to national law and practice, and any ILO instrument could either confirm or diverge from the opinions of the Committee of Experts. Any standard developed by the Conference, the most authoritative body of the ILO, would enjoy legitimacy and ownership by the ILO as a whole. A starting point for resolving the dispute might be to acknowledge the unique role of the Conference as the creator of standards on all labour issues, including the right to strike.

41. The Forced Labour Convention, 1930 (No. 29), contained no explicit or implied reference to trafficking in persons. Nonetheless, over time, the Committee of Experts had made comments on trafficking when examining its application, and that regulatory gap had been filled by a Protocol. The standard-setting via a Protocol proposed by her group was therefore wholly consistent with previous practice, since the Committee of Experts had similarly developed detailed opinions on the right to strike when examining the application of Convention No. 87, even though the right to strike had been expressly excluded from it.

42. A number of governments had referred to her group's proposals as possible options to be considered at a later stage. She therefore reiterated her group's intention to bring the matter before the Conference at a future session, as well as to reaffirm its views on the opinions of the Committee of Experts on the right to strike during the next session of the Conference, particularly since the Office had indicated that the referral to the ICJ would not have a suspensive effect and that the Committee of Experts could therefore continue to express its views on the matter.

43. **The Worker Vice-Chairperson** said that she remained dissatisfied with the Employer Vice-Chairperson's response to her urgent request for clarification of the statement that the decision adopted by the Governing Body at its 349th *bis* (Special) Session would have consequences for the Conference's 2024 session. She sought assurances that all ILO constituents would participate faithfully in tripartite discussion at that session of the Conference. In the absence of such assurances, her group would cease engaging in genuine social dialogue in the ILO owing to the disingenuous stance of the Employers' group.

44. The Workers' group took a different view of the precedent relating to Convention No. 4, that had been used by the Employers' group to make the case for standard-setting. Prior to the referral to the ICJ of the dispute concerning the interpretation of that Convention, which had related to the definition of women workers, there had been considerable disagreement within

the Governing Body as to its possible resolution. The Governing Body's initial decision to engage in standard-setting had failed because persistent disagreement on the definition had prevented the required majority from being reached in the Conference, demonstrating the need for the ICJ's guidance before the Convention could be revised. It was clear, therefore, that when views on the interpretation of a Convention varied greatly, legal clarity must be sought before standard-setting could be efficient or desirable.

45. The Employers' group had repeated its arguments time and time again, and little progress had been made. The strong support for standard-setting voiced by the Employers' group represented a dramatic, albeit welcome, change to its stance over the previous decade. The idea that all issues should be resolved through standard-setting ran counter to the long-standing position of the Employers' group, and the Workers' group believed that such an approach was inappropriate, particularly given that the ICJ was yet to issue its advisory opinion. Lastly, while there had been general recognition of a regulatory gap in relation to Convention No. 29, leading to the development of a Protocol on the basis of guidance from the Committee of Experts, in the case of Convention No. 87 there was disagreement as to the existence of a gap, and the Protocol proposed by the Employers' group would not be based on the guidance of the Committee of Experts, but obliterate it.

46. **Speaking on behalf of a majority of Asia and Pacific group (ASPAG) countries,** a Government representative of the Islamic Republic of Iran expressed strong support for the timely inclusion of a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference. The proposed Protocol to Convention No. 87, while voluntary, would provide legal certainty on a long-standing issue and represent meaningful progress by creating binding obligations regarding the right to strike for States that ratified it, and it could also serve to update the Convention. Disagreements on key provisions should be resolved through tripartite dialogue and standard-setting, and the governments on whose behalf he was speaking stood ready to participate actively in tripartite discussion and technical preparations for the standard-setting item. It was, however, disappointing that the decision to request an advisory opinion of the ICJ had been taken through a Governing Body vote rather than at the International Labour Conference, which had been the preference stated by most ILO Member States in the Committee of the Whole. Tripartism, consensus and standard-setting procedures represented the best means of following up the advisory opinion in line with countries' particular circumstances.

47. **Speaking on behalf of a group of 45 countries,** [1] a Government representative of Colombia highlighting his group's commitment to reaching consensus through social dialogue and tripartism and noting that it would not be possible to adopt the necessary measures until the advisory opinion of the ICJ had been received, proposed a subamendment to the Workers' proposed amendment that read:

> 16. The Governing Body decided:
>
> (a) ~~F~~further to the request of the Employers' group and of the Republic of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the

[1] Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Chile, Cyprus, Czechia, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, South Africa, Spain, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America.

112th Session of the International Labour Conference (2024), not to include such an item; and

(b) that after having received the advisory opinion of the International Court of Justice as requested by the Governing Body at its 349th*bis* (special) Session, it would consider appropriate follow-up action.~~decided that no further action was needed.to~~

48. **Speaking on behalf of a majority of ASPAG countries,** another Government representative of the Islamic Republic of Iran proposed another subamendment to the amendment proposed by the Workers' group, to replace the words "decided that no further action was needed" by "recommended a follow-up to the International Court of Justice advisory opinion by placing an item, at the earliest session of the International Labour Conference, to conduct an in-depth discussion on the possible follow-up."

49. **A Government representative of Argentina** highlighted that a standard-setting item could not be placed on the agenda of the next session of the Conference because it was not for States to establish the scope of the right to strike, which was linked to the defence of workers' interests and therefore constituted a human right. Moreover, the requests of the Employers' group might be impacted by the fact that the right to strike was enjoyed solely by workers. States could only place limits on the right to strike when it affected the human rights of other groups or endangered life, security or health, or in other specifically determined circumstances. Those situations could be regulated only by States, in line with national legislation and the relevant international instruments, including Convention No. 87; they could not be regulated by means of an international treaty. Should a Protocol to Convention No. 87 be developed, the right to strike would be limited only in States that ratified it, thereby undermining coherence in the multilateral system.

50. There were also procedural barriers to placing a standard-setting item on the Conference's agenda. For example, it was not appropriate to address the matter before the ICJ had issued its advisory opinion, and there was insufficient time before the 112th Session of the Conference to respect the procedural timeframes set out in the Standing Orders of the Governing Body and the Conference.

51. **A Government representative of Bangladesh** voiced concern at the fact that the decision on the referral to the ICJ had been taken via a vote by the Governing Body, excluding many Member States, and at the apparent division within the Organization; the situation strengthened the argument for the democratization of the Governing Body. A standard-setting discussion was necessary given that the ICJ would not rule on the extent to which governments should allow strikes, or in which circumstances. The issue had arisen from the unmandated interpretation of Convention No. 87 by the Committee of Experts, and the divergence in opinions related to how, rather than whether, the right to strike should be enjoyed. Given that most national legislation permitted strike action, it was likely that most governments would be willing to contribute to the process of determining the scope and limits of the right to strike. The contribution of all ILO constituents would be vital in developing the proposed Protocol. He supported the subamendment proposed by a majority of ASPAG countries.

52. **A Government representative of Brazil** drew attention to the need to strengthen social dialogue, given the obstacles to it that had led to the current situation. His Government engaged in social dialogue on a daily basis through tripartite working groups, and it would welcome further discussion of the right to strike, for example via a tripartite technical group and at a future session of the Conference, provided that the Governing Body adopted a decision to that effect and only after the ICJ had concluded its legal assessment.

53. **A Government representative of Indonesia** stressing the importance of social dialogue in the ILO's decision-making, said that in the interest of fairness, the proposal of the Employers' group should be afforded equal attention to that of the Workers' group. She supported the subamendment proposed by a majority of ASPAG countries.

54. **A Government representative of India** highlighted that although the decision on the referral to the ICJ had been arrived at by means of a vote by the Governing Body, the majority of Member States had believed that it should be discussed by the Conference. Nevertheless, the subamendment proposed by a majority of ASPAG countries recognized the need to move forward constructively and collectively by placing the ICJ's advisory opinion before the Conference, a step that would democratize the decision-making process. That proposed subamendment also addressed the Governing Body's responsibility to the Conference, which was particularly relevant given that most Member States that would be affected had not been able to voice an opinion.

55. **Speaking on behalf of the Arab group,** a Government representative of Morocco supported the subamendment proposed by a majority of ASPAG countries.

56. **The Employer Vice-Chairperson** clarified that her group's proposed amendment was not intended to lower established standards; rather, the proposal was for the International Labour Conference to have a discussion thereon. The issue of the definition of women workers in Convention No. 4 had been referred to the ICJ only after the Conference had failed to reach a majority decision; that procedure should be followed in the current circumstances. The subamendments proposed by the group of 45 countries and by a majority of ASPAG countries demonstrated a desire for a more inclusive discussion of the right to strike.

57. **A representative of the Director-General** (Legal Adviser) recalled that the ICJ's advisory opinion would be delivered to the Governing Body as the requesting organ. It would then fall to the Governing Body to analyse it and consider possible follow-up, which could include bringing the matter before the Conference. That aspect was addressed in paragraphs 18–20 of the procedural framework for the referral of interpretation questions or disputes to the ICJ under article 37(1) of the Constitution, contained in Appendix I to document GB.347/INS/5.

58. **The Employer Vice-Chairperson** raised a point of order, since the Governing Body was aware of the legal procedures, and the Legal Adviser should not intervene in policy discussions.

59. **The Director-General** said that the intention had been to ensure that all Governing Body members were aware of the procedure.

(The Governing Body resumed its consideration of the item following a brief suspension of the sitting.)

60. **The Worker Vice-Chairperson** expressed support for the subamendment proposed by the group of 45 countries.

61. **The Employer Vice-Chairperson** rejected the subamendment proposed by the group of 45 countries, as her group wished to secure a firm commitment to discussing the issue of the right to strike at the International Labour Conference. That decision was completely separate from the decision on referral to the ICJ taken at the 349th *bis* (Special) Session of the Governing Body, although the Employers' group recognized that discussion of the right to strike at the Conference should naturally take place after the ICJ had delivered its advisory opinion. She therefore supported the subamendment proposed by a majority of ASPAG countries, which captured the need for an inclusive discussion on the right to strike. Another acceptable option would be to merge the two subamendments by retaining the element whereby the Governing

Body would consider appropriate follow-up action, but adding wording to the effect that such action would include placing an item on the agenda of the Conference. She called on the Governing Body to show flexibility by considering that solution, which represented a compromise between two opposing positions.

62. **The Worker Vice-Chairperson** said that her group had not accepted referral to the Conference as part of the decision taken at the 349th *bis* (Special) Session of the Governing Body, and would not accept it in any decision taken at the current session. The parameters of any follow-up action taken by the Governing Body should not be fixed before the ICJ had delivered its advisory opinion. In that context, she asked the Employer Vice-Chairperson to clarify her position regarding the Conference in the light of the decision to refer the issue to the ICJ.

63. **The Employer Vice-Chairperson** said it was regrettable that her attempt to seek a compromise had been rejected by the Workers' group and certain governments. The Employers' group was ready to make concessions, but had met with obstruction from the other parties; that did not generate confidence in the Organization's capacity for tripartite dialogue. Given the disastrous state of debate at recent Governing Body sessions, the Office leadership should give careful consideration to how the proceedings were conducted.

(The Governing Body resumed its consideration of the item following a brief suspension of the sitting.)

64. **The Worker Vice-Chairperson** said that, following a discussion in which various options to avoid a vote had been explored, her group had decided that, due to the seriousness of the situation, it could not compromise. Its attempts to find solutions through social dialogue over the past 11 years had been blocked by the Employers' group. Any recognition that there was a persistent and deep-rooted dispute and that the Workers' group wanted access to justice had been denied. The Employers' group was demonstrating a serious lack of trust towards the Workers and Governments and towards the Office. She therefore called for a vote.

65. **The Employer Vice-Chairperson** requested the opportunity to review the draft minutes of the session to ensure their accuracy.

66. **A Government representative of Morocco** said that, when he had first participated in the work of the Governing Body, he had been told that the Governing Body always found solutions through discussion and that voting was extremely rare. That appeared to no longer be the case. Voting meant that there were winners and losers. In reality, the biggest loser would be tripartism and the Organization itself, which would be blocked every time an important decision needed to be made. It was important to look to the future. The members of the Governing Body could not continue to work together if they did not trust one another.

67. Sincere efforts to find consensus could still be made, based on the subamendment proposed by the group of 45 countries. Although the Workers' group was within its rights to call for a vote, he appealed to it to reconsider the importance of social dialogue and to make one final attempt to find a solution together. In that regard, he proposed that the phrase ", including possible discussions at the Conference" could be added at the end of subparagraph (b) of the subamendment proposed by the group of 45 countries.

68. **The Worker Vice-Chairperson** said that her group had already explored all the options and none of them were acceptable. The issue would not be resolved through a discussion at the Conference. She reiterated her call for a vote.

69. **The Employer Vice-Chairperson** thanked the Government representative of Morocco for his tireless efforts to achieve consensus and recalled the willingness of her group and others to

compromise. Nonetheless, the Workers' group remained completely inflexible. The situation was disastrous and did not bode well for the future. Regrettably, she needed to leave the meeting, but another Employer spokesperson would take her place.

70. **Speaking on behalf of a majority of ASPAG countries,** a Government representative of the Islamic Republic of Iran agreed that votes should be carried out only in exceptional situations and urged all participants to consider the cost to the ILO and to tripartism of taking that route. She supported the proposed addition by Morocco, but suggested the deletion of the word "possible".

71. **The Worker Vice-Chairperson** speaking on a point of order, said that the special session was being held at the request of the Employers' group, and all participants had made their weekend available and been told to be prepared for extended sittings. It showed an extreme disregard for the work of the Governing Body that, before the discussions had ended, the Employer Vice-Chairperson had decided to leave.

72. **Speaking on behalf of the group of 45 countries,** a Government representative of Colombia welcomed the efforts that had been made to reach consensus, but noted with regret that all avenues had been exhausted. He called for a vote to be taken.

73. **The Employer Vice-Chairperson** said that the remarks made by the Worker Vice-Chairperson were completely unacceptable. There was a good reason behind why she had been obliged to change her travel plans and leave the meeting early. It was not for the Worker Vice-Chairperson to criticize how the Employers' group organized itself.

74. **The Worker Vice-Chairperson** presented her apologies to the Employer Vice-Chairperson. Nonetheless, it would have been polite to have given the Governing Body advance notice of her early departure.

75. **Speaking on behalf of the Government group,** a Government representative of Namibia urged all participants to focus on the issues before the Governing Body, think of the process and respect the systems that were in place.

76. **The Chairperson** invited the Workers' and Employers' spokespersons, the Government representatives of Colombia and the Islamic Republic of Iran, and the Chairperson of the Government group to attend an informal meeting.

(The Governing Body resumed its consideration of the item following a brief suspension of the sitting.)

77. **Speaking on behalf of the group of 45 countries,** a Government representative of Spain noted the complexity and the deep-rooted nature of the issue. His group sought to obtain legal certainty as well as support for the supervisory mechanisms of the ILO, the legitimacy of which should not be questioned. Other questions had been raised, including on inclusivity and democratization, which also contributed to the current impasse. However, it was not appropriate to conflate issues that were completely disparate and could not be mixed with negotiations that had to follow a different path. A discussion by the Conference should not be the only avenue for legitimizing a decision. The Governing Body should wait for the advisory opinion of the ICJ and then decide what to do.

78. **Speaking on behalf of GRULAC,** a Government representative of Mexico noted that, while she was grateful to the Chairperson for his efforts to reach agreement on the issue, any informal meetings held in the margins of the plenary sitting should be inclusive and involve the coordinators of all regional groups.

79. **The Chairperson** took note of the comment by GRULAC and explained that the attendees at the informal meeting had been selected in a bid to find consensus.

80. **Speaking on behalf of the group of 45 countries,** a Government representative of Spain requested information on the order in which the Governing Body would discuss the proposed subamendments.

81. **A Government representative of Morocco** said that, as his proposal had not met with consensus, he wished to withdraw it.

82. **The Chairperson** referring to the subamendments to the Workers' proposed amendment, said that the Governing Body would decide first on the subamendment proposed by the group of 45 countries, and then on the one proposed by a majority of ASPAG countries.

83. **The Clerk of the Governing Body** invited the Governing Body to proceed with a vote by show of hands on the subamendment proposed by the group of 45 countries.

(The subamendment proposed by the group of 45 countries was accepted, with 30 votes in favour, 19 votes against and 6 abstentions.)

84. **The Worker Vice-Chairperson** raising a point of order, requested clarification as to the rationale for the upcoming vote on the subamendment proposed by a majority of ASPAG countries; that subamendment should have fallen after the adoption of the one proposed by the group of 45 countries.

85. **Speaking on behalf of a majority of ASPAG countries,** a Government representative of the Islamic Republic of Iran confirmed that ASPAG had not withdrawn its subamendment.

86. **A representative of the Director-General** (Legal Adviser) clarified that the subamendment proposed by a majority of ASPAG countries conflicted with the one proposed by the group of 45 countries that had just been adopted. Therefore, the former had fallen upon the acceptance of the latter. He suggested that the Governing Body could proceed to decide on the amendment proposed by the Workers' group – it could be accepted by consensus or by a vote.

87. **The Employer spokesperson** said that the implications of the vote had not been clearly explained before the vote. She asked whether it would be possible for the Governing Body to hold another vote, on which of the two proposed subamendments it wished to accept.

88. **The Chairperson** acknowledged that Governing Body members may not have been clear about the voting process. The vote would therefore be retaken in order to protect the integrity of the process. The two subamendments would be put to a vote against each other, as expressly provided for in the Standing Orders.

89. **The Clerk of the Governing Body** said that the Governing Body would proceed to a vote by show of hands on which of the two proposed subamendments it wished to accept.

(There were 30 votes in favour of the subamendment submitted by the group of 45 countries, 22 votes in favour of the amendment submitted by a majority of ASPAG countries and 3 abstentions.)

90. **The Chairperson** announced the results, noting that the subamendment proposed by the group of 45 countries was accepted and the one proposed by a majority of ASPAG countries was rejected. Accordingly, and in the absence of any objection, he took it that the Governing Body was prepared to adopt the amendment proposed by the Workers' group, as subamended by the group of 45 countries.

Decision

91. The Governing Body decided:

(a) further to the request of the Employers' group and of the Republic of Türkiye to urgently include a standard-setting item on the right to strike on the agenda of the 112th Session of the International Labour Conference (2024), not to include such an item; and

(b) that after having received the advisory opinion of the International Court of Justice, as requested by the Governing Body at its 349th *bis* (Special) Session, it would consider appropriate follow-up action.

(GB.349*ter*/INS/1, paragraph 16, as amended by the Governing Body)

Closing remarks

92. **The Worker Vice-Chairperson** said that, while her group was supportive of the International Labour Conference, past experience had demonstrated that a calm discussion of the right to strike would not be possible, and her group could not trust the unclear motives behind such proposals. The Employers' group had proposed standard-setting that aimed to void 70 years of the Committee of Experts' jurisprudence. She invited those who had accused her group and others of failing to respect democracy or adhere to the values of social dialogue to consider their own actions in their countries.

93. She welcomed the recognition by the group of 45 countries that the only appropriate outcome of the current session was to await the ICJ's advisory opinion before submitting it for assessment by the Governing Body. Thanking the Chairperson for guiding an extremely complicated session and other participants for engaging in respectful, tripartite social dialogue, she called on the Employers' group to engage in further discussion so as to avoid future conflict.

94. **The Employer spokesperson** while expressing deep disappointment at the outcome of the two special sessions, thanked the participants that had supported her group's positions. While she welcomed the efforts made to reach consensus, the outcome of the two special sessions was disastrous for the ILO and indicated significant division. Not for the first time, the Governing Body had resorted to voting rather than consensus, severely compromising its credibility and integrity. The tone and content of debate in the Governing Body should be respectful, and she took great exception to the false accusations levelled at her group by the Workers' group.

95. Given that many governments had stressed the importance of inclusivity and democratic decision-making, the right to strike must be placed on the agenda of the Governing Body's next session to ensure that it was discussed at the Conference, which was the Organization's supreme body. Her group believed that one of the underlying reasons for the current situation was some governments' reluctance to make progress towards democratization and to strengthen the role of the Conference. The mistrust of the outcome of the Conference on the part of the Workers' group was regrettable.

96. She commended the Chairperson for his work in such difficult circumstances and thanked the Office for its support. She also thanked the Employer Vice-Chairperson for her commitment to defending her group's views, which were informed by its desire to take decisions acceptable to all; the importance of those decisions meant that the Governing Body must endeavour to accommodate opposing views and reach consensus.

97. **Speaking on behalf of the Africa group,** a Government representative of Morocco thanked the Office for its unfailing support and the Chairperson for his impartial steering of the 349th Session and 349th *bis* and *ter* (Special) Sessions of the Governing Body.

98. **Speaking on behalf of the Government group,** a Government representative of Namibia commended the Chairperson for his leadership, the participants for their openness to considering differing views and negotiating in good faith, and the Office for its continued support.

99. **Speaking on behalf of a majority of ASPAG countries,** a Government representative of the Islamic Republic of Iran clarified that the countries on whose behalf she was speaking had not withdrawn their proposed subamendment because they maintained that the International Labour Conference must remain the Organization's supreme body. All ASPAG countries thanked the Office for its efforts.

100. **A representative of the Director-General** (Legal Adviser) explained that the Director-General would, in the coming days, formally transmit the Governing Body's resolution in which it decided to refer the question of the interpretation of Convention No. 87 to the ICJ, requesting that the ICJ authorize the participation in advisory proceedings of international employers' and workers' organizations that enjoyed general consultative status at the ILO. He would also request that the ICJ consider, if possible, an accelerated procedure. The Director-General would also write to the United Nations Economic and Social Council to inform it of the request, as required under article IX(4) of the 1946 Agreement between the United Nations and the International Labour Organization (also known as the UN-ILO relationship agreement).

101. Upon receipt of the Director-General's communication, the Registrar of the ICJ would give notice of the referral request to all ILO Member States and notify any international organization considered by the ICJ as likely to be able to furnish information on the question. The ICJ would then determine the form and time limit for written submissions and decide whether to hold oral hearings, setting a date if necessary. The Office would shortly begin preparing a comprehensive dossier of documentation likely to shed light on the matter for submission to the ICJ. That dossier and other relevant information would be published on a dedicated page of the ILO's website. The Office would provide detailed information as the process progressed.

102. **The Chairperson** thanked all participants for their valuable contributions and commendable dedication.

Document No. 34

GB.322/INS/5, The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards, October 2014

INTERNATIONAL LABOUR OFFICE

Governing Body

322nd Session, Geneva, 30 October–13 November 2014

GB.322/INS/5

Institutional Section

INS

Date: 16 October 2014
Original: English

FIFTH ITEM ON THE AGENDA

The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards

Purpose of the document

The document sets out the possible modalities, scope and costs of action under article 37 of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention. It also addresses further outstanding issues in respect of standards policy and the supervisory system (see the draft decision in paragraph 125).

Relevant strategic objective: Promote and realize standards and fundamental principles and rights at work.

Policy implications: This document relates to the ongoing discussions on the international labour standards policy of the Organization.

Legal implications: Those associated with the possible implementation of article 37 (paragraphs 1 and 2) of the ILO Constitution, including a possible request to the International Court of Justice for an advisory opinion and the possible establishment of an in-house tribunal for the expeditious settlement of interpretation disputes. The possible establishment of a standards review mechanism would have significant legal implications.

Financial implications: To be determined, depending on the decisions taken.

Follow-up action required: Depends on the decisions taken.

Author unit: Office of the Director-General (CABINET).

Related documents: GB.309/LILS/4; GB.310/LILS/3/1(Rev.); GB.312/LILS/5; GB.320/LILS/4.

Contents

Appendices

Introduction

1. In March 2014, following a broad consultative process with all groups, the Governing Body was invited to give its direction on concrete proposals that address the main outstanding issues in relation to the standards supervisory system. In view of the urgency and gravity of the situation, the Governing Body felt it was necessary to give further consideration to the options under article 37 (paragraphs 1 and 2) of the ILO Constitution and requested the Director-General to prepare a document for its 322nd Session in November 2014 setting out the possible modalities, scope and costs of action under article 37 of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention. [1] The Governing Body also recognized that a number of steps could be examined with a view to improving the working methods of the standards supervisory system and requested the Director-General to present to the 322nd Session of the Governing Body a timeframe for the consideration of remaining outstanding issues in respect of the supervisory system and for launching the Standards Review Mechanism.

2. This document is accordingly divided in two sections. Section I focuses on the practical modalities of the two courses of action envisaged in article 37 of the Constitution, namely a request for an advisory opinion of the International Court of Justice and the establishment of an in-house tribunal for the expeditious settlement of interpretation disputes. Section II addresses a number of outstanding issues in respect of the standards policy and the supervisory system.

Section I. Modalities, scope and costs of action under article 37 (paragraphs 1 and 2) of the ILO Constitution

3. Part A of this section reviews the main characteristics and procedural aspects of the advisory function of the International Court of Justice, emphasizing issues of particular importance to the ILO, such as the possibility of international employers' and workers' organizations being granted direct access to Court proceedings. To facilitate discussion, it also includes proposed wording of possible questions that might be brought before the International Court of Justice on the right to strike and the mandate of the Committee of Experts on the Application of Conventions and Recommendations and a draft Governing Body resolution containing the questions to be put to the Court (Appendix I).

4. Part B provides proposals for the establishment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of ILO Conventions. These proposals take into account the specificities of ILO Conventions and the tripartite nature of the Organization, and aim at devising a cost-efficient mechanism for the rapid settlement of interpretation issues. A draft statute (Appendix II) has been prepared building on prior discussions and extensive research on the functioning of existing international

[1] GB.320/LILS/4, para. 41(a). The question of interpretation of international labour Conventions, and the possible implementation of article 37 has been the subject of recurrent discussions in the past four years; see *Non-paper on interpretation of international labour Conventions* (February 2010); *Informal exploratory paper on interpretation of international labour Conventions* (October 2010); *The ILO supervisory system: A factual and historical information note* (September 2012); *Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations* (February 2013). Copies of these documents are found at https://www.ilo.org/public/english/bureau/leg/art37.htm.

courts and tribunals. Practical indications of cost estimates and the possible duration of the proceedings are also presented.

5. It needs to be clarified at the outset that the possibilities provided for in article 37 (paragraphs 1 and 2) of the ILO Constitution are complementary and not mutually exclusive. Article 37(1), which refers to the advisory function of the International Court of Justice, is part of the Constitution as originally drafted in 1919, whereas article 37(2), which provides for the establishment of an internal judicial body, was introduced at the time of the constitutional amendment of 1946. As it currently reads, article 37 is based on the postulate that the most critical questions relating to the interpretation of ILO Conventions and any question relating to the interpretation of the Constitution itself should be brought before the International Court of Justice, while requests for the interpretation of ILO Conventions that might be less complex or more amenable to expeditious determination could be submitted to an internal tribunal.

6. Even though this document addresses, in line with the Governing Body decision, the two options under article 37 of the ILO Constitution, it should be recalled that the Governing Body could also consider other options, including the possibility of holding a tripartite discussion on the issues that have arisen in relation to the right to strike, the application of that right and limitations to its exercise. Such a tripartite discussion could take the form, for example, of a debate during the Governing Body, a meeting convened by the Governing Body for this purpose, a specific item placed on the agenda of the International Labour Conference, or a dedicated session of the Conference Committee on the Application of Standards.

A. Article 37, paragraph 1: Taking the matter to the International Court of Justice

7. Article 37(1) of the ILO Constitution provides for the referral of "any question or dispute" (*questions ou difficultés* in French) relating to the interpretation of the Constitution or of any international labour Convention adopted by member States pursuant to the provisions of the Constitution to the International Court of Justice "for decision" (*appréciation* in French). Despite the inconsistency between the English and French texts, article 37(1) gives expression to the clear intention of the drafters to entrust the settlement of any dispute or question relating to the interpretation of the Constitution or of an international labour Convention, as a last resort, to the highest judicial authority of the United Nations system and to recognize its pronouncements as decisive. As a matter of constitutional theory and practice, article 37(1) has always been understood as conferring a binding and decisive effect to advisory opinions obtained on that basis.

8. In its early years, the ILO – in reality, the League of Nations acting at the Organization's request – had recourse to the advisory function of the Permanent Court of International Justice on six occasions between 1922 and 1932 (one specifically requesting the interpretation of an international labour Convention) but has not so far sought any advisory opinion from the International Court of Justice. [2] All six requests were submitted to the

[2] The Permanent Court of International Justice (PCIJ) – the predecessor to the International Court of Justice – held its inaugural sitting in 1922 and was dissolved in 1946. During this period, the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions. The six requests for advisory opinions that concerned the ILO were: *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference* (1922); *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (1922); *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production* (1922); *Competence of the ILO to Regulate*

Court through the Council of the League of Nations pursuant to Article 14 of the Covenant of the League of Nations.

9. In fact, Article 14 of the Covenant, which called for the establishment of a Permanent Court of International Justice, also provided that the Court "may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly". As interpreted in practice, and eventually also reflected in article 82 of the Rules of Court of 1936, two types of advisory opinion were envisaged; one was an opinion related to a "dispute" *(différend)*, which was largely related to a contentious case, while the other was an opinion related to a non-contentious "question" *(point)*.

10. In the event, article 14 of the Covenant was replaced by article 96 of the United Nations Charter, which follows the same pattern as it grants the right to initiate advisory proceedings "on any legal question" to two principal organs of the United Nations, namely the General Assembly and the Security Council, and to specialized agencies that the General Assembly would authorize to request advisory opinions "on legal questions arising within the scope of their activities". Basically the same provision is reproduced in article 65 of the Statute of the International Court of Justice, which succeeded the Permanent Court of International Justice. There is a significant element of continuity between the two Courts, and this may impact positively on any request for an advisory opinion that might be initiated by the ILO.

A.1. Advisory function of the International Court of Justice: Procedural aspects

A.1.1. General remarks

11. Contrary to the contentious jurisdiction of the International Court of Justice, the purpose of its advisory function is not to settle inter-state disputes (even if it can contribute to such a settlement) but to provide legal advice to the organs and institutions requesting the opinion. [3] The provisions governing advisory proceedings are set out in articles 65 and 66 of the Statute of the Court and articles 102 to 109 of its Rules. [4]

12. The main distinction is, however, that in an advisory procedure there is no "case" to be adjudicated and consequently there are no "parties"; what is submitted to the Court is a request for legal guidance, and the Court must ensure that it obtains all necessary information through written statements and/or hearings before it delivers its opinion. An important consequence thereof is that the consent of the parties to a dispute, which is the basis of the Court's jurisdiction in contentious cases, is not required in advisory proceedings.

Incidentally the Personal Work of the Employer (1926); *Free City of Danzig and the ILO* (1930); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (1932). For a brief account on these cases, see S.M. Schwebel: "Was the capacity to request an advisory opinion wider in the Permanent Court of International Justice than it is in the International Court of Justice?", in *British Yearbook of International Law* (1991, Vol. 62), pp. 87–90.

[3] On the procedural aspects of the advisory function of the International Court of Justice, see S. Rosenne: *The law and practice of the International Court 1920–2005*, 4th edition (2006, Vol. III), pp. 1653–1703; C.F. Amerasinghe: *Jurisdiction of specific international tribunals* (2009), pp. 199–254; R. Kolb: *The International Court of Justice* (2013), pp. 1102–1111; M. Pomerance: *The advisory function of the International Court in the League and U.N. Eras* (1973), pp. 277–329.

[4] The full text of the Court's Statute and Rules of Court and the text of all advisory opinions and background documents can be accessed at www.icj-cij.org. Additional information on the advisory function of the Court may be found at https://www.ilo.org/public/english/bureau/leg/art37.htm.

13. According to the Statute of the Court, the formal request for an advisory opinion has to emanate from a body that is authorized by the United Nations Charter to make such a request, as noted above. [5] Given the fact that, in accordance with article 96(2) of the United Nations Charter, the General Assembly has duly authorized the ILO to request advisory opinions, it is probable that in the event of a request for an advisory opinion submitted by the Organization, the Court will base its jurisdiction primarily on article IX(2) of the 1946 Agreement between the United Nations and the ILO, which explicitly authorizes the ILO to request an advisory opinion, and UN General Assembly Resolution 50(I) of 14 December 1946 by which the General Assembly approved the UN–ILO Agreement. [6]

A.1.2. Initiation of proceedings

14. The advisory procedure starts with the request for an advisory opinion, which has to be made in writing and transmitted to the Court. It is for the requesting organization to determine how the question is to be formulated and how the decision to request an advisory opinion may be made. According to article 65(2) of the Statute, "questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question". [7] This documentation should contain all background information on the underlying dispute and may also relate to the debate that led to the adoption of the decision requesting the opinion. [8]

15. To date, all requests submitted to the Court have taken the form of a formal resolution adopted in the normal manner by the requesting organ. Following a common pattern, these resolutions contain a few preambular paragraphs contextualizing the problem on which

[5] According to the *International Court of Justice Yearbook* (2010–11), pp. 107–108, three United Nations organs besides the Security Council and the General Assembly, as well as 16 organizations, are at present authorized to request advisory opinions. To date, only four specialized agencies have sought advisory opinions of the Court: the United Nations Educational, Scientific and Cultural Organization, the International Maritime Organization, the World Health Organization and the International Fund for Agricultural Development.

[6] Article IX(3) of the UN–ILO Agreement provides that a request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorization by the Conference. Such an authorization was given in 1949; see International Labour Conference, "Resolution concerning the procedure for requests to the International Court of Justice for advisory opinions", *Official Bulletin* (1949, XXXII), pp. 388–389. In addition, under article IX(4) of the Agreement, in the event of a request to the International Court of Justice for an advisory opinion, the ILO has to inform the United Nations Economic and Social Council. A draft letter to the UN Secretary-General is at https://www.ilo.org/public/english/bureau/leg/art37.htm.

[7] In addition, according to Rule 104, "the documents … shall be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry". As a matter of practice, the Court does not necessarily wait, before fixing time limits for the submission of written statements, to receive the whole of the relevant documentation from the chief administrative officer of the requesting organization.

[8] The adoption of the request by the requesting organ is the first step, but the Court is not officially seized of the case until the transmission letter is received in the Registry; the date of the receipt of the original copy thereof is the date of the institution of the proceedings. Although infrequent, the request may not be notified immediately after adoption; in the *IMCO* case the request was adopted on 19 January 1959 but was sent to the Court on 23 March, while in the *Nuclear Weapons/WHO* case, the request was adopted on 14 May 1993 and was transmitted to the Court on 3 September. A draft transmission letter to the Registrar of the ICJ is found at https://www.ilo.org/public/english/bureau/leg/art37.htm.

advice is sought, followed by the question or questions to be answered by the Court. Sometimes the resolutions include instructions to the executive head of the organization that files the request regarding the documentation to be transmitted to the Court, measures to be taken pending the opinion and follow-up action once the opinion is received. [9]

A.1.3. Notification, invitation to participate in proceedings

16. Article 66(1) of the Statute provides that "the Registrar shall forthwith give notice of the request for an advisory opinion to all States entitled to appear before the Court". Article 66(2) adds that "the Registrar shall also, by means of a special and direct communication, notify any State entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question".

17. Whereas all States entitled to appear before the Court automatically receive the general notification of requests for advisory opinions set out in article 66(1), only those States and international organizations that in the Court's view may be in a position to provide specific information receive the special notification provided for in article 66(2). It should be noted that States or organizations specially notified under article 66(2) are entitled to participate in any written and oral phase of the proceedings if they so wish, but they have no obligation to do so. It should also be noted that, as explained in greater detail below, every time an opinion concerning the ILO has been requested, international employers' and workers' organizations have been allowed to participate in the proceedings.

18. The Court has always placed particular importance on ensuring that the information available to it is sufficiently comprehensive and adequate for it to fulfil its judicial function. The Court's constant concern, in fact, is whether it "has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question or fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character" (*Wall*, 2004, para. 56). Bearing in mind that an advisory opinion states the law on the basis of the facts as made available to the Court at the time of the decision (*Nuclear Weapons/UN*, 1996, para. 97), it would be very important to ensure that in the event of an ILO request for an advisory opinion, as many member States as possible – from all regions and representing all legal systems – actively participate in the proceedings and communicate relevant information to the Court.

A.1.4. Written observations and oral arguments

19. The Court fixes by order the time limit for any submission of written statements by those States and international organizations that have been invited to participate. This time limit varies in practice between two and six months. The Court may decide to extend the time limit and may also decide to hold a round of written comments on written statements of others. [10]

[9] As reflected in the Court's case law, the Court often draws on the indications included in the preamble of the resolution in order to determine the object of the request and the character of the question; see Rosenne, op. cit., Vol. II, p. 965; and Amerasinghe, op. cit., p. 204.

[10] There seems to be no theoretical obstacle to a State submitting written observations on behalf of a regional group. In the *Wall* case (2004), Ireland, ensuring the rotating European Union Presidency at the time, filed a written statement on behalf of the European Union.

20. The Court's Statute provides for the possibility of entities participating in the advisory proceedings to be granted the right to reply to the statements presented by other entities. According to article 66(4), "states and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other States or organizations in the form, to the extent, and within the time limits which the Court … shall decide in each particular case". In addition, article 105 of the Rules of Court provides as follows: "Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements. The Court, or the President if the Court is not sitting, shall: (a) determine the form in which, and the extent to which, comments permitted under article 66, paragraph 4, of the Statute shall be received, and fix the time limit for the submission of any such comments in writing; (b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of article 66 of the Statute, and fix the date for the opening of such oral proceedings".

21. The Court may at its discretion decide to hold public hearings for oral arguments. [11] In contrast, when the proceedings are urgent or time constraints so require, the Court may dispense with public hearings completely. There is no obligation for participants who have communicated written statements to take part in the oral proceedings; conversely, participation in hearings is not limited to participants in any previous written phase. While in advisory proceedings there are technically no "parties" and States do not appoint "agents" to present their views (these terms are used only in contentious cases), yet, in practice, advisory proceedings may be conducted in a manner that resembles very closely the modalities followed in contentious cases. [12]

22. Under article 106 of its Rules, the Court may, in the course of the proceedings, make accessible to the public the written statements/comments and any annexed documents. As a matter of practice, as soon as the oral proceedings begin, the Court makes public these documents by posting them on the Court's website. [13]

A.1.5. Urgent requests

23. Article 103 of the Rules provides that "when the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer … the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of

[11] The length of hearings depends, inter alia, on the number of entities that indicated their intention to make statements. Participants may have between 45 minutes and one hour to make oral statements. The judges may ask participants to provide written answers to questions they pose during the hearings. To date, there has been only one case in which although the Court had decided to hold hearings, no such hearings were held because no State had requested to be heard.

[12] There is no uniform pattern regarding the order of speaking in the public hearings but the representative of the chief administrative officer of the requesting organization has always addressed the Court first. Representatives of requesting organizations normally limit their interventions to providing background information or general explanations on the secretariat's point of view.

[13] The practice as to the number of written statements/comments and oral interventions that the Court has to consider varies considerably. In the *Wall* case (2004), the Court received written statements from 48 entities and heard oral arguments from 15 of them; In the *Nuclear weapons/UN* case, it received 28 written statements, written comments from three States on the written statements of others, and heard 21 oral arguments; while in the *Kosovo* case the Court received 35 written statements as well as 14 written comments on written statements of others, and heard 29 oral arguments.

proceeding to a hearing and deliberation on the request". [14] The need for expeditious advice is examined by the Court on a case-by-case basis and there are no specific provisions in the Court's Rules on how it may accelerate the proceedings. When the Court recognizes the urgency of a particular request, it normally fixes rather short time limits for any written statements and/or comments and/or for the opening of the oral proceedings. The Court has not so far dispensed with written or oral proceedings in urgent advisory cases.

A.1.6. Public reading of the advisory opinion

24. The Court delivers its opinion in a public sitting. Currently, the reading of the opinion is retransmitted live on the Court's website. In a more or less standardized format used in contentious and advisory cases alike, the text of an advisory opinion contains the composition of the Court, a summary account of the proceedings, the various positions and arguments, the reasoning of the Court, and in the final paragraph, known as *dispositif*, the Court's response to the question(s) asked. The opinion further indicates the judges who voted for and against the Court's main findings and also names the judges who appended separate or dissenting opinions. At the end of the reading of the opinion, one copy duly signed and sealed is handed to the representative of the organization which requested the opinion, another is sent to the UN Secretary-General, and a third is placed in the archives of the Court.

A.1.7. Legal effect of an advisory opinion

25. Advisory opinions are neither final nor binding, as those terms are used in articles 59 and 60 of the Court's Statute with respect to contentious cases. [15] However, advisory opinions may be accepted as binding through specific Conventions or acts of international organizations. For instance, advisory opinions relating to the review of judgments of the ILO Administrative Tribunal are given binding effect by Article XII of the Tribunal's Statute. Similarly, article IX (section 32) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies provides that, should a difference arise between a specialized agency and a member concerning the interpretation or application of the Convention, a request shall be made for an advisory opinion on any legal question and "the opinion given by the Court shall be accepted as decisive by the parties". Be that as it may, the Court has consistently pointed out that such clauses do not affect the nature of the Court's advisory function, nor do they affect the reasoning by which the Court forms its opinion or the content of the opinion itself. The Court has always drawn a distinction between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute to an advisory opinion (*Immunity from Legal Process*, 1999, para. 25).

[14] For instance, requests for urgent answers were made in the *Wall* case (2004), the *Nuclear Weapons/UN* case (1996) and the *WHO/Egypt* case (1980). At times, no specific reference is made to article 103, but the opinion is asked to be delivered "urgently", "on a priority basis", "at an early date", or "taking into account the time constraint".

[15] As the Court has stated in several cases, "these opinions are advisory, not binding [and] are intended for the guidance of the United Nations" (*Privileges and Immunities*, 1989, para. 31).

Advisory proceedings: What and how

- The advisory jurisdiction of the Court is open to the United Nations General Assembly, the Security Council (on any legal question) and other bodies so authorized by the General Assembly (on legal questions arising within the scope of these bodies' activities).
- The request for an advisory opinion must be based on a decision of the competent organs of the organization concerned containing the question to be asked to the Court.
- The request must be accompanied by a dossier containing all the background documents that, in the view of the organization concerned, should be brought to the knowledge of the Court.
- Advisory opinions are intended to give legal advice to the organization that initiated the request.
- In deciding to whom participation in the advisory proceedings should be open, the Court's main concern is to ensure that all relevant actors are, as far as possible, involved and that accordingly all relevant information is available.
- The Court has shown that it is prepared to accept the participation of actors other than intergovernmental organizations and States if: (a) this is in the interest of obtaining the most accurate and factual information possible; or (b) the special circumstances of the case at hand so necessitate.
- Advisory proceedings consist of written submissions – which may include comments on the statements of other participants – and/or hearings.
- The Court is prepared to expedite the advisory proceedings, if expressly requested to do so.

26. Even though advisory opinions have no binding force, nor do they produce the effects of res judicata, they reflect the state of international law and benefit from the authority of the International Court of Justice, the principal judicial organ of the United Nations: as such they carry important legal weight. It should be recalled that certain advisory opinions contain judicial pronouncements of major significance and are viewed today as milestones in the development of international law, such as the 1949 *Reparation for Injuries* opinion with regard to the capacity of intergovernmental organizations to bring international claims; the 1951 *Genocide* opinion in relation to the concept of peremptory norms of international law imposing obligations *erga omnes*; the 1962 *Certain Expenses* opinion for the broad interpretation of the functions and powers of the General Assembly, including in matters relating to the maintenance of peace and security; and the 1971 *Namibia* opinion in connection with the obligation of States not to recognize an illegal situation resulting from a serious breach of international law.

27. As regards the ILO, reference should be made to the 1922 advisory opinion of the Permanent Court of International Justice concerning the nomination of the Workers' delegate at the third session of the International Labour Conference, which still today stands as the only authoritative guidance on matters relating to representativeness of workers' organizations and on which the Conference Credentials Committee systematically builds its case law. It should also be noted that the rationale underlying article 37 of the ILO Constitution is to recognize the referral to the International Court of Justice as the ultimate recourse in matters of interpretation disputes and to accept the Court's "decision" as final settlement of any such dispute. It is clear, therefore, that according to the letter and the spirit of the ILO Constitution, advisory opinions obtained from the International Court of Justice enjoy extra legitimacy and authority for all members of the Organization.

A.1.8. Costs

28. Requests for advisory opinions carry minimal costs. No provision is made for any administration or Court fees for filing a request with the International Court of Justice. According to article 33 of the Statute, the expenses of the Court are borne by the United Nations. The budget of the Court is in fact part of the budget of the United Nations. The only expenses relate to the reproduction of the dossier in the number of copies required by

the Registry (45 in English and 45 in French), and the mission cost of the representative of the requesting organization who may participate in the oral proceedings.

A.1.9. Institutional follow-up

29. The Court has consistently taken the view that the practical utility of the advisory opinion is a matter exclusively for the requesting organ to consider, and that once it has spelled out the law, it is for the body that initiated the request to draw the conclusions from the Court's findings. As stated in a recent case, "the Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion" (*Wall*, 2004, para. 62). In some cases, especially when the decision to request an advisory opinion is made in a highly polarized political context or is a result of a divisive vote, implementing the Court's advice may prove particularly challenging. According to standard United Nations practice, the Secretary-General distributes the advisory opinion to all member States, publishes it in the official records and ensures that an appropriate item is included in the agenda of the requesting organ. The Secretary-General may also have to comply with any special instructions included in the resolution embodying the request. In most cases, on receipt of an advisory opinion, the General Assembly adopts one or more resolutions expressing its appreciation to the Court, taking note of the Court's advice and extending recommendations to member States for the implementation of the Court's findings. [16]

30. As regards the ILO, in the case of the six advisory opinions delivered at its request, all of them were published in the ILO *Official Bulletin* and referred to in the Director-General's Report to the Conference. They were also given effect, according to the issue concerned, in the subsequent practice of the Organization. For instance, following the Court's advisory opinion relating to the interpretation of the ILO's Night Work (Women) Convention, 1919 (No. 4), the Governing Body decided in 1933 to propose the revision of the Convention that was eventually adopted by the Conference in 1934. [17]

A.2. Object of the request for an advisory opinion: Jurisdiction and admissibility

31. When seized of a request for an advisory opinion, the Court first considers whether it has *jurisdiction* and, if so, also whether there is any reason why in its *discretion* it should decline to exercise such jurisdiction. As the Court has said: "The Court cannot exercise its discretionary power if it has not first established that it has jurisdiction in the case in question: if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise" (*Nuclear Weapons/WHO*, 1996, para. 14).

A.2.1. The Court's jurisdiction to examine a request for an advisory opinion

32. The Court has consistently pointed out that it is a precondition of its competence that the advisory opinion be requested by an organ duly authorized to seek, that it be requested on a legal question, and, when the request does not emanate from the General Assembly or the

[16] In general, these resolutions reflect full acceptance and utmost respect for the Court's opinion. It is not infrequent, however, that a certain number of States vote against these resolutions and do not accept to comply with the judicial pronouncements of the Court, in which case the advisory opinion is seriously weakened and basically leaves the divisive issue at the origin of the request unresolved.

[17] See *Minutes of the Governing Body*, 64th Session (1933), p. 20; and International Labour Conference, 18th Session, *Record of Proceedings* (1934), pp. 196, 202.

Security Council, that the question should be one arising within the scope of the activities of the requesting organ (*Wall*, 2004, para. 14; *Kosovo*, 2010, para. 19).

33. With respect to the legal nature of the question, the Court has remarked that questions framed in terms of law and raising problems of international law are by their very nature susceptible to a reply based on law and are questions of a legal character (*Nuclear Weapons/UN*, 1996, para. 13). The jurisprudence of the Court confirms that the term "legal question" is not to be interpreted narrowly and that the Court may give an advisory opinion on any legal question, whether abstract (*Conditions for Admission*, 1948, p. 61) or even purely academic or historical (*Western Sahara*, 1975, paras 18–19).

34. The Court has observed on several occasions that the fact that a legal question also has political aspects (as, in the nature of things, is the case with so many questions that arise in international life) does not suffice to deprive it of its character as a legal question (*Kosovo*, 2010, para. 27; *Wall*, 2004, para. 41). It has further considered that the political nature of the motives that may be said to have inspired the request, and the political implications that the opinion given might have, are of no relevance in the establishment of its jurisdiction (*Nuclear Weapons/UN*, para. 13). The Court has even taken the view that in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate (*WHO/Egypt*, 1980, para. 33).

35. The Court has also taken the view that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction and recalled, in this respect, that the Court has often been required to broaden, interpret and even reformulate the questions put (*Wall*, 2004, para. 38; *Kosovo*, 2010, para. 50).

36. When the request for an advisory opinion emanates from a body other than the General Assembly or the Security Council, the Court, in establishing its jurisdiction, must ascertain not only that the request relates to a legal question but also that the question arises within the scope of the activities of the organization requesting the advisory opinion. To date, there has been only one case in which the Court has declined to give the requested opinion, on the ground that the question asked fell outside the competence of the organization concerned and that therefore "an essential condition of founding its jurisdiction was absent" (*Nuclear Weapons/WHO*, 1996, para. 31). [18]

A.2.2. The Court's discretionary power to refuse to give an advisory opinion

37. As to the Court's discretion to exercise its jurisdiction and decline to reply to a question put to it for reasons of judicial propriety, the Court's consistent position is that while enjoying a wide margin of appreciation in this respect, it is mindful that its answer to a request for an advisory opinion represents its participation in the activities of the organization, that it should not, in principle, refuse to give an advisory opinion, and that only compelling reasons could lead it to such a refusal (*Nuclear Weapons/UN*, para. 14; *Wall*, 2004, para. 44). In fact, there has never been a refusal, based on the discretionary

[18] While reaffirming that international organizations enjoy "implied powers" (that is, powers conferred by necessary implication as being essential to the performance of their duties), the Court recalled that specialized agencies were autonomous organizations invested with sectoral powers and responsibilities. Those responsibilities, however, were necessarily restricted to the sphere of specialty of the organization concerned (for instance, public health in the case of WHO) and could not encroach on the responsibilities of other parts of the United Nations system (for example, in the same case, the legality of the threat or use of nuclear weapons and nuclear disarmament).

power of the Court, to act upon a request for advisory opinion in the history of the International Court of Justice. [19]

Object of the request: Key points

- The question put to the Court must be legal in nature.
- The question must be directly related to the activities of the requesting organization and must refer to issues falling within its sphere of competence or speciality.
- The fact that the question may have political dimensions, or is abstract or unclear, does not, in principle, suffice for the Court to decline to give an opinion.
- The Court may reformulate or interpret the question, as it may deem appropriate, for the purposes of rendering its opinion.

38. In recent cases, the Court has not accepted as compelling reason any of the arguments raised in support of the view that the Court should decline to give an advisory opinion. The Court dismissed, for instance, arguments concerning the motives behind the request; the vague or abstract nature of the question asked; and the fact that the opinion might adversely affect ongoing negotiations, could impede a negotiated solution, or would lack any useful purpose. In this respect, the Court has made clear that it is for the organ that requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions (*Wall*, 2004, para. 62; *Kosovo*, 2010, para. 34).

A.3. Participation of international employers' and workers' organizations in advisory proceedings

39. The question whether the social partners could participate in the advisory proceedings has been central to the debate about the possible referral of a dispute regarding the interpretation of a Convention to the International Court of Justice. [20]

40. The uncertainty stems from article 66(2) of the Statute of the Court, which provides that "the Registrar shall ... notify any State entitled to appear before the Court or international organization considered by the Court ... as likely to be able to furnish information on the question, that the Court will be prepared to receive ... written statements, or to hear ... oral statements relating to the question". Indeed, the term "international organization" under this article of the Statute has been applied by the Court narrowly with the principal aim of excluding the participation of non-governmental organizations. In the context of the advisory proceedings concerning the *Legality of the Threat or Use of Nuclear Weapons*,

[19] The PCIJ did it only once, in view of "the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way (*Status of Eastern Carelia*, PCIJ, Series B, No. 5)" (*Nuclear Weapons/UN*, 1996, para. 14).

[20] In 1993, an Office paper on the interpretation of international labour Conventions noted that "there is probably good reason to consider that it is even more important, in order to ensure that the specificity of the Organisation and of international labour Conventions is taken adequately into account at the Court, to ensure appropriate access for the social partners to enable them to assert their interests and intentions, than to be concerned with the methods and principles of interpretation that may be applied at the Court"; see GB.256/SC/2/2, para. 48. The same document indicated, however, that "it is unclear whether, in the current context of the Statute of the International Court of Justice the term 'international organization' could continue to be given such a wide interpretation as to enable international employers' and workers' organizations to be consulted and heard directly" (ibid., para. 42).

the Court received a high number of unsolicited submissions from non-governmental organizations, and as a result it adopted in 2004 Practice Direction XII, which suggests that the terms "international organization" and "intergovernmental organization" are co-extensive. [21]

41. However, it is unlikely that the Court applies the same narrow interpretation of the term "international organization" in relation to the possible participation of international employers' and workers' organizations in advisory proceedings initiated by the ILO. In fact, there are good reasons to believe that the Court may decide to invite a limited number of international employers' and workers' organizations to participate autonomously in such proceedings.

42. First, as a matter of established practice, numerous international employers' and workers' organizations were permitted to submit information in relation to advisory proceedings concerning the ILO at the time of the League of Nations. In fact, article 66(2) of the Statute reproduces article 73 of the Revised Rules of the Permanent Court of International Justice – the precursor to the International Court of Justice. The Permanent Court allowed employers' and workers' organizations to participate in advisory proceedings concerning the ILO in the period 1922–32. [22] As the Court's President Loder put it at the time, "practice had created a precedent of admitting great industrial organizations, whether of workers or of employers, which would be difficult to exclude owing to their very great

[21] Practice Direction XII further provides that "where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file. … Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted". It has been suggested, however, that a recourse to the *travaux préparatoires* of articles 66 and 67 of the Statute leads to the conclusion that the omission of the word "public" in these provisions was deliberate, and was designed to include also non-governmental international organizations among the entities that could have access to the Court in advisory proceedings and furnish information if the Court so wishes. See E. Jiménez de Aréchaga, "The participation of international organizations in advisory proceedings before the International Court of Justice", in *Communicazioni e Studi* (1975, Vol. 14), p. 419.

[22] In 1922, in the advisory proceedings concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the Court invited the International Association for the Legal Protection of Workers, the International Federation of Christian Trade Unions, and the International Federation of Trade Unions. In the advisory proceedings relating to the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, the Court invited the following six organizations to participate: the International Federation of Agricultural Trade Unions, the International League of Agricultural Associations, the International Federation of Christian Trade Unions of Landworkers, the International Federation of Landworkers, the International Federation of Trade Unions, and the International Association for the Legal Protection of Workers. In the 1926 advisory proceedings on the *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, three organizations were permitted to participate: the International Organization of Industrial Employers, the International Federation of Trade Unions and the International Confederation of Christian Trade Unions. It is indicative that the third annual report of the PCIJ, published in 1927, contains a list of the international organizations permitted to submit information to the Court under article 73 that consists almost entirely of international trade unions; cited in D. Shilton, "The participation of non-governmental organizations in international judicial proceedings", in *American Journal of international Law* (1994, Vol. 88), p. 623.

importance, although admittedly these great organizations were at any rate indirectly recognized as constituting elements of the ILO". [23]

43. Second, recent case law supports the view that the Court is prepared to open up its advisory proceedings to actors – other than States and international intergovernmental organizations – every time the participation of such actors is substantively and procedurally essential considering the concrete context of the case, in light of considerations of fairness and justice, but also bearing in mind the need to obtain the fullest information possible.

44. In 2003, for instance, the United Nations General Assembly asked the International Court of Justice to give an advisory opinion on the consequences of the construction by Israel of a wall in the Occupied Palestinian Territory. In authorizing Palestine to submit a written statement and to take part in the hearings, the Court took into account, among other considerations, "the fact that [Palestine] is co-sponsor of the draft resolution requesting the advisory opinion" (*Wall*, 2004, para. 4). Similarly, in 2007, when the General Assembly requested the Court to give an advisory opinion on whether the unilateral declaration of independence by the provisional institutions of self-government of Kosovo was in accordance with international law, the Court decided to invite the authors of the declaration to participate in the written and oral proceedings "taking into account the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion [and therefore] the authors of the above declaration are considered likely to be able to furnish information on the question" (*Kosovo*, 2010, para. 3).

45. The same case law seems to confirm that the Court is open to the participation of entities that are directly interested in a dispute and likely to be affected by the outcome of the proceedings; they are also likely to provide information that may not be available to the Court otherwise. [24]

46. In any event, it is now widely recognized that the Court adopts a pragmatic approach so as to ensure that all interests at stake can be expressed, and shows a certain flexibility to hear actors other than States. [25] It is also commonly admitted that in the case of the ILO, the

[23] Cited in Y. Ronen, "Participation of non-State actors in ICJ proceedings", in *The Law and Practice of International Courts and Tribunals* (2012), p. 88. It has been suggested that the reason for this "preferential" treatment of the ILO may have been the specific provision in the ILO Constitution designating the Court as a dispute settlement forum with respect to complaints of non-observance of ILO Conventions and their interpretation – "a special invitation to the Court to take up requests for advisory opinions. If the Court wished to respond to this invitation affirmatively and fulfil the role assigned to it in a persuasive manner, it could not disregard the modus operandi of the ILO" (ibid., p. 93).

[24] It is important to note, in this respect, that in the hearings of the *Wall* and *Kosovo* proceedings, the representatives of Palestine and the authors of the declaration of independence of Kosovo were listed first and second respectively in the list of speakers and were allocated three hours for their oral statements, i.e. four times more than other participants.

[25] See, for instance, Pierre-Olivier Savoie, "La CIJ, l'avis consultatif et la fonction judiciaire: entre décision et consultation", in *Canadian Yearbook of International Law* (2004), p. 71. In the words of another commentator, "at least in cases in which non-governmental organizations enjoy international legal rights and duties – from employers' and employees' organizations in the ILO Statute to the ICRC in international humanitarian law – the Court may consider allowing those organizations to furnish information"; see Andreas Paulus, "Article 66", in A. Zimmermann,

potential for participation of non-state actors in advisory opinions on the basis of prior practice is particularly pronounced, as industrial organizations are represented within the ILO's tripartite structure and may therefore be regarded as constituting elements of the Organization. [26]

47. Finally, it should be noted that, irrespective of whether the Court would grant permission to any international employers' and workers' organizations to participate autonomously in the proceedings, the Office could include in the dossier to be submitted together with the request any briefs, position papers or other documents that the Employers' and Workers' groups might wish to bring to the knowledge of the Court. In any event, failing direct invitation by the Court, nothing prevents employers' and workers' organizations from submitting their views as uninvited briefs. Moreover, it cannot be excluded that, in preparing their written statements, some member States may consult national employers' and workers' organizations and properly reflect their views as part of the information communicated to the Court.

A.4. Current situation: Drafting the question

48. In formulating the question that the Governing Body might decide to ask the Court in connection with the current dispute on the right to strike and the mandate of the Committee of Experts, it would be important to take into account the following parameters: (a) the question needs to capture all the different aspects of the ongoing controversy for which legal advice is sought; (b) it must give expression in a direct and concise manner to the differing views expressed; (c) it must be clearly worded so as to limit the need for the Court to engage in its own interpretation of the question; and (d) it should be susceptible of an unequivocal answer that gives immediate, practical guidance to ILO organs as to the limits of their action in matters covered by the request.

49. There are clearly two questions that dominate the relevant discussions: (1) the substantive question as to whether the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), can be interpreted as protecting the right to strike; and (2) whether the Committee of Experts' mandate gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle. It would appear that both of those questions need to be answered to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again. It also appears appropriate to formulate the two following questions separately:

(1) Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

(2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to:

(a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); and

(b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?

C. Tomuschat and K. Oellers-Frahm (eds): *The Statute of the International Court of Justice: A commentary* (2006), pp. 1435, 1440.

[26] See Ronen, op. cit., pp. 88–89.

B. Article 37, paragraph 2: Setting up a permanent in-house tribunal

50. This section aims to outline a concrete structure set up within the Organization for the expeditious determination of disputes or questions relating to the interpretation of ILO Conventions. To this effect, the Office drew upon earlier discussions and consultations on the subject, [27] and undertook a comprehensive review of the structure of major international courts and tribunals in operation. [28]

51. The following paragraphs provide a commentary to the draft Statute of a tribunal established in accordance with article 37(2) of the Constitution and describe the elements necessary for the operation of an independent tribunal that enjoys the support of the tripartite ILO constituency and adequately reflects the specificities of ILO Conventions. Combining expeditiousness and cost-efficiency, the tribunal is designed as a readily available on-call body that may be activated only when a question or dispute is referred to it.

52. The Statute would first need to be examined and agreed upon by the Governing Body before being submitted to the Conference for approval. The same procedure would apply to any amendment to the Statute. Given that this procedure derives from the text of article 37(2), it is not deemed necessary to include specific provisions in the Statute regarding amendments.

53. In view of the time needed for an in-depth examination of the draft Statute – should the Governing Body decide to pursue its consideration of the possible establishment of a tribunal under article 37, paragraph 2, of the Constitution – it could appoint a working party to prepare recommendations, on the basis of the proposed draft Statute, to be submitted to the Governing Body at a future session. Such a working party could be composed of eight members from each group and hold three two-day meetings (for instance, in January, March and June 2015). [29]

B.1. The tribunal

B.1.1. Establishment

54. The tribunal would be established under the authority provided by article 37(2) of the ILO Constitution. It is proposed that its seat be the International Labour Office in Geneva. This

[27] See, in particular, GB.256/SC/2/2, GB.256/PV(Rev.); *Non-paper on interpretation of international labour Conventions* (February 2010); *Informal exploratory paper on interpretation of international labour Conventions* (October 2010). Copies of these documents are at https://www.ilo.org/public/english/bureau/leg/art37.htm.

[28] The statutes and rules of procedure of the following courts and tribunals were consulted: International Court of Justice; International Tribunal for the Law of the Sea; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; Inter-American Court of Human Rights; European Court of Human Rights; African Court on Human and People's Rights; ILO Administrative Tribunal. Other relevant documents included the World Intellectual Property Organization Arbitration and Expedited Arbitration Rules, the Agreement establishing the World Trade Organization (WTO), the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, and the UNCITRAL Arbitration Rules.

[29] The estimated cost assuming that two of its meetings would take place on the margins of the 323rd and 324th Sessions of the Governing Body (March and June 2015) would be approximately 157,600 Swiss francs (CHF).

would both minimize operation costs and facilitate the protection of the tribunal's status and necessary immunities, including the inviolability of its archives.

B.1.2. Competence

55. As set out in article 37(2), the tribunal would be competent to determine any question or dispute relating to the interpretation of an ILO Convention referred to it by the Governing Body or in accordance with the terms of the Convention. [30] To date, no international labour Convention provides for such referral but consideration could be given to drafting an appropriate standard clause to be included in future instruments in case an article 37(2) tribunal is established.

56. Referral of an interpretation dispute or question to the tribunal should not be viewed as a precondition to the submission of a request for an advisory opinion to the International Court of Justice. Both mechanisms would be available to address questions and disputes, the choice depending on the nature and importance of the subject matter. While the Organization should opt for the International Court of Justice to address a broader variety of legal matters, including matters of a constitutional nature, the in-house tribunal, once established, would afford a more technically specialized mechanism tailored to the expeditious determination of specific, and possibly less sensitive, interpretation requests.

57. It has been long argued that ILO Conventions have specificities that should be borne in mind in an interpretation exercise. The question has also been raised whether the general rules of treaty interpretation, as embodied in the Vienna Convention on the Law of Treaties, 1969, meet entirely the special features of international labour Conventions, and in particular the unique role of employers' and workers' organizations in the adoption process. In this regard, it should be recalled that Article 5 of the Vienna Convention recognizes that the rules of the Convention apply "to any treaty adopted within an international organization without prejudice to any relevant rules of the organization". The proposed Statute thus requires the tribunal to bear in mind the specificities of ILO Conventions as international treaties. This acknowledges the importance of giving full consideration to the tripartite process followed for the adoption of international labour Conventions.

B.1.3. Composition

58. In order to ensure a suitable composition for the tribunal, the draft Statute sets out a number of requisites for judges based on common requirements found in the statutes of other international courts and tribunals. First, the elementary qualities required of any adjudicator: high moral character and independence. Second, sufficient professional qualifications such as those required for appointment to high judicial offices or necessary to be considered a jurist of recognized competence. Third, adequate competence on the subject matter, in particular, demonstrated expertise in labour law and international law. Fourth, fluency in one of the official languages of the tribunal (English, French and Spanish) and passive knowledge of another official language.

59. As is the case in most tribunals and with a view to facilitating decision-making, questions or disputes referred to the tribunal would need to be examined by an odd number of judges. While three judges would be the minimum necessary, a larger odd number, such as five, would seem advisable given the authority required to determine the interpretation of an ILO Convention, which may have been the subject of long-standing comments by supervisory bodies or of widely differing views by constituents. Furthermore, as it may

[30] The terms "question" and "dispute" are used interchangeably to cover any interpretation issue that might be the subject of a request referred to the tribunal.

happen that the tribunal remains inactive for a certain period of time, it cannot be expected that all judges will be immediately available at any given time to participate in full-time proceedings at short notice. Consequently, it would be advisable to appoint a larger number of judges to be able to draw from whenever a referral is made by the Governing Body.

60. It is therefore proposed that 12 judges be appointed to the tribunal and that each request for interpretation be handled through a smaller panel of five judges. This structure would provide several advantages. First, a five-member panel and the diversity it encompasses would endow the tribunal with adequate authority, greater than that of three adjudicators. Second, a group of five judges would still be small enough so that it would not entail large costs nor undue complexities, in particular given that the tribunal would only be in session if a referral were made to it and its members would need to be rapidly engaged and deliberate efficiently. Third, bearing in mind the on-call nature of the tribunal, the availability of seven additional judges would facilitate the swift constitution of a panel, and any replacements needed during the process. Having a larger number of judges appointed would not entail any additional cost to the Organization. Moreover, it would ensure the expeditious and continued operation of the tribunal, which would not be compromised nor delayed should vacancies occur. Fourth, a panel of five judges would allow for a quorum and minimum majority for awards that combines both practicability for the expeditious conduct of proceedings and adequate support for final decisions (see Part B.2.8).

61. Finally, it is proposed that its composition demonstrate to the greatest extent possible gender balance, representation of the principal legal systems and geographical distribution. It is also suggested that judges should be of different nationalities. These are standard criteria found in many constitutive texts of existing international courts and tribunals.

B.1.4. Selection and appointment

62. It is foreseen that members of the tribunal be appointed by the International Labour Conference for a period of six years. This would be consistent with the general principle that an adequate length of appointment safeguards the independence of adjudicators. Moreover, it seems both efficient and fully consistent with the nature of an article 37(2) tribunal. Given its uncertain workload and possible inactivity for prolonged periods, it would be advisable not to overburden the Conference and the Governing Body with carrying out the selection and appointment procedure at short intervals.

63. In the proposed Statute, the Officers of the Governing Body are given special responsibilities concerning the preparation of nomination proposals for the appointment of members of the tribunal and the constitution of panels. However, other options could be envisaged, especially with a view to ensuring broader participation of constituents.

64. Under one possible selection and appointment process, the Director-General could be responsible for submitting to the Officers of the Governing Body a proposed list of nominations that would ensure: (a) that candidates conform to the qualifications and expertise requirements; and (b) that the composition of the tribunal reflects to the largest extent possible the abovementioned criteria of gender balance, representation of legal systems and geographical distribution. In this connection, the Director-General could receive suggestions or proposals from any member of the Governing Body and would consider those suggestions or proposals before communicating the proposed nominations to the Officers.

65. The Officers of the Governing Body could subsequently assess the proposed nominations and prepare a proposal for the composition of the tribunal to be submitted to the Governing

Body. Where necessary, the Officers could seek the assistance of the Director-General in order to identify additional candidates.

66. The composition proposals of the Officers would need to be approved by the Governing Body for submission to the Conference. All members of the tribunal would thus enjoy, as independent judges, the confidence of the three groups.

B.1.5. Panel constitution

67. Promptly after an interpretation dispute or question is referred by the Governing Body to the tribunal, a five-member panel would be constituted to examine it. In order to determine the composition of the panel, it is proposed to have a default designation mechanism while allowing for ad hoc designations in the case of full tripartite consensus.

68. By default, the five judges would be drawn randomly by the Officers of the Governing Body. To foster rotation, the panel so constituted would not include more than two judges having served in the previous case, unless this were necessary to constitute a full five-judge panel (for example, due to the limited availability of judges). This default mechanism would provide an expeditious and reliable procedure for the constitution of the panel, and avoid a potentially time-consuming decision as to who might be best placed to sit in a particular panel. Moreover, the rule preventing more than two repeat judges would foster rotation while not rendering predictable the composition of the following panel.

69. Nevertheless, the proposed Statute could also allow for flexibility in the designation mechanism to adapt panel composition where the circumstances would so warrant, subject to tripartite consensus. This could be achieved by allowing the Officers of the Governing Body – based on a unanimous decision – to depart from the default mechanism and designate one or more judges to the panel. It is also provided that this possibility should not unreasonably delay the expeditious constitution of the panel, so that in the absence of a swift and unanimous decision from the Officers, the panel would be constituted in accordance with the default mechanism.

70. Once constituted, the panel would elect its President. The President would have a casting vote (see Part B.2.8) and could be entrusted with any function necessary for the expeditious conduct of the proceedings. This could expedite the adoption of procedural decisions, such as on special requests for participation.

B.1.6. Incompatibility

71. In order to safeguard the judges' independence and impartiality, exercising the duties of a judge would not be compatible with being appointed as an ILO official or sitting in any capacity in another ILO body.

B.1.7. Resignation, withdrawal and removal

72. The proposed Statute acknowledges the different circumstances under which the composition of the tribunal may need to be altered, drawing on common rules found in other statutes of international courts and tribunals. Judges may resign at any time by notifying their decision to the Director-General, who would inform the Governing Body in order to launch the procedure to fill the vacancy. Judges should withdraw from any case in which their impartiality might reasonably be doubted for any reason. They should be removed, temporarily or permanently, as the case may be, if they are unable or unfit to exercise their functions. Any question relating to the withdrawal or removal of a judge would be brought forth by the judge concerned or, where necessary, decided by the tribunal.

B.1.8. Replacements and vacancies

73. If a judge needs to be replaced after the panel has already been constituted, for example due to unforeseen circumstances rendering the judge unfit to perform their duties, the replacement method would be the same with that used to constitute the panel. Similarly, the procedure to fill vacancies would be the same one used for the appointment of judges, the duration of appointment being limited to the remainder of the term.

B.1.9. Status

74. Just like members of other special ILO bodies, such as commissions of inquiry, the members of the tribunal would be deemed experts entrusted with a special mission by the Organization, that is the settlement of disputes relating to the interpretation of ILO Conventions. This entails the enjoyment of certain privileges and immunities necessary for the effective exercise of their functions, provided for in Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies. These include, most importantly, the immunity from legal process in respect of words spoken or written, or acts committed, in the performance of their official functions.

B.1.10. Honoraria

75. As is customary in other international courts, provision is made for the payment of compensation for the performance of duties by judges, as well as travel and subsistence expenses for their official meetings. The Governing Body would be granted the authority to approve the rate of such compensation and to update that rate as necessary. The applicable amounts would be reproduced as an annex to the Statute (see Part B.3). Bearing in mind the stand-by nature of the proposed tribunal, the underlying principle is that honoraria would be provided only for the eventual participation of judges in a panel. There would be no honoraria linked to the mere appointment of judges, which of course limits the cost implications of the tribunal.

B.1.11. Administrative arrangements

76. The Director-General would be responsible for making administrative arrangements necessary for the operation of the tribunal. Taking into account the fact that the tribunal would only be in session when a dispute or question is referred to it, and in order to avoid fixed costs, it is proposed that no permanent registry should be envisaged. The proposed Statute does not presuppose the existence of any fixed administrative framework, nor the appointment of a registrar, and thus affords the flexibility for the tribunal to operate with minimal cost implications. No provision is made, therefore, for permanent appointments or for new posts related to the functioning of the tribunal.

77. Instead, a number of alternative options can be considered to ensure adequate support for the tribunal's work. For instance, similar to what occurs for commissions of inquiry, ILO staff could be detached as necessary for the provision of any secretarial assistance to the tribunal (for example administrative staff for the support that the tribunal may require). As the tribunal would most likely only hear one case at a time, it may suffice at first to detach, on a part-time basis, one P staff and one G staff member for the duration of the proceedings. Alternatively, external recruitment of the necessary support staff could be envisaged for the duration of the proceedings. In order to maximize cost-efficiency, it is proposed to provide all support necessary through the part-time detachment of staff members. Considering that tribunal cases could have an estimated maximum duration of six months, this would entail no more than three work-months of a G staff and a P staff member (see Part B.3).

78. The proposed Statute also acknowledges that a number of administrative arrangements could be set up to enhance the expeditious and cost-effective operation of the tribunal, in particular through IT means, enabling electronic communications and performance of certain duties remotely by judges. This could include the use of an online electronic platform for efficient transmission of notifications and communications to participants. In this regard, to promote expeditiousness and reduce costs, the tribunal could decide that, unless otherwise requested by the participants, documents be submitted and made available to them in electronic form. Similarly, the use of technological means could allow the members of the tribunal to communicate and perform certain of their tasks remotely, thus limiting the duration and cost implications of their meetings in Geneva.

B.2. Procedure

79. The proposed Statute sets out a procedure that combines the need to ensure tripartite access to the tribunal and the objectives of expeditious settlement and reasonable cost. It also seeks to afford a degree of flexibility to adapt, where necessary, the tribunal's operation to the specific circumstances of the question or dispute referred to it.

B.2.1. Initiation of proceedings

80. While the tribunal is designed to be permanently available to receive and examine an interpretation request, it would only be in session when a question or dispute is referred to it by the Governing Body. Judges would not be expected to carry out any duties, and the tribunal would not be functioning until a panel is constituted to hear a case.

81. Under article 37(2) of the Constitution, the referral of interpretation-related questions or disputes to the tribunal is a prerogative of the Governing Body. Therefore the Statute does not attempt to define how the Governing Body might assess the appropriateness of referring a particular matter to the tribunal. In assessing whether to make an interpretation request, the Governing Body may consider all practical, legal and political circumstances it deems pertinent, such as whether the matter has already been the subject of comments by an ILO organ or by another body; the nature of the interpretative question or dispute and its implications, including in relation to the ILO supervisory system; whether any requests for clarification have been made and by whom; and the usefulness of obtaining an authoritative interpretation.

82. The proposed Statute does not regulate either how the consideration of a question or dispute could be brought before the Governing Body. It would be difficult to anticipate all possible scenarios, while the Standing Orders of the Governing Body already provide for an adequate tripartite framework, in particular through the screening group. [31] Several courses of action can, nevertheless, be envisaged as to how a question or a dispute might be brought before the Governing Body for possible submission to the tribunal. For example, the ILO supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations or the Conference Committee on the Application of Conventions and Recommendations, may in their respective reports express the view that the Governing Body should refer a specific matter to the tribunal. Consideration of an interpretation issue could also be included in a session of the Governing Body by the screening group, whose mandate to draw up the agenda of the Governing Body would allow the matter to be introduced whenever it was deemed suitable. Moreover, the Governing Body itself could decide to include in its agenda an item on a possible referral to the tribunal. Furthermore, in case of urgency, the existing rules

[31] See section 3.1 of the Standing Orders of the Governing Body and paragraphs 28 to 34 of the Introductory note to the Compendium of Rules applicable to the Governing Body.

allow the Officers, following consultations with the other members of the screening group, to include in the agenda of the Governing Body matters of urgent importance that may arise either between or during sessions. In short, existing procedures applicable to Governing Body agenda setting provide an adequate and comprehensive framework, which safeguards the discretionary power of the Governing Body and its flexibility in considering requests for interpretation.

83. When referring a request for interpretation, the Governing Body should agree on the question to be communicated to the tribunal. The accompanying documents would be provided to it by the Director-General.

B.2.2. Participation in proceedings

84. In keeping with the ILO's tripartite structure, the tribunal proceedings need to allow for full tripartite participation. It is proposed that participation rights be granted to the governments of all member States of the ILO, to Employer and Worker members of the Governing Body and to organizations enjoying general consultative status. [32] The tribunal or the Governing Body could also invite other organizations or persons to participate in the proceedings. For example, in a case where the request for interpretation concerns a technical or sectoral matter, the Governing Body could provide for the participation of the international employers' and workers' organizations directly concerned. The Governing Body could also transmit invitations to international organizations, such as the United Nations, specialized agencies, or regional organizations, having an interest in the matter referred to the tribunal. Where appropriate, the Governing Body could consider granting standing invitations to certain organizations. [33]

85. In addition, similarly to the statutes of other courts allowing for interested parties to request participation, it is proposed that international intergovernmental or non-governmental organizations, in particular employers' and workers' organizations, having an interest in the question or dispute should be allowed to submit a request to the tribunal to participate in the proceedings. It is also proposed to ensure flexibility by affording the tribunal sufficient discretion to decide on whether to grant such participation, and to fix the relevant conditions. The tribunal could, for instance, allow and set the conditions for the submission of amicus curiae briefs. Finally, the proposed Statute also acknowledges that participation may be exercised collectively. This could contribute to the expeditious determination of the interpretation request.

B.2.3. Conduct of proceedings

86. The draft Statute seeks to ensure the expeditiousness of the proceedings by means of two types of provisions: first, provisions on general time limits, which would apply automatically so that judges do not need to take administrative or procedural decisions; and second, provisions calling upon the tribunal to make orders for the expeditious conduct of the proceedings, including with regard to the form and volume of written submissions or the length of oral presentations. Time could also be gained through the extensive use of IT means, for example the posting of all procedural notifications and communications on a dedicated web page.

87. Based on a comparative analysis of the time schedule provided for under the statutes of other courts and tribunals, it could be reasonably expected that proceedings not exceed six

[32] See Compendium of Rules applicable to the Governing Body, Annex V.

[33] For example, relevant public international organizations, or non-governmental international organizations enjoying regional consultative status or included in the Special List.

months from the date the Governing Body submits a formal request for interpretation to the date the tribunal delivers its award. [34] This is the default time frame foreseen in the proposed Statute. If a specific question or dispute required a different time frame, for instance in the light of the complexity of the subject matter, or proceedings were delayed, for instance due to the withdrawal or replacement of one or several judges, it should be possible for the Governing Body or the tribunal to adapt time limits accordingly.

88. It is proposed that the official languages of the tribunal be the official languages of the ILO – English, French and Spanish. Written and oral submissions may be made in any of the official languages. Simultaneous interpretation in the three official languages would be provided during the oral hearings.

89. The proposed Statute is sufficient for the tribunal to be fully operational. However, it is likely that, once in operation, the members of the tribunal may wish to further regulate its functioning and procedure in the form of more detailed rules. It is proposed, therefore, that the Statute should provide for the possible adoption of rules of procedure. These would draw upon suggestions by the judges and practical experience. The adoption of rules of procedure, a common practice in most international courts and tribunals, would allow the Statute to be complemented with respect to the detailed aspects of procedure or organization of the tribunal, without the need to formally amend the Statute and go through the approval of the Conference.

B.2.4. Phases of proceedings

90. Most statutes of international courts and tribunals provide for both written and oral phases. Although an oral phase could increase the length and cost of the proceedings, the views expressed during earlier discussions have emphasized the need to ensure the adversarial character of the proceedings and thus hold oral hearings. However, in some instances, the exchange of written statements may provide sufficient opportunity for a comprehensive debate, as all participants would have access to the submissions of others and would have the opportunity to make comments. It is suggested, therefore, that the procedure should consist of written proceedings followed by oral hearings, unless the tribunal were to decide otherwise (for example, if it deemed that the latter would not provide a useful contribution to the examination of the case).

B.2.5. Notification and written proceedings

91. As a general principle, the draft Statute provides that requests for interpretation should be notified to all participants entitled to take part in the proceedings. Notification would allow to ensure that all participants are aware of the opening of the proceedings and, if the tribunal so decides, of the time limit to submit written statements. In the absence of a specific time limit, the Statute provides for a default time limit of 45 days.

92. In order to ensure an effective exchange of arguments and thus enhance the adversarial character of the procedure before the tribunal, the proposed Statute further provides that upon the expiry of the period to submit written statements, the submissions received shall be made available. In accordance with the suggested rule on publicity (see Part B.2.7) submissions will normally be made available to the public, unless the tribunal decides otherwise, for example to limit access to other participants only, if special circumstances

[34] For example, under the WTO Dispute Settlement Understanding, Annex II, the panel must issue its reports within six months (article 12.8) and the appellate body must circulate its report within 60 days (article 17.5). The WIPO Expedited Arbitration Rules provide that the final award must be made within four months (article 58), while under the ICC Arbitration Rules the final award must be rendered within six months (article 30).

so warrant. Participants having presented written statements would thus be permitted to comment on the statements of others within the time limits decided by the tribunal. Again, should the tribunal deem it unnecessary to specify a different time limit, the proposed Statute provides for a default time limit of 30 days.

B.2.6. Oral proceedings

93. As noted above, the draft Statute proposes to offer the possibility of holding hearings, unless the tribunal decides otherwise. Should it decide to hold hearings, the tribunal would fix the dates and form of such proceedings. The draft Statute provides for a default time frame of five days. This appears to be sufficient to hear the views of all participants authorized to take part in the proceedings and of such other persons as the tribunal may decide to hear (such as experts or other persons who may provide a valuable contribution to the tribunal's expeditious determination).

B.2.7. Publicity

94. The proposed Statute recalls the public nature of the proceedings. Unless the tribunal decided otherwise for specific reasons, documents deposited with the tribunal would be accessible to the public and hearings would be public. This would be consistent with the rules of other courts and tribunals. Such presumption of publicity is also reflected in the provision on making available the submissions received by the tribunal.

B.2.8. Adoption of decisions, quorum, effect of tribunal's award

95. A balance is sought between promoting the efficient operation of the tribunal and ensuring that its awards reflect broad agreement among judges to sustain their authority. The Statute thus proposes a quorum of three judges. This applies to any decision relating to the proceedings as well as to the award. All questions would be decided by a majority of the judges present and the President or replacing member would have a casting vote in the event of equality of votes. This approach follows the practice of numerous courts. As to the tribunal's award, it is proposed to require the concurrence of at least three judges.

96. Awards of the tribunal, including any interpretation of specific provisions of an ILO Convention and other judicial pronouncements made in the context of determining the dispute referred to it, would be binding which means that they would be opposable to all, only subject to any relevant judgment or advisory opinion of the International Court of Justice. [35] Moreover, as a corollary to the authoritative nature of awards, the proposed Statute requires all ILO organs to give effect to the interpretations provided by the tribunal.

97. As provided for in article 37(2), the tribunal's award would need to be circulated to the Members of the ILO and any observations that they might make thereon would need to be brought before the Conference. This constitutional requirement is closely linked to the binding nature of the award, allowing member States to provide their views and the Conference to consider any follow-up action it deems appropriate (for example, through a

[35] As reflected in the *travaux préparatoires*, the Tripartite Conference Delegation on Constitutional Questions that discussed article 37(2) in 1946 stressed the need for uniformity of interpretation and expressed the view that any award of the tribunal should be binding on all member States. During these discussions, Wilfred Jenks, confirming similar observations made by the constituents, noted that "uniform interpretations were needed, binding on all countries"; see *Official Bulletin* (1946, Vol. XXVII, No. 3), p. 768. When the question was raised that the proposed amendment to the Constitution did not specify that the awards would be binding, the Chairperson responded that this "would be provided by the rules laid down by the Governing Body"; see ibid., p. 771.

discussion as to whether standard-setting action would be necessary as a result of an award).

98. Consistent with the spirit of article 37(2), no right of appeal is provided for in the draft Statute, as this would run counter to the expeditious settlement of a question or dispute. However, nothing would prevent the same question or dispute from being submitted to the International Court of Justice.

B.3. Costs

99. Under the proposed configuration of the tribunal, the costs would be kept fairly low. While members of the tribunal would be appointed for a renewable term of six years, they would not receive any honoraria unless selected to sit on a panel. Similarly, support and registry services would be solicited only when needed. Once an interpretation request is referred by the Governing Body to the tribunal, two financial questions would need to be addressed.

100. The first question relates to the payment of appropriate compensation to judges. The Governing Body would need to approve an honorarium amount, which could be calculated either on the basis of time spent or as a lump sum per case. The judges would also need to be provided with a subsistence allowance and travel expenses for their meetings. As to compensation, it is proposed that it be provided on a case-by-case basis. While a multiplicity of payment methods abound in international tribunals, [36] providing for a fixed amount on a case-by-case basis allows for a more standardized calculation of the operational costs of the tribunal. Having assessed the compensation provided by other international tribunals and similar bodies, [37] and bearing in mind the likely duration of each case, it is proposed that the amount offered by case, which could be updated as necessary by the Governing Body, be CHF4,000–7,000 per case. This would entail a predictable and reasonable cost and retain the symbolic nature of such compensation. [38] As to allowance and travel expenses for their meetings, it is proposed that judges should receive the same treatment and should be subject to the same rules applicable to Governing Body members. An estimate of the minimum cost, based on the working hypothesis of two trips from different regions for five judges and a total stay of two weeks in Geneva, is given in table 1.

[36] For example, the judges of the ILO Administrative Tribunal receive US$3,000 per decision drafted and US$750 per decision signed. In the WTO, the Dispute Settlement Body panellists receive CHF600 per day worked in Geneva and CHF600 per eight hours of preparation work, while the Appellate Body members receive a monthly retainer fee of CHF9,031 and a monthly administrative fee of CHF330. The judges of the International Court of Justice, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the former Yugoslavia receive a base salary of approximately US$166,000 and a post adjustment.

[37] For example, the compensation of CHF4,000 that the members of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) receive per session serves as a useful comparison.

[38] The compensation of CHF4,000–7,000 is comparable to the amount received by the ILO Administrative Tribunal judges per decision drafted, the remuneration of the WTO Dispute Settlement Body panellists for two weeks of work, and the honorarium for the CEACR members. The compensation is considerably less than the salary of the International Court of Justice judges and the retainer fee for the WTO Appellate Body members, reflecting the symbolic nature of the compensation.

Table 1. Estimated minimum cost per case

Expenses	Calculation	Amount (CHF)
Compensation	CHF4 000–7,000 per judge x five judges	20 000–35 000
Daily subsistence allowance	CHF380 per day per judge x 14 days x five judges	26 600
Travel expenses		
Africa	CHF4 000 per trip x two trips	8 000
Americas	CHF4 000 per trip x two trips	8 000
Asia	CHF4 000 per trip x two trips	8 000
Europe	CHF500 per trip x two trips	1 000
Average of the four regions	CHF3 125 per trip x two trips	6 250
Translation costs	Three translators x ten days	11 250
Interpretation costs	Five days of hearings	35 000
Total per case		124 100–139 100

101. The second financial question concerns administrative costs. As noted above, the aim would be to minimize and, to the extent possible, absorb them within existing Office budgetary allocations. It is proposed that the Office support be provided through part-time detachment of two ILO officials. Assuming that a case would have an average duration of six months, that one staff member at the P4 level and another at G6 level would be sufficient to cover the needs, and that the total time spent on a case would not exceed half of their working hours, the cost for these two positions would not be more than three working months of each staff member per case. [39] Other operating expenses, such as any necessary document services, IT infrastructure or archival support, would be absorbed by the departmental budgets of the relevant ILO services. Finally, it is recalled that the operation of the tribunal in all three ILO official languages necessarily implies significant translation and interpretation expenses [40] that most likely could not be covered by existing budgetary allocations.

Section II. Addressing further outstanding issues in respect of standards policy and the supervisory system

102. In addition to discussing the issue of how to address a dispute or question arising in relation to the interpretation of an ILO Convention, the Governing Body has, at recent sessions, discussed a number of other items concerning the standards policy and the supervisory system and asked for a time frame to be proposed for considering them.

[39] For the current biennium, the standard cost per work month is US$19,020 for a P4 staff member and US$13,890 for a G6 staff member.

[40] Translation and interpretation costs remain, however, very difficult to estimate as they depend on several variables, such as the number of submissions received and the linguistic capacities of panel members.

A. Designing a Standards Review Mechanism

103. In particular, the Governing Body has given importance to the launching of a Standards Review Mechanism (SRM). It will be recalled that, at its 312th Session (November 2011), the Governing Body took a decision in principle to establish such a mechanism as a component of the standards policy agreed at its 309th Session (November 2010). However, the Governing Body also asked the Office to hold "further consultations on the modalities of the SRM with a view to identifying and resolving the concerns in relation to such a mechanism and to make a proposal to the Governing Body in March 2012 on the options set out in GB.312/LILS/5, bearing in mind the views expressed by the Governing Body members under this agenda item".

104. The Office, as requested, undertook such consultations in order to build the trust and confidence among the tripartite constituents that would be required if the substantive issues associated with the SRM were to be effectively addressed.

105. In March 2012, the Governing Body invited the Office "to continue the consultations already begun, including on the modalities of the Standards Review Mechanism, and to make a proposal to the Governing Body at its 316th Session (November 2012) on the options set out in GB.312/LILS/5, bearing in mind the views expressed by the Governing Body members under this agenda item".

106. In the course of these discussions, there was consensus that the 2008 ILO Declaration on Social Justice for a Fair Globalization provided the overarching framework for the implementation of an ILO standards policy and specifically that an SRM was the means to give effect to the Declaration's requirements that the Organization must "promote the ILO's standard-setting policy as a cornerstone of ILO activities by enhancing its relevance to the world of work, and ensure the role of standards as a useful means of achieving the constitutional objectives of the Organization".

107. The Governing Body has also agreed that the standards initiative suggested by the Director-General in his Report to the International Labour Conference in 2013 should be implemented as a single endeavour, with the SRM as an integral part of it.

108. Nevertheless, the controversies concerning the right to strike and related matters that have appeared with particular force since the 2012 session of the International Labour Conference have obstructed progress towards the implementation of the SRM. Up to this point, the absence of the necessary confidence and understanding between ILO constituents, which has resulted from these controversies, has not allowed for substantive action to follow up on the decisions of principle already taken.

109. The question before the Governing Body is therefore how to respect the commitment to the standards initiative as a single endeavour with the SRM as a key component in circumstances of continued controversy over the right to strike. Obviously, the difficulty would be largely or wholly resolved in the event of agreement on the options set out in the first section of this document. But even without that, the Governing Body may take the view that progress can in any case be made in respect of the SRM, beginning at its session in March 2015.

110. Specifically, further work on the design of an SRM, building on the significant discussions and decisions taken by the Governing Body in 2011, is necessary and could now be undertaken so that the SRM could become operational as soon as decisions taken in other areas provide the necessary preconditions for the success of its work.

111. In this regard, consideration of a time frame for the SRM should properly address not only the timing of its initiation but also of its completion, not least in the light of the ambitious and demanding methodology under consideration in 2011.

B. Functioning of the Conference Committee on the Application of Standards

112. In addition to the question of the SRM, constituents continue to draw attention to the possible need to further improve some aspects of the work of the Conference Committee on the Application of Standards. While it may be recalled that decisions on the list of cases to be considered by the Committee were reached in due time in 2014, even if it was not possible to adopt conclusions on most of them, interest continues to be expressed in continued examination of the issues involved, it being recognized that the composition of the list remains the prerogative of the Workers' and Employers' groups.

113. The Governing Body may take the view that it would therefore be useful to reconvene the tripartite Working Group on the Working Methods of the Committee on the Application of Standards, which met in the framework of the Governing Body sessions up until November 2011, but whose work has been discontinued since. This Working Group could meet as soon as the Governing Body considered convenient and either during or between Governing Body sessions.

C. Matters related to regular and complaint-based supervision

114. In the course of discussions on the standards supervisory system since 2012, a number of ideas have been tabled concerning the appropriate use of articles 22, 23 and 24 of the ILO Constitution, the routing of reports and representations arising from them to different organs of the supervisory system, and the proper relationship and division of responsibilities between them. Some of these ideas have been linked to concerns about the continually increasing workload facing the supervisory system. In that context, some attention has been given to the institutional arrangements that have been developed in some member States on a tripartite basis to facilitate resolution at the national level of issues that might otherwise be referred directly to the ILO while preserving the right of access to the supervisory system.

115. These issues were the subject of some discussion in the Governing Body at its 320th Session (March 2014). Nevertheless, the views expressed to date do not indicate significant convergence of ideas on the matters involved or indeed the utility of giving further detailed attention to them at this stage, it being apparent that they could involve far-reaching and complex discussions at a time when the Governing Body must already address a series of demanding standards-related issues.

116. This being the case, the Governing Body would need to provide further concrete guidance as the basis for a proposal of any time frame for action on this area.

D. Matters related to the functioning of the Committee of Experts on the Application of Conventions and Recommendations

117. The Office has continued to give active attention to the strengthening of its support to the Committee of Experts on the Application of Conventions and Recommendations, to enhance the discharge of the Committee's mandate.

118. At its session in November–December 2013, the Committee of Experts decided to reconvene at its 2014 session its Subcommittee on Working Methods to discuss its working methods in the light of the issues which have arisen since 2012. The Office has prepared an internal working document to facilitate those discussions, based on the guidance given by the experts. As of 2013, at the request of the Committee of Experts, its annual session has been extended by one day (to include the last Saturday of the session). The associated cost has been absorbed within existing resources. At the request of the Committee, the Office revised the working schedule in order to improve time management, enabling a better balance between individual examination by the members of the Committee of the files for which they are responsible and the plenary sittings of the Committee.

119. The Office has supported the Committee in establishing working parties since 2012 to deal with a consolidated set of reports concerning specific matters. Through the establishment of a password protected IT platform, the members of the Committee of Experts have, since 2013, had easy access to all the information and documents relating to reports for which they are responsible well in advance of the session of the Committee. Since 2012, new members of the Committee have been invited to in-depth briefings prior to the first session of the Committee in which they participate and on arrival for their first session. Since 2013, new members have been paired with senior members of the Committee during their first session. The preparatory work for the filling of vacancies is undertaken in a timely manner for submission by the Director-General to the Officers of the Governing Body.

120. A proposal has been submitted to the Officers of the Governing Body at the current session concerning the possibility of increasing by two the number of members of the Committee, which would, if accepted, increase the composition of the Committee to 22 members. This increase is in response to the concerns expressed by the Experts themselves regarding their increasing workload due to the increased ratification levels of ILO Conventions in recent years, the increased compliance by countries of their reporting obligations and the follow-up undertaken by the Committee at the request of the other supervisory bodies of the Organization, as well as the importance they need to give to ensuring the quality and coherence of their comments.

121. The Office has also enhanced its support to the experts by revising and preparing new tools for staff supporting the work of the experts with a view to contributing to greater quality control and coherence.

122. At the current session of the Governing Body, its Officers will also have before them proposals for the filling of a number of vacancies in the Committee of Experts. There are currently three vacancies, one of which has been notified to the Director-General only recently.

123. The Governing Body will be aware that there has already been considerable discussion by its Officers in recent months of the most appropriate method of providing recommendations to the Governing Body on appointments to the Committee. Under current arrangements, a long and a short list of candidates are presented by the Director-General to the Officers of the Governing Body and they in turn are called upon to

report to the Governing Body on their recommendation. Delays have sometimes arisen in the filling of recent vacancies because it has proven difficult for the Officers to agree on recommendations in the light of the information presented to them.

124. Further consideration of this matter will be reported by the Officers to the Governing Body at its current session.

Draft decision

125. ***The Governing Body may wish to decide on any or all of the following measures:***

(a) the adoption of the resolution in Appendix I to the present document requesting the International Court of Justice to urgently give an advisory opinion in accordance with article 37, paragraph 1, of the Constitution;

(b) the establishment of a tribunal under article 37, paragraph 2, of the Constitution and to this end, the appointment of a working party, as set out in paragraph 53 of the present document, to prepare recommendations, on the basis of the draft Statute in Appendix II of the present document, to be submitted to the Governing Body at its 325th Session (November 2015);

(c) action to be taken with respect to the Standards Review Mechanism;

(d) the reactivation of tripartite consultations aimed at resolving outstanding issues in relation to the functioning of the supervisory system, in particular with regard to the functioning of the Committee on the Application of Standards at the 104th Session (2015) of the International Labour Conference.

Appendix I

Draft resolution of the ILO Governing Body

The Governing Body,

Conscious that the International Labour Organization is facing a serious institutional crisis that puts at risk the functioning of the Organization's supervisory system and has over the past three years twice prevented the Conference Committee on the Application of Standards from discharging its responsibilities,

Recalling that at the origin of the deepening controversy lies the decision of one part of the ILO constituency to challenge the long-standing position of the Committee of Experts on the Application of Conventions and Recommendations – as expressed in the 2012 General Survey on the fundamental Conventions – that the right to strike is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and to affirm that in so doing the Committee of Experts has exceeded its mandate and has improperly engaged in interpretive functions,

Noting that other parts of the ILO constituency maintain to the contrary that the right to freedom of association is commonly understood to include the right to strike, that comments to this effect made not only by the Committee of Experts but also by the tripartite Committee on Freedom of Association remained unchallenged for 40 years, and that the findings of these supervisory bodies are now largely echoed in judgments of international human rights courts,

Affirming that the ILO supervisory system that has been in operation for the past 88 years is based on the complementarity of the Committee of Experts and the tripartite Conference Committee on the Application of Standards and is often regarded as being among the most effective in the multilateral system,

Mindful of the need for the ILO to continue to have a strong supervisory system enjoying the support of all parties, and aware that the absence of satisfactory responses to unresolved issues and persistent concerns would damage the functioning and strength of the system,

Recognizing the need to receive authoritative legal guidance from the International Court of Justice as the sole organ that may decide any question or dispute relating to the interpretation of the Constitution or of an international labour Convention under article 37, paragraph 1, of the ILO Constitution, and acknowledging the decisive effect of any advisory opinion so obtained,

Expressing the hope that in view of the ILO's unique tripartite structure, not only governments but also international employers' and workers' organizations would be invited to participate directly and on an equal footing in any procedure aimed at clarifying the current situation,

1. *Decides*, in accordance with article 96, paragraph 2, of the Charter of the United Nations, article 37, paragraph 1, of the ILO Constitution, article IX, paragraph 2, of the Agreement between the United Nations and the ILO, approved by Resolution 50(I) of the General Assembly of the United Nations on 14 December 1946, and the Resolution concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, adopted by the International Labour Conference on 27 June 1949, to request the

International Court of Justice to urgently render an advisory opinion on the following questions:

(1) Is the right to strike of workers and their organizations protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

(2) Was the Committee of Experts on the Application of Conventions and Recommendations of the ILO competent to:

(a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and

(b) in examining the application of that Convention, specify certain elements concerning the scope of the right to strike, its limits and the conditions for its legitimate exercise?

2. *Instructs* the Director-General to:

(a) transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with article 65, paragraph 2, of the Statute of the Court;

(b) respectfully request the International Court of Justice to allow for the participation in the advisory proceedings of the employers' and workers' organizations enjoying general consultative status with the ILO;

(c) respectfully request the International Court of Justice to consider possible steps to accelerate the procedure, in accordance with article 103 of the Rules of the Court, so as to render an urgent answer to this request;

(d) prepare, after the Court has given its opinion, concrete proposals to give effect to that opinion;

(e) inform, as required under article IX, paragraph 4, of the 1946 United Nations–ILO Agreement, the United Nations Economic and Social Council of this request.

Appendix II

Draft Statute

I. THE TRIBUNAL

ARTICLE 1

Establishment

1. A Tribunal for the expeditious determination of disputes or questions relating to the interpretation of ILO Conventions is established pursuant to article 37, paragraph 2, of the ILO Constitution.

2. The seat of the Tribunal shall be the International Labour Office in Geneva, Switzerland.

ARTICLE 2

Competence

1. The Tribunal shall be competent to determine any question or dispute relating to the interpretation of an ILO Convention referred to it by the Governing Body or in accordance with the terms of the Convention.

2. When determining any dispute or question, the Tribunal shall take into account the specificities of ILO Conventions as international treaties.

ARTICLE 3

Composition

1. The Tribunal shall be composed of a body of judges appointed from among independent persons of high moral character. They shall possess the qualifications required for appointment to high judicial offices or shall be jurists of recognized competence, and shall have demonstrated expertise in labour law and international law. They shall be fluent in at least one of the official languages of the Tribunal and shall have passive knowledge of at least another.

2. The Tribunal shall consist of 12 judges and shall sit in a panel of five judges.

3. The Tribunal's composition shall reflect to the greatest extent possible gender balance, representation of the principal legal systems, and geographical distribution. Judges shall be of different nationalities.

ARTICLE 4

Selection and appointment

1. The judges of the Tribunal shall be appointed by the International Labour Conference for a term of six years, and may be re-appointed.

2. Candidate nominations meeting the criteria set out in article 3 shall be submitted by the Director-General to the Officers of the Governing Body. Before submitting the nominations, the Director-General shall consider any suggestions or proposals made by any member of the Governing Body.

3. The Officers shall assess the nominations and prepare a proposal for the composition of the Tribunal. Where necessary, the Officers may request the Director-General to provide additional candidates.

4. The proposal for composition of the Tribunal shall be approved by the Governing Body for submission to the International Labour Conference.

ARTICLE 5

Panel constitution

1. A five-judge panel shall be promptly constituted when the Governing Body refers a question or dispute to the Tribunal.

2. The judges in the panel shall be drawn randomly by the Officers of the Governing Body or whomever they delegate to. The panel shall not include more than two judges having served in the previous case, unless necessary to constitute a full five-judge panel.

3. Notwithstanding the foregoing, the Officers may by unanimous decision specifically designate one or more judges to the panel. This decision shall not unreasonably delay the prompt constitution of the panel.

4. Each panel shall elect its President. The panel may delegate to the President any function necessary for the expeditious conduct of the proceedings.

ARTICLE 6

Incompatibility

Judges may not be appointed as ILO officials or sit in any capacity in another ILO body.

ARTICLE 7

Resignation, withdrawal and removal

1. A judge may resign at any time by notifying the Director-General, who shall inform the Governing Body.

2. Judges shall withdraw from any case in which their impartiality might reasonably be doubted.

3. Judges shall be removed, temporarily or permanently as the case may be, if they are unable or unfit to exercise their functions.

4. Any question relating to the withdrawal or removal of a judge shall be brought forth by the judge concerned or decided by the Tribunal.

ARTICLE 8

Replacements

Any necessary replacements of panel judges shall take place in accordance with the panel constitution procedure.

ARTICLE 9

Vacancies

Vacancies to the Tribunal shall be filled in accordance with the appointment procedure. The duration of appointment shall be the remainder of the term.

ARTICLE 10

Status

When performing their duties for the Tribunal, judges shall have the status of experts on mission enjoying the privileges and immunities provided for in Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies.

ARTICLE 11

Honoraria

1. Judges shall receive a compensation for the performance of their duties in the proceedings in which they are engaged, as well as a subsistence allowance and travel expenses for their official meetings in the seat of the Tribunal.

2. Rates for compensation and travel and subsistence expenses shall be approved by the Governing Body and annexed to this Statute.

ARTICLE 12

Administrative arrangements

The Director-General shall make any administrative arrangements necessary for the expeditious operation of the Tribunal, including registry services, the use of technological means and the possibility for judges to perform certain of their duties remotely.

II. PROCEDURE

ARTICLE 13

Initiation of proceedings

1. The Tribunal shall only be in session when a question or dispute is referred to it.

2. The Governing Body shall refer questions or disputes to the Tribunal by means of a request for interpretation.

3. The Director-General shall submit to the Tribunal any documents and other information relevant to the request for interpretation.

ARTICLE 14

Participation in proceedings

1. Governments of ILO Members, Employer and Worker members of the Governing Body, and non-governmental international organizations enjoying general consultative status, as well as any other organizations or persons invited by the Governing Body or by the Tribunal, shall be entitled to participate in the proceedings. Participation may be exercised collectively.

2. International organizations or non-governmental international organizations, in particular employers' and workers' organizations, having an interest in the question or dispute may submit a request to the Tribunal to be permitted to participate in the proceedings. The Tribunal shall decide on the extent and time limits of this participation.

ARTICLE 15

Conduct of proceedings

1. The Tribunal shall make orders for the expeditious conduct of the proceedings, including as to the form and time for written and oral submissions.

2. The proceedings shall not exceed six months from the date the Governing Body submits a request for interpretation to the date the Tribunal circulates its award. Different time limits may be established when specifically requested by the Governing Body or otherwise decided by the Tribunal.

3. The Tribunal may, at any stage of the proceedings, call upon the participants to produce documents or provide other contributions.

4. The official languages of the Tribunal shall be English, French and Spanish. Written and oral submissions may be made in any of the official languages. The award shall be given in the three official languages, all three texts being equally authoritative.

5. Subject to the provisions of the present Statute, the Governing Body may adopt rules of procedure for the Tribunal.

ARTICLE 16

Phases of proceedings

The procedure before the Tribunal shall consist of written proceedings, followed by oral proceedings unless the Tribunal decides otherwise.

ARTICLE 17

Notification

Requests for interpretation shall be promptly notified to those entitled to participate in the proceedings pursuant to article 14.1.

ARTICLE 18

Written proceedings

1. Unless the Tribunal decides otherwise, the initial notification shall include an invitation to submit written statements within a time limit of 45 days.

2. Submissions received shall be made available upon expiry of the period to submit written statements.

3. Participants having presented written statements shall be permitted to comment on the statements of others. Unless the Tribunal decides otherwise, the time limit for comments shall be of 30 days from the end of the period to submit written statements.

ARTICLE 19

Oral proceedings

1. The Tribunal shall decide whether oral proceedings shall take place and fix the dates and form. Unless the Tribunal decides otherwise, hearings shall not exceed five days.

2. The oral proceedings shall consist of the hearing by the Tribunal of those authorized to take part in the proceedings pursuant to article 14, and of such others as the Tribunal may decide to hear.

ARTICLE 20

Publicity

Unless the Tribunal decides otherwise, hearings shall be public and documents deposited with the Tribunal shall be accessible to the public.

ARTICLE 21

Adoption of decisions

1. The quorum for adoption of decisions by the Tribunal shall be three judges.

2. All questions shall be decided by majority of the judges present. In the event of equality of votes, the President shall have a casting vote.

3. The adoption of an award shall require the affirmative vote of three judges.

ARTICLE 22

Award

The Tribunal shall decide a request for interpretation with an award. The award shall be circulated to the member States and any observations which they make thereon shall be brought before the Conference.

ARTICLE 23

Effect

1. The awards of the Tribunal shall be binding and shall be given effect by all ILO bodies.

2. The foregoing is without prejudice to the provisions of the ILO Constitution, or to any applicable judgment or advisory opinion of the International Court of Justice, which shall be binding upon the Tribunal.

Document No. 35

Minutes of the 322nd Session of the Governing Body, October–November 2014, paras 47–209

INTERNATIONAL LABOUR OFFICE

Governing Body

322nd Session, Geneva, 30 October–13 November 2014

GB.322/PV

Minutes of the 322nd Session of the Governing Body of the International Labour Office

Fifth item on the agenda

The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards

(GB.322/INS/5, GB.322/INS/5(Add.), GB.322/INS/5(Add.1), GB.322/INS/5(Add.2) and GB.322/INS/5(Add.3))

47. *The Chairperson* recalled that a serious institutional crisis was jeopardizing the functioning of the Organization's supervisory system and had, over the previous three years, twice prevented the Conference Committee on the Application of Standards from discharging its responsibilities. Efforts now had to be made to reach a sustainable solution.

48. *The Director-General* said that intensive consultations had taken place since the ILC session in June 2014, in strict accordance with the instructions of the Governing Body in March 2014. Despite the divided opinions, there was unanimity with regard to the overall objective of establishing full tripartite consensus on the operation of a strong and authoritative standards system and to the fundamental importance of that objective to the successful functioning of the ILO. In the light of the failures of the past two years, the Governing Body had to demonstrate its capacity to move forward. The current impasse had already damaged the ILO and its work, and would cause further damage if it continued. However, since June, although there had been numerous expressions of frustration about the lack of progress – particularly from governments – there had also been a renewed commitment to find solutions and recognition of the shared responsibility to do so. The effort now had to be made to find common ground, through negotiation and compromise, on the issues, which were of fundamental importance. Pragmatic solutions had to be found that would allow the integrity of the ILO's principles to be upheld.

49. The matters addressed in the two sections of the Office document were interrelated and that added to the difficulty of the task, given the complexity of the issues. However, that also provided an opportunity to take the broadest possible approach, to find negotiating space and to accommodate differing views on a wide spectrum of issues rather than focusing on one part or one set of points. He recalled that at the June 2013 session of the ILC he had presented the standards initiative covering the issue under discussion as part of a single endeavour. The Governing Body should use all the opportunities at its disposal during the session so that agreement could be reached on the course of action to be taken. To that end, he and his colleagues would be available to work with members informally. He thanked the many governments that had offered facilities and services to expedite the process of reaching agreement. The draft decision in paragraph 125 had been left open deliberately, to offer an opportunity to construct a package of decisions that could form the basis of agreed solutions

50. *The Worker Vice-Chairperson* said that his group had reached the inescapable conclusion that referral of the interpretation dispute to the International Court of Justice (ICJ) for an advisory opinion, as a matter of urgency, was the necessary way forward if the ILO supervisory system was to remain relevant and continue to function. The ILO's supervision of the application of its Conventions and Recommendations relied on the full support of its tripartite constituents. However, in 2012 the Employers had challenged the existence of the right to strike as protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), a right that had long been recognized to exist by all ILO constituents. They had also challenged the authority of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and recently had done so in connection with a number of Conventions other than Convention No. 87 and had refused to reach consensual conclusions in the cases supervised by the Committee on the Application of Standards. The drafters of the ILO Constitution had foreseen that disputes

might arise concerning the interpretation of a Convention, and had therefore made provision for the referral of such questions to the ICJ for an advisory opinion. Taking advantage of the legal expertise of the ICJ did not demonstrate a failure of the ILO's supervisory system; quite the contrary, the Court was an integral and necessary part of that system and it was unquestionable that the Court was competent to adjudicate on the matter. An opinion issued by it would allow the ILO to proceed in an atmosphere of greater legal certainty. What mattered was that the questions referred to it should be clear, direct and concise and that the Court should be able to understand the legal problem or problems on which guidance was sought. International workers' and employers' organizations, including the ITUC and the IOE, would be allowed to participate autonomously in the proceedings.

51. As for the mandate of the CEACR, the Workers' group would be open to reformulating the question set out in paragraph 1(2) of the draft resolution in Appendix I, concerning the competence of the CEACR. Regarding a dialogue approach, the Workers appreciated the arguments in favour of further dialogue. They believed in social dialogue, and had participated in good faith in a series of bipartite and tripartite meetings since May 2012. However, experience had shown that further discussion would not resolve the current dispute. It would be valueless for the Governing Body to issue a statement recognizing that the right to strike existed in national law and practice, since the employers challenged the international protection of that right under Convention No. 87. There was also no value in a tripartite meeting related to the modalities of exercising the right to strike at the national level. Further delay in resolving the question would weaken the ILO's supervisory system, perhaps permanently.

52. The proposal to establish a tribunal under article 37(2) of the Constitution could be explored as a potential long-term solution but would only be acceptable subject to certain guarantees. The group could agree to the appointment of a working party to prepare recommendations on that issue.

53. The proposed Standards Review Mechanism would require an atmosphere of trust and mutual respect between the three groups, which was lacking at present. It was hard to see how a review would work successfully if one group disagreed with the observations of the experts on more than one ILO Convention. If the Governing Body decided to refer the present dispute to the ICJ for an advisory opinion, his group could, however, consider further discussions on the design of such a mechanism – including on its scope and modalities. As indicated in paragraph 111, further discussions would be required on the methodology under consideration in 2011 and possible other options.

54. His group could also agree to the reconvening of the tripartite Working Group on the Working Methods of the Committee on the Application of Standards. However, the possibility suggested by the Employers in June 2014 of non-consensual conclusions would, if applied to cases considered by the Committee, undermine the supervisory system and legal clarity with detrimental consequences for workers and also governments. It would also enable one group to veto the application of a Convention or certain of its provisions.

55. With respect to regular and complaint-based supervision, he recalled that no overlaps had been found in the work of the different supervisory bodies and that his group had expressed opposition in the past to proposals related to the rebalancing of the system. At the current stage, it was more urgent to focus on resolving the dispute by agreeing on a referral to the ICJ and ensuring a proper functioning of the Committee on the Application of Standards in 2015. The group therefore did not believe that a discussion should be opened at the current stage on the use of the different supervisory procedures set out in the Constitution. The group supported the proposal to increase the membership of the CEACR to 22.

56. Should the Governing Body agree to refer the dispute to the ICJ, his group would be willing to engage in a dialogue with the other groups on a possible package deal covering the other issues addressed in the document.

57. *The Employer coordinator* made a number of proposals on the right to strike issue and on a broader reform package to demonstrate his group's efforts to find a solution to the current impasse and to improve the system.

58. The Employers believed that the right to strike was recognized at the national level in different national jurisdictions. As a first step, the Governing Body could make a tripartite declaratory statement recognizing the existence of a right to strike under national law and practice. The ILO could organize a tripartite meeting of experts in January 2015, to identify the problems relating to the modalities of exercising the right to strike at the national level, and evaluate possible areas of future ILO action on the issue, including standard setting. The meeting could be composed of two Government experts per region and one Employer and one Worker expert per region, be chaired by an international personality to be defined by the Officers of the Governing Body, and take place over the course of a week. It should prepare reports to be submitted for consideration by the Governing Body in March 2015. That discussion could then be taken up at the ILC in June 2015. While such discussions were in progress, it would not make sense to continue dealing with right to strike cases, which should be suspended across the supervisory system. The scenario he was proposing was more efficient time-wise, and was also far cheaper, more inclusive and more flexible than a referral to the ICJ, which would be a clear acknowledgment not only that tripartism and social dialogue had failed but also that social dialogue had not even been given a chance to resolve the dispute.

59. His group considered that if the ICJ decided that Convention No. 87 did include the right to strike and allowed for the modalities developed by the CEACR, countries that had ratified the Convention would be obliged to revise their laws and practices accordingly, which might affect national sovereignty in industrial relations. An ICJ opinion to the contrary would damage the credibility of the ILO's supervisory system, by calling into question the status of the Committee's observations and reports. Similarly, if the ICJ decided that the ILO constitutional principle of freedom of association as developed in Chapter 10 of the *Digest of decisions and principles of the Freedom of Association Committee* included the right to strike, then all ILO member States, regardless of ratification, would be obliged to revise their national laws and practices in compliance, which might also affect national sovereignty in industrial relations. An opinion to the contrary would damage the credibility of the ILO's supervisory system by calling into question the status of the *Digest*. In any event, difficult issues would remain, regardless of the opinion issued by the ICJ, and further discussion would be required by the Governing Body on the way forward.

60. Referring to the need to focus on a broader reform package, he proposed depoliticizing the list of cases for the Committee on the Application of Standards by having the CEACR prepare a draft list of cases according not only to their urgency but also to their distribution by region and type of Convention, as well as other rules to ensure balance. The Employers' and Workers' groups could agree on changes, otherwise the draft list would be submitted for adoption to the Conference Committee on the Application of Standards in 2015. The Employers were ready to reach agreement on that proposal.

61. At its next session, the Governing Body should agree on a time frame for launching the Standards Review Mechanism, as well as its initial work programme and its administrative and logistical arrangements.

62. He proposed a tripartite discussion, to be held without delay, on a new informal ad hoc procedure for settling issues concerning the disputed interpretation of ILO Conventions, and the expression of divergent views within the ILO supervisory system. Another tripartite discussion should be held with the CEACR on tackling its increased workload, including with regard to prioritization. As to the mandate of the CEACR, the group expected the statement inserted in the report submitted to the 2014 session of the Conference confirming the non-binding nature of the comments of the CEACR to be respected. The statement should be faithfully reproduced in all future publications.

63. The Employers were also open to considering other issues on a tripartite basis. It was hoped that mutual trust could be rebuilt and new impetus given to the Organization through the revival of social dialogue. The Employers aimed to see the supervisory system as a whole and to achieve an improvement that would reinforce its credibility, efficiency and sustainability. Their objective was by no means to undermine or destroy the ILO's supervisory system. The desired reforms should strengthen and modernize the Organization and maintain its relevance to all constituents.

64. *Speaking on behalf of GRULAC*, a Government representative of Cuba supported the proposal to refer the question of the interpretation of Convention No. 87 with respect to the right to strike to the ICJ. He stressed, however, that the three groups of constituents should be fully involved in the proceedings before the Court. He emphasized that the ICJ should be informed of the urgency of the matter, that an expedited advisory opinion should be sought and that that should be done through a resolution in conformity with the rules applicable to the Governing Body.

65. GRULAC did not support the establishment of a permanent in-house tribunal under article 37(2) of the Constitution. In that regard, the group would only agree to the appointment of a working party, as proposed in point (b) of the draft decision in paragraph 125 of the document, if that working party was created for the purpose of discussing the implementation of any advisory opinion issued by the Court. It should comprise 16 Government members, eight Employer members and eight Worker members. Should such a working party be appointed, and should the Governing Body decide to pursue the examination of the establishment of a tribunal under article 37(2) of the Constitution, the matter could also be considered by that working party.

66. GRULAC regretted that the Standards Review Mechanism had yet to be launched and that no time frame had been presented for the consideration of remaining outstanding issues in respect of the supervisory system and for launching the Standards Review Mechanism to the current session of the Governing Body, despite the decision in that regard at the 320th Session. It trusted that progress would be made with respect to the time frame by March 2015.

67. There was an imperative need to further improve some aspects of the work of the Conference Committee on the Application of Standards. As for the composition of the list of cases remaining the prerogative of the Workers' and Employers' groups, he reiterated the views that had been expressed on behalf of GRULAC at the 320th Session of the Governing Body with respect to document GB.320/LILS/4. [2] With regard to reconvening the tripartite Working Group on the Working Methods of the Committee on the Application of Standards, he recalled the decision that any future outcomes from that working group should be integrated into the work of the Working Party on the Functioning of the Governing Body and the International Labour Conference (GB.322/WP/GBC/1).

[2] GB.320/PV, paras 585–586.

68. Concerning matters related to regular and complaint-based supervision, GRULAC would add article 26 of the Constitution and cases submitted to the Committee on the Freedom of Association to the list mentioned in paragraph 114. He reiterated the group's concern about the simultaneous use of different components of the system to consider cases, which could weaken the functioning of the ILO supervisory bodies. The greatest attention possible had to be given to that issue, even if it involved far-reaching and complex discussions, and a time frame for action was necessary.

69. He noted the contents of paragraphs 117–122 and was confident that the CEACR could enhance the discharge of its mandate through informal dialogue with the Committee on the Application of Standards, continued meetings with tripartite constituents and informal discussions with government representatives. Lastly, he noted the information in paragraph 123 on the filling of vacancies in the CEACR and recalled the decision of March 2014 " … to propose any adjustments to the relevant procedures to facilitate this objective". [3] GRULAC would continue to pay attention to discussions on the issue and reserve its right to make any further statements it deemed necessary.

70. *Speaking on behalf of ASPAG*, a Government representative of China reiterated that dispute resolution was best achieved through tripartite discussions. He considered that governments had not yet been part of tripartite discussions in the Governing Body or the ILC. His group was concerned that referral to the ICJ would take the matter outside of ILO hands and could destroy the good practice of tripartism. ASPAG supported the Employers' proposal for tripartite discussions to find a long-term solution to the issues surrounding the right to strike and that should be done by June 2015. Therefore, efforts should be made to solve the issue internally up to the last minute before turning to the ICJ. His group felt that the question of whether the right to strike was an international rule or not could be solved through time-bound tripartite discussions based on consensus.

71. His group did not support the establishment of an in-house tribunal, not least because that tribunal's decisions could be challenged, which would create a need to resort to the ICJ again.

72. ASPAG supported the idea of solving all standards-related issues as a package and the reconvening of the Working Group on Working Methods of the Committee on the Application of Standards to further enhance transparency, objectivity and fairness. The criteria for determining the lists of cases should be observed and balance ensured across regions and Conventions. ASPAG encouraged the Office to provide the Governing Body with a time frame for implementation of the Standards Review Mechanism. Overlapping in the coverage of cases by the different mechanisms should be avoided in the future. ASPAG also encouraged the selection of more candidates from the ASPAG region for the current vacancies in the CEACR to ensure a balance across regions and across developing and developed countries.

73. *Speaking on behalf of the Africa group*, a Government representative of Kenya said that his group was in favour of giving consideration to all possible options, including tripartite discussions on the various issues at stake, either through the Governing Body, as an ILC agenda item or a dedicated session of the Committee on the Application of Standards.

74. In order to settle the current dispute and create the legal certainty necessary for the supervisory system to function fully again, two questions had to be answered: whether Convention No. 87 should be interpreted as providing for or protecting the right to strike; and whether the CEACR's mandate gave it the authority to make such interpretations and,

[3] GB.320/PV, para. 597(d).

if so, whether such interpretations could go beyond general principles and give details regarding the application of the principle.

75. Prevailing circumstances were not conducive to establishing an in-house tribunal and referral to the ICJ should be a last resort, after all issues had been exhausted through tripartite dialogue and consultations between the parties. His group therefore endorsed point (d) of the draft decision to reactivate tripartite discussions to resolve outstanding issues relating to the functioning of the supervisory system. An Office paper on the reform of the supervisory system and the functioning of the Committee on the Application of Standards could be referred to the Governing Body for initial examination at its 323rd Session (March 2015) before adoption at the 104th Session of the ILC. The group would propose an amendment to point (c) of the draft decision after circulating the text among the social partners.

76. His group hoped that issues relating to the right to strike would not hamper further progress on the Standards Review Mechanism, on which more discussions were envisaged for March 2015. It would be useful to reconvene the tripartite Working Group on the Working Methods of the Committee on the Application of Standards, which should meet as soon as members of the Governing Body considered it convenient, either during or between Governing Body sessions. He noted, with appreciation, improvements made to the functioning of the CEACR.

77. *Speaking on behalf of IMEC*, a Government representative of Canada said that IMEC continued to believe that maintaining the strength and authority of the supervisory system was fundamental to the Organization and directly related to ensuring the relevance of international labour standards in the contemporary world. The draft decision offered elements for a constructive and well-balanced package solution.

78. IMEC had always stressed the importance of tripartite participation in restoring consensus in the process and was ready to discuss at the current session the request for an advisory opinion from the ICJ. Having listened to the different views, it believed that, against a backdrop of uncertainty, receiving authoritative guidance from the ICJ to inform and build further tripartite discussions was a clear next step. Before making a referral to the ICJ, however, there should be tripartite discussion and consensus on the exact question to be put to the ICJ. To that end, IMEC suggested the immediate establishment of an ad hoc drafting group. A referral to the ICJ was not a failure of tripartism; rather, it was one part of a solution built entirely through tripartism and consensus.

79. It was premature to consider the establishment of a tribunal under article 37(2) and IMEC would welcome further elaboration by the Office or a tripartite working party, so that the matter could be considered by the Governing Body in March 2015. In particular, more options regarding the selection and appointment of judges and the constitution of panels should be explored and cost details provided.

80. She reiterated IMEC's support for launching a Standards Review Mechanism and reconvening the Working Group on the Working Methods of the Committee on the Application of Standards. The remaining work on the design of the mechanism should be resumed immediately and the tripartite consultations reactivated to resolve the outstanding issues regarding the functioning of the supervisory system.

81. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy said that Montenegro, Serbia, Albania, the Republic of Moldova and Georgia aligned themselves with her statement. She expressed support for the statements of the Government group and IMEC. As the ILO supervisory system contributed to the promotion and protection of human rights and affected the EU and its policies directly, the

EU attached great importance to the ILO's impartial supervision of compliance with international labour standards.

82. The EU was ready to support a request for an advisory opinion from the ICJ which could provide authoritative guidance to inform and guide further tripartite discussions including possibly at the ILC level. The questions to be referred to the ICJ should concentrate on the main point at issue, namely the protection of the right to strike by Convention No. 87, and the competence of the CEACR to determine that right under Convention No. 87. Therefore paragraph 1(2)(b) of the draft resolution in Appendix I, concerning the determination by the CEACR of limits to the scope of the right to strike and the conditions for its legitimate exercise, should be deleted. If constituents required more time to reach a consensual text, an ad hoc drafting group could be set up for that purpose. The authoritative character of an ICJ advisory opinion had to be recognized.

83. It was premature to consider the establishment of an in-house tribunal, and further elaboration by the Office or by a tripartite working group of Part B of section I of the document was proposed for consideration by the Governing Body in March 2015. Other possible ways of selecting and appointing judges and constituting panels should be explored and more details about costs would also be welcome.

84. A Governing Body working party should be instructed to make proposals, including a timetable, regarding the setting up of a Standards Review Mechanism for presentation to the 323rd Session of the Governing Body. The EU supported the reactivation of the Working Group on the Working Methods of the Committee on the Application of Standards. In order to maintain the ILO's credibility, the social partners must make sure that the Committee functioned smoothly by agreeing on the list of cases for discussion and adopting consensual conclusions. A transitional mechanism was needed until a sustainable solution could be found. The EU renewed its commitment to filling vacancies on the CEACR as soon as they arose.

85. *A Government representative of the Bolivarian Republic of Venezuela* said that the ICJ should be asked to interpret Convention No. 87 with respect to the right to strike, since it alone had competence to interpret ILO Conventions; the opinions and comments of the CEACR were not legal interpretations. Establishing an in-house tribunal was not necessary, would entail additional costs and might not guarantee the requisite objectivity and impartiality. While his Government was always open to dialogue, given the opposing views of Employers and Workers, it had reasonable doubt as to whether the tripartite discussion on the right to strike mentioned in paragraph 6 of the document prepared by the Office could yield positive results, and such a discussion could result in time being lost.

86. He welcomed the establishment of a Standards Review Mechanism and looked forward to receiving the timetable that could allow progress to be made. The Conference Committee on the Application of Standards needed to act in accordance with the principles of legality, legitimacy, objectivity, transparency, efficiency and without regard to particular political interests. Concerning the different components of the supervisory system, his Government looked forward to receiving the timetable mentioned in paragraph 116. His Government reserved its position on Appendix I, pending the submission of amendments thereto. It did not support point (b) of the draft decision or Appendix II concerning the establishment of a tribunal under article 37(2) of the Constitution.

87. *A Government representative of the Dominican Republic* said that as two years of discussions had not produced an answer to the crucial issue of whether the CEACR was competent to interpret Conventions and Recommendations, that question should be referred as a matter of urgency to the ICJ under article 37(1) of the Constitution. The list of countries that were requested to provide information to the Conference Committee on the

Application of Standards had to be chosen by the constituents in a transparent manner. She urged constituents to make an effort to reach consensus on the draft decision.

88. *A Government representative of Algeria* said that the constituents should discuss the competence of the CEACR to interpret Conventions, bearing in mind the wider context of deliberations concerning the reform and improvement of the functioning of the Conference Committee on the Application of Standards.

89. *A Government representative of France* said that the effective implementation of international labour standards was an essential means to safeguard the social dimension of globalization. The ILO's credibility depended on its ability to establish and ensure universal compliance with those standards. That credibility had been called into question by what was essentially a political crisis. All constituents had the responsibility to show that tripartism was useful and effective. The first step would be a largely consensual decision on the process for overcoming the crisis. His Government supported the adoption of a package including all the different aspects of the supervisory system.

90. His Government supported referral of a question limited to the interpretation of Convention No. 87 in respect of the right to strike to the ICJ for an urgent advisory opinion. As it would be impractical to refer every question or dispute concerning the interpretation of a Convention to the Court, his Government had long been in favour of establishing an in-house interpretative body under article 37(2) of the Constitution. It should be a flexible, low-cost mechanism that would convene at the express request of the Governing Body. A tripartite working party could be instructed to present proposals on such a mechanism's functioning and composition and on the terms and conditions for referral to it to the 323rd Session of the Governing Body. The launching of a Standards Review Mechanism would likewise send a positive signal that the ILO constituents intended to guarantee international labour standards effectively in an up-to-date manner. By adopting the draft decision, the Governing Body would revamp the system for overseeing compliance with standards.

91. *A Government representative of Brazil* said that the opinions of the CEACR were not binding and were intended only to guide the action of national authorities. Her Government therefore did not consider that the interpretative function of the CEACR was an issue. Since a question had arisen with regard to the interpretation of Convention No. 87, namely whether it recognized the right to strike, that matter should be referred to the ICJ for an advisory opinion, after which there would still be need for dialogue and decision-making. The Court should not, however, be consulted on the competence of the CEACR. The question set out in paragraph 1(2) of the draft resolution in Appendix I should therefore not be included. It was premature to discuss the establishment of an in-house tribunal. The limited number of difficulties concerning the interpretation of ILO Conventions suggested that there was no need to establish such a tribunal which could undermine dialogue and tripartism and foster recourse to such an institution. Therefore, her Government did not support point (b) of the draft decision in paragraph 125 of the document.

92. *A Government representative of China* said that his Government was in favour of pursuing dialogue in order to resolve the issue under consideration. It was only if that dialogue proved fruitless that consideration should be given to adopting the measures set out in article 37 of the Constitution. It was not, however, in favour of establishing an in-house tribunal. In addition to cost considerations, constituents might turn to it whenever a dispute arose, undermining consultation and dialogue. In the end, if recourse to the ICJ was supported by the majority, they would not object. An effective Standards Review Mechanism should be established in the near future, as such a mechanism was of vital importance in ensuring that international labour standards were always up to date and

served constituents' needs. He supported the reconvening of the tripartite Working Group on the Working Methods of the Committee on the Application of Standards and urged the Director-General to fill the vacancies on the CEACR.

93. *A Government representative of Germany* highlighted that the ILO was currently at a critical juncture and it was urgent to find a solution. The ILO was running the risk of losing its unique role in the supervision of standards. To prevent other bodies from stepping in and filling that void, it was necessary for all constituents to voice their opinions rather than sit back and wait. Although consensus was a great asset, when it was lacking, there needed to be other pragmatic options. Her Government supported the solution of turning to the ICJ. That would not imply the bankruptcy of the principle of tripartism because going to the ICJ would provide a framework in which action would be hinged on tripartism. She proposed reformulating the questions to be put to the ICJ, to make them more concise. A tripartite approach was needed to that end. Further consensus was needed so that an advisory opinion might be accepted as binding. A temporary mechanism should be identified, also on the basis of consensus, for the interim period, which would permit the Conference and the Committee on the Application of Standards to function until a definitive decision had been reached. Although the Employers' group had suggested drafting a statement affirming the existence of the right to strike in national legislation, the utility of such a statement was not clear, as countries in the EU, as did others, already guaranteed citizens the right to strike. If there was consensus among the three parties that in principle the right to strike was contained in Convention No. 87, there could be tripartite discussion on many issues. However, in the absence of such consensus, turning to the ICJ seemed the only option. She strongly urged to break the deadlock on the matter at the current Governing Body session and agreed that establishing a working group on the questions at stake would be a sensible step forward. A decision of principle had to be taken without further delay.

94. *A Government representative of the United Arab Emirates* said that the resolution of disputes among ILO constituents could and should be achieved through constructive dialogue within the ILO. Resorting to external mechanisms would place the future of tripartite dialogue at risk and adversely affect the credibility of the ILO as a leading UN organization. His delegation called for continued dialogue on a tripartite basis and the appointment of a working party to formulate recommendations for reaching consensus.

95. *A Government representative of Panama*, pointing out that the ILO had already consulted international courts for an advisory opinion on six occasions, expressed his country's support for the draft decision in paragraph 125, except for point (b).

96. *A Government representative of the United Kingdom* said that it was crucial to use the current situation as a catalyst for reinvigorating the Standards Review Mechanism with a clear time frame and tripartite commitment. The Committee on the Application of Standards should be fully operational in 2015, backed by pragmatic plans. His delegation was prepared to support referral to the ICJ, although it would have been preferable if the social partners had found a solution based on dialogue. Tripartite agreement should be reached on the questions to be asked and a clear plan put in place for handling the outcome.

97. *A Government representative of Zimbabwe* said that, since the dispute had first arisen in 2012, the Office had engaged in informal consultations with the Employers and Workers, but Governments had not had the opportunity to officially express their views. Tabling the issue of the right to strike for discussion at the following session of the ILC would enable an inclusive tripartite discussion and provide the Organization with direction, either to resolve the matter internally or, once all internal mechanisms had been exhausted, through the ICJ. He also proposed adding the issue of the mandate of the CEACR as an agenda

item at the following session of the ILC and requested the Office to provide guidance on the topic in a paper. His Government looked forward to a holistic approach that strengthened the Organization.

98. *A Government representative of Argentina* expressed his delegation's support for point (a) of the draft decision, regarding the request to the ICJ, but said that the second question in paragraph 49 of the document prepared by the Office was inappropriate, since the non-binding nature of the role of observations of the CEACR had already been sufficiently clarified. It was also too early to consider appointing a tribunal, as provided for in point (b) of the draft decision. He continued to trust in tripartite social dialogue.

99. *A Government representative of Japan* said that the supervision of standards was the Organization's most essential function. It was inappropriate to apply to the ICJ immediately. First, the ICJ would not be able to deliver a fundamental solution as, even after receiving the advisory opinion, the ILO would need to continue consultations on how to deal with the opinion in-house. Such consultation would not be successful unless mutual trust between the Employers and the Workers was restored. Second, the established practice of tripartite decision-making within the ILO would be seriously damaged by the request, as it would be akin to declaring to the international community that the ILO had no ability to solve its own problems. At the same time, Japan did not favour continuing consultations without any prospect of compromise. It could support consultations with a concrete and focused procedure with a fixed time frame. To create new dynamics so as to advance discussions in a tripartite framework, his Government proposed adopting a tripartite resolution on the agreed interpretation of Convention No. 87 at the session of the ILC in June 2015. Although there were many issues to be resolved, it would be better to limit aims to resetting the atmosphere and reopening constructive consultations. His delegation expressed its support for points (c) and (d) of the draft decision, but not (a) and (b).

100. *A Government representative of Mexico* said that even though his Government believed that tripartite dialogue was the most effective tool for finding a solution, it was also convinced that using the same methods would only generate the same results, which, to date, had fallen short. The ILO Constitution already offered the legal tools for a solution. Mexico therefore supported requesting the ICJ to rule on the right to strike and the competency of the CEACR.

101. *A Government representative of the Islamic Republic of Iran* recalled the decision made by the Governing Body at its 312th Session (November 2011) to establish the Standards Review Mechanism as well as the Governing Body agreement that the standards initiative should be implemented as a single endeavour, including the Standards Review Mechanism. He called on the Office to prepare for implementation of the Standards Review Mechanism by the next Governing Body session (March 2015) and to step up its work on the mechanism's design. Constituents should strive to find a consensual solution. His Government disagreed that tripartite discussions on the right to strike had already failed. Tripartism should be given a real opportunity based on mutual trust and willingness among constituents. On the functioning of the Conference Committee on the Application of Standards, his Government supported reconvening the tripartite Working Group on the Working Methods of the Committee on the Application of Standards.

102. *Speaking on behalf of IMEC*, a Government representative of Canada said that, regarding the issue of the right to strike, her group wished to clarify that it was ready to discuss at the current session the request for an advisory opinion from the ICJ, under article 37(1) of the ILO Constitution.

103. *A Government representative of Turkey* said that before considering recourse to the ICJ, the Governing Body should explore all ways of reaching a solution through tripartite consensus. Article 37 of the ILO Constitution did not classify or specify the disputes to be referred to the ICJ or a tribunal, and the draft statute concerning the latter provided no further clarification or legal criteria. Regarding the Standards Review Mechanism, a comprehensive review of existing standards should take the concerns of all parties into consideration and should be established with the full confidence of the tripartite constituents. The Governing Body should establish a time frame and promote mutual understanding on outstanding issues. The required principles for a Standards Review Mechanism were included in the ILO Declaration on Social Justice for a Fair Globalization. Discussions on the Standards Review Mechanism should not be delayed any longer.

104. *A Government representative of Bulgaria* said that her Government was convinced that consulting the ICJ would not undermine tripartite dialogue. It would bring the necessary dynamic to the issue and provide clarity on the ILO supervisory mechanisms.

105. *A Government representative of the Republic of Korea* said that regarding the interpretation of Convention No. 87 in relation to the right to strike, the main focus should be on making a decision objectively and in an acceptable way. Her Government did not consider it useful to refer the matter of the mandate of the CEACR to the ICJ or to an in-house tribunal. The latter would be established by an ILC decision, and doubts could be raised as to its authority over the CEACR. Indeed, in its report submitted to the Conference in June 2014, the CEACR had clarified that its mandate included the non-binding interpretation of the scope and contents of national laws as well as the meaning of relevant Articles of Conventions. Accordingly, her Government supported points (c) and (d) of the draft decision and requested the Office to provide a timeline for reconvening the tripartite Working Group on the Working Methods of the Conference Committee.

106. *A Government representative of India* reiterated his Government's request for an in-depth analysis of the current system and the reason for its failure. It also wished to be informed of the proportion of cases involving the question related to the right to strike being an integral element of Convention No. 87, and disputes on other international labour standards, or disagreement on the interpretation of other Conventions which could not be resolved by the Committee on the Application of Standards. It supported the continuation of a tripartite process, considering that decisions regarding the Organization should be taken by ILO constituents. The ILC was the supreme forum for decisions on any matter pertaining to the world of work and it had the authority to amend the standards it had adopted. Disagreement on the interpretation of any Convention by the Committee had to be brought back to the ILC. An in-house tribunal and referral to the ICJ would add to multiplicity without improving clarity. Either a specific item on the ILC agenda or a discussion in the Conference Committee on the Application of Standards would provide the ideal means of reaching a solution. The social partners should continue working to determine a list of cases and criteria should be developed to ensure balance regionally and in terms of category of Convention. Other international agencies should continue to deal with subjects within their mandate and those should not be related to core labour issues. Issues of compliance concerning non-member countries would also need to be addressed. His Government looked forward to strengthening the CEACR, including through filling vacancies.

107. *Speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and the Netherlands*, a Government representative of Norway expressed support for the EU statement. He observed that it was of the utmost importance for the ILO to unblock the blockage and to continue to have a well-functioning supervisory system that enjoyed the support of all constituents. While the ILO Constitution provided a way to solve

disputes relating to interpretation of Conventions, the advisory opinion from the ICJ was one step in the context of a bigger picture. Technical adjustments to the supervisory system were also needed. The draft decision provided a constructive and well-balanced solution. He called for a tripartite decision on all elements of the draft decision at that session. It was crucial that a decision should be taken on point (a) of the draft decision in paragraph 125, to request the Court to give an urgent advisory opinion, preferably on the question set out in paragraph 1(1) of the draft resolution in Appendix I. With respect to point (b) of the draft decision in paragraph 125, he was not in favour of establishing an in-house tribunal but would not oppose the appointment of a working party to prepare recommendations in that regard. He supported point (c) of the draft decision, concerning the parallel action to be taken with regard to the Standards Review Mechanism and proposed to include in the draft decision the appointment of a working party to prepare recommendations, including a timetable for concrete actions, to be submitted to the following session of the Governing Body. He supported point (d) of the draft decision, on the reactivation of tripartite consultations on the outstanding issues. The draft decision presented a balanced package in which the legal question on whether the right to strike was included in Convention No. 87 was not negotiable: legal questions required legal answers. Recourse to the ICJ did not amount to a failure in social dialogue as it was a measure enshrined in the Organization's Constitution and there was a precedent for such action.

108. *A Government representative of Indonesia* said that her Government fully supported the reactivation of tripartite consultations. Problems within the ILO should be resolved using available mechanisms and the Organization should avoid creating a precedent by referring the question of the right to strike in relation to Convention No. 87 to the ICJ. Establishing an internal tribunal would create a financial burden and undermine the existing mechanism. Her Government was in favour of the Standards Review Mechanism; ILO standards should be relevant to socio-economic development and applicable to its constituents.

109. *A Government representative of Ethiopia* said that article 37 of the ILO Constitution provided a last-resort measure. Under normal circumstances, the Organization should rely on its supervisory system and its constituents rather than on third parties. She supported point (d) of the draft decision in paragraph 125, concerning the reactivation of tripartite consultations.

110. *A Government representative of Belgium* said that the Governing Body should take a decision on the interpretation of Convention No. 87 during the current session and should request an opinion from the ICJ. Furthermore, at its next session the Committee on the Application of Standards should adopt by consensus a list of cases and conclusions.

111. *A Government representative of Colombia* said that her Government supported a comprehensive solution to restore the supervisory system. It hoped that social dialogue and improved working methods would provide the way forward. The involvement of governments was an essential element of tripartism.

112. *A Government representative of Botswana* said that the question of the interpretation of Convention No. 87 was a symptom of a broader problem relating to the functioning of the ILO supervisory system. As the problem centred on the rationale for the existence of the ILO it required a policy rather than a legal solution. It should be ILO constituents who decided on the ILO's objectives. Her Government therefore supported an approach that would emphasize social dialogue as the ideal means of resolving disputes.

113. *A Government representative of Spain* said that, given the complexity of the issue, a solution would only be found through tripartite consensus on a clear, comprehensive and

coherent package of measures and a clear timeline. The Organization should approach the issue as an opportunity to perfect the ILO's supervisory system in a sustainable manner.

114. *A Government representative of Lesotho* said that social dialogue, a central pillar of the ILO, should be given a chance. Referring the matter to the ICJ would signal the erosion of the spirit of tripartism. Existing mechanisms should be used and internal solutions exhausted before turning to external remedies. Accordingly, her Government fully supported the proposal for further consultations to reach consensus and mutual understanding.

115. *A Government representative of Poland* said that if the ILO was to discharge its responsibilities, it was essential to have an effective and efficient supervisory system that also contributed meaningfully to the promotion and implementation of universal human rights. It was therefore necessary to find a practical solution as quickly as possible through "trialogue" and consensus rather than referring the matter to the ICJ. However, if a general agreement was reached within the house on the referral to the Court, his Government was ready to support it in a spirit of consensus.

116. *A Government representative of Jordan* observed that no real tripartite discussions had so far been held and that the active participation of governments could help diffuse tensions. Any decision or opinion from the ICJ would come back to the Governing Body for implementation, and there could be a problem of interpretation of the decision which could create further difficulties. Constituents should continue giving a chance to tripartism as a fundamental pillar of the Organization.

117. *A Government representative of Angola* called for a decision based on consensus. He suggested that the various options set out in the document should be considered, taking into account the tripartite nature of the ILO. He expressed the hope that a decision could be reached that would satisfy all parties.

118. *A Government representative of Switzerland* said that the Director-General had encouraged member States to hold consultations at the national level. Her Government had done so with its social partners. She underscored the importance of finding a long-term solution based on dialogue and trust. It was crucial to find an immediate solution and also to remedy underlying issues. Her Government, if requested, would do everything in its power to help the ILO quickly find a solution that was satisfactory to all parties.

119. *The Employer coordinator* said that he remained optimistic and reaffirmed his group's commitment to moving forward. It was too early to draw any conclusions. His group looked forward to contributing to any activity that would allow the situation to move forward.

120. *The Worker Vice-Chairperson* said that all the parties had recognized the critical nature of the issue, the importance of an effective supervisory system for the ILO and all constituents, and the need to act urgently to resolve the dispute. An advisory opinion from the ICJ was required in order to resume, in good faith, tripartite discussions on the supervisory system in an environment of greater legal certainty. His group was appreciative of the Governing Body members that had indicated support for referral to the ICJ, were open to the idea or would not stand in the way of a majority. The issue had been discussed in bipartite and tripartite forums since 2012 and all constituents had had the opportunity to express their views, yet no consensus had been reached. The ILO Constitution was clear regarding what to do where views on the interpretation of a Convention differed; referral to the ICJ was an integral part of the ILO supervisory system. Issues of interpretation were not within the remit of the ILC, which had a legislative, not a judicial, role. Further discussion would only serve to defer the conclusion of the matter.

The last-resort moment had arrived. Although it would be necessary to discuss the impact of the advisory opinion, it would break the deadlock. If the ICJ were to affirm the position of the CEACR on the existence of the right to strike, there would be no change in the legal obligations of the member States that had ratified Convention No. 87. The advisory opinion would not apply directly to the member States but would provide a final interpretation of the Convention. Member States whose legislation was not considered to be in line with Convention No. 87 had already been receiving comments from the CEACR. The nature and content of the observations formulated by the CEACR concerning the right to strike would not be affected by a positive decision from the ICJ. No country's sovereignty would be affected. The Workers' group was committed to finding a way forward. The Governing Body had been given the power by the ILC to decide whether to refer disputes to the ICJ. There was no reason why a decision could not be made at the present session of the Governing Body.

121. *The Director-General* said that the ILO had been working with full tripartite participation aimed at finding consensus on difficult issues. There seemed to be support for a package solution on all sides. Willingness and flexibility had been expressed in terms of assembling the package. There was not, however, an obvious, emerging consensus on which to base a decision. Yet, the circumstances did not permit further inaction. There was a clear need for a substantive decision at the present session of the Governing Body. He proposed that the Office would carefully go over the statements made and, based on them, draw up a document containing a set of proposals that would be ready on the morning of 10 November 2014 for the consideration of the Governing Body. The proposals would be in lieu of the draft decision in paragraph 125. Every effort would be made to accommodate the views of all parties. Gridlock was not inevitable and a consensus was firmly within reach.

122. *Speaking on behalf of GRULAC*, a Government representative of Cuba underscored that the document that would be submitted by the Director-General should be impartial and objective and take into account the points that had been raised during the discussion.

123. The Governing Body accepted the proposal made by the Director-General.

124. *The Director-General*, introducing a revised version of the draft decision in paragraph 125 of document GB.322/INS/5, said that the new text, which was set out in document GB.322/INS/5(Add.), had not formed the subject of consultations with any group or individuals, but had been produced under his sole responsibility. It was the fruit of the very careful consideration of the two main messages from debates, namely that a decision was required forthwith and that only a package of decisions would permit progress on the issue under consideration. It was a balanced and comprehensive document which constituted both a compromise between diverging views and an attempt to build a coherent set of decisions with an internal logic. The six elements were interrelated; they complemented and did not duplicate one another. The removal of any one of those elements would probably destroy the equilibrium upon which the text's success depended. A decision should therefore be taken on all six elements simultaneously, if possible at the current session.

125. *A representative of the Director-General* (Deputy Director-General for Management and Reform), introducing document GB.322/INS/5(Add.1) on the financial implications of the revised draft decision contained in document GB.322/INS/5(Add.), said that the table was complex on account of the number of variables to be taken into account when estimating the cost of the tripartite meeting of experts referred to in point 2 of the revised draft decision. Such variables included the number of participants, the interpretation services required and the location. The total estimated cost of the package of measures proposed by the Director-General stood at US$1,148,300. The costs associated with requesting the ICJ

to render an advisory opinion on the question referred to in point 1 would be borne by the Office. However, there could be additional travel costs ranging from US$5,000 to US$7,000. The revised draft decision explained how the total cost entailed by the package of measures would be met.

126. *The Employer coordinator* said that his group endorsed point 2 of the revised draft decision. The tripartite meeting of experts could help clarify the extent to which the interpretation of the right to strike by the CEACR had influenced practice at the national level and consequently how the question referred to in point 1 could best be put to the ICJ, if the Governing Body decided as a last resort to refer the matter. The meeting should take place before the March 2015 session to guide the Governing Body in that decision. The crucial question was how, and to what extent, a right to strike as defined by the CEACR at the international level would affect member States' authority to legislate that right at the national level. His group endorsed point 3 and suggested that the Office should specify that the Standards Review Mechanism should be launched by May 2015 to allow time for the necessary preparations following submission of proposals by the tripartite working group and the decision by the Governing Body in March 2015. His group also endorsed point 4 concerning the Working Group on the Working Methods of the Committee on the Application of Standards. If the Working Group was reconvened, the Governing Body should provide it with special guidance. The Governing Body could, at its present session and as a special arrangement for 2015, request the CEACR to draw up the list of cases to be considered by the Conference Committee on the Application of Standards at the 2015 session of the ILC. His group endorsed point 5. The Employer and Worker spokespersons of the Conference Committee on the Application of Standards and the Committee on Freedom of Association could also join in the preparation of the report referred to in that point. The report should be ready for the November 2015 session of the Governing Body. His group also endorsed point 6. Nevertheless, the Employers' group considered that not all possibilities for a tripartite solution had been exhausted. The group was not in favour of referring the question in point 1 to the ICJ and did not consider that there was any consensus or majority among the members of the Governing Body on the matter. However, even if a consensus was reached, the matter of referral to the ICJ should be carefully prepared before a decision was taken, as a last resort, to request an advisory opinion from the Court. Thus the question in point 1 of the draft decision did not capture the core problem of the right to strike and should be reworded so as to ascertain whether Convention No. 87 imposed binding rules relating to the scope of the right to strike, its limits, and the conditions for its legitimate exercise that member States were obliged to implement in law and practice. Further, the Employers' group asked how the social partners and member States would participate in the proceedings before the Court, as referred to in paragraph 2(b) of the draft resolution appended to the revised draft decision, and how the ILO would support the participation of social partners. It would welcome the opportunity to discuss, in particular, the fourth preambular paragraph and operative paragraph 2(b) and (d) of the draft resolution. In addition, the Governing Body should suspend the consideration of all cases concerning the right to strike by the ILO's supervisory machinery until the advisory opinion had been rendered. The Office should begin the preparations necessary to allow the Governing Body to take an informed decision at its March 2015 session on whether to refer the matter to the ICJ.

127. *The Worker Vice-Chairperson* said that the tripartite constituents should be willing to compromise on the package of proposed measures contained in the revised draft decision in order to move forward. The Workers' group endorsed point 1 on an urgent referral of the matter to the ICJ. That was a necessary element of any package. However, it did not see the need for a further tripartite meeting of experts on strike action, as proposed in point 2, as the ILO supervisory bodies had already established clear principles concerning the modalities of implementation of the right to strike. The Workers' group was nevertheless prepared to accept point 2 in the interests of reaching a consensus. On point 3,

the group had misgivings over launching the Standards Review Mechanism when there was a lack of trust among the groups. The protection of workers was, and must remain, the object of the Standards Review Mechanism. However, his group was willing to accept point 3, on the condition that the whole package of measures was adopted. His group supported point 4, but recalled that only the ILC could take a decision on the list of cases. On point 5, the Workers' group did not consider it necessary to review the supervisory procedures provided for in the ILO Constitution, as they had been reviewed quite recently. However, the group would endorse point 5 in the spirit of compromise. It also endorsed point 6 on deferring consideration of the establishment of a tribunal. It was willing to accept the package of measures as a whole, in the order in which they appeared in the revised draft decision, in the spirit of tripartite dialogue and compromise.

128. *Speaking on behalf of GRULAC*, a Government representative of Cuba said that the group endorsed the action proposed in point 1 of the revised draft decision. The tripartite meeting of experts on strike action referred to in point 2 should be convened in April 2015 at the latest. Broad discussions should be held on all aspects of the Standards Review Mechanism and on improving the various supervisory procedures provided for in the ILO Constitution. The group endorsed the initiative outlined in point 4 concerning the reconvening of the Working Group on the Working Methods of the Committee on the Application of Standards so that the necessary steps would be taken to ensure the effective functioning of the Committee at the 104th Session (June 2015) of the Conference. The list of cases should be drawn up and the conclusions on them should be formulated in an objective and transparent manner. The report referred to in point 5 should be prepared in consultation with the tripartite constituents and the findings submitted to the Governing Body for evaluation and approval. The group endorsed point 6 and concurred that the issue should be discussed at a later date. The group endorsed the revised draft decision as a whole.

129. *Speaking on behalf of ASPAG*, a Government representative of China said that tripartite dialogue was the key to resolving the dispute and finding long-term solutions to the problems associated with the right to strike.

130. *Speaking on behalf of the Africa group*, a Government representative of Kenya recalled that his group viewed tripartite dialogue as the best way to resolve the dispute and that a referral to the ICJ should only be decided as a last resort. However, it appeared from the revised draft decision that the preferred option was to refer the question to the ICJ as a matter of urgency. The group had expected the Governing Body to arrive at a consensus and then to agree on a roadmap for implementation. The group maintained that it was premature to refer the question to the ICJ and raised a number of questions. Thus, the speaker asked: how long the referral process would take; what the status quo would be in the interim; whether the functioning of other committees would be affected; whether the parties would still be willing to engage in dialogue; and whether it would cement or further polarize the house. Point 1 did not reflect the position of the Africa group. It made the following proposals: point 1 should be moved to the end of the revised draft decision and amended to include "as a last resort" at the beginning of the point; the tripartite meeting of experts should be convened no later than March 2015; the Standards Review Mechanism should be launched with specific timelines; the Working Group on the Working Methods of the Conference Committee on the Application of Standards should be reconvened with immediate effect; and the report mentioned in point 5 should be prepared and the Office should specify the modalities for its submission. Lastly, the group requested the Office to give assurances that funding was available for the proposed package of measures and that other priority areas would not be adversely affected.

131. *Speaking on behalf of IMEC*, a Government representative of Canada said that her group was approaching the package of measures in a constructive manner and in the spirit of compromise. She called upon the other groups to do likewise with a view to reaching a tripartite consensus on the revised draft decision.

132. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy endorsed the package of measures as a whole. She requested clarification on the legal implications of the wording of the question to be put to the ICJ and, in particular, of the word "protected". She asked whether the duration of the special sitting of the Conference Committee on the Application of Standards could be limited so as not to distract from the consideration of cases and the General Survey.

133. *A Government representative of the United States*, while concerned about the consequences of prolonging the dispute, could not support point 1 of the revised draft decision. Although his Government would not block consensus, it had concerns about requesting an advisory opinion from the ICJ and the precedent that such an action would establish.

134. *A Government representative of France* noted that the revised draft decision focused on the question of the right to strike under Convention No. 87 as well as on the Committee on the Application of Standards. The consideration of a sustainable in-house mechanism for the settlement of interpretation disputes was deferred. In the interests of finding a way out of the current impasse, his Government supported the revised draft decision and was ready to actively participate in the working groups and consultations proposed in the revised draft decision.

135. *A Government representative of Japan* urged a final attempt at resolving the matter through tripartite consultation. He repeated his earlier proposal that a resolution should be adopted during the 104th Session (2015) of the ILC confirming tripartite agreement on the issue of whether Convention No. 87 included the right to strike. Both the Employers and Workers should demonstrate a spirit of compromise. He hoped that consensus would be reached during the current session.

136. *A Government representative of the Russian Federation* supported points 2–6 of the revised draft decision. The ILO should exhaust its internal mechanisms before turning to the ICJ. A tripartite meeting of experts could play a significant role in finding a compromise solution acceptable to all. Not only was referral of the matter to the ICJ premature, but it could also complicate the implementation of the Standards Review Mechanism, part of the Director-General's proposed solution. Point 1 should therefore be moved to the end of the sequence, and should be worded differently, to make it clear that only after exhausting the preceding measures would the Governing Body consider other dispute resolution mechanisms.

137. *A Government representative of the United Kingdom* supported the proposed package, with the caveat that any question posed to the ICJ needed to be formulated so as to ensure that the advisory opinion received helped to explain how Convention No. 87 dealt with the right to strike.

138. *A Government representative of the Republic of Korea* reiterated the view that time-bound tripartite consultation should precede referral to the ICJ on the interpretation of the right to strike in relation to Convention No. 87. The proposed tripartite meeting of experts should be deferred until after either further tripartite consultations or an advisory opinion from the ICJ. Tripartite consultations or an advisory opinion would add a new dimension to the work of the meeting of experts. He supported the remaining proposals.

139. *The Minister of Labour and Workforce Development of Panama* expressed support for the revised draft decision.

140. *A Government representative of Germany* expressed support for the revised draft decision, particularly point 1. Requesting an advisory opinion from the ICJ was a good way to have a rapid and binding decision on that legal question and did not represent a failure of tripartism.

141. *A Government representative of Zimbabwe* said that the Africa group's earlier suggestion that referral to the ICJ should be a last-resort solution had not been given adequate consideration. Recalling the group's concern that governments had been called upon to make an urgent decision with insufficient time, he questioned whether governments' views were valued on such critical matters. Internal dialogue should be given another chance.

142. *A Government representative of Mexico* felt that the package took the different positions into account coherently and with complementarity between the elements. While an advisory opinion from the ICJ was only one component of a tripartite effort to improve the supervisory system, it was nevertheless of great importance, and the constituents should be bound by the ICJ's decision. It was the Standards Review Mechanism and the improvement of the constitutional procedures of the supervisory system that would allow for tripartite implementation of the ICJ's opinion in the way best suited to the Organization.

143. *Speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) and the Netherlands*, a Government representative of Norway expressed agreement with the EU statement. He underlined the need to endorse the proposed package of measures in its entirety, and in the sequence indicated, and to do so at the current session, observing that it represented a coherent and balanced approach. Further, he recalled that referral to the ICJ in extraordinary situations was enshrined in the ILO's Constitution, and was therefore perfectly in line with the spirit and practice of the Organization and should foster a return to constructive social dialogue.

144. *The Minister of Labour of the Dominican Republic* supported the revised draft decision and expressed willingness to actively participate in any activities that would lead to consensual outcomes.

145. *A Government representative of India* affirmed that tripartite consultation at the ILC was the best way to address the issue. She expressed appreciation for the proposed analysis of national legislative systems in the light of provisions under Convention No. 87 that the Office would prepare for the tripartite meeting of experts, as it would shed light on the reasons underlying the supervisory system's failure. Her Government remained committed to tripartite consultation as the best way ahead.

146. *A Government representative of Turkey* reiterated that, in relation to point 1, constituents should endeavour to find a solution before resorting to the ICJ. His Government was seeking a more constructive path than referral to the ICJ. However, his Government supported the rest of the proposed package. The sequencing of the different elements of the revised draft decision was somewhat complex and the Director-General should propose an implementation timeline, taking the balance of the items into consideration.

147. *A Government representative of Thailand* emphasized the importance of dialogue, and hoped that expeditious, time-bound tripartite consultation would lead to a solution. Only if that failed should the matter be referred to the ICJ.

148. *A Government representative of Belgium* reaffirmed support for the revised draft decision.

149. *A Government representative of Australia* expressed a strong preference for consensus through tripartite dialogue. There were risks associated with referring the matter to the ICJ, particularly with regard to the wording of the question. However, the risks associated with the continuing impasse were greater. Accordingly, her Government was prepared to accept the proposed package in order to move forward. Australia was ready to assist in any way possible, including through participation in tripartite working groups as proposed in the revised draft decision.

150. *The Director-General* said that a third round of substantive discussions would be held. It would be damaging for the Organization if the current Governing Body session were to close without progress having been made. Many speakers had found the revised draft decision to be a fair, objective and balanced attempt to unite divergent views. The fact that it contained elements that certain parties had not supported, or did not contain elements that they had, did not mean that their views had not been considered. The lack of consensus was not surprising, in view of the complexity of the matter. The way forward lay in a package of measures, the six components of which were delicately balanced. To remove or significantly modify any of them would throw into question the integrity and coherence of the whole. Equally important was the chronological sequence of the implementation of decisions. The focus of the discussion had been on point 1, referral of the matter to the ICJ, and the relationship between that and point 2, the tripartite dialogue process. It was necessary to re-examine those two components with a view to reconciling the views expressed. In the package's original formulation, both items had been designed to deal with issues related to strike action, in complementary but differentiated ways, and they did not easily lend themselves to the type of sequencing proposed by some in the discussions. While there had been broad consensus on points 3–6, the package had to be viewed as a whole. The Office would submit another revised draft decision for consideration and decision.

151. *The Chairperson* said that the Office had further revised the draft decision on item 5 to take into account the views expressed during the most recent discussions on that item. The new revised draft decision was contained in document GB.322/INS/5(Add.2). The estimated costs of the measures proposed in the new revised draft decision had also been reviewed and were set out in document GB.322/INS/5(Add.3).

152. *The Worker Vice-Chairperson* said that there was much that the Workers' group had not requested in the previous package of measures but that they had accepted the package as a whole in the spirit of compromise. Regrettably, the new package of measures no longer included the possibility of requesting the ICJ to urgently render an advisory opinion on the question of whether the right to strike was protected by Convention No. 87. The Workers' group had not objected to the tripartite meeting of experts proposed previously to review and discuss national legislation and practice on the right to strike. However, a tripartite meeting on whether the right to strike was protected by Convention No. 87 and the limitations of that right was no substitute for the judgement of the CEACR. To follow that course of action would only lend support to the Employers' erroneous theory that the tripartite constituents, and not the CEACR and ultimately the ICJ, were competent to interpret ILO Conventions. For that reason, the interpretation of Convention No. 87 should not be discussed at such a meeting. The drafters of the ILO Constitution had provided that any disputes over the interpretation of Conventions should be referred to the ICJ for an advisory opinion.

153. As to point 2, it did not provide for an ICJ referral and merely placed it on the agenda of the March 2015 session of the Governing Body for decision. However, it was unlikely that further progress would be made on the divergent positions at the March 2015 session of the Governing Body, and the success of the 2015 Committee on the Application of Standards would be compromised without a decision to request an opinion from the ICJ. With respect

to point 3, there was insufficient trust among the groups to launch the Standards Review Mechanism, which could only work if differences in interpretation were settled according to the law, and not according to constituents' views. The Workers feared that the Standards Review Mechanism would be used to weaken the existing protection that international labour standards afforded workers.

154. The report mentioned in point 5, in relation to the various supervisory procedures, could provide a useful insight into the functioning of the supervisory system and ways of strengthening it. However, if the tripartite constituents could not agree to abide by the rule of law and continued to impede the effective functioning of the supervisory system, that report would be of limited value. Confidence in, and acceptance of, the views of the CEACR were prerequisites for a functioning supervisory system. Since 2012, however, one group was no longer abiding by those views. If no agreement could be reached at the tripartite meeting on the right to strike being protected by Convention No. 87, the question should be immediately referred to the ICJ. Points 3 and 5 should be deleted from the new revised draft decision and discussed further at the March 2015 session of the Governing Body.

155. *The Employer coordinator* said that the new revised draft decision fell short of the Employers' group's expectations, but constituted a step in the right direction. The group agreed with the need to progress and stood by the arguments and proposals it had made previously. If progress could not be made, it would be difficult for the tripartite constituents and ILO partners to maintain confidence in the mission and objectives of the ILO. His group could support the new revised draft decision.

156. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy said that the EU had found the previous package of measures to be a coherent whole and had endorsed it. To add or remove elements of the package could prevent a balanced outcome, and changing their order changed the nature of the package. However, she was prepared to accept the proposal as a basis for discussion. With respect to point 1, she strongly believed that the tripartite meeting should discuss only the question of the interpretation of Convention No. 87 in relation to the right to strike. The two proposed questions could not be discussed in a meeting of only three days and they might each require different expertise. Observer States should also be allowed to attend and speak at the meeting, and governments should be able to express views as groups. She requested the addition of a sentence to the end of point 1 to the effect that if no clear consensus could be reached on the question at the tripartite meeting, the conditions for the application of article 37(1) of the ILO Constitution would be met. She also suggested that the words "the issue of a request to the International Court of Justice" be replaced with "the item of an immediate referral to the International Court of Justice" in point 2. The Governing Body needed to take a decision on the matter without further delay.

157. *A Government representative of Germany* said that the new revised draft decision was balanced and accurately reflected the most recent discussions on the matter. His Government viewed the tripartite meeting to be held in February 2015 as the last opportunity for a successful outcome. If an agreement could not be reached on that occasion, article 37(1) of the ILO Constitution should be applied with immediate effect.

158. *A Government representative of the United Kingdom* said that the Governing Body needed to take a decision that day. He encouraged all tripartite constituents to engage in the discussion with a view to reaching a consensus on the matter, thereby potentially obviating the need to request an advisory opinion from the ICJ. The proposed tripartite meeting would be the last opportunity to do so. If a consensus was not reached, the question would have to be referred to the ICJ.

159. *A Government representative of the Russian Federation* said that the new revised draft decision accurately reflected the most recent discussions on the matter. However, he maintained that the immediate referral of the question to the ICJ if no agreement was reached at the tripartite meeting in February would be premature and could have a negative impact on future discussions on that question. He endorsed the new revised draft decision.

160. *Speaking on behalf of the Nordic countries (Denmark, Iceland, Finland, Sweden and Norway) and the Netherlands*, a Government representative of Norway said that he supported the statement delivered on behalf of the EU. The new revised draft decision did not accurately reflect the most recent discussions held on the matter and did not offer a fair compromise solution. The new proposal gave no assurances that the appropriate mechanisms would be activated if an agreement could not be reached on the question of whether the right to strike was protected under Convention No. 87, and the last session of the Committee on the Application of Standards had shown that there was no agreement among tripartite constituents on that matter. He was not opposed to holding a tripartite meeting, but was not convinced that it was the appropriate forum for dealing with questions relating to the interpretation of an ILO Convention. That should be done by the Committee on the Application of Standards as the ILO supervisory body competent to deal with questions of that nature, or through the application of the provisions of the ILO Constitution. He requested further clarification on the tripartite meeting proposed in point 1 and on the link between points 1 and 2. Any failure to reach consensus at the tripartite meeting on the interpretation of Convention No. 87 should not influence the decision to refer the question to the ICJ. Furthermore, it was unclear why a meeting on national practices and experiences relating to the right to strike could serve as input for decision-making on the issue.

161. *A Government representative of Japan* said that the new revised draft decision was a good basis for compromise. The proposed tripartite meeting would be the last opportunity to reach a consensus before seeking an advisory opinion from the ICJ. He endorsed the new revised draft decision.

162. *A Government representative of France* supported the new revised draft decision together with the modifications submitted by the EU, and encouraged the Governing Body to take a decision on the matter that day.

163. *A Government representative of Belgium* said that she, too, failed to see how a tripartite meeting on the modalities and practices of strike action could influence the decision on whether to refer the question on the right to strike to the ICJ.

164. *Speaking on behalf of GRULAC*, a Government representative of Cuba said that points 3–6 of the new revised draft decision were important and should be maintained. The group would comment on points 1 and 2 at a later stage in the discussion.

165. *A Government representative of Panama* said that Panama maintained its position that the matter should be referred to the ICJ. In the interests of making progress, it could support the revised draft decision, provided that, if an agreement could not be reached at the tripartite meeting proposed in point 1, the question on the right to strike would be referred to the ICJ without further delay. Point 2 of the new revised draft decision should therefore be amended accordingly.

166. *A Government representative of Argentina* said that, in relation to point 1 of the new revised draft decision, the tripartite meeting should only discuss the question of the interpretation of Convention No. 87 in relation to the right to strike and not the modalities and practices of strike action, and should formulate a concrete proposal for the Governing Body to consider at its March 2015 session. In relation to point 2, if a tripartite consensus

could not be reached, the Governing Body should be authorized to urgently request an advisory opinion from the ICJ under article 37(1) of the ILO Constitution. She fully endorsed points 3–6 of the new revised draft decision.

167. *Speaking on behalf of the Africa group*, a Government representative of Kenya said that the new revised draft decision largely reflected the views expressed by the tripartite constituents and gave precedence to tripartite dialogue, which was the key to overcoming the current impasse. The group also appreciated the inclusion of a concrete time frame for action, which would culminate in a Governing Body decision in March 2015. He endorsed the new revised draft decision.

168. *Speaking on behalf of ASPAG*, a Government representative of China said that the new revised draft decision largely addressed his group's concerns and he could support it, although the group might wish to propose some amendments in due course.

169. *A Government representative of India* said that tripartite consultation within the ILC would be the best way to resolve the matter. The revised draft decision was a good way to reach a logical conclusion, on the basis of a broad consensus. Her Government was prepared to consider various options following the report on the outcome of the proposed tripartite meeting, including a referral to the ICJ. However, an automatic referral would preclude the possibility of a positive outcome to the tripartite consultations.

170. *A Government representative of Zimbabwe* said that, in spite of some remaining concerns, she could accept the draft decision in the spirit of compromise, and she welcomed the idea of continuous engagement by all parties in the endeavour to arrive at a solution.

171. *The Director-General* observed that there was still some distance to go to arrive at a consensus. The Office would undertake consultations with a view to submitting to the Governing Body a decision that could meet consensus.

172. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy further clarified the amendments to the new revised draft decision that the EU had proposed previously. First, in relation to point 1, the three-day tripartite meeting should be open to observer States with speaking rights. In addition, governments should be able to express views as groups. Second, her group could accept the deletion of the word "interpretation" from the first question concerning Convention No. 87 and the right to strike action. Third, the reasons for deleting the second question on the modalities and practices of strike action were not to overburden the meeting and the fact that different expertise might be required for the two questions. She acknowledged that some groups had concerns regarding the language used in the proposed addition of the following sentence to point 1: "In the absence of a clear and consensual answer to the question above by the tripartite meeting, conditions for the application of article 37(1) of the ILO Constitution will be met." The statement was meant to clearly state a possible outcome, not suggest that the meeting would fail. In view of those concerns she suggested adding: "By the same token, if a consensual answer to the question above is agreed by the tripartite meeting, the result will be forwarded to the Governing Body for adoption." With regard to the amendment that the EU had proposed to point 2 – namely, to replace the words "the issue of request" with "the item of an immediate referral" – she suggested changing the word "immediate" to "urgent", or another word, so that it could not be interpreted as meaning that the referral would be automatic. She supported point 4 of the revised draft decision following the Governing Body debate held on 11 November 2014, but reserved the right to return to points 3, 5 and 6 when the package was finalized.

173. *Speaking on behalf of GRULAC*, a Government representative of Cuba stressed that the proposal must be considered as a package. GRULAC supported the EU's amendments to points 1 and 2. In the interests of showing flexibility, it agreed to postpone the revision of points 3 and 5 to a later date, such as to the 323rd Session of the Governing Body. Points 4 and 6 should remain in their original form.

174. *Speaking on behalf of ASPAG*, a Government representative of China said that there were only three options: to postpone the item until March 2015; to put it to a vote, which would be the worst option as it would cause irreparable damage to the Organization's tripartite structure; or to reach a compromise on the revised decision. ASPAG supported the document as a package. He proposed adding the word "including" after the word "meeting" in point 2 of the new revised decision. He agreed that the second bullet in point 1, concerning the modalities and practices of strike action, should be deleted.

175. *Speaking on behalf of the Africa group*, a Government representative of Kenya reiterated that his group supported the proposal as a package. Consultations were necessary because governments had been brought into the process late. The consultation process would contribute to the discussion at the 323rd Session of the Governing Body. It was difficult to accommodate the proposed EU amendment related to point 2 because it went against the spirit of compromise and implied a predetermined outcome, undermining social dialogue, and gave the impression of a lack of inclusivity of consultations with constituents.

176. *The Employer coordinator* said that the Employers' group supported the whole package presented in the new revised decision. It had not been consulted on the EU's proposal, which seemed to increase automaticity in the transfer from the tripartite approach to the ICJ, and it did not support that move. It was somewhat dismayed by the process that was taking place. The preparatory work in his group had been based on the package, which seemed to be disintegrating. The group was not in a position to support any of the amendments to the package because it had not had the opportunity to discuss them.

177. *The Worker Vice-Chairperson* reiterated that something had been missing from the package proposed that morning and consequently it was no longer a package. While the EU's amendments did not respond to all the needs of the Workers' group, it responded to some of its concerns. A solution should be possible before the end of the session. He noted that GRULAC wanted to retain points 4 and 6. In that context, the remaining points could not be retained. However, the group was open to finding a solution when decisions had been taken on the other points; they could be taken up at the Governing Body in March 2015.

178. *The Director-General* said that, in relation to point 1, there did not seem to be any objection to opening the tripartite meeting to observer States, but noted that that might need to apply to Worker and Employer observers as well. Based on views expressed on the mandate of the tripartite meeting, he identified a call for removal of the words "of interpretation" from the first question, and deleting the second question. There were two remaining, interrelated, issues: first, concerns regarding the relationship between the outcome of the meeting and what would happen in light of that outcome, particularly in relation to any recourse to article 37(1) of the Constitution; and second, the integrity of the package. If an agreement on points 1 and 2 could be reached, there appeared to be agreement on points 4 and 6.

179. *The Employer coordinator* said that it was inappropriate to imply that consensus had been reached. His group had clearly stated that it supported the package presented earlier and nothing else.

180. *The Director-General* said that in the context of the entire package or otherwise, there had been no substantive opposition to the content of points 4 and 6. With regard to points 3 and 5, reserve had been expressed by some governments and the Workers' group. However an agreement on points 1, 2, 4 and 6 might be possible. A decision on points 3 and 5 could be postponed until March 2015 in the light of progress on the other areas of the package. The key to moving forward was determining the articulation of the outcome of the tripartite meeting as proposed and subsequent action, with no prejudgement of what the outcome might be. He suggested continuing the discussion or taking a break in order to find appropriate language.

181. *The Employer coordinator* said that his group had been working on the basis of a package and expressed some dismay about the procedure. On the points raised, he said that it was unclear how including observers in the tripartite meeting could be useful. He did not agree with the deletion of the second bullet point related to the modalities and practices of strike action, because it was important to focus the discussion on the real world and the consequences for companies. The group did not support the EU's proposals regarding points 1 and 2, and without points 3, 4, 5 and 6 it could not support points 1 and 2 as previously drafted; it could not support moving away from the package.

182. *The Worker Vice-Chairperson* was open to discussing the different points mentioned by the Director-General and therefore proposed that consultations among the groups should take place.

(The sitting was suspended.)

183. When the sitting was reopened, *the Chairperson* said that the consultations had resulted in a revised draft decision and that consensus was very close to being reached. He asked members to make the greatest possible effort to reach agreement. The text read:

> **1.** Further to the wide-ranging discussion held under the fifth item on the agenda of the Institutional Section, the Governing Body decides to:
>
> (1) convene a three-day tripartite meeting in February 2015, open to observers with speaking rights, to be chaired by the Chairperson of the Governing Body and composed of 32 Governments, 16 Employers and 16 Workers with a view to reporting to the 323rd Session (March 2015) of the Governing Body on:
>
> - the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike; and
> - the modalities and practices of strike action;
>
> (2) place on the agenda of its 323rd Session, the outcome and report from this meeting on the basis of which the Governing Body will take a decision on the need or otherwise for a request to the ICJ to render an urgent advisory opinion concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike;
>
> (3) take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference, and to this end reconvene the Working Group on the Working Methods of the Conference Committee on the Application of Standards to prepare recommendations to the 323rd Session of the Governing Body in March 2015, in particular with regard to the establishment of the list of cases and the adoption of conclusions;
>
> (4) defer at this stage further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution;
>
> (5) as part of this package, refer to the 323rd Session of the Governing Body the following:

(a) the launch of the Standards Review Mechanism (SRM), and to this effect establish a tripartite working party composed of 16 Governments, eight Employers and eight Workers to make proposals to the 323rd Session of the Governing Body in March 2015 on the modalities, scope and timetable of the implementation of the SRM;

(b) a request to the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association.

184. *The Employer coordinator* said that his group welcomed the revised draft and could accept the proposed package. The formulation in point 2 was acceptable, as was the referral of point 5(a) and (b) to the 323rd Session, but he suggested adding the word "agreed" before the word "package" in point 5.

185. *The Worker Vice-Chairperson* said that his group was not pleased with the procedure adopted or the outcome. He suggested including the words "at the national level" after the words "the modalities and practices of strike action" in the second bullet in point 1. The group would refrain from proposing further amendments to the text, but found it very difficult to accept point 5(a), which anticipated the launch of the Standards Review Mechanism, and point 5(b) and did not consider the package "agreed". The group was open to discussing the package further.

186. *Speaking on behalf of ASPAG*, a Government representative of China supported the revised draft decision, with the addition of the words "through their group" after the words "open to observers with speaking rights" in point 1, so that observers could express their opinions through their group delegates, bearing time constraints in mind.

187. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy said that the EU could accept the revised wording of point 1, as well as the amendment proposed by ASPAG. The EU reserved its right to speak as a group through its representative in the tripartite meeting. It had initially wished to remove the second bullet in point 1 concerning the modalities and practices of strike action due to time constraints, but was willing to accept its inclusion. The EU wished to be consulted prior to the tripartite meeting in February so that it could express its views on the organization of the meeting, particularly to ensure that adequate time was allocated for both issues to be properly discussed. It sought clarification on the meaning of "the need or otherwise for" in point 2 concerning a request to the ICJ to render an urgent advisory opinion, and suggested removing those words.

188. *Speaking on behalf of the Africa group*, a Government representative of Kenya said that his group supported points 1, 2, 3 and 4, but did not understand why point 5(a) and (b) should be deferred, as the Standards Review Mechanism was particularly relevant to the issues being discussed. The group would have preferred to proceed with the launch of the mechanism but was willing to compromise.

189. *The Employer coordinator* noted that the words "the need or otherwise for" had been removed from the text. He had not interpreted the comment made on behalf of the EU as a proposed amendment.

190. *The Worker Vice-Chairperson* said that the EU preferred to have the words removed, as did the Workers' group.

191. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy said that the EU's preference was to remove the words because their meaning was not clear, but would welcome clarification from the Office.

192. *The Worker Vice-Chairperson* said that the meaning was so unclear that the words should be removed.

193. *The Employer coordinator* proposed using the words "necessity or not" instead.

194. *Speaking on behalf of the Africa group*, a Government representative of Kenya said that, to him, the meaning of the original wording was clear, but he would support the wording proposed by the Employers.

195. *Speaking on behalf of ASPAG*, a Government representative of China said that his group considered the original wording was appropriate and objected to removing "the need or otherwise for".

196. *Speaking on behalf of the EU and its Member States*, a Government representative of Italy indicated that her group was willing to support the removal of the words if the Workers proposed doing so but would also accept the wording proposed by the Employers.

197. *The Director-General* said that the amendment to point 1 proposed on behalf of ASPAG on speaking rights for observers through their groups, as well as the Workers' proposed amendment to the second bullet in point 1 adding the phrase "at the national level", appeared to be acceptable to all. The secretariat had chosen the words "need or otherwise" in an effort to use the most neutral wording possible when drafting the decision, but he agreed that "necessity or not" had the same meaning and was clearer. With regard to point 5, his understanding was that the Africa group had reservations but did not appear to oppose the text. The only outstanding issue was whether the word "agreed" should appear before "package" in point 5. Given that the Workers firmly objected to its inclusion, he suggested leaving the wording as it was and said that the Employers' understanding of the language could be reflected in the minutes. The text, as amended, was put forward for adoption by the Governing Body.

198. *The Employer coordinator* said that his group was simply seeking clarity when it proposed the addition of the word "agreed". However, the Workers' refusal to accept it was significant because it revealed that they did not, in fact, agree. A commitment to deal with the launching of the Standards Review Mechanism at the 323rd Session was crucial, and a number of governments had asked for the mechanism to be launched immediately. The Employers wanted some assurance that the Standards Review Mechanism would be launched as proposed in point 5(a) and that there would be no further delays.

199. *The Worker Vice-Chairperson* said that, for his group, any package would involve the ICJ. With regard to a decision on the necessity or not for a request to the ICJ, the decision could go either way, but there would definitely be a decision.

200. *A Government representative of Argentina* said that the Spanish translation of point 2 of the revised decision under consideration appeared to be slightly different from the French and English versions. The French referred to "a decision on the necessity or not for a request" whereas the Spanish referred to "a decision on the need for a request". The translations should be harmonized, but the French appeared to be the clearest.

201. *The Chairperson* said that the original amendment had been made in English and suggested that the translators adjust the translations accordingly.

202. *The Worker Vice-Chairperson* said that if the words "necessity or not" were retained, he wished to state very clearly that in the discussion at the meeting to be held, there would be a necessity and at that moment there would have to be a referral to the ICJ.

203. *The Employer coordinator* said that the decision on the necessity or not for a request to the ICJ would have to be taken by the Governing Body at the 323rd Session and could not be made in advance. With respect to the proposed addition of the word "agreed", he could see no valid reason not to include the word. If the package was not an "agreed package", then it was simply a package for later discussion, which was not the understanding of the Employers.

204. *The representative of the Director-General* (Deputy Director-General for Management and Reform) said that the Employers' view on the agreed nature of the package and the Workers' position on the need for a referral to the ICJ could appear in the minutes of the meeting and did not have to be included in the decision. The Governing Body did not usually use the word "agreed" in a decision because it was implied that a decision taken was an agreed decision.

205. *The Employer coordinator* said that the issue was not a linguistic one. They had been dealing with the Standards Review Mechanism for a long time but had failed to make any progress. The draft decision was supposed to be a decision to move forward on the Standards Review Mechanism, albeit at a later date, and his group sought a commitment from the Workers on that issue, which a large number of governments had supported.

206. *The Worker Vice-Chairperson* said that the aim of his group was to achieve a balanced draft decision and that the Employers' position of referring the decision on the right to strike to March 2015 while other elements of the package were accepted, would destroy that balance.

207. *The Employer coordinator* said that they were no longer close to consensus and that as a result, his group had to question its ability to support the draft decision. The "necessity or not" was key to their entire debate, and his group would not accept an automatic referral to the ICJ.

208. *The Worker Vice-Chairperson* said that his group agreed about the "necessity or not" in the context of the statement they had made on that. It was clear that his group had made significant efforts and various proposals to find solutions during the discussions. They had changed some of their views and positions in order to come to a decision. The group did not support the draft decision but accepted it. He wished to place on record his group's understanding that point 5 would be decided at the 323rd Session of the Governing Body.

Decisions

209. ***Further to the wide-ranging discussion held under the fifth item on the agenda of the Institutional Section, the Governing Body decided to:***

(1) convene a three-day tripartite meeting in February 2015, open to observers with speaking rights through their group, to be chaired by the Chairperson of the Governing Body and composed of 32 Governments, 16 Employers and 16 Workers with a view to reporting to the 323rd Session (March 2015) of the Governing Body on:

- ***the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike; and***
- ***the modalities and practices of strike action at national level;***

(2) place on the agenda of its 323rd Session, the outcome and report from this meeting on the basis of which the Governing Body will take a decision on the necessity or not for a request to the International Court of Justice to render an urgent advisory opinion concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike;

(3) take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference, and to this end reconvene the Working Group on the Working Methods of the Conference Committee on the Application of Standards to prepare recommendations to the 323rd Session of the Governing Body in March 2015, in particular with regard to the establishment of the list of cases and the adoption of conclusions;

(4) defer at this stage further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution;

(5) as part of this package, refer to the 323rd Session of the Governing Body the following:

(a) the launch of the Standards Review Mechanism (SRM), and to this effect establish a tripartite working party composed of 16 Governments, eight Employers and eight Workers to make proposals to the 323rd Session of the Governing Body in March 2015 on the modalities, scope and timetable of the implementation of the SRM;

(b) a request to the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association.

(GB.322/INS/5(Add.2), paragraph 1, as amended according to the discussion.)

Financial implications

210. ***The Governing Body decided that the cost of the package of measures proposed by the Director-General estimated to cost up to US$684,300 that could not be financed from extra-budgetary contributions, be financed in the first instance from savings in Part I of the budget for 2014–15 or, failing that, through Part II, on the understanding that should this subsequently prove impossible, the Director-General would propose alternative methods of financing.***

(GB.322/INS/5(Add.3), paragraph 3.)

Document No. 36

GB.323/INS/5, The Standards Initiative, March 2015

INTERNATIONAL LABOUR OFFICE

Governing Body

323rd Session, Geneva, 12–27 March 2015

GB.323/INS/5

Institutional Section

INS

Date: 13 March 2015
Original: English

FIFTH ITEM ON THE AGENDA

The Standards Initiative

Introduction

1. This document and its three appendices provide information on the follow up to and progress made on the implementation of the decision of the Governing Body at its 322nd Session (November 2014) in relation to the Standards Initiative (GB.322/INS/5):

> The Governing Body decided to:
>
> (1) convene a three-day tripartite meeting in February 2015, open to observers with speaking rights through their group, to be chaired by the Chairperson of the Governing Body and composed of 32 Governments, 16 Employers and 16 Workers with a view to reporting to the 323rd Session (March 2015) of the Governing Body on:
>
> – the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike; and
>
> – the modalities and practices of strike action at national level;
>
> (2) place on the agenda of its 323rd Session, the outcome and report from this meeting on the basis of which the Governing Body will take a decision on the necessity or not for a request to the International Court of Justice to render an urgent advisory opinion concerning the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike;
>
> (3) take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference, and to this end reconvene the Working Group on the Working Methods of the Conference Committee on the Application of Standards to prepare recommendations to the 323rd Session of the Governing Body in March 2015, in particular with regard to the establishment of the list of cases and the adoption of conclusions;
>
> (4) defer at this stage further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution;
>
> (5) as part of this package, refer to the 323rd Session of the Governing Body the following:
>
> (a) the launch of the Standards Review Mechanism (SRM), and to this effect establish a tripartite working party composed of 16 Governments, eight Employers and eight Workers to make proposals to the 323rd Session of the Governing Body in March 2015 on the modalities, scope and timetable of the implementation of the SRM;

(b) a request to the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association.

A. The outcome and report of the tripartite meeting concerning the question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level

2. The Tripartite Meeting took place from 23 to 25 February 2015. A background document was prepared by the Office for the Meeting. Part I of the document provided a factual background on the adoption and supervision of the application of Convention No. 87 in relation to the right to strike and the relevant rules of international law on treaty interpretation. Part II provided a broad overview of modalities concerning strike action at the national level in both law and practice.

3. The Meeting was conducted in a constructive atmosphere. The Workers' and Employers' groups presented a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system. The Government group expressed its common position on the right to strike in relation to freedom of association and also delivered a second statement in response to the social partners' joint statement. The outcome and report of the Tripartite Meeting, together with the Office background document are appended (Appendices I, II and III).

4. It is on the basis of the outcome and report of the Tripartite Meeting that the Governing Body is called to decide on the need to request the International Court of Justice, in accordance with article 37 of the Constitution, for an advisory opinion on the question of the interpretation of Convention No. 87 in relation to the right to strike.

B. The effective functioning of the Committee on the Application of Standards (CAS)

5. After consultations with the three groups, arrangements have been made for the Working Group on the Working Methods of the Conference Committee on the Application of Standards (CAS Working Group) [1] to meet during the 323rd Session of the Governing Body.

[1] The composition of the CAS Working Group at its last meeting in November 2011 was based on the following arrangements: nine Employer representatives; nine Worker representatives; and nine Government representatives, including two from Africa, two from the Americas, two from the Asia–Pacific region, two from Europe and one from the Arab States.

6. The proposed agenda for the CAS Working Group will include the two questions referred to it by the Governing Body, namely: the establishment of the list of cases and the adoption of conclusions. It is also proposed that the CAS Working Group consider the possible implications of the two-week session of the Conference at its 104th Session (2015) on the work of the Committee, while retaining the current number of sittings of the Committee. Background documents have been prepared by the Office to facilitate the discussions of the CAS Working Group, taking into account the statements from the Government group [2] and the Joint Statement from the Workers' and the Employers' Groups [3] to the Tripartite Meeting.

7. The recommendations arising from the CAS Working Group will be referred to this session of the Governing Body and submitted to the CAS at the beginning of its work during the 104th Session (June 2015) of the Conference. [4] At the 325th Session (November 2015) of the Governing Body, the Working Party on the Functioning of the Governing Body and the International Labour Conference (WP/GBC) will review the experience of the two-week session of the Conference. [5]

C. Launching the Standards Review Mechanism (SRM)

8. It is recalled that at its 312th Session (November 2011), the Governing Body had before it a document, [6] which set out nine elements related to "modalities" of the SRM that would need tripartite consultation and consideration:

- Element 1: Objectives and proposed outcomes.
- Element 2: Guiding principles.
- Element 3: Framework.
- Element 4: Role of the Legal Issues and International Labour Standards (LILS) Section of the Governing Body.
- Element 5: Establishment of the tripartite working group.
- Element 6: Composition of the tripartite working group.
- Element 7: Working methods and terms of reference of the tripartite working group.
- Element 8: The selection of standards to be reviewed.

[2] TMFAPROC/2015/2, Appendices II and III.

[3] TMFAPROC/2015/2, Appendix I.

[4] The outcome of the discussion of the CAS Working Group will be reflected in document D.1, "Work of the Committee", which is to be adopted by the CAS at the beginning of its work. Document D.1 will be attached to the letter communicating the preliminary list of individual cases, together with a draft provisional work schedule for the CAS.

[5] GB.322/INS/PV/Draft, para. 287(b)(i).

[6] GB.312/LILS/5, paras 4–34.

– Element 9: Time frames accompanying the reviews.

Element 1: Objectives and proposed outcomes

9. At the 312th (November 2011) Session of the Governing Body it was proposed that the objectives of the SRM would be to determine the status of the standards concerned, identify those that are up to date and should be promoted, the best means of keeping them up to date, those in need of revision, consolidation or other action, identify new subjects and approaches for standard-setting; identify the best methods of preparation and adoption of standards and the means for their effective implementation.

10. With respect to outcomes, the SRM would: ensure that ILO standards provide effective protection for all workers, take into account the needs of sustainable enterprises, are responsive to modern-day needs and future challenges, strengthen support for up-to-date standards, increase the number of ratifications, improve effective implementation of ratified Conventions and ensure that the body of international labour standards in place supported the achievement of the ILO's strategic objectives.

Element 2: Guiding principles

11. At its 310th (March 2011) and 312th (November 2011) Sessions, the Governing Body discussed a set of general principles to guide the discussions on standards policy and which should, ultimately, provide the basis for recommendations under the SRM. Following further discussions between the Employers' and Workers' groups, at the 313th Session of the Governing Body (March 2012), the two groups jointly put forward to governments a set of common principles that emphasized the need for:

- policy coherence in the context of the ILO Declaration on Social Justice for a Fair Globalization;
- a clear, robust and up-to-date body of standards for the purpose of protecting workers, taking into account the needs of sustainable enterprises;
- the adoption of decisions by consensus and, in the absence of consensus, existing decisions should remain in place;
- negotiations in good faith leading to a clear, robust and up-to-date body of standards; and
- agreement among the social partners to implement those commitments. [7]

12. The Joint Statement of Workers' and Employers' Groups to the Tripartite Meeting reflected similar principles:

- Create a coherent policy framework within ILO standards machinery;
- A clear, robust and up-to-date body of standards;
- For the purpose of the protection of workers and taking into account the needs of sustainable enterprises;
- Adopt decisions by consensus;

[7] GB.313/PV, para. 485.

- Negotiate in good faith to have a clear, robust and up-to-date body of standards;
- The social partners agree to implement these commitments.

Element 3: Framework

13. Discussions at the 312th Session of the Governing Body (November 2011) indicated that there is consensus among constituents that the Social Justice Declaration provides a well-defined framework for the SRM. The Joint Statement of Workers' and Employers' Groups also indicates that: "The framework for the SRM would be the principles contained in the ILO Declaration on Social Justice for a Fair Globalization".

Element 4: Role of the legal issues and International Labour Standards (LILS) Section of the Governing Body

14. Based on the discussions in March 2011, a consensus emerged among constituents for the LILS Section of the Governing Body to establish and oversee the SRM process and act as the responsible forum to follow-up on the recommendations of the tripartite working group. The Joint Statement of Workers' and Employers' Groups indicates that: "Overview and follow up to SRM decisions: By the Governing Body in its LILS Section".

Elements 5, 6 and 7: Establishment, composition, working methods and terms of reference of the tripartite working group

15. The Governing Body decision of November 2014 calls for a tripartite working party composed of 16 Governments, eight Employers and eight Workers. The Joint Statement of Workers' and Employers' Groups refers to a tripartite working group composed of 24 members (eight Governments, eight Employers and eight Workers) and that the tripartite working group should meet for three days in March and November every year.

Element 8: The selection of standards to be reviewed

16. At the 312th Session (November 2011) the Office proposed two options to the Governing Body:

(1) all standards with the exception of: the fundamental and governance Conventions and their accompanying Recommendations, as well as the withdrawn, replaced and recently consolidated instruments; [8] or

(2) standards not reviewed by the Cartier Working Party and adopted between 1985 and 2000 – with the exception of the Worst Forms of Child Labour Convention, 1999 (No. 182), and its accompanying Recommendation (No. 190), and the recently consolidated standards – standards that have been classified by the Cartier Working

[8] This relates to 130 Conventions, three Protocols and 105 Recommendations.

Party as having an interim status, those in need of revision and those for which further information was to be requested. [9]

17. The Joint Statement of Workers' and Employers' Groups to the Tripartite Meeting proposed the scope of the work of a tripartite SRM working group as: "All ILS, except outdated, withdrawn, replaced or recently consolidated ILS, should be subject to discussion and if agreed, review. In a first instance, Standards not reviewed by the Cartier Working Party and adopted between 1985 and 2000, the instruments for which the Cartier Working Party had requested further information, those classified by the Cartier Working Party as having interim status, and those that remained to be revised could be the subject of review." [10]

Element 9: Time frames accompanying the reviews

18. Based on the proposal in the Joint Statement from the Workers' and Employers' Groups as referred to above, the first meeting of the tripartite SRM working group would be for three days before the 325th Session of the Governing Body (November 2015). It could discuss the modalities referred to above and the identification and selection of the standards to be considered for review.

19. Taking into account the elements above, the following time frame is proposed:

- April–July 2015: The Office would prepare a working document for consultation with tripartite constituents.
- September 2015: Consultations with the three groups, after which the Office would prepare a revised document taking into account the outcome of consultations.
- November 2015: SRM Working Group would hold its first meeting prior to the Governing Body to consider the modalities for the SRM and the identification of the first group of Standards to be reviewed. A progress report would be submitted to the Governing Body (LILS Section) for discussion and decision.
- January–February 2016: A further working document prepared by the Office as a follow-up to the November 2015 Governing Body discussions, guidance and decisions.
- March 2016: SRM Working Group would hold its second meeting on the basis of the working document prepared by the Office and propose the group of standards that should be the subject of the review by the SRM and the consultation process for the review.
- November 2016: Examination of the first set of ILS reviewed under the SRM is submitted to the Governing Body for its consideration and decision.

[9] This relates to 49 Conventions and 52 Recommendations. The Protocol of 1996 to the Merchant Shipping (Minimum Standards) Convention, 1976, which was earlier included in this group of instruments has been revised and replaced by the MLC, 2006.

[10] See GB.312/LILS/5, Appendix II, for a list of the instruments covered. This proposal would result in a total of 139 Conventions, four Protocols and 113 Recommendations under review and, for those instruments adopted between 1985 and 2000, this would result in a total of 49 Conventions and 52 Recommendations that would be considered by the tripartite working group.

- March 2017: SRM Working Group reports on progress.
- November 2017: SRM Working Group continues its work and the Governing Body adopts relevant decisions.
- March 2018: Governing Body follow-up to November 2017 decisions of the Governing Body.

D. Preparation of a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution (decision point 5(b))

20. At its 322nd Session (November 2014) the Governing Body deferred to this session consideration of a request to the Chairpersons of the CEACR and the CFA to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association. The Joint Statement of the Workers' and Employers' Groups refer to the "clarification of the roles and mandates of the CFA and the art. 24/26 procedures vis-à-vis regular standards supervision".

Financial implications

21. As there is no provision in the Programme and Budget for 2014–15 nor in the Director-General's Programme and Budget proposals for 2016–17 to cover the costs of the outcomes of the Tripartite Meeting, should the Governing Body decide to adopt any of the measures proposed, financial arrangements would have to be made.

22. The estimated cost of Tripartite Working Group on the Standards Review Mechanism described in paragraphs 15 and 19 would be US$176,800 per meeting, comprising:

	US$
Travel costs	105 300
Interpretation	70 000
Documentation	1 500
	176 800

23. The estimated costs in 2015 would be $176,800 and in 2016–17 would be $707,200.

24. The estimated cost to prepare and publish the report referred to in paragraph 20 during the current biennium is $50,000.

Draft decision

25. ***The Governing Body:***

(a) takes note of the outcome and report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention,

1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level;

(b) decides, in light of the outcome and report of the Tripartite Meeting, not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike;

(c) decides to take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference, taking into account any recommendations made by the Working Group on the Working Methods of the Conference Committee on the Application of Standards, in particular with regard to the establishment of the list of cases and the adoption of conclusions;

(d) decides to establish under the SRM a tripartite working group composed of 32 members: 16 representing Governments, eight representing Employers and eight representing Workers to meet for three days prior to the March and November sessions of the Governing Body every year;

(e) decides that this tripartite SRM working group will report to the Governing Body at its 325th Session in November 2015 on progress made in the implementation of the SRM;

(f) requests the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association;

(g) decides that the cost of the measures proposed in this paper estimated to cost up to $226,800 in 2015 and up to $707,200 in 2016–17 be financed in the first instance from savings in Part I of the budget for the respective bienniums or, failing that, through Part II, on the understanding that should this subsequently prove impossible, the Director-General would propose alternative methods of financing.

Document No. 37

Minutes of the 323rd Session of the Governing Body, March 2015, paras 51–84

INTERNATIONAL LABOUR OFFICE

Governing Body

323rd Session, Geneva, 12–27 March 2015

GB.323/PV

Minutes of the 323rd Session of the Governing Body of the International Labour Office

Decision

50. ***The Governing Body noted that while progress had been made, a number of fundamental activities required under the Action Plan for the Elimination of Forced Labour in Myanmar by 2015 had not yet been implemented. In that context the Governing Body:***

(a) requested the Director-General to prepare a report for consideration at the 325th Session of the Governing Body (November 2015) on the implementation and possible need for extension of the Action Plan, the status of any outstanding individual cases including those specifically referred to in the report, and steps necessary to ensure prosecution and accountability of those who had exacted forced labour; and

(b) called on the Government of Myanmar to take all necessary actions to ensure compliance with the Forced Labour Convention, 1930 (No. 29), and requested the Government to submit, to the 325th Session of the Governing Body (November 2015), a report on the measures it would take to do so in the shortest possible time.

(GB.323/INS/4(Add.), paragraph 1.)

Fifth item on the agenda

The Standards Initiative
(GB.323/INS/5), (GB.323/INS/5/Appendix I)
(GB.323/INS/5/Appendix II) and (GB.323/INS/5/Appendix III)

51. *The Employer coordinator* welcomed the document, which gave a fair and balanced account of what had been achieved in the November session of the Governing Body and the Tripartite Meeting held in February 2015 on the right to strike. Those results were important in breaking the deadlock that had prevented the ILO supervisory system from operating properly, but were only a first step towards ensuring an effective and well-functioning supervisory system. The Employers position remained unchanged on the fact that the "right to strike" was not recognized in Convention No. 87. However, the "Joint Statement" was considered as a commitment to continue to work together to strengthen the supervisory system despite the differences of views. The Employers remained committed to finding solutions to the many problems described in the document. It was important to abide by the timetable given in paragraph 19, while progressing one step at a time towards a solution. The joint statement of the Workers and Employers stated the need to clarify and streamline supervisory procedures, including the role and mandate of the Committee on Freedom of Association (CFA). It would indeed be advisable for the Chairperson of the CFA and the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) to prepare a report on the interrelationship, functioning and possible improvement of the various supervisory procedures, as proposed in paragraph 20. The tripartite partners should be closely involved in its preparation and drafting. His group supported the draft decision in paragraph 25.

52. *The Worker Vice-Chairperson* clarified some points in relation to the joint statement presented by the Workers and Employers at the tripartite meeting held in February 2015. The joint statement did not attempt to resolve all the problems, but it did allow the ILO to resume the unimpeded supervision of international labour standards, which was crucial to

the promotion of decent work everywhere. Nor did the statement mean that the Workers' view on the right to strike had changed. The right to strike was fundamental to democracy and a fundamental option for workers. It was protected by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). He welcomed the commitment of the Employers' group, despite their disagreement on the interpretation of that Convention, to restore mature industrial relations and to acknowledge the right of workers to take industrial action in support of their legitimate industrial interests. He endorsed the Government group's statement reaffirming that the right to strike was an intrinsic corollary of the right of freedom of association. Perhaps the most important element of the joint statement by the social partners was the recognition of the mandate of the CEACR, since it should permit the resumption of normal supervision of cases in the Conference Committee on the Application of Standards (CAS).

53. On the draft decision, he welcomed subparagraph (a). His group looked forward to the discussion in the Working Group on the working methods of the CAS, since it should guarantee that the CAS henceforth operates normally. The Workers and the Employers had agreed to a methodology for the selection of a long and a short list of cases and for the drawing up of consensus-based conclusions with enhanced participation by the social partners. His group therefore supported subparagraph (c). As the Workers' group had agreed to the launching of the Standards Review Mechanism (SRM), and given the prevailing atmosphere of trust and mutual respect between the social partners, it was in favour of subparagraphs (d) and (e) on the Tripartite Working Group to be established under the SRM and its composition. Since a joint report from the Chairpersons of the CEACR and the CFA could provide useful insights into the functioning and possible improvement of the supervisory system, the Workers endorsed subparagraph (f). They likewise agreed with subparagraphs (g) and (b), because they no longer sought referral to the International Court of Justice of the interpretation of the right to strike under Convention No. 87.

54. *Speaking on behalf of the Government group*, a Government representative of Italy expressed her appreciation of the social partners' constructive approach to dialogue. She emphasized that the Government group recognized that the right to strike was linked to freedom of association, which was a fundamental principle of the ILO. It specifically recognized that freedom of association, in particular the right to organize activities for the promotion and protection of workers' interests, could not be fully realized without protecting the right to strike, which albeit part of the fundamental principles and rights at work of the ILO, was not an absolute right. The scope and conditions of that right were regulated at the national level. Hence member States were responsible for the effective implementation and observance of labour standards.

55. The process of nominating nine countries to participate in the Working Group on the working methods of the CAS was complete. The CAS itself might wish to revise the composition of the Working Group in order to reflect the particular regional structure of the Government group. Observers without speaking rights would be able to attend meetings of the Working Group. As to the Working Group on the SRM, her group intended to complete the process of nominating the 16 government participants and of identifying a suitable independent Chairperson before the Governing Body session in June 2015. In order to contain costs and allow for more intense discussions, the Working Group should meet once a year for one week. She agreed that the Chairpersons of the CEACR and the CFA should be requested to jointly prepare the report mentioned in paragraph 20. While agreeing with the financial provisions suggested in paragraph 25(g), she requested clarification of the alternative methods of financing mentioned therein. Lastly, she proposed a number of amendments, which had been circulated in a paper distributed the previous day.

56. *Speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC)*, a Government representative of the Bolivarian Republic of Venezuela said that GRULAC had played an active role in the Tripartite Meeting held in February 2015, at which the Government group had reached a common position recognizing the link between freedom of association and the right to strike. It was regrettable that the findings and recommendations of the CAS Working Group had not been submitted to the Working Group on the Functioning of the Governing Body and the International Labour Conference. That procedure should be followed in future. As for the SRM, it would be advisable to consider whether it was really necessary for the Tripartite Working Group to meet twice a year for three days. His group agreed with the time frame proposed in paragraph 19 and was in favour of the joint report mentioned in paragraph 20, which should be presented to the 326th Session of the Governing Body. Lastly, the decision adopted at the current session should be reviewed at the 328th Session, without prejudice to the prior consideration of any other issue arising in respect to the topic which might prove necessary. He supported the draft decision in paragraph 25, subject to the amendments proposed by the Government group.

57. *Speaking on behalf of ASPAG*, a Government representative of China welcomed the fact that the social partners had reached agreement on the standards initiative, without the need to refer the matter to the International Court of Justice. Selection of the cases submitted to the CAS should be depoliticized and based on objective criteria. The list should be balanced between fundamental and technical Conventions, geographical representation and a country's level of development, and should be released before the opening of the Conference. As to the newly launched SRM, it could ensure a clear, robust and up-to-date body of standards, meeting the needs and challenges of the current world of work. All international labour standards, except outdated, withdrawn, replaced or recently consolidated standards, should be subject to discussion and, if so agreed, reviewed. Concerning the joint report referred to in subparagraph (f) of the draft decision, it was important that the work of the various supervisory mechanisms should not overlap. The roles and mandates of the CFA should therefore be clarified, as should those of regular supervision procedures under articles 24 and 26 of the ILO Constitution. His group supported the draft decision.

58. *Speaking on behalf of the Africa group*, a Government representative of Kenya expressed appreciation of the fact that tripartite dialogue had prevailed in resolving the issues raised by Convention No. 87 in relation to the right to strike and the modalities and practices of strike action at the national level. His group looked forward to working closely with the social partners with a view to fully re-establishing the effective functioning of the CAS, including the planned review of the entire supervisory system. It proposed that government delegates be funded from the budgetary provisions mentioned in subparagraph (g) of the draft decision, in order that they could attend the Tripartite SRM Working Group. It supported the draft decision, as amended by the Government group.

59. *Speaking on behalf of IMEC*, a Government representative of the United States welcomed the progress made in relation to the Standards Initiative, especially the outcome of the Tripartite Meeting on Convention No. 87 in relation to the right to strike. That meeting had created a new momentum of trust between the social partners and of unity among governments. The package of measures set out in the joint statement of the social partners and the two statements by the Government group showed the way towards an effective and lasting solution to the issues surrounding the ILO's supervisory system. IMEC supported the reactivation of the CAS Working Group and its proposed agenda. An independent chair should be appointed from the Government group in addition to the nine Government members. Governments should not be involved in drawing up the list of individual cases to be reviewed by the CAS, whose conclusions would provide constituents with valuable guidance.

60. The SRM should be launched as soon as possible; however, some clarifications and modifications were needed. While IMEC could support the objectives of the SRM as set out in paragraph 9 of document GB.323/INS/5, care should be taken not to overburden the process. The main focus should be on arriving at a body of up-to-date standards. A follow-up mechanism should be included, to ensure that standards in need of revision were put on the agenda of the International Labour Conference within a reasonable time frame. Her group agreed that the ILO Declaration on Social Justice for a Fair Globalization was the right framework for the SRM and concurred with the role of the Legal Issues and International Labour Standards Section of the Governing Body, as outlined in paragraph 14. It was in favour of establishing the SRM Working Group defined in paragraph 15 and of appointing an independent chair from the Government group, in addition to the 16 Government members. The members of the Working Group should have expert knowledge of the ILO's legal framework and it should be possible to vary the membership according to the expertise needed for the standards under review. The Working Group required clear terms of reference to ensure that the work of the Cartier Working Party was not duplicated.

61. When selecting the standards to be reviewed, careful consideration should be given as to whether to exclude the fundamental and governance Conventions, since they had special status. Her group agreed with the contents of paragraph 16(2) and with the suggested time frame, on the understanding that it could be adapted if necessary. The joint report referred to in paragraph 20 should be discussed at the 326th Session (March 2016). She trusted that its examination would not compromise the independence of the CEACR. She requested clarification of the costs mentioned in paragraph 22. In order to contain costs, the SRM Working Group should meet for one week, once a year.

62. *Speaking on behalf of ASEAN*, a Government representative of Cambodia welcomed the outcome of the Tripartite Meeting held in February 2015 and the efforts to ensure the effective functioning of the CAS. The criteria for the selection of cases to be submitted to the latter should be objective and well-balanced between fundamental and technical Conventions, geographical representation and the country's level of development. ASEAN was in favour of launching the SRM. It was crucial to clarify the roles and mandates of the CFA and the articles 24 and 26 procedures. ASEAN supported the draft decision as it stood in paragraph 25.

63. *A Government representative of France*, noting that the effective application of international labour standards was at the core of the Organization's work, welcomed the restored capacity for dialogue within the Governing Body, the willingness of the constituents to ensure the effective functioning of the labour standards system, and the re-launch of the SRM. The important statement delivered by Governments at the Tripartite Meeting in February should have been mentioned in the draft decision. Governments were willing to consider the conditions for exercising the right to strike; however, conflicting interpretations emerging from the CAS could threaten the legitimacy of tripartism. There was still no legitimate procedure for resolving the interpretation question concerning Convention No. 87 and other possible interpretation questions. His Government was still in favour of establishing a flexible, low-cost interpretative body under article 37(2) of the Constitution that would convene at the express request of the Governing Body.

64. *A Government representative of Indonesia* welcomed the outcome and report of the Tripartite Meeting. In particular, he welcomed the efforts by the social partners to issue a joint statement concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system. Underlining the importance of tripartite dialogue, he hoped that the constructive atmosphere would continue. He supported the efforts to establish an SRM.

65. *A Government representative of Japan* said that the dispute on supervisory mechanisms should be resolved through internal tripartite consultation. In that regard, he welcomed the efforts made at the Tripartite Meeting to reach consensus. He agreed with the proposal in the joint statement by the Workers and Employers that the list of cases chosen for the CAS should be based on objective criteria and be balanced between the fundamental and technical Conventions, geographical representation and a country's level of development. In the light of the proposal that no conclusions would be issued in the absence of consensus, however, he said that the Employers and Workers should give due consideration to ensuring that such a situation did not arise, as it would undermine the role of the CAS. He would welcome a report on the inter-relationship, functioning and possible improvement of the supervisory procedures.

66. *A Government representative of Germany* welcomed the progress made and the efforts made by the social partners in particular to overcome the deadlock. Much remained to be done, however, and his Government was willing to take an active part in the process.

67. *A Government representative of Brazil* hoped for a final consensus, including on the application of article 37 of the Constitution. The interpretation question should be resolved by the International Court of Justice, rather than by an internal ILO tribunal. The right to strike was formally recognized in the International Covenant on Economic, Social and Cultural Rights, as well as in the founding instruments of regional bodies such as the Organization of American States. He supported the establishment of the SRM. More transparent criteria should govern the selection of cases for the CAS. The role of governments, as the bearers of the treaty obligations concerned, could be strengthened. The hierarchy and priority given to the Committee's procedures should be clarified. The frequency of reporting should be reduced, and the supervisory function treated as a unitary process.

68. *A Government representative of India* welcoming the outcome of the Tripartite Meeting, reiterated the importance of tripartite discussion. In that regard, the International Labour Conference was the supreme forum for deciding on matters relating to the world of work. She supported the launch of the SRM and looked forward to a joint report by the Chairpersons of the CEACR and the CFA on the operation and possible improvement of the supervisory procedures related to articles 22, 23, 24 and 26 of the Constitution. Consideration should be given to the burden of reporting, and to new reporting formats.

69. *A Government representative of the United States* reiterated his Government's strong desire to see the ILO's supervisory machinery function fully and effectively and its willingness to work with the other governments and the social partners to that end. Noting with satisfaction the progress that had been made at the Tripartite Meeting, in particular with regard to the framework proposed by the Employers and Workers, he said that he welcomed the renewed spirit of collaboration and commitment to reinvigorating the supervisory system.

70. *A Government representative of Angola*, noting with satisfaction the outcome of the Tripartite Meeting, said that the right to strike was not absolute, being subject to national law. The list of cases to be handled by the CAS should be balanced between the core and technical Conventions, geographical representation and the level of development of the various countries.

71. *A Government representative of Turkey*, noting that the Tripartite Meeting had provided the opportunity for constructive social dialogue, said that the joint statement by the Employers and Workers had given hope that consensus could be reached on a way out of the current deadlock in the supervisory system. He also welcomed the consensus on the mandate of the CEACR, and hoped for a similar consensus on the work of the CAS. He

recalled that the CAS was not a tribunal but rather a platform for tripartite dialogue, and that its conclusions were not court rulings. That principle should be reflected in the wording of the conclusions. Efforts to ensure balance in the list of cases – which should be adopted earlier – should not result in the omission of cases involving more serious breaches. When complaints were made, there should also be an explanation of the steps taken at the national level to resolve the issues.

72. *A Government representative of China*, highlighting the importance of social dialogue, tripartism and technical cooperation, welcomed the positive outcome of the Tripartite Meeting. He supported the proposal in the joint statement by the Workers and Employers that the list of cases chosen for the CAS – which should be ready before the opening of the session of the Conference – should be based on objective criteria and be balanced between the fundamental and technical Conventions, geographical representation and a country's level of development. He agreed that the overall objective of the SRM should be to guarantee the implementation of international labour standards that responded to changing patterns of the world of work, for the purpose of the protection of workers and taking into account the development of sustainable enterprises. He supported the establishment of an SRM Working Group, as proposed in paragraph 17.

73. *A Government representative of the United Kingdom* said that the positive outcome of the Tripartite Meeting demonstrated the unique role that the ILO played in finding sustainable and consensual solutions; its importance should not be underestimated. He noted with satisfaction that plans were in place to ensure the effective functioning of the CAS, and looked forward to a renewed tripartite relationship and the wider benefits that such a relationship would bring. Welcoming the commitment that had been expressed in the Governing Body towards the SRM, he said that his Government would play a constructive role in ensuring that the body of international labour standards was relevant and effective.

74. *A Government representative of Belgium*, highlighting the link between the right to strike and freedom of association, said that further consideration should be given to whether the fundamental Conventions should be covered by the SRM. In that regard, it would be useful to prepare terms of reference. Reaffirming her Government's commitment to ensuring the effective functioning of the CAS, she noted that although significant progress had been made, much remained to be done.

75. *The representative of the Director-General* (DDG/MR) explained that the measures proposed in paragraph 25(g) could be funded through the reallocation of any savings or under-expenditure achieved across the Office, or by using the provisions for unforeseen expenditure provided for under Part II of the budget. It was only when those options were exhausted that consideration would be given to alternative methods of financing. The presentation of the report of the Working Party on the Functioning of the Governing Body and the International Labour Conference later in the session would provide an opportunity for the Governing Body to consider the relationship between the Working Party and the CAS Working Group. There was no provision, in the estimated cost of meetings of the SRM Working Group, for covering the travel costs of Government representatives.

76. *The representative of the Director-General* (DDG/MR), referring to point (c) of the draft decision, said that no recommendations for the Governing Body had been made at the meeting of the Working Group on the Working Methods of the Committee on the Application of Standards, which had been held on 23 March 2015. The outcome of that meeting would be developed further at the next meeting of the Working Group, in June 2015.

77. *The Employer coordinator* said that his group could support the draft decision as amended by the Government group.

78. *The Worker spokesperson* said that, in general, his group could support the amendments proposed by the Government group, apart from the additional wording suggested in point (b), since it had not been decided at the 322nd Session (November 2014) of the Governing Body not to pursue action in accordance with article 37 of the Constitution.

79. *Speaking on behalf of the Government group*, a Government representative of Italy said that the decision taken in November 2014 contained a reference to deferring further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution. Her group had wished to recall that decision in the point in question.

80. *The Worker spokesperson* said that, in view of that explanation, a separate point should be added which would refer to action under article 37(1), on which no decision had been taken in November 2014.

81. *The representative of the Director-General* (DDG/MR) suggested that point (b) should be amended to read "pursuant to the decision taken in November 2014, decides, in light of the outcome and the report …".

82. *Speaking on behalf of the Government group*, the Government representative of Italy endorsed the wording proposed by the representative of the Director-General.

83. *The Worker spokesperson* and the Employer coordinator also agreed to the wording proposed by the representative of the Director-General.

Decision

84. ***The Governing Body:***

(a) took note of the outcome and report of the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level;

(b) pursuant to the decision taken at the 322nd Session of the Governing Body (November 2014), decided, in light of the outcome and report of the Tripartite Meeting, not to pursue for the time being any action in accordance with article 37 of the Constitution to address the interpretation question concerning Convention No. 87 in relation to the right to strike;

(c) decided to take the necessary steps to ensure the effective functioning of the Committee on the Application of Standards at the 104th Session of the International Labour Conference (June 2015), taking into account any recommendations made by the Working Group on the Working Methods of the Conference Committee on the Application of Standards, in particular with regard to the establishment of the list of cases and the adoption of conclusions;

(d) called on all parties concerned, in light of the commitments made at the Tripartite Meeting and at the 323rd Session of the Governing Body (March 2015), to contribute to the successful conclusion of the work of the Conference Committee on the Application of Standards at the 104th Session of the International Labour Conference (June 2015);

(e) decided to establish under the Standards Review Mechanism (SRM) a Tripartite Working Group composed of 32 members: 16 representing Governments, eight representing Employers and eight representing Workers to meet once per year for one week;

(f) requested the Director-General to prepare draft terms of reference for the Tripartite SRM Working Group for its consideration and submission to the 325th Session of the Governing Body (November 2015) for decision;

(g) decided that this Tripartite SRM Working Group would report to the Governing Body at its 325th Session in November 2015 on progress made in the implementation of the SRM;

(h) requested the Chairperson of the Committee of Experts on the Application of Conventions and Recommendations (CEACR), Judge Abdul Koroma (Sierra Leone), and the Chairperson of the Committee on Freedom of Association (CFA), Professor Paul van der Heijden (Netherlands), to jointly prepare a report, to be presented to the 326th Session of the Governing Body (March 2016), on the interrelationship, functioning and possible improvement of the various supervisory procedures related to articles 22, 23, 24 and 26 of the ILO Constitution and the complaints mechanism on freedom of association;

(i) decided that the cost of the measures proposed in document GB.323/INS/5 estimated to cost up to US$226,800 in 2015 and up to $707,200 in 2016–17 be financed in the first instance from savings in Part I of the budget for the respective bienniums or, failing that, through Part II, on the understanding that should this subsequently prove impossible, the Director-General would propose alternative methods of financing;

(j) decided to place on the agenda of its 328th Session (November 2016) an overall review of this decision, without prejudice to any other issue arising out of the standards initiative requiring prior consideration.

(GB.323/INS/5, paragraph 25, as amended.)

Sixth item on the agenda

Complaint concerning non-observance by Guatemala of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), made by delegates to the 101st Session (2012) of the International Labour Conference under article 26 of the ILO Constitution
(GB.323/INS/6(Rev.))

85. *The special representative of the Director-General for Guatemala*, providing an update to the report, said that the Office would help to disseminate the general directive issued by the Public Prosecutor's Office, to which reference was made in paragraph 44, to

Document No. 38

GB.344/INS/5, Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan, February 2022

International Labour Organization

▶ GB.344/INS/5

Governing Body

344th Session, Geneva, March 2022

Institutional Section **INS**

Date: 16 February 2022
Original: English

Fifth item on the agenda

Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan

Purpose of the document

The document captures the outcome of the informal tripartite consultations held in January 2020 encompassing a tripartite exchange of views on proposals to consider further steps to ensure legal certainty, based on the Office paper on the elements and conditions for the operation of an independent body under article 37(2) of the Constitution and of any other consensus-based options, as well as the article 37(1) procedure. The document provides further information on progress in implementing selected proposals of the work plan to strengthen the supervisory machinery.

Note: The consideration of this item has been deferred from the 338th Session (March 2020) of the Governing Body and has since been presented to the 341st and 343rd Sessions of the Governing Body for information. The content of the document is the same as GB.343/INS/INF/5(Rev.1) with a few adjustments in paragraph 73 and Appendix II. A draft decision has been added in paragraph 74.

Relevant strategic objective: All four strategic objectives.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision and Outcome B: Effective and efficient governance of the Organization.

Policy implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: Office of the Legal Adviser (JUR) and the International Labour Standards Department (NORMES).

Related documents: GB.343/INS/INF/5(Rev.1); GB.341/INS/INF/1; GB.337/INS/5; GB.337/PV; GB.335/INS/5; GB.335/PV; GB.334/INS/5; GB.334/PV; GB.332/INS/5(Rev.); GB.332/PV; GB.331/INS/5; GB.331/INS/3; GB.331/POL/2; GB.331/PFA/5; GB.331/PV; GB.329/INS/5; GB.329/INS/5(Add.)(Rev.); GB.329/PV; GB.328/LILS/2/2; GB.328/INS/6; GB.328/PV; GB.326/LILS/3/1; GB.326/PV; GB.323/INS/5; GB.323/PV.

▶ Contents

▶ Introduction

1. The revised work plan for the strengthening of the supervisory system, approved by the Governing Body in March 2017, [1] provided under action 2.3 on legal certainty for guidance to be sought from the Governing Body on the modalities of a possible future tripartite exchange of views on article 37(2) of the Constitution and the elements and conditions necessary for the operation of an independent body to interpret international labour Conventions. At its 335th Session (March 2019), the Governing Body "with respect to the proposal to consider further steps to ensure legal certainty, decided to hold informal consultations in January 2020 and, to facilitate that tripartite exchange of views, requested the Office to prepare a paper on the elements and conditions for the operation of an independent body under article 37(2) and of any other consensus-based options, as well as the article 37(1) procedure". [2]

2. In January 2020, the Office facilitated the tripartite exchange of views on further steps to ensure legal certainty based on a paper which provided clarifications on the meaning of legal certainty, and its implications as regards the interpretation of Conventions. The tripartite exchange of views permitted to reinforce the shared understanding that: (i) article 37 provides the only constitutionally-based mechanism guaranteeing legal certainty in matters of interpretation of Conventions; and (ii) the current constitutional order of the Organization establishes an obligation for its tripartite constituents to refer any question or dispute relating to the interpretation of Conventions to the International Court of Justice (ICJ), or possibly, to an in-house tribunal.

3. The present document further elaborates on the paper that served as a basis for the tripartite exchange of views and seeks to address issues raised in the course of that exchange. It also provides an interim summary update of selected action points in the revised work plan on strengthening the supervisory machinery.

▶ Legal certainty, interpretation of international labour Conventions and the ILO constitutional order

Previous tripartite discussions

4. Extensive discussions and consultations have already taken place on the conditions and modalities of a possible recourse to the possibilities set out in article 37 of the Constitution to resolve any question or dispute relating to the interpretation of any Convention. There have been two substantive discussions in the Governing Body.

5. The first discussion took place at its 256th Session in 1993 based on a paper that recalled the origin and purpose of article 37(2); then reviewed how the problem of interpretation had been dealt with and their limits and finally examined whether an article 37(2) tribunal could offer a useful addition to the existing machinery. [3] However, while it was welcomed by the members

[1] GB.329/INS/5(Add.)(Rev.).

[2] GB.335/PV, para. 304(g).

[3] GB.256/SC/2/2.

of the Governing Body, the paper did not give rise to a detailed discussion and it was generally felt that the creation of a tribunal under article 37(2) required further consideration. [4]

6. Most recently, the Governing Body at its 320th Session (March 2014) requested the Director-General to prepare a document setting out the possible modalities, scope and costs of action under article 37 of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention. The Office paper was presented to the 322nd Session (October–November 2014) of the Governing Body and dealt with article 37(1) and (2) in that respective order. The first part was dedicated to article 37(1) and laid out the main characteristics and procedural aspects of the advisory function of the ICJ. The legal and practical information contained in that document remains entirely valid and up to date. [5] The second part of the October 2014 paper contained a draft statute for the establishment of an in-house tribunal under article 37(2). Following a discussion, the Governing Body decided to defer further consideration of the possible establishment of a tribunal in accordance with article 37(2) of the Constitution. [6]

7. The Governing Body discussions of November 2018 and March 2019 reflect a general agreement on the need to ensure legal certainty in standards-related matters, and in particular as regards the settlement of disputes on the interpretation of international labour standards. [7] In the same context, some constituents sought explanations as to the meaning and utility of the principle of legal certainty. [8] It is recalled, in this regard, that in their joint position on the ILO supervisory mechanism of 13 March 2017, the Workers' and Employers' groups had observed that "divergent views and disputes about the interpretation of Conventions continue to be a reality". [9]

8. Building on all previous discussions, and taking into account the recent tripartite exchange of views, the purpose of the present analysis is to describe the main features of the constitutional framework for the authoritative and definitive settlement of interpretation disputes and to clarify the measure of discretion of the tripartite constituents within that constitutional framework. This analysis below proceeds in three parts. The first part reviews the modalities for seeking an advisory opinion from the International Court of Justice. The second part clarifies key parameters for the establishment and operation of an in-house tribunal, and the third part provides some considerations on the role of tripartite consensus-based modalities in promoting legal certainty.

The principle of legal certainty

9. Legal certainty may be defined as the "clarity, unambiguity, and stability in a system of law allowing those within the system to regulate their conduct according to the law's dictates". [10] Legal certainty is a core element of the principle of the rule of law [11] and fulfils a triple function

[4] GB.256/11/22, paras 10–15; and GB.256/PV(Rev.), VI/3 and VI/4.

[5] GB.322/INS/5.

[6] GB.322/PV, para. 209(4).

[7] GB.335/PV, para. 240.

[8] GB.334/PV, para. 254.

[9] GB.329/PV, Appendix II, Joint Position of the Workers' and Employers' groups on the ILO Supervisory Mechanism, 194.

[10] *Black's Law Dictionary*, tenth edition.

[11] In the words of the UN Secretary-General, "the rule of law … refers to a principle of governance in which all persons, institutions, and entities … are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated … . It requires measures to ensure adherence to the principles of supremacy of law, equality before the law,

by promoting clarity *(certitudo)*, security *(securitas)* and good faith *(fides)* in creating, interpreting or applying the law. [12]

10. When it comes to the interpretation of international labour Conventions, legal certainty implies the ability to obtain unambiguous and decisive pronouncements on the scope and meaning of provisions of Conventions so that States parties, or States considering ratification, can fully appreciate the nature and extent of obligations arising from ratification, and can adapt national law and practice accordingly.

11. In that sense, recourse to the advisory function of the ICJ and/or the establishment of an in-house tribunal would enhance stability and predictability in the understanding of the meaning of Conventions, which in turn may have a positive impact on the ratification and implementation of Conventions, and more broadly, on the credibility of the ILO and the effectiveness and transparency of the system of supervision of standards. Having fully operational procedures capable of resolving rapidly and definitively interpretation disputes would indeed reinforce the perception of the ILO body of standards as an integrated and coherent "International Labour Code".

12. Moreover, in view of the growing number of international agreements and dispute settlement mechanisms having a bearing on international labour standards but operating outside the Organization, making use of, and conforming to the constitutional prescriptions of article 37 would enable the Organization to counter-balance, control or otherwise influence these phenomena, through a procedure which is known and controlled by constituents. Authoritative and binding interpretations obtained through the World Court under article 37(1) or through an internal judicial body subject to the conditions enunciated in article 37(2) would protect and preserve the integrity of the ILO body of standards and effectively mitigate the risk of ILO standards being "interpreted" by entities foreign to the Organization without any sort of influence by the ILO. As a result, article 37 is key to ensuring legal certainty and avoid a fragmented interpretation of ILO Conventions.

Main features of the International Court of Justice advisory proceedings initiated under article 37(1)

Constitutional theory and practice

13. Article 37(1) of the ILO Constitution provides for the referral of "any question or dispute" relating to the interpretation of the Constitution or of any international labour Convention adopted by Member States pursuant to the provisions of the Constitution to the International Court of Justice "for decision". The terms "question" and "dispute" have been taken directly from Article 14 of the Covenant of the League of Nations which provided that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly" and have been inserted in what would become article 37 of the Constitution by the Commission on International Labour Legislation. It appears that the use of both terms in the Covenant was meant not to restrict the scope of the Permanent Court of International Justice's (PCIJ) advisory function. As such, while a "dispute" in international law encompasses "a disagreement on a point of law or fact, a conflict of legal views or of interests between two

accountability to the law, fairness … legal certainty, avoidance of arbitrariness and procedural and legal transparency"; see *The rule of law and transitional justice in conflict and post-conflict societies,* S/2004/616, para. 6.

[12] See, for instance, Robert Kolb, "La sécurité juridique en droit international: aspects théoriques", *African Yearbook of International Law*, 2002, Vol. 10, 103.

persons", [13] the term "question" is broad enough to allow for any interpretation request to be referred to the Court. [14] This does not mean, of course, that any matter would or should be referred to the Court. The existence of a dispute or question which should normally lead to a request for advisory opinion is for the Governing Body to determine. At present, there is one pending interpretation dispute which concerns the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

14. Interpretation disputes may be distinguished from mere or occasional expressions of disagreement on the meaning of international labour standards and from clarification requests addressed to the Office for advice. Disagreement on the scope or meaning of certain provisions may arise without necessarily calling into question the validity of comments, conclusions or recommendations of the supervisory bodies or interfering with their authority to formulate such comments, conclusions or recommendations. As for requests addressed to the Office, they seek to obtain clarifications on the meaning of specific provisions, mainly through a careful review of the preparatory work.

15. As a matter of constitutional theory and practice, article 37(1) has always been understood as conferring a binding and decisive effect to advisory opinions obtained on that basis. In its early years, the ILO – in reality, the League of Nations acting at the Organization's request – had recourse to the advisory function of the PCIJ on six occasions between 1922 and 1932 on the basis of the provision inserted in the 1919 Constitution – which is almost identical to the current article 37(1). The PCIJ rendered advisory opinions on the interpretation of the Constitution on five occasions and of a Convention on one occasion (Night Work (Women) Convention, 1919 (No. 4)). All six advisory opinions were promptly accepted and implemented. For instance, following the interpretation of Convention No. 4 by the PCIJ, the Conference decided that it was necessary to revise Convention No. 4 and thus adopted the Night Work (Women) Convention (Revised), 1934 (No. 41). [15]

16. All six pronouncements provided valuable inputs and guidance with regard to the mandate, scope of action and normative function of the Organization. The first advisory opinion on article 3(5) of the Constitution has shed – and continues to shed – light on the issue of the method of nomination of non-governmental delegates at the Conference. The advisory opinion on women's night work led to the revision of Convention No. 4 while the three advisory opinions on ILO competence confirmed that the scope of standard-setting could extend to work in agriculture and could regulate the employers' activities. As for the advisory opinion on the Free City of Danzig, it determined that the capacity of an entity to freely participate in ILO activities, such as the ratification of international labour Conventions, is a precondition for statehood, and by implication, a precondition for admission to ILO membership.

17. To date, the ILO has not referred any interpretation question for an advisory opinion to the ICJ since the latter succeeded the PCIJ. As for the reasons why there has been no recourse to article 37 since 1932, it should be recalled that the initial constitutional set up in 1919 consisted in distinguishing among three normative functions, the adoption of international labour standards, the control of their application and their interpretation. Gradually, and especially

[13] *The Mavrommatis Palestine Concessions*, Permanent Court of International Justice, Collection of Judgments, Series A, No. 2, 11.

[14] The term "question" in Article 14 of the League's Covenant is commonly understood as referring to matters other than disputes or specific aspects of disputes considered separately or legal questions arising outside of any dispute; see Robert Kolb, ed., *Commentaire sur le Pacte de la Société des Nations*, 2014, 593.

[15] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (Advisory Opinion 25; PCIJ Rep Series A/B No. 50).

after the 1946 constitutional reform, the supervisory bodies assumed a more prominent role in "interpreting" international labour standards in the discharge of their responsibilities. For a long period, their views were regarded on the whole sufficient to maintain legal certainty. Recent experience, however, shows that in those instances in which the comments or conclusions of supervisory bodies are not perceived to be sufficient to maintain legal certainty, recourse to article 37(1) is needed to prevent an interpretation dispute from generating a level of legal controversy and uncertainty that compromises the harmonious pursuit of the normative activities of the Organization.

18. It is recalled that such an advisory opinion could be solicited for an interpretation of a "question or dispute" under article 37(1), or for a "legal question within the scope of [ILO] activities" under article IX(2) of the 1946 UN–ILO relationship agreement.

Legal nature of article 37

19. Article 37 of the ILO Constitution typifies what is better known as a "dispute settlement clause", that is a provision that prescribes the method, technique or procedure that should be used for resolving future differences arising out of the application or the interpretation of an international treaty. By its nature, therefore, a dispute settlement clause provides for compulsory rather than optional action; it dictates in more or less detailed terms a specific legal solution at the exclusion of others.

20. In the case of article 37, in particular, the unqualified language renders the idea of a direct legal obligation even stronger; "any" interpretation dispute shall be referred to the ICJ for decision *(toutes les questions seront soumises)*. Had the intention been to leave room for discretion the drafters would have provided that a question "may be referred" to the ICJ or they would have made referral conditional on the inability to resolve the issue through other means. This is the case, for instance, of the Convention on the Privileges and Immunities of the Specialized Agencies, section 32 of which provides that all differences shall be referred to the ICJ "unless in any case it is agreed by the parties to have recourse to another mode of settlement". [16]

21. In the self-contained legal framework established by the drafters of the ILO Constitution, recourse to the advisory function of the ICJ appears mandatory in all circumstances. Whereas procedurally speaking, a referral needs to be discussed and decided upon by the appropriate organ, the forum and method of settlement are specifically determined under article 37(1). What article 37(2) has added to this framework in 1946 is a possibility to create a separate judicial instance for the expeditious settlement of disputes relating to the interpretation of Conventions when "the points at issue are of so meticulous a character as not to warrant recourse to the principal judicial organ of the international community". [17] As long as this possibility is not put into effect, referral to the ICJ for an advisory opinion under article 37(1) remains to date the only constitutional avenue of authoritatively resolving an interpretation dispute. Therefore, not making use of article 37 despite the existence of a generally acknowledged interpretation dispute is difficult to justify on constitutional grounds.

[16] See also article 75 of the Constitution of the World Health Organization (WHO) which provides that any question of dispute concerning the interpretation or application of the Constitution "which is not settled by negotiation or by the Health Assembly" shall be referred to the ICJ "unless the parties agree on another mode of settlement". Similarly, article XVII of the Constitution of the Food and Agriculture Organization (FAO) provides that any question or dispute concerning the interpretation of the Constitution "if not settled by the Conference" shall be referred to the ICJ.

[17] ILO: Report IV(1), International Labour Conference, 27th Session, 1945, 108.

Initiation of proceedings

22. The advisory procedure may be initiated with a written request addressed by the Office to the Registrar of the ICJ. In doing so, the Office must provide an exact statement of the question – as decided by the Governing Body – upon which an opinion is required and must accompany it with all documents likely to throw light upon the question. This documentation should contain all background information on the underlying dispute. [18]

Jurisdiction and admissibility

23. For the Court to have jurisdiction, the question must be directly related to the activities of the requesting organization and must refer to issues falling within its sphere of competence or speciality. For it to be receivable, the question put to the Court must be legal in nature. The fact that the question may have political dimensions, or is abstract or unclear, does not, in principle, suffice for the Court to decline to give an opinion. It should be noted that the Court may reformulate or interpret the question, as it may deem appropriate, for the purposes of rendering its opinion.

Notification, invitation to participate in proceedings

24. The Court has always placed particular importance on ensuring that the information available to it is sufficiently comprehensive and adequate for it to fulfil its judicial function. All States entitled to appear before the Court and international organizations considered by the Court as likely to be able to furnish information on the question are invited to provide written statements or make oral statements but they have no obligation to do so.

25. Accordingly, it is probable that in the event of a request for an advisory opinion on the interpretation of an ILO Convention, all Member States – whether they have ratified the Convention in question or not – would have the possibility to actively participate in the proceedings and communicate relevant information to the Court.

Participation of international employers' and workers' organizations

26. The question whether the social partners could participate in advisory proceedings has been central to the debate about the possible referral of a dispute regarding the interpretation of a Convention to the ICJ.

27. While there may be some doubt as to which "international organizations" are allowed to submit briefs or to appear before the Court – this term in principle excluding the participation of non-governmental organizations – it is unlikely that the Court would apply a narrow interpretation of that term in relation to the possible participation of international employers' and workers' organizations in advisory proceedings initiated by the ILO.

28. As a matter of fact, every time an opinion concerning the ILO has been requested in the period 1922–32, international employers' and workers' organizations have been allowed to participate in the proceedings. [19] The current article 66(2) of the ICJ Statute reproduces article 73 of the Revised Rules of the PCIJ.

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[18] For example, when requesting the advisory opinion on the interpretation of Convention No. 4, the ILO submitted extracts from verbatim records of the ILC, Governing Body minutes, draft Conventions, Office reports, and written statements of constituents.

[19] In 1922, in the advisory proceedings concerning the *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, the Court invited the International Association for the Legal Protection of

29. In addition, recent case law supports the view that the Court is prepared to open up its advisory proceedings to actors other than States and international intergovernmental organizations every time the participation of such actors is substantively and procedurally essential considering the concrete context of the case, in light of considerations of fairness and justice, but also bearing in mind the need to obtain the fullest information possible. [20] It is now widely recognized that the Court adopts a pragmatic approach so as to ensure that all interests at stake can be expressed, and shows a certain flexibility to hear actors other than States.

30. In any event, in the case of an eventual referral, the Office could include in the "dossier" that needs to be submitted together with the request, any briefs, position papers or other documents that the Employers' and Workers' groups might wish to bring to the knowledge of the Court.

Written observations and oral arguments

31. The Court fixes by order the time limit for any submission of written statements by those States and international organizations that have been invited to participate. The Court's Statute provides for the possibility of entities participating in the advisory proceedings to be granted the right to reply to the statements presented by other entities. The Court may at its discretion decide to hold public hearings for oral arguments.

Urgent requests

32. The Court can render an advisory opinion following an accelerated procedure if an urgent request is made to that effect (for example shorter time limits for written submissions, and/or no hearings). The need for expeditious advice is examined by the Court on a case-by-case basis.

Costs

33. Requests for advisory opinions carry no costs other than those resulting from the participation of the Office in oral proceedings before the Court. The operation of the ICJ is fully funded by the United Nations (UN). The only expenses would eventually relate to the reproduction of the "dossier" in the number of copies required by the Registry and the mission cost of the representative of the requesting organization who may participate in the oral proceedings.

Workers, the International Federation of Christian Trade Unions, and the International Federation of Trade Unions. In the advisory proceedings relating to the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, the Court invited the following six organizations to participate: the International Federation of Agricultural Trade Unions, the International League of Agricultural Associations, the International Federation of Christian Trade Unions of Landworkers, the International Federation of Landworkers, the International Federation of Trade Unions, and the International Association for the Legal Protection of Workers. In the 1926 advisory proceedings on the *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, three organizations were permitted to participate: the International Organization of Industrial Employers, the International Federation of Trade Unions, and the International Confederation of Christian Trade Unions. In the 1932 advisory opinion on the *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*, the International Federation of Trade Unions and the International Confederation of Christian Trade Unions submitted written and oral statements.

[20] For instance, in the context of recent advisory proceedings (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Order of 19 December 2003, I.C.J. Reports 2003*, 429) and *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Order of 17 October 2008, I.C.J. Reports 2008*, 410), the Court has accepted to receive submissions from entities other than States and public international organizations. See also Dinah Shelton, "The participation of non-governmental organizations in international judicial proceedings", *American Journal of International Law*, Vol. 88, 1994, 623.

Legal effect of an advisory opinion and institutional follow-up

34. While advisory opinions are not binding per se, they may be accepted as such, for instance, through a specific clause to this effect. The Court has always drawn a distinction between the advisory nature of its task and the particular effects that parties to an existing dispute may wish to attribute to an advisory opinion. As a matter of constitutional practice, the ILO has always considered advisory opinions to be binding. On a practical level, it will be for the ILO executive organs to decide and implement the necessary measures – legal, political, administrative or others – in order to give full effect to the judicial pronouncement. It is recalled, for instance, that the revision of Convention No. 4, which eventually led to the adoption of Convention No. 41 in relation to night work of women, was initiated in application of the advisory opinion delivered by the PCIJ regarding the interpretation of Article 3 of Convention No. 4. [21]

35. As for the institutional follow-up, the Court has consistently taken the view that the practical utility of an advisory opinion is a matter exclusively for the requesting organ to consider, and that once it has spelled out the law, it is for the body that initiated the request to draw the conclusions from the Court's findings.

36. In the case of the six advisory opinions delivered at the ILO's request, they were all published in the *Official Bulletin* and referred to in the Director-General's Report to the Conference. They were also promptly implemented in practice. For instance, following the Court's advisory opinion relating to the interpretation of Convention No. 4, the Governing Body decided in 1933 to propose the revision of the Convention, which eventually led to the adoption of Convention No. 41 in 1934. [22]

Outline of the legal framework for the possible establishment of a tribunal under article 37(2)

Constitutional parameters

37. Article 37(2) of the Constitution reads as follows: "Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgment or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference."

38. This article provides limited guidance on the organization and functioning of the tribunal, and therefore affords considerable discretion to the Governing Body to shape the tribunal according to needs and preferences. The Constitution defines, nonetheless, in an unqualified manner, certain key parameters which set the framework under which the Governing Body will be able to exercise its discretion in establishing such tribunal.

[21] See footnote 14.

[22] ILO: See *Minutes of the Governing Body*, 64th Session, 1933, 20; and *Record of Proceedings*, International Labour Conference, 18th Session, 1934, 196, 202.

39. First, as per the terms of article 37(2), the independent body to be established can only be a tribunal, and not any other type of expert body, even if it were to perform quasi-judicial functions. A tribunal is defined as a "court of justice or other adjudicatory body" [23] or as a "jurisdictional organ established to rule on disputes by issuing binding decisions based on legal rules". [24] In the same vein, it should be noted that the tribunal is to render awards which are "jurisdictional acts that aim at adjudicating in a definitive and binding manner". [25] It flows, therefore, that the tribunal referred to in article 37(2) is to be composed of judges who should meet high standards of legal expertise, integrity and impartiality. Constituents participating in the tripartite exchange of views in January 2020 underlined the importance of judges meeting these standards and were generally of the view that it would not be appropriate for a tribunal to have a tripartite composition.

40. As confirmed by the preparatory work, [26] the terms "tribunal" and "award" used in article 37(2) imply judicial adjudication and leave no doubt that the awards of the tribunal would be binding and opposable to all, only subject to any relevant judgment or advisory opinion of the ICJ. [27]

41. Second, the purpose of the tribunal is to ensure the "expeditious determination" of any dispute or question relating to the interpretation of a Convention. This does imply that certain questions of interpretation are expected to be handled expeditiously by an in-house tribunal. In the Conference discussions leading up to the 1946 constitutional amendment, the nature of questions that could be brought to the tribunal was distinguished from those which should be referred to the ICJ. While, in principle – should a tribunal be established – any question or dispute could be submitted to either body at the discretion of the Governing Body, it was generally accepted that some questions about the scope or meaning of provisions of international labour Conventions might not merit to be brought before the principal judicial organ of the UN. [28] Accordingly, it may be assumed that questions with broader systemic implications for the Organization and beyond could be referred to the ICJ whereas questions of a narrowly technical nature with limited repercussions outside the confines of the Convention in question could be in the first instance transmitted to the tribunal.

42. Third, the rules establishing the tribunal – which would include a statute as the constituent instrument and procedural rules – would be drawn up by the Governing Body and approved by the Conference. The Office could provide assistance in preparing those rules, drawing on the practice of other international tribunals mandated to interpret international treaties.

43. Fourth, the referral to a tribunal of any dispute or question of interpretation can only be made by the Governing Body or in accordance with the terms of the Convention in question. As things now stand, only questions of interpretation referred by the Governing Body could be handled by the tribunal. Should a tribunal be established, a standard clause could be included in the

[23] *Black's Law Dictionary*, tenth edition.

[24] Emile Bruylant, *Dictionnaire de droit international public*, 2001.

[25] Bruylant, 2001.

[26] The Tripartite Conference Delegation on Constitutional Questions that discussed article 37(2) in 1946 stressed the need for uniformity of interpretation and expressed the view that any award of the tribunal should be binding on all Member States.

[27] See article 37(2). The ICJ is not a regular appeal court for any international tribunal (see https://www.icj-cij.org/en/frequently-asked-questions). However, observations on awards of the tribunal would be brought before the Conference (article 37(2)). If the award of the tribunal were to be challenged, an advisory opinion of the International Court of Justice could still be sought in accordance with article 37(1).

[28] ILO: Report IV(1), International Labour Conference, 27th Session, 1945, 107–108.

final provisions of future Conventions providing for referral of any interpretation dispute to that tribunal.

44. Fifth, any applicable judgment or advisory opinion of the International Court of Justice will be binding upon the tribunal, which implies that awards rendered by the tribunal could be possibly challenged by filing an "appeal" with the ICJ.

45. Sixth, decisions made by the tribunal will be circulated to the Members of the Organization for them to make possible observations that would be brought before the Conference. It appears that the intention of the drafters was to ensure that all ILO Member States would be appraised of the tribunal's award and be given the opportunity to express their views before the Conference. Communicating comments of Member States to the Conference would not entail, in principle, reopening the substantive interpretation question unless constituents wished to "appeal" the award and seek to bring the matter before the ICJ for final decision. The emphasis was, therefore, both on the public nature of the procedure and the possibility to ILO members and the Conference to draw the consequences of a particular interpretation rendered by the tribunal, including a revision of the Convention interpreted by the tribunal. In line with the practice of other international courts and tribunals, the proceedings could be made public, possibly within limits defined by the Governing Body or the tribunal itself.

46. Within these constitutional parameters, it would be useful to highlight the specificities of an in-house tribunal. A tribunal could strengthen the role of tripartism in matters of interpretation and would constitute an important safeguard for constituents in relation to decisions that would have a binding effect and would be applicable to all Member States. For one thing, the development and adoption of rules for the appointment of a tribunal under article 37(2) would enable constituents to shape the establishment of an authoritative interpretation mechanism and its integration into the overall system of the supervision of standards. What is more, rules providing for an adversarial process and the possibility of oral proceedings would allow tripartite constituents to actively contribute to the development of a body of interpretations on significant standards-related matters.

47. It should also be recalled that the tribunal would be primarily intended to allow for the expeditious settlement of any question or dispute regarding the interpretation of Conventions. The expeditiousness of the process would be ensured by the fact that the tribunal would be on-call and would exclusively have to deal with interpretations requests referred to it by the Governing Body, contrary to the ICJ which has to examine numerous contentious cases and requests for advisory opinions every year. Another important feature of the tribunal is that the Governing Body would maintain control over its structure and procedure and thus offer greater flexibility as compared to the ICJ. In addition, as already mentioned, the tribunal could be entrusted with all those interpretation questions which would not be considered suitable for referral to the principal judicial organ of the UN.

Structure and composition

48. The Governing Body would have to decide whether it wishes to set up a permanent structure or not. This would mostly depend on the envisaged workload of the tribunal. As the exact number of future interpretation requests may not be foreseen with precision, it might be advisable to consider setting up an on-call mechanism, or a mechanism for a trial period of three to five years.

49. As article 37(2) is silent on the composition of an in-house tribunal, (that is number/qualifications of judges) it would be for the Governing Body to provide for the number of judges (possibly between three and seven) and eligibility criteria. The composition of

international tribunals usually respond to two imperatives: selecting judges of high moral character and outstanding professional qualifications, and ensuring gender and geographical balance. The Governing Body could also consider appointing assessors selected by the Employers' and Workers' groups and specifically tasked to provide inputs of a technical nature without having any decision-making power. The Tribunal's Statute would also need to provide for rules on a number of issues related to judges, such as incompatibilities, resignation, conflict of interest and recusal, removal and honoraria.

Selection and term of office of judges

50. The Governing Body would have to draw up the relevant rules on the selection and appointment of judges, involving for example prospection by the Office, recommendations submitted by the Director-General, examination of appointable candidates by the Governing Body, and approval by the Conference.

51. The length of the judges' term of office should be determined in the Tribunal's Statute. The practice of international courts and tribunals varies considerably both in terms of number of years and also with regard to the possibility of renewal. In light of the unforeseen workload and the importance of securing judicial independence, a relatively long term of office of between five and ten years could be envisaged.

Administrative arrangements and costs

52. The seat of the tribunal would be at ILO headquarters in Geneva. The Director-General would be responsible for making administrative arrangements for the operation of the tribunal. The Governing Body should decide whether a permanent registry would be necessary or not. In the event an ad hoc or on-call mechanism is established, ILO staff servicing the ILO Administrative Tribunal could be detached, as necessary, for the provision of secretarial assistance to the tribunal.

53. The costs would depend on the type of structure (permanent or on-call) and other modalities (permanent registry or temporary detachment of officials) retained by the Governing Body, and the number of cases submitted to the tribunal. Expenses could be kept fairly low. It could be decided, for instance, that the judges would not receive any honoraria unless selected to sit on a panel or that support and registry services would only be solicited on a need basis. [29]

Relationship with supervisory bodies

54. Concerns have often been raised in previous discussions on the impact of an in-house tribunal on the status and authority of the supervisory bodies. Ultimately, this issue lies with the constituents and would need to be addressed under the rules for the appointment of a tribunal. These rules could contain the necessary procedural guarantees to ensure that the tribunal's functions and responsibilities are properly articulated as distinct from those of the supervisory bodies. [30]

[29] It was estimated in 2014 that a tribunal designed to be permanently available to receive and examine interpretation requests, but would only be in session when a question or dispute is referred to it by the Governing Body and so would only be functioning if a panel is constituted to hear a case would cost at most between CHF124,100 and CHF139,100 per case (see GB.322/INS/5, para. 100).

[30] See also Joint report of the Chairpersons of the CEACR and the CFA, GB.326/LILS/3/1, paras 131–136.

Procedural rules – Initiation of proceedings

55. Under article 37(2), referral of interpretation requests is the prerogative of the Governing Body. In assessing whether to make an interpretation request, the Governing Body may consider all practical, legal and political circumstances it deems pertinent. In drawing up the rules, the Governing Body could also provide for receivability criteria (for example failed attempts to resolve an interpretation question through consensus-based modalities, a specific request received from supervisory bodies or from outside bodies or organizations). As already mentioned, the rules could allow supervisory bodies, or other entities to be determined, to submit a request to the Governing Body to seize the tribunal on an interpretation question. Indeed, it should be recalled that in the early years, [31] the Committee of Experts and the Conference Committee on the Application of Standards drew the attention of the Governing Body on a number of difficulties in the interpretation of Conventions.

Conduct of the proceedings

56. In case of a request for interpretation made by the Governing Body, there would not be strictly speaking "parties" to a dispute. The Tribunal's Statute or rules could provide for full tripartite participation in the proceedings. The Statute or rules could allow any government of Member States, as well as the Employers' and Workers' groups to submit their views to the tribunal. In following the practice of other international tribunals, the Governing Body could decide to allow organizations enjoying a general consultative status, public international organizations or international non-governmental organizations to submit briefs, commonly known as *amicus curiae* or to allow the tribunal to invite those organizations to provide it with any relevant information.

57. The rules drawn up by the Governing Body should provide for general time limits, form and volume of written submissions, and length of oral submissions. These questions or some details thereof could alternatively be left to the tribunal to decide.

Means of interpretation

58. The Governing Body may also decide to adopt provisions specifying the means of interpretation to be applied by the tribunal. For instance, it could be envisaged that in determining disputes or questions relating to the interpretation of an international labour Convention, the tribunal should apply, in addition to the Convention in question, any other relevant rule of international law (which could include relevant international Conventions, international customary law such as the rules on interpretation of the 1969 Vienna Convention on the Law of Treaties, general principles and jurisprudence of international courts and tribunals) as well as the *travaux préparatoires* of the Convention in question and comments, reports or conclusions of ILO supervisory bodies.

Adoption of decisions

59. The Governing Body would have to decide on the quorum for the tribunal's awards to be valid, and the majority required. In practice, most international courts and tribunals adopt their decisions by majority with the President having a casting vote. The Governing Body could choose between a civil law approach, whereby an award is rendered by the tribunal without leaving the possibility for judges to append concurring, separate or dissenting opinions, and

[31] Note on the application of Article 423 of the Treaty of Peace, Standing Orders Committee, 15 October 1931, 1.

the practice in common law countries – also followed in international courts such as the ICJ – where such a possibility exists.

The role of tripartite consensus-based modalities

60. The ILO Constitution provides for two specific procedures to deliver authoritative and binding interpretations of international labour Conventions. As mentioned above, if legal certainty in matters of interpretation is understood as the ability to obtain final pronouncements on the scope and meaning of conventional provisions, the only two mechanisms that can offer such certainty are explicitly set out in article 37.

61. In this context, consensus-based modalities can only be explored as a modality to either: (i) attempt reconciling diverging views through tripartite discussion prior to referral of the matter for interpretation to the ICJ or an internal tribunal; or (ii) to follow-up on the advisory opinion of the ICJ or the award of an internal tribunal.

62. The first modality – that is a consensus-based modality aimed at reconciling divergent views prior to submitting the interpretation question to article 37 procedure – was pursued in 2014–15, culminating in the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level. The Tripartite Meeting produced a joint statement of the social partners concerning a package of measures to find a possible way out of the existing deadlock in the supervisory system, and laid the basis for the Standards Initiative. [32]

63. The experience with the ad hoc Tripartite Meeting suggests the functional validity of such mechanisms which, while not providing interpretations meeting the criteria of legal certainty outlined above, succeed in generating a "political" consensus robust enough to temporarily mitigate the impact of a legal dispute without resolving it. In order for such "tripartite pacts" to be institutionally functional within its limitations, it would appear that, at a minimum, the meeting is convened by the Governing Body with a clear mandate and representing a sufficiently large cross-section of the ILO membership. [33] The regular conversation between the supervisory bodies, which has advanced as an action point in the work plan for strengthening the supervisory system, [34] may continue to enhance mutual understanding and consensus-building around the working methods of the supervisory bodies, including the meaning they attribute to a Convention when supervising its application by a member State. However, when differences in attributed meaning persist and prove impossible to bridge, a legal interpretation dispute arises in respect of which the Governing Body has a duty to pursue resolution in accordance with article 37.

64. The second modality – that is a consensus-based modality to follow-up on the advisory opinion or an award – was pursued to follow-up on the advisory opinions rendered by the PCIJ on the interpretation of Convention No. 4, already mentioned earlier, by adopting Convention No. 41 that revised Convention No. 4. [35]

[32] TMFAPROC/2015/2.

[33] The Tripartite Meeting followed up on a decision taken by the Governing Body at its 322nd Session (GB.322/INS/5(Add.2)) and brought together participants from 32 Governments of ILO Member States, 16 Employer participants and 16 Worker participants nominated by the Employers' group and the Workers' group of the Governing Body, respectively.

[34] See Appendix II, Action Point 1.2.

[35] See para. 15.

65. Finally, the regular standard-setting process, involving consensus-building leading up to the adoption of Conventions, Protocols and Recommendations remains at all times available to settle issues of interpretation. For example, the Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), clarified that the end of the period of transition originally foreseen but not defined in Convention No. 29 for the continued use of forced labour under certain conditions had formally ended. However, a consensus-based modality involving standard-setting cannot and does not generate the legal certainty provided by article 37 of the ILO Constitution. Recommendations by their very nature do not provide an outcome binding under international law. The consensus-based outcome of a Convention or Protocol would be binding only for those Member States which have eventually ratified these. Legal uncertainty would therefore continue to prevail in respect of Member States having ratified the Convention subject to a legal dispute for as long as they are not in a position to ratify the newly adopted Convention or Protocol.

Final considerations

66. In sum, the discussion around article 37 of the ILO Constitution may be guided by the following considerations:

(1) A difference or dispute about the scope and meaning of provisions of Conventions is a legal question and as such calls for a legal answer to be obtained through legal means.

(2) The wording of article 37 leaves no doubt that the Organization - meaning its tripartite constituents and executive or deliberative organs - has an obligation to resolve interpretation disputes by having recourse to judicial means and that the authority to give definitive and binding interpretations currently lies exclusively with the ICJ. The well-established practice of Office informal opinions could not affect, and has not affected, the validity of such constitutional obligation since the Office informal views have always been provided subject to the standard reservation that the ICJ is the only competent organ to interpret international labour Conventions. The Organization also avails itself of bodies attributing meaning to and expressing their understanding of provisions of international law in the course of carrying out their mandate, which is to supervise the application of these provisions in the law and practice of Member States.

(3) The mechanisms provided for in article 37 are the only methods that can guarantee legal certainty since legal interpretation takes eventually the form of a definitive, non-appealable judicial pronouncement. Legal certainty is the sentiment of confidence and trust that procures a set of clearly articulated and consistently implemented rules. Legal certainty – in many respects synonymous with the ideals of security, stability, predictability and good faith – is a sine qua non for the functioning and credibility of an international normative organization.

(4) Article 37(1) links the resolution of interpretation disputes to the advisory function of the ICJ, which is regulated by the Court's Statute and its Rules of Court. This is a well-tested, highly reputed and cost-free procedure that the UN and specialized agencies have used on several occasions in the past.

(5) Article 37(2) lays down an unambiguous requirement for a body of a judicial nature – therefore composed of judges meeting the highest standards of independence and impartiality – but provides broad discretion as regards its organizational set up and its procedural rules (for example number of judges, eligibility criteria, selection and appointment process, registry, applicable law, etc.).

(6) Not taking action in respect of interpretation disputes in conformity with constitutional prescriptions creates the misconception that legal means of settlement of those disputes are either unavailable or have failed.

(7) Legal uncertainty affects not only the credibility of standards and the supervisory system but represents also a challenge for the overall governance of the Organization.

(8) Consensus-based modalities would only play a role to either: (i) attempt reconciling diverging views through tripartite discussion prior to considering submitting the matter for interpretation to the ICJ or an internal tribunal; or (ii) follow-up on the advisory opinion of the ICJ or the award of an internal tribunal.

67. The tripartite exchange of views held in January 2020 has shown a unanimously shared concern about the need to ensure legal certainty in interpreting standards in accordance with the applicable constitutional provisions. In this context, and taking into account some groups articulated merely preliminary views, the possibility of having recourse to the International Court of Justice under article 37(1) when a question or dispute on the interpretation of a Convention arises found a basis for support. Questions meriting further examination were raised in respect of the implementation of article 37(2). In particular, clarifications were sought on the need for a tribunal and on the modalities for its establishment.

68. As a first step, the Governing Body will want to provide guidance at its present session (March 2022) on the considerations in respect of ensuring legal certainty set out in the present document, taking into account the tripartite exchange of views held in January 2020. At successive sessions, the Governing Body may then wish to examine a possible procedural framework for referral of interpretation disputes to the ICJ for an advisory opinion under article 37(1) as well as additional aspects of the implementation of article 37(2). The Office stands ready to prepare proposals for a procedural framework, taking into account the guidance provided by the Governing Body.

▶ Revised work plan for the strengthening of the supervisory system – Update on selected work plan items

69. It was foreseen from the outset that the implementation of the work plan was to be monitored by the Governing Body in accordance with its governance role. All action points in the work plan continue to be implemented as decided, including the trial of optional voluntary conciliation or other measures at the national level, which the Governing Body decided to introduce in the operation of the representations procedure under article 24 of the Constitution at its 334th Session (October–November 2018) (see Appendix I). The Governing Body may wish to review the trial of optional voluntary conciliation introduced in the operation of the representation procedure under article 24 of the Constitution as well as the pilot project for the establishment of baselines for the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), at one of its forthcoming sessions, possibly at its 346th Session (October–November 2022) (see Appendix II).

Guide on established practices of the supervisory system and codification of the article 26 procedure
(Action Points 1.1 and 2.1) [36]

70. At its 335th Session (March 2019), the Governing Body "with respect to the proposal for codification of the article 26 procedure, recalled the decision to consider the steps to be taken after the guide to the supervisory system was available to constituents, and requested the Office to provide it with further information in that regard in March 2020" (see Appendix I).

71. At its 331st Session (October–November 2017), the Governing Body had approved the development of "a user-friendly and clear guide for the supervisory system, bringing together useful information and ensuring a level playing field of knowledge. In practical terms, such a guide would build on existing descriptions of the supervisory system and its procedures." [37]

72. The proposal to consider a possible codification of the complaints procedure provided for in articles 26–34 of the Constitution stems from the fact that the procedure governing the period between the submission of a complaint and the decision of the Governing Body to either establish a Commission of Inquiry or close the procedure without establishing a Commission of Inquiry, follows practice rather than codified rules. The Governing Body had reached a consensus on a staged approach whereby, as a first stage, the clarification of existing rules and practices, and linkages with other procedures, would be addressed through the Guide on Established Practices. Should this approach not prove sufficient, a tripartite discussion of the possible codification of the article 26 procedure could be continued at a later stage.

73. The Office, in cooperation with the International Training Centre of the ILO in Turin, has developed a draft guide in the three official languages, consisting of a web-based tool and a fully customized application for tablets and smartphones. A beta version of the tool and application was presented to Governing Body members during informal consultations in January 2019 and a pre-release of the text in downloadable format was circulated to constituent groups for comments in April 2019. The Office received extensive comments from all constituent groups by the end of 2019. The web-based tool was released in August 2021 and is available in the three official languages. [38] The application for tablets and smartphones is now also available. [39]

▶ Draft decision

74. **The Governing Body, considering that settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards, decided to continue its discussion at its 346th Session (October–November 2022) and requested the Office to facilitate tripartite consultations with a view to preparing:**

[36] GB.329/INS/5.

[37] GB.329/INS/5, para. 15.

[38] The ILO supervisory system: A Guide For Constituents.

[39] The mobile application may be downloaded from the App Store or the Google Play Store. Relevant links to the stores may also be found in the right-hand bottom corner of the static landing page of the Guide.

(a) proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice for decision in accordance with article 37(1); and

(b) additional proposals for the implementation of article 37(2), taking into account the guidance of the Governing Body and the opinions expressed in the tripartite exchange of views.

▶ Appendix I

Decisions taken by the Governing Body on strengthening the supervisory machinery

334th Session (October–November 2018)

The Governing Body, based on the proposals set out in documents GB.334/INS/5 and GB.332/INS/5(Rev.) and the further guidance provided during the discussion and the tripartite consultations:

(1) Approved the following measures concerning the operation of the representations procedure under article 24 of the Constitution:

(a) arrangements to allow for optional voluntary conciliation or other measures at the national level, leading to a temporary suspension for a maximum period of six months of the examination of the merits of a representation by the ad hoc committee. The suspension would be subject to the agreement of the complainant as expressed in the complaint form, and the agreement of the government. These arrangements would be reviewed by the Governing Body after a two-year trial period;

(b) publication of an information document on the status of pending representations at the March and November sessions of the Governing Body;

(c) members of article 24 ad hoc tripartite committees need to receive all information and relevant documents from the Office 15 days in advance of their meetings and members of the Governing Body should receive the final report of article 24 ad hoc tripartite committees three days before they are called to adopt their conclusions;

(d) ratification of the Conventions concerned as a condition for membership of Governments in ad hoc committees unless no Government titular or deputy member of the Governing Body has ratified the Conventions concerned;

(e) maintaining existing measures and exploring other possible measures to be agreed upon by the Governing Body for the integrity of procedure and to protect ad hoc committee members from undue interference; and

(f) reinforced integration of follow-up measures in the recommendations of committees and a regularly updated document on the effect given to these recommendations for the information of the Governing Body, as well as continuing to explore modalities for follow-up action on the recommendations adopted by the Governing Body concerning representations.

(2) Approved the measures proposed on the streamlining of reporting on ratified Conventions concerning:

(a) thematic grouping for reporting purposes under a six-year cycle for the technical Conventions with the understanding that the Committee of Experts further reviews, clarifies and, where appropriate, broadens the criteria for breaking the reporting cycle with respect to technical Conventions; and

(b) a new report form for simplified reports (Appendix II of GB.334/INS/5).

(3) Decided to continue to explore concrete and practical measures to improve the use of article 19, paragraphs 5(e) and 6(d), of the Constitution, including with the purpose of enhancing the functions of General Surveys and improving the quality of their discussion and follow-up.

(4) Instructed the Committee on Freedom of Association to examine representations referred to it according to the procedures set out in the Standing Orders for the examination of article 24 representations, to ensure that representations referred to it be examined according to the modalities set out in the Standing Orders.

(5) Encouraged the Committee of Experts to pursue the examination of thematically related issues in consolidated comments; and invites it to make proposals on its possible contribution to optimizing the use made of article 19, paragraphs 5(e) and 6(d), of the Constitution, in particular by considering measures to improve the presentation of General Surveys, so as to ensure a user-friendly approach and format that maximizes their value for constituents.

(6) Invited the Committee on the Application of Standards to consider, through the informal tripartite consultations on its working methods, measures to enhance its discussion of General Surveys.

(7) Requested the Office to present at its 335th Session (March 2019) following consultations with the tripartite constituents:

(a) concrete proposals to prepare the discussion on actions 1.2 (regular conversation between the supervisory bodies) and 2.3 (consideration of further steps to ensure legal certainty), including, but not limited to, organizing a tripartite exchange of views in the second semester of 2019 on article 37(2) of the Constitution;

(b) a report on progress towards the development of a guide on established practices of the supervisory system, bearing in mind the guidance received on action 2.1 (consideration of the codification of the article 26 procedure);

(c) further detailed proposals on the use of article 19, paragraphs 5(e) and 6(d), of the Constitution, including in relation to the Annual Review under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work;

(d) a report on progress towards the development of detailed proposals for electronic accessibility to the supervisory system for constituents (e-reporting, section 2.1 of GB.332/INS/5(Rev.)) bearing in mind the concerns raised by constituents during the discussion;

(e) more information on a pilot project for the establishment of baselines for the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) (section 2.2.2.2 of GB.332/INS/5(Rev.)); and

(f) a report on progress towards completing the Standards Initiative work plan as revised by the Governing Body in March 2017, including information on progress made with regard to the review and possible further improvements of their working methods by the supervisory bodies in order to strengthen tripartism, coherence, transparency and effectiveness.

(GB.334/INS/5, paragraph 21, as amended by the Governing Body)

335th Session (March 2019)

The Governing Body:

(a) welcomed the efforts of all constituents and the Office towards the progress reported on the implementation of the two components of the Standards Initiative, namely the Standards Review Mechanism (SRM) and the work plan to strengthen the supervisory system;

(b) with respect to the component concerning the SRM, noted the information provided on the lessons learned and future directions; requested the Standards Review Mechanism Tripartite Working Group (SRM TWG) to take its guidance into account in continuing its work and to provide a report for the Governing Body's second review of the functioning of the SRM TWG in March 2020; and, to guarantee the impact of that work, reiterated its call to the Organization and its tripartite constituents to take appropriate measures to follow-up on all its previous recommendations;

(c) having reviewed, against the common principles guiding the strengthening of the supervisory system, the report on progress in implementing the ten proposals of the work plan, welcomed the progress achieved so far and requested the Office to continue the implementation of the work plan which should be updated according to its guidance;

(d) approving the approach taken and the timelines proposed, requested the Office to ensure that action was taken with respect to producing the guide on established practices across the supervisory system, the operation of the article 24 procedure, the streamlining of reporting, information sharing with other organizations, the formulation of clear recommendations of the supervisory bodies, pursuing systematized follow-up at the national level and consideration of the potential of article 19, paragraphs 5(e) and 6(d);

(e) with respect to the proposal for a regular conversation between the supervisory bodies, invited the Chairperson of the Committee on Freedom of Association to present its annual report to the Conference Committee on the Application of Standards as from 2019;

(f) with respect to the proposal for codification of the article 26 procedure, recalled the decision to consider the steps to be taken after the guide to the supervisory system was available to constituents, and requested the Office to provide it with further information in that regard in March 2020;

(g) with respect to the proposal to consider further steps to ensure legal certainty, decided to hold informal consultations in January 2020 and, to facilitate that tripartite exchange of views, requested the Office to prepare a paper on the elements and conditions for the operation of an independent body under article 37(2) and of any other consensus-based options, as well as the article 37(1) procedure;

(h) with respect to the proposal for review by the supervisory bodies of their working methods, invited the CAS, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the CFA to continue their regular consideration of their working methods.

(GB.335/INS/5, paragraph 84, as amended by the Governing Body)

Appendix II

Work plan and timetable for Governing Body discussions on the strengthening of the supervisory system

Review workplan

	Governing Body, October–November 2018	*Governing Body, March 2019*	*Governing Body, March 2020*	*Governing Body, November 2021*	*Governing Body, March 2022*	*Governing Body, November 2022*	*Governing Body, March 2023*
Decisions taken	**GB.334/INS/5, paragraph 21**	**GB.335/INS/5, paragraph 84**					
Focus area 1: Relationships between the procedures							
1.1. Guide on established practices across the system		*Report on action taken*	*Report on action taken*	*Information*	Report on action taken (completed)	Completed	Updated
1.2. Regular conversation between supervisory bodies		Review					
Focus area 2: Rules and practices							
2.1. Consider codification of the article 26 procedure	Guidance on possibility of Standing Orders	*Report on action taken*	*Report on action taken*			Review at later stage	Review at later stage
2.2. Consider the operation of the article 24 procedure	Discussion as per guidance	Review					Review
2.3. Consider further steps to ensure legal certainty	Guidance on possible tripartite exchange of views	Guidance on possible tripartite exchange of views	*Consideration following tripartite exchange of views (postponed)*	Information		Follow-up to the March 2022 discussion	Follow-up to the November 2022 discussion (TBC)
Focus area 3: Reporting and information							
3.1. Streamline reporting	Continuation of examination of options	Continuation of examination of options	Review				Review
3.2. Information sharing with organizations			Review				
Focus area 4: Reach and implementation							
4.1. Clear supervisory body recommendations			Review				
4.2. Systematized follow-up at national level			Review				
4.3. Consider potential of article 19	Further guidance	Further guidance	Review				
Review by the supervisory procedures of their working methods							

Committee on the Application of Standards	Informal tripartite consultation on working methods
Committee of Experts	Ongoing discussion of working methods
Committee on Freedom of Association	Ongoing discussion of working methods

Document No. 39

Minutes of the 344th Session of the Governing Body, March 2022, paras 139–202

Governing Body

344th Session, Geneva, March 2022

Minutes of the 344th Session of the Governing Body of the International Labour Office

Contents

instrument of ratification of Convention No. 138 in the next days. She requested the Office's support for her Government's efforts to eradicate the worst forms of child labour by 2025 and called on it to redouble its efforts to bring about the universal ratification of all fundamental Conventions of the ILO. She supported the draft decision.

136. **A representative of the Director-General** (Deputy Director-General for Policy) underscored that the Office would continue to make every effort to mobilize additional budgetary resources to increase the number of development cooperation projects that promoted freedom of association and the right to collective bargaining, and she invited donors to support the Office in those efforts. Collective bargaining was one of the key principles underpinning the compliance assessment tool used in the Better Work programme; indeed, an evaluation of the programme's impact had indicated that factories with workplace cooperation committees demonstrated better compliance with legal requirements and collective agreements. The programme's monitoring of respect for freedom of association and collective bargaining also promoted a climate conducive to the enjoyment of those rights. The Office would seek to ensure that the programme's work on collective bargaining rights complemented other ILO activities in that area. The ILO's normative mission remained fundamental and served as an important basis for the Office's ongoing work. The success achieved with regard to Convention No. 182 demonstrated that universal ratification was possible.

137. **The Worker spokesperson** recalled that the Better Work programme and the fundamental right to collective bargaining, although complementary, were distinct concepts.

Decision

138. **The Governing Body:**

(a) took note of the information presented in the Annual Review under the follow up to the ILO Declaration on Fundamental Principles and Rights at Work for the 2020–21 period;

(b) invited the Office to continue its support to Member States to ensure timely reporting on all unratified fundamental Conventions and the Protocol of 2014 to the Forced Labour Convention, 1930, and to keep providing technical assistance to address obstacles to ratification and realization of the fundamental principles and rights at work; and

(c) reiterated its support for the mobilization of resources with a view to further assisting Member States in their efforts to respect, promote and realize fundamental principles and rights at work, including through universal ratification of all fundamental Conventions and the Protocol of 2014 to the Forced Labour Convention, 1930.

(GB.344/INS/4(Rev.1), paragraph 115)

5. Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty and information on other action points in the work plan (GB.344/INS/5)

139. **The Employer spokesperson** said that it was necessary to further investigate possible practical solutions on the issue of legal certainty within the tripartite context to build consensus on the best way to proceed. Taking any decisions on the use of the options under article 37 of the ILO Constitution seemed premature. The Employers recognized the need for legal certainty

regarding provisions of ILO Conventions; that required both legal clarity on the meaning of the terms and provisions of those Conventions and wide acceptance of a particular meaning of such terms and provisions. The question was how best to achieve legal certainty and to what extent the procedures under article 37 could contribute to it. The main issue of contention was the detailed rules on the right to strike developed by the Committee of Experts in its supervision of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The Employers did not consider that article 37 provided a viable way forward, as the right to strike was a multifaceted and complex issue that could not be separated from the widely diverging industrial relations systems and practices in ILO Member States. It was doubtful that recourse to the options under article 37 could achieve legal certainty, as it was unclear how external and judicial bodies could possibly develop a solution that would be widely accepted by ILO constituents on such a complex matter. Such a solution should remain in the hands of the Committee of Experts, the Office and the ILO's tripartite constituents. There was significant room for dialogue and cooperation among those stakeholders to move closer to consensus. Referral to external and judicial bodies, the International Court of Justice or an ILO tribunal should not occur unless all possibilities of dialogue between the main ILO actors competent with respect to ILO standards had been exhausted, which was not currently the case.

140. Regarding the main features of the proceedings under article 37(1) to seek an advisory opinion from the International Court of Justice, she noted that although the rationale for the provision had perhaps been to give extra legitimacy and authority to advisory opinions, it was not clear from article 37(1) that such opinions were also legally binding. While the ILO had treated all six advisory opinions issued by the Permanent Court of International Justice as binding, that did not necessarily mean that the same decision would be made in a new case. The only decision issued by the Permanent Court of International Justice concerning the interpretation of an ILO Convention had been more than 100 years previously, on the Night Work (Women) Convention, 1919 (No. 4), which was much less complex than the question of the right to strike. The Employers' group contested the claim that the wording "shall be referred" in article 37(1) meant that International Court of Justice needed to be determined who decided whether a dispute was eligible for referral to the International Court of Justice. As the option of article 37(1) was intended to be a last resort, it could be argued that a dispute could be referred only when all other options had been exhausted. The author of a question regarding the interpretation of a Convention obviously had the autonomy to decide unilaterally whether to refer the question to the International Court of Justice. However, the wording of article 37(1) could also mean that, if a decision to obtain an authoritative response had been made for a dispute or question concerning the interpretation of an ILO Convention, such a response could be obtained only from the International Court of Justice and not from any other dispute settlement institutions outside the UN system.

141. Concerning the proposed establishment of an ILO tribunal under article 37(2), she noted that there had never been a major effort to create such an institution. Furthermore, the majority of participants at the informal consultations in January 2020 had not supported the article 37(2) alternative. The purpose of such a tribunal was the expeditious determination of any dispute or question relating to the interpretation of a Convention, but that was possible only for specific questions of limited scope, not long-standing, complex and contentious issues such as the Committee of Experts' interpretation of the right to strike in Convention No. 87.

142. The Employers' group would have liked to have seen the option of tripartite consensus-based modalities addressed in greater depth in the document. They should be the first option to resolve diverging views on interpretation, and would maintain the competence of the tripartite

constituents to determine the content of international labour standards. The purpose of a consensus-based option would not be to find a legally binding solution based on legal process, but a solution based on the authority arising from the support of a majority of the tripartite constituents. A dispute over a particular interpretation of an ILO Convention could be placed on the agenda of the International Labour Conference, which could decide to discuss the matter in a committee which would make a recommendation on the interpretation or on further action to address the issue. Another possibility would be to organize a process whereby constituents would be requested to provide their views in writing on a contentious interpretation, which would indicate the level of acceptance of the interpretation and help settle the dispute. The Committee of Experts should then take into account the outcomes of those processes in its future comments on Convention No. 87. If such options did not lead to a settlement, a final possibility could be to consider the initiation of a standard-setting process which could establish a Protocol to the respective Convention setting out the interpretation considered to be the appropriate one, which would have to receive a two-thirds majority of the International Labour Conference. Such a Protocol would become binding only for those countries that ratified it.

143. The Employers' group strongly supported social dialogue and a consensus-based option to resolve existing disputes and to prevent new ones. The tripartite constituents, the supervisory bodies and the Office had a shared responsibility and an essential role to play in ensuring legal certainty. The group had therefore submitted a proposal for an amended draft decision, to read:

> The Governing Body decided to continue its discussion at its 346th Session (October–November 2022) and requested the Office to facilitate tripartite consultations with a view to preparing further proposals for finding consensus-based solutions under the existing procedures involving tripartite constituents, including an informal tripartite dialogue with the Committee of Experts.

144. **The Worker spokesperson** noted that, since 2012, the Employers' group had been challenging the long-standing authoritative interpretation of the ILO supervisory bodies that the right to strike was recognized and protected under Convention No. 87. There had been heated discussions and negotiations but the matter remained unsolved for the Employers' group. The current situation was no longer acceptable, as the ILO's credibility and its unique tripartite and social justice mandate were at stake. The only way provided for in the ILO Constitution for the Organization to ensure legal certainty and decisive determinations in matters of interpretation of Conventions was through the application of article 37. That was essential for ratifying States and States considering ratifying a particular Convention. In the absence of authoritative and binding interpretations obtained through the ILO, other national, regional or international bodies would develop their own interpretation, which could lead to divergent interpretations and further legal uncertainty.

145. The ILO had resorted to the International Court of Justice on six occasions and its decisions had been readily implemented. As a matter of constitutional practice, the ILO had always considered the Court's advisory opinions to be binding. Document GB.344/INS/5 made it clear that article 37(1) placed a direct legal obligation on the ILO to refer any interpretation issue to the International Court of Justice. It would be for the Governing Body to decide to refer such issues. The only way to solve the persisting interpretation dispute concerning Convention No. 87 and the right to strike, in a manner that provided legal certainty and was in line with the ILO Constitution, was to refer it to the International Court of Justice.

146. Regarding the proposed establishment of a tribunal under article 37(2), her group was ready to explore the option, but would accept it only if a series of guarantees and conditions were

met. Even if a tribunal were established, the advisory opinion issued by the International Court of Justice would be binding on that tribunal. The Workers' group agreed with the Employers' group that article 37(2) described situations where an expedited opinion on a more minor interpretation matter would be needed. The Workers' group strongly opposed the establishment of a tripartite tribunal; as a judicial organ, the tribunal must be composed of judges meeting high standards of legal expertise, integrity and impartiality. Nor did the group support the proposal to add final provisions in future Conventions on referral of any interpretation disputes to such a tribunal, as it would provide no solution to existing standards that did not include such a provision, and might lead to excessive recourse to the procedure. An ad hoc tribunal would be more appropriate than a permanent tribunal for serious situations of disagreement. The standing orders of the tribunal would have to make its purpose clear. Legitimate concerns existed on the impact of an ad hoc tribunal on the supervisory system and the unintended consequences if the procedure were used excessively. Her group required further clarification on allowing the Committee of Experts and the CAN to refer a question of interpretation to such a tribunal. The group had strong reservations about the suggestion to allow other international organizations to file requests for interpretation with any such tribunal. Under article 37(2) of the Constitution, any requests must be submitted to the Governing Body. Furthermore, it should only be possible for other judicial institutions to raise such questions. Regarding the other means of interpretation based on relevant international case law, the *travaux préparatoires* for Conventions and the reports of the supervisory bodies, further clarification was necessary on the potential impact on the mandate of the supervisory bodies.

147. The Workers' group supported the legal analysis in the document that consensus-based options could not provide legal certainty. There was a role for tripartite attempts to resolve outstanding issues of interpretation, both prior to the submission of a matter for interpretation to the International Court of Justice or a tribunal and as follow-up to an advisory opinion of the International Court of Justice or the award of a tribunal. However, it should be clear at the preliminary stage that if such attempts did not succeed, the dispute could be resolved only through one of the two mechanisms under article 37. Therefore, a time-bound procedure was needed to ensure that discussions did not continue indefinitely, thus creating a persistent situation of legal uncertainty. In the Workers' group's opinion, the ILO was currently in such a situation, as many attempts had been made through tripartite discussions to reconcile views on the right to strike, but no solutions had been found, only a provisional agreement to disagree. The process had been extremely difficult and the Workers' group did not wish to repeat it or for it to persist any longer.

148. The Workers' group was categorically opposed to the suggestion that the ILO could adopt a new standard to address an interpretation dispute, as the same disagreement on interpretation would persist in the development of the new standard, thus preventing consensus. The example of the Forced Labour Convention, 1930 (No. 29), and its Protocol was not appropriate, as the Protocol updated the Convention and there had been no dispute over its interpretation. Resolving interpretation disputes required recourse to article 37 of the Constitution, not standard-setting.

149. The Workers' group therefore supported subparagraph (a) of the draft decision, on the referral of questions or disputes to the International Court of Justice, but wished to defer any discussions on subparagraph (b), concerning the implementation of article 37(2). In view of the importance and complexity of the matter, the Governing Body should return to the item at its 347th Session rather than its 346th Session, which would also give the new Director-General time to be seized of the matter. Her group could not support the amendment put forward by

the Employers' group, which omitted any reference to article 37. The Workers' group firmly disagreed that an informal tripartite dialogue with the Committee of Experts should be considered as part of a consensus-based solution and that it could help address the dispute over the interpretation of the right to strike. There had already been such opportunities, which had not helped to solve the conflict. A dispute over the scope and meaning of provisions of Conventions was a legal question that required a legal answer through legal means to ensure legal certainty.

150. **Speaking on behalf of IMEC,** a Government representative of the United States agreed that article 37 of the ILO Constitution provided appropriate methods of seeking legal certainty with respect to an existing ILO instrument and that legal certainty on outstanding disputes was critical to the functioning and credibility of the ILO as an international standard-setting organization. The group agreed that there was only one pending interpretation dispute, concerning Convention No. 87, and sought confirmation from the social partners that that was also their understanding. Tripartite consensus-based modalities had thus far only generated temporary political consensus and could not provide the requisite legal certainty to ensure the effective and efficient functioning of the supervisory system. Efforts should therefore be made to seek a resolution under article 37 of the Constitution.

151. The option of recourse to the International Court of Justice under article 37(1) appeared to have merit. The interpretation dispute with respect to Convention No. 87 certainly had broader systemic implications for the exercise of the fundamental right to freedom of association. That exercise was necessary for full participation in the ILO. As such, the interpretation dispute on the right to strike was not of a meticulous character. Her group looked forward to engaging in a tripartite process on the formulation of a balanced question to be referred to the International Court of Justice and on the process for compiling the dossier. She welcomed the Office's assessment that all ILO constituents would likely be permitted to participate in the proceedings, and requested the Office to provide additional information on the time required to prepare for the submission of a request under article 37(1) and on the role of Member States and the social partners in the process. With respect to article 37(2), IMEC considered that the Office had outlined the appropriate considerations. If there was consensus to establish such a tribunal, it must be composed of expert judges, and its establishment would require significant consultation with and concerted effort from all constituents. Her group could not support the amendment proposed by the Employers' group.

152. **Speaking on behalf of the EU and its Member States,** a Government representative of France said that Turkey, North Macedonia, Montenegro, Serbia, Albania, Iceland, Norway, Ukraine, the Republic of Moldova and Georgia aligned themselves with his statement. He observed that the long-standing divergence in opinions had generated uncertainty regarding the legal obligations assumed by governments upon the ratification of Conventions, which might reduce their willingness to ratify Conventions. In 2014, the EU and its Member States had been prepared to support the option to seek an advisory opinion on the interpretation of Convention No. 87 from the International Court of Justice, and maintained the opinion that continued disputes on legal interpretation required recourse to the Court, an organ that had demonstrated its capability to fulfil such duties. While the tools of social dialogue, tripartite discussion and consensus-building had proven effective in resolving disputes on other matters, the situation concerning Convention No. 87 was not a permanent solution. The EU and its Member States stood ready to participate in identifying the most appropriate solution and supported the original draft decision.

153. **Speaking on behalf of the Africa group,** a Government representative of Morocco recalled that agreement had not been achieved despite lengthy discussions on the item at previous

sessions and expressed the hope that a decision by consensus would soon be reached. The mechanisms under article 37 to guarantee legal certainty in interpreting ILO standards must be independent and operate in accordance with the principles of transparency, accountability and good governance. He welcomed the efforts made to ensure the settlement of interpretation disputes and called for further tripartite discussions to enable the constituents to examine the advantages and disadvantages of both of the options presented to the Governing Body. A cost–benefit analysis of each option would also help the constituents to make an informed decision. He supported the original draft decision.

154. **A Government representative of Colombia** said that Member States set great store by the recommendations of the ILO supervisory bodies. If the Governing Body were to consider the establishment of a tribunal under article 37(2) of the ILO Constitution, it would be essential to reflect on the potentially significant costs involved and the impact of such a tribunal on the work of the Committee of Experts, a body guided by the principles of independence, impartiality and objectivity and formed of members with first-hand experience of different legal, economic and social systems. Great care must be taken to avoid undermining the trust of the tripartite constituents and weakening the Committee of Experts. Since very few interpretation disputes had been referred to the International Court of Justice, the establishment of a tribunal for that sole purpose would be inappropriate. It was unclear whether such a tribunal would have other functions related to the ILO's mandate, concerning, for example, a country's acceptance or application of a procedure under article 26 of the ILO Constitution. Her Government was convinced that social dialogue could provide a path to consensus and therefore supported the amendment proposed by the Employers' group.

155. **A Government representative of Brazil** recalled that responsibility for adopting and supervising the application of standards rested primarily with tripartite constituents convened at the International Labour Conference. The text of instruments adopted, the relevant preparatory work and their interpretation by the tripartite constituents should therefore serve as the authoritative references to be considered in the application of standards, and interpretation disputes should be settled first and foremost through tripartite consultations. While the ILO Constitution provided for alternatives to that process, social dialogue had long been the preferred method of dispute resolution at the ILO and no attempts should be made to block that process. He supported the amendment proposed by the Employers' group.

156. **A representative of the Director-General** (Legal Adviser) responding to a question by IMEC, said that it was difficult to estimate how long it would take to prepare for the submission of a request to the International Court of Justice under article 37(1) but suggested that between three and five months would be needed to prepare a dossier that would include details of the question, background information and potentially also the views of constituents. The dossier would need to be submitted to the International Court of Justice shortly after the session of the Governing Body at which a decision was made to refer the case to that organ. It was likely that employers' and workers' organizations would be allowed to participate in advisory proceedings before the Court on the basis of explanations provided in 2014 by its Registrar and also recent practice (for instance, the advisory proceedings on the *Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory* and the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*), which confirmed that the Court adopted a pragmatic approach and might invite entities other than intergovernmental organizations whenever it deemed it necessary. It should also be recalled that employers' and workers' organizations had been allowed to participate in the proceedings brought before the Permanent Court of International Justice.

157. **Another representative of the Director-General** (Director, International Labour Standards Department) clarified that a tribunal established under article 37(2) of the ILO Constitution would focus only on matters relating to the interpretation of Conventions and would not be called upon to address any other matters, including those arising from the acceptance or application of article 26.

158. **The Worker spokesperson** requested clarification from the Legal Adviser on whether the usage of the word "shall" in article 37(1) of the ILO Constitution conferred any obligation on the ILO. She reiterated the importance of social dialogue to her group, but said that there was nevertheless a need for a mechanism to settle interpretation disputes in cases where attempts at seeking consensus through social dialogue had not borne fruit. Her group continued to support the existing arrangements and considered that the call for further discussions on the item was no more than a delaying tactic. She maintained her group's support for the original draft decision.

159. **The Employer spokesperson** noted with satisfaction that a number of Governments had supported the social dialogue approach that she had outlined. There was clearly no disagreement that the principle of freedom of association included the right to strike; it was the exact detail of the international regulation of that right that was in question. The document presented by the Office described the multifaceted regulations that States had adopted to frame the right to strike. It should be acknowledged, however, that expertise guided by national experience or individual cases could not always be applied at the international level or in a different national context. The discussion that had led to the adoption of Convention No. 87 had explicitly rejected the inclusion of the notion of the international regulation of the right to strike in that text. It was not clear why the Workers did not want to have a global tripartite discussion on the issue.

160. In a spirit of compromise, she proposed a subamendment that would reinstate subparagraphs (a) and (b) of the original draft decision and include her group's original amendment as subparagraph (c). The draft decision would read:

> The Governing Body, ~~considering that settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards,~~ decided to continue its discussion at its 346th Session (October–November 2022) and requested the Office to facilitate tripartite consultations with a view to preparing:
>
> (a) proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice for decision in accordance with article 37(1); ~~and~~
>
> (b) additional proposals for the implementation of article 37(2), taking into account the guidance of the Governing Body and the opinions expressed in the tripartite exchange of views~~.~~; and
>
> (c) further proposals for finding consensus-based solutions under the existing procedures involving tripartite constituents, including an informal tripartite dialogue with the Committee of Experts.

161. **The representative of the Director-General** (Legal Adviser), responding to the request of the Worker spokesperson for clarification of the true meaning of the wording used in article 37(1), said that the wording was clear and unambiguous. According to the customary law principles of interpretation reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, texts must be interpreted in accordance with the ordinary meaning of the words used in their context and having regard to the object and purpose of the text. The words "any dispute shall be referred for decision" left no doubt as to the compulsory character of the judicial settlement

of interpretation disputes. Moreover, article 37(1) was worded in unconditional terms; unlike the constitution of other organizations, such as the Food and Agriculture Organization of the United Nations (FAO) and the World Health Organization (WHO), article 37(1) did not qualify the requirement to refer any interpretation dispute to the International Court of Justice for decision, (for instance, "unless settled by negotiation or "if not settled by the Conference"), which meant that there was no other possible course of action for such disputes.

162. **The Worker spokesperson** said that there was no doubt that an interpretation dispute existed and recalled that the Governing Body had a responsibility to fulfil a constitutional obligation to refer the dispute to the International Court of Justice. In that regard, it might be useful to gain clarity that it was the responsibility of the ILO supervisory system to establish the conditions on the right to strike. It was unclear why the Employers were so reluctant to refer the matter to the International Court of Justice. Her group was not prepared to accept any kind of informal further discussion. Several Government groups had supported the original draft decision, with a number of qualifiers about further discussion, in which the Employers could participate. The Workers stood ready to proceed on that basis.

163. **The Employer spokesperson** reiterated that, in order to agree on consolidated principles at the global level, the initial focus must be the different situations at the national level, which could be addressed through discussion both among the countries and with the countries' tripartite constituents. She called on participants to consider the draft decision as subamended, which would allow for an informal tripartite dialogue with the Committee of Experts as the next step.

164. **The Worker spokesperson** said that her group did not accept the proposed subamendment and saw no need for informal tripartite dialogue with the Committee of Experts – which was an independent committee responsible for providing expertise on the application of Conventions.

165. **The Employer spokesperson** reiterated that the dispute concerning interpretation was not a matter for the International Court of Justice. She recalled that the only discussion on the subject by the Conference had been in the run up to the adoption of Convention No. 87, which had led to the decision to exclude the right to strike from the regulatory part of the Convention. The constituents should have the opportunity to discuss that decision and consider how things had evolved and the implications for regulation at the global level. That opportunity would be provided for in the tripartite dialogue proposed in her group's original amendment, which had been subamended to accommodate the wishes of those who wanted to refer to article 37 as well.

166. **Speaking on behalf of the EU and its Member States,** a Government representative of France questioned the proposal by the Employers' group to delete the reference to the ILO Constitution in the draft decision. Including the reference would add value and contribute to preventing future disputes. While the intention of the parties might be clear at the time of the adoption of a Convention, that clarity might be lost over the years. Using the procedures already provided for in the articles of the Constitution could allow the Governing Body to move forward and avoid the need to turn to a judge. The original draft decision was therefore a good proposal, since it provided time to consider different options.

167. **Speaking on behalf of IMEC,** a Government representative of the United States said that her group was not in a position to support the subamendment proposed by the Employers.

168. **The Worker spokesperson** clarified that, while she supported the original draft decision, her group would rather continue the discussion in March 2023, in order to allow the new Director-General time to settle into post prior to its resumption.

169. **The Chairperson** suggested that, since the majority had spoken in favour of the original draft decision, the Governing Body could adopt that version.

170. **The Employer spokesperson** said that her group could not support the draft decision as proposed by the Office. Her group's proposal to hold tripartite discussions on the issue had found support from Governments. It had proposed a compromise that would take on board both views and, also, included the elements that the Employers and a number of Governments considered important. Her group wished to have an informal tripartite dialogue with the Committee of Experts in order to find a solution on which there was consensus, in line with the Governing Body's mandate. In a spirit of compromise, her group was willing to agree to discuss article 37(1) and (2) of the ILO Constitution and to include a reference to the Constitution in the draft decision.

171. **The Worker spokesperson** said that, together with her group, several Government groups had supported the original draft decision with an amended date, while only two Government groups had supported the amendments proposed by the Employers' group. The view of the Governing Body was clear.

172. **The Chairperson** said that the Officers of the Governing Body had decided to move forward and discuss the issue again in March 2023.

173. **The Employer spokesperson** said that, since a new element had been introduced, the Employers were not in a position to conclude discussions during the current round. Another round of discussion would be needed.

174. **The Worker spokesperson** said that although she had originally proposed that the discussion should take place in March 2023, if the Governing Body could not agree to that, the Workers could agree to hold the discussion in November 2022.

175. **The Employer spokesperson** suggested that the discussion should be suspended with a view to seeking consensus on the draft decision and resuming discussion at a later stage.

176. **The Worker spokesperson** recalled that despite many beautiful words on consensus, there had been no consensus on the issue for ten years. It was clear that a majority wished to move forward, which would mean further tripartite consultations and preparation; that was the decision that should be made.

(The discussion was adjourned.)

177. **The Employer spokesperson** noted that there appeared to be support from Governments for her group's view that the draft decision should make reference to tripartite dialogue. Accordingly, referring to the original draft decision set out in paragraph 74 of the document, she proposed that subparagraph (b) could be amended to read: "additional proposals for the implementation of article 37(2) of the ILO Constitution" and that a new paragraph 75 could be inserted that would read: "The Governing Body requested the Office to also provide possible proposals for approaches to the resolution of divergences of views related to international labour standards within the ILO's tripartite structures within a reasonable time frame". A new paragraph 76 could also be added, with some wording taken from the original subparagraph (b), that would read: "The Office is requested to prepare proposals under paragraphs 74 and 75 taking into account the guidance of the Governing Body and the opinions expressed in the tripartite exchange of views".

178. **The Worker spokesperson** welcomed the growing agreement surrounding paragraph 74. She reiterated her group's dedication to tripartism, social dialogue and consensus-seeking, but said that the Employers' proposed new paragraph 75 was overly broad, and indeed superfluous, given that the Governing Body had always sought to find tripartite solutions to the diverging views on international labour standards that had existed since the ILO's inception. Any reference to tripartism should be specifically in relation to the work plan on the strengthening of the supervisory system. Accordingly, she suggested that paragraph 75 could include wording along the lines of: "The Governing Body committed to continue its tripartite discussion on the further implementation of the work plan on the strengthening of the supervisory system". She recalled that the Governing Body had already made a commitment to that effect, in 2017, when it had adopted the revised work plan for the strengthening of the supervisory system.

179. **The Employer spokesperson** noted with appreciation the flexibility demonstrated by the Workers' group in finding a way forward. She could agree to the wording that had been proposed by the Workers, if a reference to the work plan and to the diverging views could also be included.

(The Governing Body resumed consideration of the item following a brief suspension of the sitting for consultations.)

180. **The Worker spokesperson**, referring to the original draft decision, proposed that paragraph 74 could be retained in its entirety, with the only change being to the date, and that a new paragraph could be added, that would read: "The Governing Body expressed its commitment to further implement the work plan on strengthening the supervisory system".

181. **The Employer spokesperson** said that the new paragraph, as proposed by the Workers, did not include the main element that her group considered important. She proposed that the sentence should therefore be subamended to refer to international labour standards and the ILO's tripartite structures, and to reflect the views of the Governments on the need for a time frame. The paragraph would therefore read: "The Governing Body expressed its commitment to further implement the work plan on strengthening the supervisory system, including approaches to the resolution of divergences of views relating to international labour standards within the ILO's tripartite structures, within a reasonable time frame".

182. **The Worker spokesperson** said that, if the Employers did not accept the wording of the new paragraph as proposed by her group, she would prefer not to add a new paragraph at all, and simply to retain the original text of paragraph 74. The Governments had indicated their support for the need for legal certainty, which in terms of divergence could be achieved only through the application of article 37. The subamendment to the new paragraph proposed by the Employers' group was not acceptable, as it would lead to more uncertainty and confusion. She reiterated that, as the Governing Body was a tripartite institution, any commitment it made was a tripartite commitment and there was no need to state that explicitly.

183. **Government representatives of Brazil and Colombia** supported the new paragraph, as subamended by the Employers' group.

184. **A Government representative of Japan** suggested that only the parts of the Employers' subamendment that were included in the work plan should be retained.

185. **A Government representative of the United States** proposed a further subamendment to the new paragraph, so that it would read: "The Governing Body expressed its commitment to strengthening the supervisory system, including through tripartite social dialogue".

186. **A Government representative of Argentina** said that the most appropriate way forward would be to adopt the new paragraph as proposed by the Workers' group.

187. **Speaking on behalf of the EU and its Member States,** a Government representative of France said that she supported the new paragraph as proposed by the Workers' group. She could not accept the subamendment proposed by the Employers' group, as all disputes relating to ILO Conventions should be governed by article 37 of the ILO Constitution. She asked for more time to consider the subamendment proposed by the representative of the United States.

188. **The Worker spokesperson** clarified that the work plan, which was a work plan on the strengthening of the supervisory system, did not include the issues addressed by the Employers' subamendment. Those new issues would further confuse a debate in which her group was seeking clarity and legal certainty. The subamendment proposed by the representative of the United States would also broaden the paragraph. She advised against entering a broader discussion on the strengthening of the supervisory system in general terms. She maintained her support for the new paragraph as proposed by her group, and could not agree to include any other language in that paragraph.

189. **A Government representative of China** said that the new paragraph as subamended by the Employers' group represented a practical way forward. It took the issue of divergent views on board and allowed for the possibility to find other solutions.

190. **The Employer spokesperson** recalled that a significant number of Governments had emphasized the importance of tripartite governance and structures. The legal system was only as good as its support. The supervisory system would be strengthened and rendered more effective by ensuring that it was supported by a broad tripartite consensus. Attempts to find consensus should be made prior to recourse to the courts. The legal traditions and jurisprudence of all countries were moving towards seeking discussion and mediation to resolve conflicts before they came before a judge, and that was particularly the case in industrial relations. If the ILO, as the tripartite house of dialogue at the international level, were to shy away from such an attempt, it would find itself out of step with history. If a reference to the tripartite structures was not included in the new paragraph, then it was not a compromise proposal. Both elements were needed to ensure that the tripartite dialogue element was there to strengthen the factual and substantive body of the supervisory system.

191. **The Government representatives of Australia, Japan, Mexico and the United Kingdom** expressed support for the subamendment to the new paragraph proposed by the representative of the United States.

192. **Speaking on behalf of the EU and its Member States,** a Government representative of France reiterated that she supported the new paragraph as proposed by the Workers' group. Before taking a position on the subamendment proposed by the representative of the United States, she wished to hear the views of the Workers' and Employers' groups.

193. **A Government representative of Brazil** expressed support for the subamendment proposed by the representative of the United States, but suggested that wording along the lines of "as an auxiliary means to resolution" could be added after "including through tripartite social dialogue".

194. **The Employer spokesperson** requested clarification of whether the subamendment proposed by the representative of the United States included the reference to the work plan.

195. **A Government representative of the United States** said that, although her original proposal had not included the reference to the work plan, she would be happy to retain it.

196. **The Worker spokesperson** said that she would be willing, in the interests of reaching agreement, to incorporate the words "including through tripartite social dialogue" at the end of the new paragraph as proposed by her group. That would be the end of the sentence; she could not accept any additional wording beyond that phrase. It was her understanding that many Governments did not want a paragraph that was unclear on how to deal with interpretation and divergences on international labour standards, and some members of her group were reluctant to accept a broadening of the issue beyond the debate on how to achieve legal certainty.

197. **The Employer spokesperson** said that the role of the Governing Body was to find ways forward and she recalled that the Governments held a variety of views. The Employers welcomed the subamendment proposed by the representative of the United States and stood ready to accept a version of the new paragraph that incorporated both that subamendment and the further subamendment just proposed by the Workers' group, on the understanding that the Office would also develop approaches and ways to settle unresolved disputes and discuss them through tripartite social dialogue, and that the door would be left open in that sense.

198. **Speaking on behalf of the Africa group,** a Government representative of Morocco expressed support for the new paragraph as subamended by the representative of the United States and by the Workers.

199. **Speaking on behalf of the EU and its Member States,** a Government representative of France also expressed her support for the new paragraph as subamended by the representative of the United States and by the Workers. She appreciated the willingness of the different groups to accept the solution.

200. **The Worker spokesperson** said that she could support the adoption of the text as subamended and welcomed the contributions made by all to the result, which marked an important step forward. While she stood ready to participate in future discussions on the different views on the subject that were held in the Governing Body, she did not share the Employers' understanding in that regard.

Decision

201. **The Governing Body, considering that settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards, decided to continue its discussion at its 347th Session (March 2023) and requested the Office to facilitate tripartite consultations with a view to preparing:**

(a) proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice for decision in accordance with article 37(1); and

(b) additional proposals for the implementation of article 37(2), taking into account the guidance of the Governing Body and the opinions expressed in the tripartite exchange of views.

202. **The Governing Body expressed its commitment to further implement the work plan on strengthening the supervisory system, including through tripartite social dialogue.**

(GB.344/INS/5, paragraph 74, as amended by the Governing Body)

Document No. 40

GB.347/INS/5, Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty, February 2023

International Labour Organization

▶ GB.347/INS/5

Governing Body

347th Session, Geneva, 13–23 March 2023

Institutional Section **INS**

Date: 27 February 2023
Original: English

Fifth item on the agenda

Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty

Purpose of the document

Further to the decision taken by the Governing Body at its 344th Session (March 2022), this document includes a draft procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice in accordance with article 37(1) of the Constitution. The document also includes additional considerations and proposals on the possible establishment of an in-house tribunal for the expeditious determination of interpretation questions or disputes in accordance with article 37(2) of the Constitution. This document has been prepared taking into account the views expressed during informal consultations held in November–December 2022 and in January–February 2023 (see the draft decision in paragraph 62).

Relevant strategic objective: All four objectives.

Main relevant outcome: Outcome 2: International labour standards and authoritative and effective supervision.

Policy implications: None at this stage.

Legal implications: None at this stage.

Financial implications: None at this stage.

Follow-up action required: Depending on the decision of the Governing Body.

Author unit: Office of the Legal Adviser (JUR).

Related documents: GB.344/PV; GB.344/INS/5; GB.335/INS/5; GB.329/INS/5(Add.)(Rev.); GB.329/PV; GB.323/PV; GB.322/INS/5; GB.320/PV.

▶ Contents

Appendices

▶ Introduction

1. At its 344th Session (March 2022), the Governing Body, considering that settling disputes relating to the interpretation of international labour Conventions in accordance with article 37 of the ILO Constitution is fundamental for the effective supervision of international labour standards, requested the Office to facilitate tripartite consultations with a view to preparing: (a) proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the International Court of Justice (ICJ) for decision in accordance with article 37(1); and (b) additional proposals for the implementation of article 37(2). [1]

2. This decision was based on the general understanding that "the wording of article 37 leaves no doubt that the Organization … has an obligation to resolve interpretation disputes by having recourse to judicial means and that the authority to give definitive and binding interpretations currently lies exclusively with the ICJ". [2]

3. The current discussion takes place in the framework of the implementation of the work plan for the strengthening of the supervisory system that was launched in March 2017 as one of the two components of the Standards Initiative. The work plan for the strengthening of the supervisory system included consideration of further steps to ensure legal certainty under action 2.3 of the Standards Initiative, [3] as a follow-up to the Governing Body decision at its 323rd Session (March 2015) not to pursue for the time being any action under article 37 of the Constitution to address the interpretation question of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike. [4]

4. Discussions on the legal certainty component of the work plan on the strengthening of the supervisory systems were first held during the 335th Session (March 2019) of the Governing Body. At that session, the Governing Body decided to hold informal consultations and, to facilitate the tripartite exchange of views, requested the Office to prepare a paper on the elements and conditions for the operation of an independent body under article 37(2) of the ILO Constitution and of any other consensus-based options, as well as the article 37(1) procedure. [5] These informal consultations and tripartite exchange of views took place in January 2020 and the outcome was reported in a paper prepared for a discussion during the 338th Session (March 2020) of the Governing Body. [6] Due to the cancellation of the 338th

[1] GB.344/PV, para. 201

[2] GB.344/INS/5, para. 66. The same document further notes that "article 37 of the ILO Constitution typifies what is better known as a 'dispute settlement clause' … By its nature, therefore, a dispute settlement clause provides for compulsory rather than optional action; it dictates in more or less detailed terms a specific legal solution at the exclusion of others." (para. 19). This 'compulsory' jurisdiction vested in the ICJ for all matters of interpretation exists in relation to all Members of the Organization, and in 1953, when the Soviet Union wished to enter the Organization with a reservation in respect of this jurisdiction, the reservation was not permitted; see *Official Bulletin*, 31 December 1954, Vol. XXXVII, No. 7, p. 228.

[3] GB.329/INS/5(Add.)(Rev.); GB.329/PV. paras 95–148.

[4] GB.323/PV, para. 84. This decision provisionally discontinued consideration of a possible referral to the Court following the discussion on modalities, scope and costs of action under 37(1) at the 322nd Session (November 2014) of the Governing Body and the Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike and the modalities and practices of strike action at national level held in February 2015.

[5] GB.335/INS/5, para. 84(g).

[6] GB.338/INS/5.

Session as a result of the COVID-19 pandemic, the Governing Body resumed its consideration of this matter only at the 344th Session (March 2022). [7] A succinct chronology of past discussions on article 37 is provided in Appendix III including links to all relevant background documents.

5. As requested by the Governing Body in March 2022, the Office held a series of informal consultations in November–December 2022 and in January–February 2023. Considering the views expressed by the tripartite constituents, as well as historical precedent and the relevant practice of the ICJ, [8] the Office has drawn up a draft procedural framework under article 37(1) and additional proposals under article 37(2), with a view to facilitating further discussions and possible future action in these matters. The draft procedural framework for the referral of interpretation questions or disputes to the ICJ under article 37(1) and its accompanying introductory note can be found in Appendix I.

6. It is noted in this context that although the Governing Body decision refers to the referral of questions or disputes regarding the interpretation of international labour Conventions, the proposed procedural framework would apply also to any question or dispute relating to the interpretation of the ILO Constitution.

7. Moreover, this document provides additional considerations and proposals on the possible establishment of an in-house tribunal for the expeditious determination of interpretation questions or disputes in accordance with article 37(2) of the ILO Constitution, with a view to enabling the Governing Body to decide whether to pursue the examination of the implementation of article 37(2) and, if so, in which time frame.

8. By way of background information, this document also contains a graphic representation of the proposed procedural framework (Appendix II) and key elements of the six precedents of interpretation requests the ILO addressed to the Permanent Court of International Justice under article 37 in the period 1922–32 (Appendix IV).

▶ 1. Procedural framework for the referral of interpretation questions or disputes to the International Court of Justice under article 37(1)

1.1 Advisory proceedings in brief

9. To facilitate the consideration of the proposed procedural framework, it would be useful to recall the main aspects of the advisory function of the ICJ as reflected in its Statute and Rules and well-established practice. [9]

[7] GB.344/INS/5.

[8] General information on the advisory jurisdiction of the ICJ can be found in The International Court of Justice: Handbook, 2019, pp. 81–93. See also Khawar Qureshi, Catriona Nicol and Joseph Dyke: *Advisory Opinions of the International Court of Justice* (London: Wildy, Simmonds and Hill Publishing, 2018); Hugh Thirlway, "Advisory Opinions" in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2006).

[9] From 1948 to 2022, the International Court of Justice rendered a total of 27 advisory opinions in response to requests submitted by the United Nations and four specialized agencies, namely UNESCO, IMO, WHO and IFAD. The full text of all advisory opinions is available at the ICJ web page on advisory proceedings. The most recent request for an advisory opinion

10. Advisory opinions are not intended to resolve inter-State disputes but only to give authoritative legal advice to the organization that so requests. The request for an advisory opinion must be based on a decision of the competent body of the organization concerned containing the question to be asked to the Court. The request must be accompanied by a dossier containing all background documents that, in the view of the organization concerned, should be brought to the knowledge of the Court.

11. The advisory jurisdiction of the Court is open to those specialized agencies authorized to this effect by the General Assembly, including the ILO which received such authorization by virtue of article IX(2) of the 1946 UN–ILO relationship agreement. Requests for advisory opinions carry minimal costs (reproduction of documents and mission costs for participation in oral proceedings), as the expenses of the Court are borne by the United Nations. The question put to the Court must be legal in nature, directly related to the activities of the organization and refer to issues falling within its sphere of competence. The fact that the question may be vague or unclear or that the request may have political motives, is not decisive for establishing the Court's jurisdiction.

12. Participation in advisory proceedings consists in submitting written statements and oral arguments, if the Court decides to hold hearings. The Court is prepared to expedite the advisory proceedings, if expressly requested to do so. In deciding which States, international organizations or other entities should be invited to participate in advisory proceedings, the Court seeks to ensure that all actors likely to provide information that may not be available to the Court otherwise, are associated with the proceedings. [10]

13. Contrary to judgments in contentious cases, advisory opinions are in essence non-binding. Notwithstanding, the Court has always drawn a distinction between the advisory nature of its task and the particular effects the requesting organization may wish to attribute to an advisory opinion. Indeed, according to the letter and the spirit of article 37 of the ILO Constitution ("any question or dispute … shall be referred for decision to the International Court of Justice"), and as consistently reaffirmed by tripartite constituents, [11] advisory opinions rendered by the Court at the ILO's request are considered to be authoritative and final pronouncements, and should be implemented as such.

was made by the United Nations General Assembly through Resolution 77/247 of 30 December 2022 and transmitted to the President of the Court by letter of the United Nations Secretary-General dated 17 January 2023.

[10] For a more detailed overview of the main characteristics and procedural aspects of the advisory function of the ICJ, see GB.322/INS/5, paras 7–47.

[11] By way of example, see the statement on behalf of GRULAC at the March 2014 Governing Body session that "legally binding interpretations of international labour Conventions [fall] within the exclusive competence of the ICJ, in accordance with article 37(1) of the ILO Constitution" (GB.320/PV, para. 585). See also the statement of the Employer spokesperson at the Committee on the Application of Standards in 2002 according to which "only the International Court of Justice had the authority to make binding interpretations of Conventions and Recommendations, which clearly derived from article 37 of the ILO Constitution…" (ILO, *Record of Proceedings*, International Labour Conference, 90th Session, 2002, 28/13, para. 45) or the statement of the Worker spokesperson at the same Committee in 1991 to the effect that the assessments and views of the supervisory bodies were generally accepted "subject to a definitive interpretation by the International Court of Justice" (ILO, *Record of Proceedings*, International Labour Conference, 78th Session, 1991, 24/4, para. 16). For a compilation of similar statements see here.

1.2. A procedural framework – key considerations

14. There seems to be broad agreement that, in drawing up a working process for referring interpretation questions or disputes to the Court under article 37(1) of the ILO Constitution, due account should be taken of the following:

(i) the overriding character of the constitutional prescription of article 37 and criticality of legal certainty for the credibility of the ILO as a standard-setting organization;

(ii) finality and stability in matters of interpretation through recourse to judicial means meeting highest standards of legal expertise, integrity and independence;

(iii) action under article 37(1) for serious and persistent interpretation disputes which justify having recourse to the principal judicial organ of the UN.

15. In addition, consultations seem to confirm that a procedural framework should:

(i) remain as close as possible to the letter and the spirit of article 37(1);

(ii) avoid introducing working arrangements that would run counter to the Constitution and might generate complexity;

(iii) ensure inclusive discussion and informed and time-bound decisions at all stages.

16. An agreed framework would carry considerable practical value since it would provide a simple, clear and ready-to-use methodology for examining a referral request and taking decisions prior to the start of advisory proceedings, clarifying the role and responsibilities of the Office before and during the proceedings, and planning any follow-up action after the Court has rendered its opinion. It would enhance coherence, transparency and efficiency as it would embody a general commitment of constituents to follow modalities agreed in advance and thus avoid time-consuming discussions about the process each time a referral request is brought before them for consideration. Its adoption, however, may not be considered in any way a precondition to making a request for an advisory opinion to the Court, as the procedural framework cannot override constitutional provisions.

17. Three main issues have drawn constituents' attention during the informal consultations: (i) the level of support (or "threshold") for triggering a full-fledged referral discussion at the Governing Body; (ii) the time limit within which the Governing Body should reach a decision on possible referral; and (iii) the role of the International Labour Conference in the referral process.

18. Firstly, with respect to the possible screening of referral requests, there seems to be adequate support for setting an indicative – and not prescriptive – threshold in terms of the number of Governing Body members or Member States that should sponsor a referral request to be considered by the Governing Body. This indicative threshold for filing a referral request with the Governing Body should not be confounded with the final decision of the Governing Body on the possible referral to the Court. Some constituents expressed preference for an elevated threshold, while others considered that the majority of the States parties to the Convention concerned should be in favour of the referral request before it can be considered. It is noted that the ILO Constitution provides that any dispute relating to the interpretation of any Convention shall be referred for decision to the ICJ, without any direct or indirect reference to the degree of support that a referral request should enjoy. Yet, in practice, referral requires a

debate and decision of the Governing Body, which in itself confirms that not all interpretation disputes are to be brought before the ICJ. [12]

19. Be that as it may, the proposed indicative threshold could not and would not set, legally speaking, a binding receivability rule but rather a shared and trusted understanding among constituents on the way to proceed for the sake of business efficiency and procedural economy. Any referral request which would fail to meet the indicative threshold would still be referred to the Officers of the Governing Body who could recommend appropriate follow-up action.

20. Secondly, as regards the duration of Governing Body discussions before a decision on referral is taken, many constituents see value in keeping the process within a specific time frame while some consider it important not to provide for any limitation, all the more so as the outcome would be uncertain if the Governing Body were unable to reach a decision within a set time limit. It may be useful to recall, in this respect, that the Governing Body discussion on possible referral would normally take place in the context of a persistent disagreement and therefore it would be reasonable to assume that the issue(s) and differing views would already be sufficiently clear to all, or that the matter would have already been debated within the Organization. On the assumption, therefore, that having recourse to article 37(1) would be considered as a last resort in case of a serious and persistent interpretation dispute, it would be sensible and realistic to expect that the Governing Body discussion is concluded in a time-bound manner, especially if the Court were to be requested to provide an "urgent answer" in accordance with article 103 of its Rules. From that perspective, it would not be advisable to dissociate the debate on the referral request from that on the legal question(s) to be put to the Court since it would delay the process.

21. Thirdly, different views have been expressed with regard to the body that should take the referral decision. While acknowledging that the Governing Body has the authority to request an advisory opinion by virtue of a 1949 Conference resolution delegating such authority, many constituents would strongly be in favour of the Governing Body's decision being subject to the validation or approval of the International Labour Conference as the supreme executive and most representative body of ILO's tripartite constituency. For some constituents any substantive discussion should take place at the Conference, while for others the Conference would not be the appropriate forum as it has mandated the Governing Body to take decisions on these matters.

22. It may be noted, in this connection, that due to its mode of operation and as confirmed by past practice, the Governing Body may be more suitable for filtering referral requests, analysing in-depth the subject matter of the interpretation dispute, debating the merits of coming before the ICJ and potentially determining the legal question(s) to be put to the Court. [13] On specific occasions, however, having regard to the institutional importance or seriousness of the

[12] For instance, in 1932, at the time the Governing Body was considering referring a question concerning night work of women based on a request from the Government of the United Kingdom, the German Government also requested a referral of a separate but related question. The Governing Body thought the German question should be postponed until the Office had carefully studied the question. The German Government did not agree with the proposed postponement and a vote was finally taken to adjourn consideration of the questions raised by the German Government. See the Governing Body minutes of the 58th Session, 1932, p. 401.

[13] As it was pointed out in 1949 by the Reporter of the Committee on Standing Orders, the Conference has "a very sporadic existence. It meets for about three weeks every year, and it may happen that it is necessary to ask the Court for an advisory opinion when it is not in session, and in that case it would seem advisable that the Governing Body should be able to ask the Court for such an opinion". See ILO, *Record of Proceedings*, International Labour Conference, 32nd Session, 1949, p. 245.

dispute at hand, the Conference could be invited to approve the Governing Body's decision (without undertaking a fresh review of the merits of the referral request) and authorize the referral on behalf of the entire ILO membership. [14] In this case, the Governing Body, upon having made a referral decision (by consensus or by a simple majority vote), would further decide to transmit a draft resolution to the following session of the Conference for adoption. The resolution, which would be channelled to the plenary through the General Affairs Committee, would confirm the decision to request an advisory opinion from the Court, including the questions to be put to the Court, and would instruct the Director-General to transmit those questions to the Registrar or the President of the Court, as per the applicable rules.

23. A similar "two-stage approach" involving consecutive decisions, first of the Governing Body and then of the Conference, can be found in articles 33, 37(2) and 38(2) of the Constitution, which provide for Conference approval or confirmation based on recommendations or draft rules prepared by the Governing Body. [15] In all three cases, the underlying rationale seems to be the need to associate the Conference by reason of its representativeness and in view of the significant implications for the entire membership. [16] Therefore, there may be merit in making express provision in the procedural framework for the possible transmission of a referral decision to the Conference for approval, to be determined by the Governing Body on a case-by-case basis.

24. Beyond these main aspects highlighted above, three other related questions were addressed during the tripartite exchanges, namely whether Member States non-members of the Governing Body should be allowed to participate in the relevant discussions, whether the Office should adopt a strictly neutral and impartial position during the referral process and the advisory proceedings and, lastly, whether a referral should have a suspensive effect on the work of the supervisory bodies in relation to the Convention concerned.

25. Firstly, as regards the possible participation of all interested governments in the Governing Body discussions, it should be clarified that the existing rules (article 4.3 of the Standing Orders) permit the Governing Body to meet as a Committee of the Whole, in which representatives of governments that are not represented on the Governing Body may be given the opportunity to express their views. Alternatively, the non-members of the Governing Body

[14] It should be noted, in this respect, that as the Office Note for the Committee on Standing Orders at the 1949 Conference clarified, "The Governing Body exercises important functions in connection with the application of Conventions, in the course of which it may find it desirable to refer a matter to the Court. … The Governing Body would clearly not approach the Court on a matter which was primarily the responsibility of the Conference without ascertaining the views of the Conference and, on this understanding, the Governing Body considers that there would not be any objection in principle to, nor any practical disadvantage in, a general authorisation". See ILO, *Record of Proceedings*, International Labour Conference, 32nd Session, 1949, pp. 391–392.

[15] The original Office proposal for article 33 provided for measures to be recommended by the Governing Body in case of failure by a Member to implement the recommendations of a Commission of Inquiry. An amendment was adopted to clarify that the measures should be recommended to the Conference on the understanding that these recommendations would address "very serious cases "and therefore "it appeared desirable to have the backing of the full Conference" as the "master body of the Organisation". As regards article 37(2), the reference to the Conference's approval of the rules drawn up by the Governing Body was introduced following a discussion on the binding effect of the awards of the tribunal for all Member States and the consequent need to provide for a role for the Conference. See ILO, *Official Bulletin*, 1946, Vol. XXVII, No. 3, pp. 606, 770 and 860.

[16] Reference may also be made to the 1986 Instrument of Amendment to the ILO Constitution (not yet in force), which provides that whereas the appointment of the Director-General remains under the responsibility of the Governing Body, it must be submitted to the approval of the entire membership represented at the Conference. See ILO, *Records of Proceedings*, International Labour Conference, 72nd Session, 1986, 18. The same two-stage process for the appointment of the Executive Head is found in UNESCO and the WHO.

could be invited to submit written comments, within the limits determined by it, which would be made available to the Governing Body prior to its first discussion on the referral request. It is suggested that this latter possibility, coupled with the further option to submit the matter to the approval of the Conference, would guarantee an inclusive process without overburdening or protracting the deliberations of the Governing Body.

26. Secondly, with respect to the Office's duty of neutrality and impartiality, it is indeed imperative for the Office to refrain from taking any action that might be perceived as supporting or helping either side in an interpretation dispute. It would be important to avoid adding to the interpretation dispute a controversy about the role and responsibilities of the Office. [17] Specifically, the comprehensive file, or dossier, to be submitted to the Court would be prepared under the sole responsibility of the Director-General and would not be submitted to the groups for review. In addition, the Office should not provide any material assistance, legal counselling or financial support to any of the constituent groups or Members that may be involved in the Court proceedings (for example, preparation of written submissions, legal representation, travel expenses and so forth). As for the Office's participation in any oral proceedings that the Court may organize, it would aim at faithfully reflecting institutional practice and jurisprudence prior to the referral, and at providing clarification of a factual nature (for example, an historical context, constitutional theory, organizational structure and responsibilities, standard-setting processes, ILO's normative system and so forth). [18]

27. Thirdly, concerning the effect of a referral on core supervisory functions and procedures, it may be noted that as the advisory proceedings would mark the last stage of a persistent controversy, there would be no reason to suspend regular supervision at this particular stage. Compliance-inducing procedures could thus continue to be available and supervisory bodies could continue to carry out their responsibilities while the request for an advisory opinion would be pending, in exactly the same way as those procedures and bodies operated since the dispute first arose. However, while suspending the ordinary work of supervisory bodies for the duration of advisory proceedings may be disruptive and would not therefore be advisable, the supervisory bodies concerned might, on their own motion and on a case-by-case basis, decide to suspend the examination of a particular aspect of the application of a Convention for as long as the Court may have not delivered its opinion.

[17] This is far from a hypothetical situation. Indeed, in the context of the advisory proceedings on the Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, a member of the Governing Body wrote directly to the Court on 17 June 1922, criticizing the lack of objectivity and neutrality of the memorandum submitted by the ILO Director and the lack of consultations. See *Acts and Documents relating to Judgments and Advisory Opinions given by the Court, No. 1*, First Ordinary Session, 15 June – 12 August, 1922; Section B, *Documents relating to Advisory Opinion No. 2*, p. 494.

[18] It is worth recalling, in this respect, the written statement submitted by the Office during the proceedings concerning the Night Work (Women) Convention, 1919 (No. 4), which read in part: "le présent mémoire comportera, en premier lieu, un exposé historique des faits et, en second lieu, *un exposé des thèses en présence.* [...] Le Bureau international du Travail s'est efforcé, dans le présent mémoire, de rapporter aussi exactement que possible les faits et les arguments relatifs à la question soumise à la Cour. *Il ne lui appartient pas de formuler une conclusion dans un sens ou dans l'autre*" (PCIJ, Series C: Acts and documents relating to Judgments and Advisory Opinions given by the Court; documents of the written proceedings, Part I, pp. 162 and 180). In his oral statement, Edward Phelan noted: "The International Labour Office has already submitted to you a written statement, the object of which is to place before the Court, *as impartially as possible, all the elements of the problem submitted for solution* [...] The International Labour Office notes the existence of differing interpretations of the Convention concerning the employment of women during the night; it deplores these differences on interpretation, and it appears before the Court with the one object of facilitating the adoption of a solution of the problem which is legally satisfactory" (PCIJ, Series C: Acts and documents relating to Judgments and Advisory Opinions given by the Court, public sittings and pleadings, p. 208).

▶ 2. Additional proposals for the implementation of article 37(2) on the establishment of an in-house tribunal for the expeditious determination of interpretation questions or disputes

2.1 Basic principles

28. At the 322nd Session (October–November 2014) of the Governing Body, the Office presented detailed proposals for setting up an in-house tribunal for the expeditious determination of questions or disputes regarding the interpretation of international labour Conventions, accompanied by a draft statute based on a comprehensive review of the structure of major international courts and tribunals in operation. [19] Further elements on the organization and functioning of the tribunal were provided in the document that was prepared for the 338th Session (March 2020) of the Governing Body. [20]

29. As indicated in earlier documents, the ILO Constitution sets out six key parameters which should guide the Governing Body in implementing article 37(2):

(i) The adjudicative body to be established should be a tribunal composed of judges;

(ii) The mandate of the tribunal would be the expeditious determination of any question or dispute relating to the interpretation of a Convention which the Governing Body decides would not warrant referral to the International Court of Justice;

(iii) The rules establishing the tribunal should be drawn up by the Governing Body and approved by the Conference;

(iv) The referral of any question or dispute to the tribunal would be decided by the Governing Body or in accordance with the terms of the Convention in question;

(v) Any applicable judgment or advisory opinion of the International Court of Justice would be binding upon the tribunal;

(vi) Decisions rendered by the tribunal should be circulated to Members for their observations, which should then be forwarded to the International Labour Conference.

30. From an institutional perspective, setting up such an internal ILO tribunal would put in place the one element provided for under the Constitution for the settlement of interpretation disputes that is currently missing. It would provide expeditious, reasoned and authoritative rulings on matters of interpretation of international labour Conventions and would also represent a sound and valid alternative for any questions or disputes not considered suitable for referral to the International Court of Justice, the principal judicial organ of the United Nations. An in-house tribunal would be a readily available and highly expert body whose jurisdiction would be solely the interpretation of ILO Conventions. Moreover, full ILO ownership would be guaranteed, since the Organization's executive organs would maintain control over its structure and procedure.

31. During the tripartite consultations held in preparation for the current discussion, some constituents saw little value in examining in detail the modalities of the establishment of an in-

[19] GB.322/INS/5, paras 50–101 and Appendix II.

[20] GB.338/INS/5, paras 37–59.

house tribunal at this juncture, as the settlement of the ongoing interpretation dispute on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) in relation to the right to strike could not be entrusted to such a tribunal. However, other constituents considered that the full potential of an in-house tribunal should be explored as a true alternative to referring the matter to the Court.

32. Constituents also expressed interest in the rationale behind the introduction of article 37(2) at the time of the constitutional amendment of 1946, and in particular on any limits to the jurisdiction conferred upon the internal tribunal.

33. The additional proposals outlined below clarify selected aspects of the in-house tribunal, such as the type of interpretation questions that could be referred to it and the process for selecting judges, and outline a possible way forward.

2.2 Origins of article 37(2) and competence

34. The idea of establishing a special tribunal to deal with questions of interpretation of international labour Conventions originated in Governing Body discussions about the possibility of instituting a special procedure "between the unofficial procedure of consulting the Office and the constitutional procedure of approaching the Permanent Court … an intermediate procedure which, whilst not possessing the supreme authority of the Court, would, nevertheless, give Members of the Organisation greater guarantees than were provided by the opinions given by the Office". [21]

35. The idea took shape at the time of the creation of the United Nations and the ensuing discussion about the relationship of the ILO to other international bodies, including the transfer to the International Court of Justice of the jurisdiction entrusted by the ILO Constitution to the Permanent Court of International Justice. In a Memorandum prepared by the then ILO Legal Adviser Wilfred Jenks on the future development of the ILO Constitution and constitutional practice, reference was made to a need "to afford facilities for the determination of questions of interpretation of *insufficient importance* to warrant reference to the Permanent Court of International Justice". [22] The same point was made in a report prepared by the Office for the Conference to address constitutional questions:

> In respect of questions or disputes relating to the interpretation of Conventions different considerations apply. The points at issue in such cases are frequently of *so meticulous a character* as not to warrant recourse to the principal judicial organ of the international community … A well-developed practice whereby unofficial interpretations of Conventions were given by the International Labour Office gave a large measure of satisfaction and should be continued in the future, but these opinions had no binding authority and the Governing Body did not feel able to assume responsibility for the interpretation of Conventions and did not think it appropriate to authorise the Committee of Experts on the Application of Conventions to formulate such interpretations. In these circumstances uncertainty in regard to the exact meaning of certain Conventions proved a serious impediment to their general ratification. [23]

[21] Minutes of the 57th Session of the Governing Body, April 1932, pp. 344–345.

[22] Emphasis added. First Session of the Committee on Constitutional Questions of the Governing Body, *Official Bulletin*, 10 December 1945, Vol. XXVII, p. 128.

[23] ILO, Matters Arising out of the Work of the Constitutional Committee: Part 1. The Relationship of the ILO to Other International Bodies, Report IV(1), International Labour Conference, 27th Session (Montreal, 1945), p. 108.

36. Beyond the utility of determining questions of interpretation that were less prominent – yet equally important for the promotion of standards – the introduction of the new procedure was justified on three main grounds: the uncertainty on whether the ILO would have unhindered access to the International Court of Justice; the fact that the constitutions of other contemporary intergovernmental agencies contained similar clauses; and the need to respond to exceptional and urgent cases. [24] There was also general agreement that the rulings of the tribunal should be binding for all Member States since uniformity of interpretation was essential, and that this tribunal should not be a body set up separately to deal with each case which arose, but should be of a permanent character. [25]

37. As to the extent of the powers of the in-house tribunal, the drafters' intention was clearly to provide for a flexible arrangement which would offer all guarantees of impartiality of a judicial body and which would have the authority to examine questions of interpretation not considered sensitive or important enough to be referred to the Court. [26]

38. Rules could be drawn up to specify the nature of the questions or disputes that could be referred to the tribunal. However, since referral would ultimately remain the prerogative of the Governing Body, the competence of the tribunal should not be defined too narrowly so as to allow it to exercise discretion. Both the International Court of Justice and the in-house tribunal would be competent to examine questions of interpretation and would be expected to function in a complementary manner, especially as the Governing Body might decide on an ad hoc basis to request an advisory opinion from the International Court of Justice on a question on which the tribunal had already ruled.

39. An indicative list of interpretation questions that had raised serious difficulties was provided in the document on article 37(2) submitted to the 256th Session of the Governing Body (May 1993). [27] It may be useful to list a few examples of requests for an informal opinion [28] from the Office that an in-house tribunal could have been called upon to examine:

(i) Can various forms of semi-military services be regarded as exceptions in accordance with Article 2, paragraph 2(a), of the Forced Labour Convention, 1930 (No. 29)?

(ii) Does the Occupational Safety and Health Convention, 1981 (No. 155), cover measures in relation to work-related accidents and create corresponding entitlements vis-à-vis insurance funds under national law?

[24] First Session of the Conference Delegation on Constitutional Questions, *Official Bulletin*, 15 December 1946. Vol. XXVII, No.3, pp. 729 and 767–768.

[25] *Official Bulletin*, Vol. XXVII, No.3, p. 770.

[26] As explained in the document prepared for the 322nd Session of the Governing Body (November 2014), "[b]oth mechanisms would be available to address questions and disputes, the choice depending on the nature and importance of the subject matter. While the Organization should opt for the International Court of Justice to address a broader variety of legal matters, including matters of a constitutional nature, the in-house tribunal, once established, would afford a more technically specialized mechanism tailored to the expeditious determination of specific, and possibly less sensitive, interpretation requests"; see GB.322/INS/5, para. 56.

[27] GB.256/SC/2/2, para 50.

[28] Informal opinions have always been considered part of the administrative assistance that Member States can expect to receive from the ILO secretariat, subject to the understanding that the Constitution does not confer upon it any special competence to interpret international labour Conventions. For more information, see "Informal opinion". See also J. F. McMahon, "The legislative techniques of the international Labour Organization", *British Yearbook of international Law*, Vol. 41 (1965–66), pp. 87–101.

(iii) Is a Member State that is a party to the Seafarers' Identity Documents Convention (Revised), 2003 (No. 185), obliged to recognize the seafarers' identity documents issued pursuant to the Seafarers' Identity Documents Convention, 1958 (No. 108)?

(iv) What is the maximum continuous length of time that a seafarer can serve on board without taking leave under the Maritime Labour Convention, 2006, as amended (MLC, 2006)? [29]

2.3 Structure and composition

40. The in-house tribunal could be either a permanent structure or an ad hoc arrangement. In this context, a *permanent* tribunal should be understood as a judicial institution duly established by a constituent text (statute) whose members would only be convened (physically or remotely, as the case may be) when a specific interpretation question or dispute is referred to it. In other words, it would be a permanent body composed of judges appointed for a fixed term and who serve only as needed (on call or stand-by).

41. In contrast, a tribunal established on an ad hoc basis would consist of a panel of judges specially selected and appointed to examine a specific interpretation question or dispute, as in the case of Commissions of Inquiry examining complaints submitted under article 26 of the Constitution. The ad hoc nature of this arrangement would delay the process to such an extent that selecting and appointing the judges could at times take longer than the determination on the interpretation question. It would thus run counter to the objective of an "expeditious determination" of an interpretation question or dispute and could also affect the overall coherence of the tribunal's case law. [30]

42. If it is decided to establish a permanent structure, a total of eight judges could be appointed for a non-renewable period of five to seven years, to ensure the independence of judges, balanced geographical distribution and the unhindered operation of the tribunal in the event of unforeseen vacancies. While three judges would be the minimum composition of a panel, an odd number greater than three, such as five judges, could also be considered.

43. As regards the eligibility criteria for judges, the Office has previously highlighted four key aspects: the high moral character and independence required of any adjudicator; outstanding professional qualifications; adequate competence on the subject matter, in particular demonstrated expertise in labour law and international law; and proficiency in one of the three official languages (with knowledge of an additional language considered an advantage). In addition, the judges should all be of different nationalities and the composition should demonstrate, to the greatest extent possible, representation of the principal legal systems, fair geographical distribution and gender balance.

[29] This interpretation question has already given rise to an Office informal opinion, reiterated comments of the CEACR and a proposed amendment to the MLC, 2006 considered inconclusively by the Special Tripartite Committee at its fourth meeting (May 2022); see ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILC.108/III(A), 2019, paras 105–113, and *Background paper for discussion*, STCMLC/Part II/2022/2, p. 19.

[30] During the discussions in 1946, the Legal Adviser expressed the following view in relation to a proposed amendment to limit referral to the Tribunal to special urgent cases: "If the amendment [...] was adopted it would create an implication that a special tribunal would be set up for each specially urgent case, and they would have a group of single, unrelated decisions rather than a whole body of interpretation. If the paragraphs provided only for ad hoc tribunals rather than for a general authorisation, it would destroy what was achieved by the last sentence of the paragraph"; *Official Bulletin*, Vol. XXVII, No. 3, p. 768.

44. The tripartite consultations confirmed general acceptance of these criteria, which reflect standard requirements set forth in the statutes of international courts and tribunals. With regard to the view expressed by some constituents that the criteria should be broadened to include in particular experience with employers' and workers' organizations, the tribunal would be entrusted with the judicial determination of abstract legal questions of interpretation and not the resolution of individual employment disputes. As for the suggestion that certain functions such as having been a member of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) or employed by the ILO would be incompatible with appointment as a judge, the matter has been previously highlighted and should indeed be addressed in order to safeguard the independence and impartiality of the judges. [31]

2.4 Selection and appointment of judges

45. The process for selecting and appointing judges should fulfil various prerequisites, including transparency, inclusivity and tripartite ownership. In this connection, useful guidance may be found in the process for appointing judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal. The judges of both tribunals are appointed by the General Assembly upon recommendation from the Internal Justice Council, an independent body. [32]

46. For both United Nations tribunals, the process is initiated by advertising the vacancies in both the online and printed editions of major newspapers and on the website of the Office of Administration of Justice. [33] The Council reviews the applications, prepares a written test and invites some candidates to participate in order to test their legal expertise and drafting ability. On the basis of that written assessment, the Council selects candidates to be interviewed and approaches the relevant national bar associations to confirm their integrity. The Council then sets out the names of the recommended candidates in a report submitted to the General Assembly which contains both a brief summary of their careers and their curricula vitae presented in a standard and summarized format. [34]

47. Further guidance on the selection process may be drawn from the recently introduced procedure for the appointment of members of the CEACR. The selection process for the judges of the tribunal could replicate some requirements, for instance: vacancies should be given wide publicity through a call for expression of interest on the ILO's global and regional public website; the selection process should not entertain any interference or public statements by ILO constituents concerning the candidates or the selection process; and the Director-General should inform the Officers of the Governing Body and submit a detailed report on the selection process for their consideration at a dedicated sitting. [35]

[31] GB.322/INS/5, para 71.

[32] The Internal Justice Council is tasked with undertaking the search for suitable candidates and recommending to the General Assembly two or three candidates for each vacancy, with due regard to geographical distribution; see UN General Assembly resolution 62/228, 22 December 2007, paras 35–38.

[33] Vacancy announcements are also sent with a Note Verbale addressed to all Permanent Missions to the United Nations in New York, Geneva and Vienna, inviting them to bring the vacancies to the attention of the Chief Justice or head of the judiciary in each country; see UN General Assembly, resolution 65/251, 24 December 2010, para. 45.

[34] See, for example, Appointment of judges of the United Nations Appeals Tribunal and of the United Nations Dispute Tribunal: Report of the Internal Justice Council, A/70/190, 14 August 2015. The Council may not recommend more than one candidate from any one Member State; see UN General Assembly, resolution 63/253, 24 December 2008, para. 57.

[35] GB.343/PV, para. 556.

2.5 Procedural rules – Initiation and conduct of proceedings

48. Article 37(2) of the ILO Constitution makes it clear that interpretation questions might be referred to the tribunal by the Governing Body, which implies that a screening process would be necessary. That process should be simple, since the questions or disputes would in principle call for an expeditious determination. A single discussion by the Governing Body – possibly informed by a succinct background report prepared by the Office when needed – would be suitable and sufficient for referrals to the tribunal.

49. The proceedings themselves could follow a simplified framework in line with the main objectives of expeditiousness and cost-efficiency; in principle, they would not exceed three to six months. Upon receiving an interpretation question, the tribunal would send a standard communication to all Member States, the secretariats of the two non-governmental groups and the Office inviting them to submit observations within a fixed time limit. The tribunal would have the discretion to invite additional submissions or organize hearings. It would also be empowered to develop a fast-track procedure for urgent questions.

50. Procedural rules would be based on the premise that a referral would not be traditional litigation proceedings with an applicant and a respondent. All interested parties would be given the opportunity to participate by providing observations or other relevant information. The use of electronic means would foster transparency and accessibility as well as the agile and economical functioning of the tribunal. All procedural communications and the written submissions would be published on a dedicated web page.

51. Concerning the means of interpretation, the tribunal would be guided by the principles of customary international law enshrined in articles 31 to 33 of the Vienna Convention on the Law of Treaties, taking into account the specificities of treaty interpretation within the ILO. Thus, in analysing the ordinary meaning of terms and expressions used in international labour standards in the light of their object and purpose, special consideration would be given to: the preparatory work which preceded the adoption of the standards in question, in particular the Office reports and the record of proceedings of the Conference technical committees; the use of identical or similar terms in other international labour instruments; any relevant comments of ILO supervisory bodies; and the extent to which the law and practice of Member States may assist in clarifying the interpretation question at hand.

52. In March 2022, some constituents requested clarification on the possibility of allowing the Committee of Experts and the Committee on the Application of Standards to refer interpretation questions to the tribunal. If the Governing Body decides to adopt special arrangements for the implementation of article 37, this might lead the supervisory bodies, and in particular the two Committees, to draw attention to any significant difficulties relating to the interpretation of Conventions they may encounter in the exercise of their functions. This could prompt a Governing Body member or Member State to propose the possible referral of a particular question to the tribunal.

53. Strong reservations were expressed in March 2022 about the suggestion of allowing other international institutions to file a request for interpretation with the tribunal. [36] The aim of that suggestion had been to enable the Governing Body to address, in the exercise of its discretion under article 37(2), the increasing use of ILO Conventions by other supervisory bodies or other regional or international courts. Similar to the provisions of article 14 of the Constitution in the context of setting the agenda of the Conference, the Governing Body could consider any

[36] GB.344/PV, para. 146.

suggestion by a public international organization that a specific question be referred to the tribunal. This could possibly result in an urgent referral: for instance in the event that the interpretation of a specific provision of an international labour Convention is sought by an international organization or an international expert body and the Governing Body considers it important to preserve and promote the ILO's authority in interpreting international labour standards. Upon receiving such a request, the Governing Body would exercise its prerogative to decide whether to refer the question to the tribunal.

2.6 Relationship with supervisory bodies

54. In earlier discussions, some constituents expressed concerns about the possible impact of the tribunal on the work of the supervisory bodies. Reference was made, for instance, to unintended consequences if the procedure were used excessively, and the need to avoid weakening the Committee of Experts. [37]

55. Under the Constitution, the *supervision* of the application of standards and the *interpretation* of international labour Conventions are two interrelated but distinct processes: the supervisory bodies address concrete questions of implementation of ratified Conventions at the national level, while the International Court of Justice and the tribunal may address legal questions of interpretation, focusing on the scope and meaning of legal provisions outside the country-specific application of those provisions through national legislation. Yet, these two processes should be carried out in a harmonious manner in the interest of a robust system of standards; as the Governing Body put it in its March 2022 decision, settling interpretation disputes in accordance with article 37 of the Constitution is fundamental for the effective supervision of international labour standards.

56. Any future rules governing the tribunal would have to strike a careful balance between the two complementary functions of supervision and interpretation and the responsibilities of the respective organs entrusted with those functions. At the same time, the added value in terms of legal and moral authority that a specialized judicial body could contribute to the reputation and visibility of the ILO's normative system should not be underestimated. Having eminent adjudicators settling interpretation questions expeditiously and through binding decisions would represent a major qualitative development in the ILO standards system. As the in-house tribunal develops its case law and refines its working methods, alongside the regular functioning of the supervisory bodies, increased clarity on the demarcation between interpretation and supervision of standards might reasonably be expected.

2.7 Legal effect of an award

57. Under the Constitution, once the tribunal has rendered its decision, the Office must promptly circulate it among Member States and also transmit to the Conference any observations received from Member States.

58. As regards the legal weight of the tribunal's awards, the preparatory work (*travaux préparatoires*) that led to the constitutional amendment of 1946 confirm that these awards were intended to be binding and opposable to all. [38] The drafters envisioned two judicial bodies - the International Court of Justice, on the one hand, and the in-house tribunal, on the other -

[37] GB.344/PV, paras 146 and 154.

[38] GB.322/INS/5, para. 96 and footnote 35.

adjudicating, each within its own scope of competence, interpretation disputes which the Governing Body placed before them as it saw fit, and issuing binding decisions.

59. The preparatory work further confirms that establishing a procedure for appeals, which would mean that the in-house tribunal would be one of first instance, was neither intended nor considered. [39] However, there is one important element of article 37(2) that speaks in favour of a "vertical" relationship between the Court and the tribunal: the requirement that the tribunal may not ignore any applicable judgment of the Court. Hence, nothing would seem to prevent a question or dispute from being submitted to the Court after being examined by the tribunal. Nevertheless, allowing the possibility for a tribunal award to be challenged presents a risk, however theoretical, that all interpretation questions – even those of "insufficient importance" or of "so meticulous a character" – might end up before the Court, which would be ill-advised and inconsistent with the rationale of legal certainty underpinning article 37.

2.8 The way forward

60. If the Governing Body agrees to pursue its discussion of the implementation of article 37(2) and the laying of the foundations of an in-house tribunal, the Office could facilitate tripartite consultations with a view to preparing a set of draft rules drawing upon earlier relevant reports, for the Governing Body's consideration at its 352nd Session (November 2024). [40]

61. The tribunal could be provisionally established for an initial period, for instance of five or seven years. [41] At the end of this trial period, the Governing Body could evaluate the functioning of the tribunal and decide whether to confirm its establishment and make any adjustments to the rules that would be required. Any revised set of rules would be submitted to the Conference for approval.

[39] The reference to the binding nature of the Court's judgments and advisory opinions was added to the Office's original proposal at the initiative of the tripartite members of the Working Party responsible for examining certain amendments to the Constitution. The Working Party and the Conference decided not to provide for the possibility of appeal to the Court. During the examination of the provision by the Committee on Constitutional Questions at the 1946 session of the Conference, the Government member of Australia submitted an amendment to provide for a right of appeal to the International Court of Justice for "any member who is dissatisfied with any decision by such a tribunal". The amendment was withdrawn without discussion; see *Official Bulletin*, Vol. XXVII, No. 3, pp. 729, 767–768, 770–771, 834 and 863.

[40] A similar approach was proposed in 2014 (see GB.322/INS/5, para. 53).

[41] The League of Nations Administrative Tribunal (which became the ILO Administrative Tribunal after the dissolution of the League of Nations) was established in September 1927 on an experimental basis for three years through a resolution of the Assembly adopting its statute (League of Nations, Official Journal, Special Supplement No. 54, Records of the 8th Assembly, Plenary Meetings, 478). By a new resolution adopted in 1931, the Assembly confirmed the statute without amendments thus turning the tribunal into a permanent body of the League (League of Nations, Official Journal, Special Supplement No. 93, Records of the 12th Assembly, Plenary Meetings, 152). Similarly, the rules for regional meetings were adopted by the Governing Body in basis (see GB.267/LILS/1) and were confirmed by the Conference with a few modifications in 2002 (see Provisional Record No. 2, International Labour Conference, 90th Session).

▶ Draft decision

62. The Governing Body decided to:

(a) approve the introductory note and procedural framework set forth in Appendix I of document GB.347/INS/5 for the referral of interpretation questions or disputes to the International Court of Justice under article 37(1) of the ILO Constitution;

(b) continue to discuss the implementation of article 37(2), and to this end, requested the Director-General to organize tripartite consultations with a view to preparing draft rules for the establishment of a tribunal for its consideration at its 352nd Session (November 2024).

▶ Appendix I

Referral of interpretation questions or disputes to the International Court of Justice under article 37(1) of the Constitution

Introductory note

Scope and purpose

The procedural framework for the referral of interpretation questions or disputes to the International Court of Justice (the Court) under article 37(1) of the ILO Constitution does not override article 37 of the Constitution or the provisions of the Standing Orders of the International Labour Conference and of the Governing Body. It provides a set of practical modalities that the tripartite constituents commit to applying in good faith with a view to facilitating a sound, efficient and time-bound referral process to the advisory jurisdiction of the International Court of Justice when needed.

Concretely, the procedural framework addresses: (i) the internal measures and decisions prior to the initiation of advisory proceedings; (ii) the role of the Office in preparation of and during the proceedings; and (iii) the actions to be taken or planned immediately following the delivery of the Court's advisory opinion.

Submission of referral request

In keeping with well-established constitutional theory and practice, not all interpretation questions or disputes warrant immediate referral to the International Court of Justice, and in this regard, the Governing Body is responsible for assessing referral requests. The referral process would seek to resolve a serious and persistent disagreement among tripartite constituents over the interpretation of a provision of the ILO Constitution or of an international labour Convention, [1] on the assumption that attempts for reaching a generally acceptable understanding through tripartite dialogue have proved unfruitful, and that under the circumstances legal certainty may only be ensured by having recourse to the dispute settlement procedure provided for in article 37(1) of the Constitution.

The holding of inconclusive tripartite discussions, unsuccessful mediation initiatives or other similar interventions could indicate that there is little likelihood for the effective resolution of the dispute and that an authoritative determination on the interpretation issue may be called for. It is for the Governing Body to ascertain the impasse, taking especially into account the duration and seriousness of the dispute.

In the interest of procedural economy and efficiency, to be examined by the Governing Body, a referral request should enjoy a certain degree of support among constituents. This aims at striking a balance between the provision of article 37(1) and the desirability to shield the process against referral requests with little chance of being favourably considered. Co-sponsorship of a referral request by at least 20 regular (that is, voting) Governing Body members, or at least 30 Member States (irrespective of whether they are members of the

[1] For the purposes of this procedural framework, the term "Convention" should be understood as encompassing also Protocols to existing Conventions.

Governing Body or not), would represent an indicative level of support which would directly activate the first step of the process, namely the expeditious preparation of an Office report, within a maximum of two months, and its transmission to the next Governing Body session. Any referral request which would not have the above-indicated level of support would be referred to the Officers of the Governing Body who could recommend appropriate follow-up action.

The supervisory bodies may not directly seize the Governing Body with a referral request.

Office report

The Office report to facilitate the Governing Body's determination of the merits of a possible referral is a technical document containing detailed background information on the question or dispute. It shall be prepared under the sole responsibility of the Director-General and shall not be subject to prior consultations with the groups.

Governing Body debate and decision

In considering action under article 37(1), the Governing Body should be satisfied that no viable option is available other than judicial means in view of the fact that the dispute persists and that attempts for reaching a generally acceptable understanding through tripartite dialogue have failed.

Keeping with the overall objective of ensuring legal certainty in the interest of the Organization, the Governing Body discussion may not exceed two consecutive sessions. Within that time frame, the Governing Body should decide whether it approves the referral to the Court, and if so, which would be the legal question(s) to be communicated to the Court. As per standard practice, the Governing Body decision should to the extent possible be taken by consensus, failing which the decision would need to be taken by a simple majority vote.

In view of the institutional importance of a referral to the International Court of Justice and in the interest of an inclusive discussion, all interested Member States should be allowed to inform the Governing Body discussions through submission of written comments. It would be particularly important to solicit the views of those Member States which have ratified the Convention(s) concerned but are not represented on the Governing Body.

The Governing Body may decide, as it may deem appropriate, to submit its decision to request an advisory opinion to the next session of the Conference for approval. If so decided, the Governing Body should transmit a draft resolution, including the legal question(s) to be put to the Court, inviting the Conference to approve the Governing Body's decision, including the legal question(s) to be put to the Court, and authorize the referral. As per standard practice, the Conference approval should to the extent possible be decided by consensus, failing which the approval would need to be decided by a simple majority vote.

Whether the referral decision is taken by the Governing Body or by the Conference, it should provide succinct contextual information, the legal question(s) in respect of which the Court's guidance is requested, any instructions to the Director-General, for instance that an urgent answer is needed or that the authorization of the Court to allow for the participation of international employers' and workers' organizations should be expressly solicited, and any measures to be taken pending the advisory opinion, such as the continuation of the regular supervision of the Convention(s) in question, a call to all constituents to collaborate fully and in good faith with the Court and a commitment to implement the Court's opinion as a final and binding pronouncement.

Advisory proceedings

Throughout the referral process and the ensuing advisory proceedings, the Office should exercise utmost discretion and adhere to its duty of neutrality and impartiality regarding the interpretation dispute.

In transmitting the Governing Body's or the Conference's decision, as the case may be, and the dossier to the Court, the Director-General should expressly request the Court to permit through "a special and direct communication", as provided for in article 66(2) of the Court's Statute, the international employers' and workers' organizations enjoying general consultative status with the ILO to participate in the written and oral proceedings. In the same communication, the Director-General should indicate whether this is an urgent request in accordance with article 103 of the Court's Rules. The governments of those Member States considered by the Court as likely to be able to furnish information on the question shall be invited to participate by means of a special and direct communication. Any Member State which has not received such special communication may address a specific request to the Court.

The initiation of advisory proceedings may not prevent the Office, the supervisory organs or the constituent groups from continuing to discharge their respective standards-related responsibilities and functions with respect to the Convention(s) concerned. The non-suspension of supervisory procedures aims at ensuring that an interpretation question or dispute, however serious, does not bring key institutional functions to a standstill, particularly in view of the overall length of the Court proceedings and the time that may be needed to receive its opinion.

For the sake of transparency, the Office should ensure throughout the duration of the proceedings that relevant documents and electronic resources (such as the NORMLEX database) indicate that a question or dispute exists relating to the interpretation of a specific provision of the ILO Constitution or of an international labour Conventions and that the matter has been referred to the International Court of Justice for decision in accordance with article 37(1) of the Constitution.

Advisory opinion – Follow up

Consistent with the guiding principle that the early resolution of a dispute relating to the interpretation of the Constitution or of an international labour Convention can promote legal certainty, the Court's opinion together with a proper analysis of any required follow-up action should be brought before the Governing Body as soon as possible.

Whether any follow-up action is required or advisable other than disseminating the Court's advisory opinion will depend on the nature of the question put to the Court and the Court's answer. The Governing Body enjoys discretion as to the type of measures it may adopt or recommend in order to implement the Court's opinion. It may not request, however, the Court to review its opinion.

In the interest of a reasonably expedient process, the Governing Body should limit its consideration of appropriate follow-up to the Court's advisory opinion to two consecutive sessions. The Office report to be submitted to the Governing Body should also contain detailed information on the total costs incurred by the secretariat for the purposes of the advisory proceedings.

Procedural framework

Submission of referral request

1. A request for the referral of an interpretation question or dispute to the International Court of Justice (the Court) shall be addressed to the Director-General and shall specify the subject of the question or dispute, the provision(s) of the ILO Constitution or of the international labour Convention(s) concerned, and the reasons for submitting the request.

2. To be examined by the Governing Body in accordance with this procedural framework, a referral request should be filed by at least 20 regular Governing Body members or at least 30 Member States (whether members of the Governing Body or not).

Office report

3. Upon receiving a request for the referral of an interpretation question or dispute, the Director-General shall inform the Officers of the Governing Body and shall prepare a report to be submitted to the Governing Body for consideration as expeditiously as possible but not later than two months from the receipt of the referral request.

4. The Office report shall include all relevant information, particularly on the nature and origin of the interpretation question or dispute and the different positions expressed by constituents, the negotiating history of the provision(s) concerned, the views of the supervisory organs as well as the legal question(s) that might eventually be referred to the Court.

Governing Body debate and decision

5. To refer an interpretation question or dispute to the Court, the Governing Body should be satisfied that a serious and persistent disagreement exists concerning the scope or meaning of a provision of the ILO Constitution or of one or several international labour Conventions and that efforts to reach a generally acceptable understanding through tripartite dialogue among constituents have not produced, and are not likely to produce, conclusive results.

6. The Governing Body should take a decision on the referral request not later than the session following that at which the Office report is considered and debated. The Governing Body should decide at the same time on the referral and the legal question(s) to be put to the Court.

7. In the absence of consensus, the Governing Body decision shall be taken by simple majority vote.

8. Any interested government which is not represented on the Governing Body shall be given the opportunity to contribute to the debate through submission of written comments within the limits to be determined by the Governing Body.

9. The decision to refer an interpretation question or dispute to the Court shall be deemed as an authorization to cover the costs of the Office participation in the written and oral proceedings.

10. The Governing Body may refer its decision on referral of an interpretation question or dispute to the Court to the Conference for approval at its next session.

Advisory proceedings

11. Once a decision is made to refer an interpretation question or dispute to the Court, the Director-General shall promptly communicate to the President or the Registrar of the Court copy of that decision, including the legal question(s) that should be examined by the Court.

12. The Director-General shall also transmit to the Registrar a dossier as expeditiously as possible and in any case not later than one month from the date of the formal communication of the request for an advisory opinion. The dossier shall provide all relevant background information and shall explain the process that led to the referral and the scope of the legal question(s) put to the Court.

13. In transmitting the decision and the dossier to the Court, the Director-General should expressly request the Court to invite through a special and direct communication the international employers' and workers' organizations enjoying general consultative status with the Organization to participate in the proceedings and should indicate whether the request necessitates an urgent answer.

14. The Office shall publish the Director-General's transmission letter, the dossier and other relevant documents or information concerning the advisory proceedings at a special web page which shall be kept regularly updated.

15. Throughout the advisory proceedings, the Director-General shall coordinate the secretariat responses to any requests of the Court, including the participation to any oral proceedings. The Office may not assume any coordination role with respect to the participation of the tripartite constituents in the proceedings and should act at all times with discretion and in strict neutrality and impartiality.

16. The Office may not intervene in the proceedings except at the express request of the Court.

17. The referral of an interpretation question or dispute to the Court and the ensuing advisory proceedings may not suspend, or otherwise affect, the supervision of the application of any Convention(s) which may be the subject of those proceedings.

Advisory opinion – Follow up

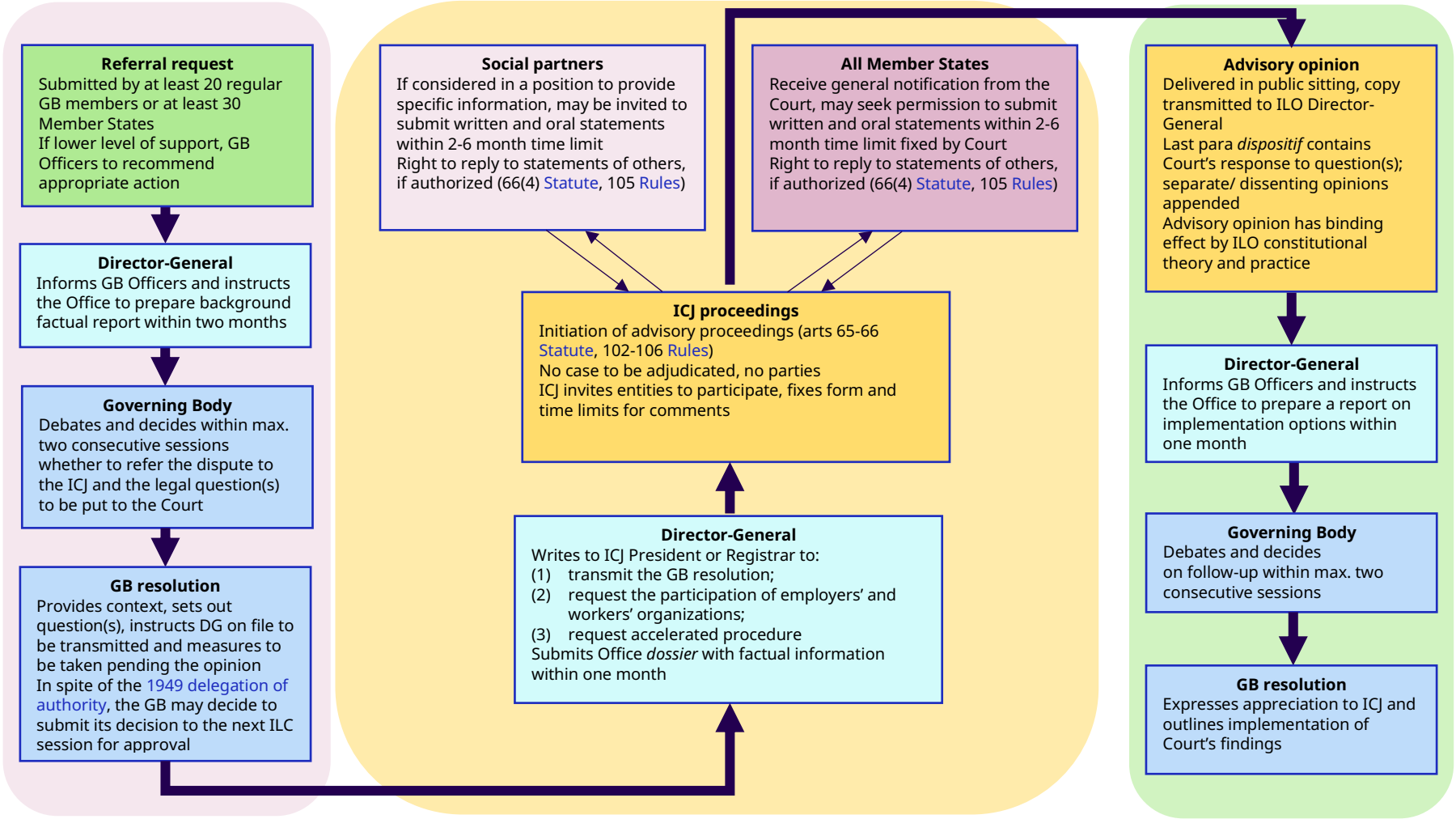
18. Upon receiving the Court's opinion and in order to facilitate an informed decision regarding any follow-up action, the Director-General shall transmit copy of the advisory opinion rendered by the Court to the Officers of the Governing Body and shall prepare a comprehensive report as expeditiously as possible but not later than one month from the date of receipt of the Court's opinion.

19. The Office report shall contain an analysis of the Court's response to the legal question(s) and shall identify any measures that would be necessary or advisable to give effect, in the short or longer term, to the advisory opinion.

20. The Governing Body shall take a decision on any appropriate follow-up action not later than the session following that at which the Office report is considered and debated.

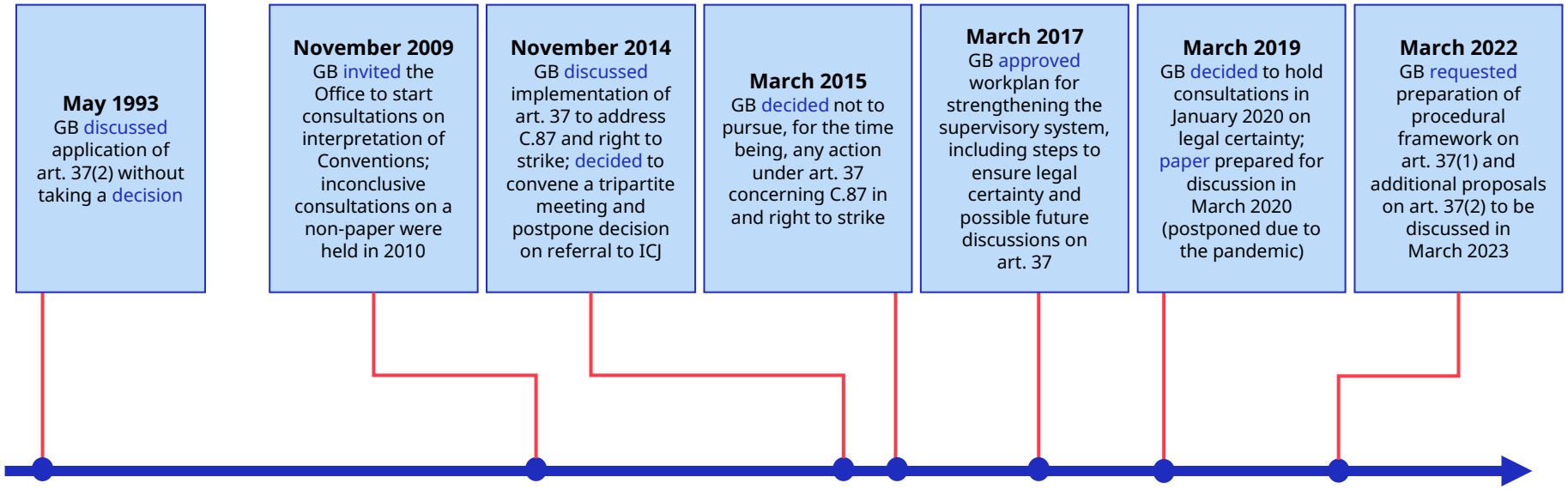
Appendix II

Graphic representation of the procedural framework



Appendix III

The debate on article 37 – Overview and key dates



Art. 37 – Origins and past practice

▶ 1919
Article 423, Treaty of Versailles: Permanent Court of International Justice (PCIJ) competent body to interpret ILO Conventions

▶ 1932
PCIJ advisory opinion on the Night Work (Women) Convention, 1919 (No. 4)

▶ 1946
ILO Constitution amendment: PCIJ replaced by International Court of Justice (ICJ); addition of a new provision concerning in-house tribunal for expeditious settlement of interpretation questions

Appendix IV

The six precedents of interpretation requests to the Permanent Court of International Justice under article 37

Designation of workers' delegate for the Netherlands at the third session of the International Labour Conference

Advisory opinion of 31 July 1922

Request introduced by the Conference resolution (18 November 1921).

Referral decided by unanimous Governing Body agreement (January 1922).

Duration of proceedings: 2.5 months (from 22 May to 31 July 1922).

Three international organizations were invited to participate: International Association for the Legal Protection of Workers; International Federation of Christian Trades Unions; International Federation of Trades Unions. Two organizations provided oral statements.

Competence of the ILO in regard to international regulation of the conditions of labour of persons employed in agriculture

Advisory opinion of 12 August 1922

Request introduced through motion submitted by the French Government directly to the Council of the League of Nations (January 1922).

Request discussed at the Governing Body based on an oral report from the Director but no decision.

Duration of proceedings: 3 months (22 May to 12 August 1922).

Eight international organizations were invited to participate: International Federation of Agricultural Trades Unions; International League of Agricultural Associations; International Agricultural Commission; International Federation of Christian Unions of Landworkers; International Federation of Land-workers; International Institute of Agriculture; International Federation of Trades Unions; International Association for the Legal Protection of Workers. Several organizations submitted written statements and also participated in the oral proceedings.

Competence of the ILO to examine proposals for the organization and development of the methods of agricultural production

Advisory opinion of 12 August 1922

Request introduced by the French Government through a letter addressed directly to the Secretary-General of the League of Nations on 13 June 1922.

There has been an Office report to the Governing Body (July 1922) but no discussion or decision.

Duration of proceedings: 24 days (from 18 July to 12 August 1922).

One international organization was invited to participate: International Institute of Agriculture, which sent a separate communication.

Competence of the ILO to regulate, incidentally, the personal work of the employer

Advisory opinion of 23 July 1926

Request introduced by the Employers' group to the Governing Body through a letter on 8 January 1926.

Referral was discussed at the Governing Body and decided by vote (30th Session, January 1926).

Duration of proceedings: 4 months (from 20 March to 23 July 1926).

Three international organizations were invited to participate: International Organization of Industrial Employers; International Federation of Trades Unions; International Confederation of Christian Trades Unions. Two submitted written memoranda and all three participated in the hearings.

Free City of Danzig and the ILO

Advisory opinion of 26 August 1930

Request introduced by the Office following a letter from the Government of Poland dated 20 January 1930, requesting that the Free City of Danzig be admitted to the ILO.

Referral was discussed at the Governing Body and decided by vote (48th Session, April 1930).

Duration of proceedings: 4.5 months (from 15 April to 26 August 1930).

No international organization was invited to participate.

Interpretation of the Night Work (Women) Convention, 1919 (No. 4), concerning employment of women during the night

Advisory opinion of 15 November 1932

Request introduced by the Government of the United Kingdom of Great Britain and Northern Ireland through a letter addressed to the Governing Body Chairman on 20 January 1932.

Referral was discussed at the Governing Body and decided by vote (57th Session, April 1932).

Duration of proceedings: 6 months (from 10 May to 15 November 1932).

Three international organizations were invited to participate: International Federation of Trades Unions; International Confederation of Christian Trades Unions; International Organization of Industrial Employers. Two submitted written statements and also participated in the oral proceedings.

The full text of PCIJ advisory opinions and pleadings, oral arguments and documents submitted to the Court may be consulted on the International Court of Justice website.

Document No. 41

Minutes of the 347th Session of the Governing Body, March 2023, paras 229–346

Governing Body

347th Session, Geneva, 13–23 March 2023

Minutes of the 347th Session of the Governing Body of the International Labour Office

Contents

(b) welcomed the Director-General's commitment to take into account its guidance and his proposal to hold tripartite consultations in preparing a governance structure including criteria and a procedure for partners' engagement and a thematic plan, built on the Decent Work Agenda, as laid down in the ILO Declaration on Social Justice for a Fair Globalization (2008), as amended in 2022, and reaffirmed in the ILO Centenary Declaration for the Future of Work (2019), and other relevant ILO documents;

(c) requested the Director-General to report to the Governing Body on further developments regarding the Coalition at its 349th Session (October–November 2023), and to take into account its continuing guidance.

(GB.347/INS/4, paragraph 31, as amended by the Governing Body)

5. Work plan on the strengthening of the supervisory system: Proposals on further steps to ensure legal certainty (GB.347/INS/5)

229. **The Employer spokesperson** expressed disappointment that despite the comprehensive feedback received during informal consultations, the Office had failed to take the majority of views expressed into account when preparing the procedural framework. It was not the case that agreement had been reached on the way forward, as implied in the draft decision. In addition, the core issue underlying discussions was the interpretation by the Committee of Experts on the Application of Conventions and Recommendations of the right to strike in the context of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); however, that issue was not the main consideration of the proposals. Furthermore, the Office had not presented the groups concerned with all possible means to resolve interpretation issues internally, such as a tripartite technical meeting or a dedicated discussion at the International Labour Conference. The Employers' proposed amendment therefore introduced a new paragraph providing an internal solution to address the right to strike issue, which should ensure that all constituents could engage actively in the process, solutions were based on consensus and adopted outcomes were universally relevant and accepted.

230. The Employers' objective was to ensure that the Committee of Experts did not create new obligations beyond those intended by the tripartite constituents at the Conference. The Committee of Experts should refer difficult questions or gaps in a Convention to the constituents for them to resolve; its failure to do so in the case of the right to strike had led to the current dispute.

231. While article 37(1) of the ILO Constitution provided an avenue to resolve interpretation questions or disputes, referral to the International Court of Justice (ICJ) should be a last resort. It would be preferable to seek internal solutions that received wide support from the constituents. The advisory opinions of the ICJ were not legally binding; the Employers doubted whether it was legally feasible to include in the introductory note a reference to a commitment to implement the Court's opinion as final and binding, in particular for those who did not support the referral. The impact on non-State actors had not been considered. Furthermore, such a commitment could place increased pressure on ratifying countries to comply and might entail adverse consequences, notably a loss of confidence in the predictability and reliability of obligations under ratified Conventions and, as a result, the reluctance of constituents to set new standards.

232. In order to create the necessary trust in the process, the referral request should only be examined if it had the support of the majority of all States parties to the Convention concerned. The International Labour Conference should be involved throughout, in order to ensure the participation of States parties directly affected by an ICJ advisory opinion. The Employers were concerned that the International Labour Standards Department might not be strictly neutral, in particular where an issue originated in an assessment by the Committee of Experts. In addition, they held that interpretations of a Convention under examination by the Court should be suspended during ICJ proceedings.

233. Her group could accept neither the introductory note nor the procedural framework as proposed. Substantive change was needed to reflect the majority views, which required further consultations and consensus building among constituents.

234. With regard to the proposals for the implementation of article 37(2) of the Constitution, the Employers had substantial comments concerning the structure and composition of an in-house tribunal, which they remained open to discuss with the Office.

235. Her group proposed the following amendments to the draft decision:

> The Governing Body decided to continue discussing at its 349th Session in November 2023:
>
> (a) ~~approve~~any unresolved issues in the introductory note and procedural framework set forth in Appendix I of document GB.347/INS/5 for the referral of interpretation questions or disputes to the International Court of Justice under article 37(1) of the ILO Constitution;
>
> (b) ~~continue to discuss~~ the implementation of article 37(2), and to this end, requested the Director-General to organize tripartite consultations with a view to preparing draft rules for the establishment of a tribunal for its consideration ~~at its 352nd Session (November 2024)~~;
>
> (c) further proposals to ensure legal certainty and strengthen the supervisory system, including by placing an item for discussion on the agenda of the International Labour Conference.

236. She expressed the hope that a positive way forward would be found but underscored that as the topic under consideration was complex and highly sensitive, time should be taken to find a consensual solution.

237. **The Worker spokesperson** recalled that, as the Legal Adviser had previously explained, under article 37(1) of the Constitution, it was expected that interpretation issues would be referred to the ICJ. Article 37(2) simply provided for the possibility of referral to a tribunal, which could in any case be overruled by decision of the Court. It was therefore clear that, according to the ILO's Constitution and legal framework – which there was no intention of changing – there was no strict need for a procedural framework, nor were there any requirements in terms of minimum support for making a referral or qualifying the seriousness of an interpretation issue. Similarly, it was not necessary to exhaust all other means prior to making a referral. The only barrier in place was that in article 37(2) whereby Governing Body approval was required for referral to a tribunal. So even without a procedural framework, the Members of the ILO were able to raise a matter of interpretation and a request a referral to the ICJ; that would go on the agenda of the Governing Body for a decision according to its normal procedures.

238. There was currently only one serious and persistent problem of interpretation within the Organization, namely on Convention No. 87, in relation to the right to strike, and the competence of the Committee of Experts to provide guidance on the matter. That was no minor issue for the Workers' group, as the right to strike was the corollary of the rights of freedom of association and collective bargaining; it redressed workers' unequal power relationships with employers and businesses. Although the right to strike was not an absolute

right, there were limits to the restrictions that could be placed on it, as had been established by long-standing authoritative guidance from the Committee of Experts. The failure of the ILO to confirm that the right to strike was recognized and protected under Convention No. 87 was bad, not only for workers but also for the Organization's reputation and credibility. Employers and their organizations were happy to call on the judiciary when seeking to challenge a strike, but appeared reluctant to make proper use of the existing constitutional means to resolve the issue on the right to strike. Although not strictly necessary, the proposed procedural framework could potentially provide a step-by-step approach to dealing with obligations under article 37(1) of the Constitution. The Workers' group was ready to discuss the details of the framework in good faith, but did not wish to enter into further general discussions that would merely create further delays.

239. The proposed procedural framework should be simple, practical and aligned with the current procedures of the Governing Body as far as possible. It should also fully reflect the guidance provided during the 344th Session. The Workers' group broadly supported the proposed procedural framework and agreed with its parameters as per paragraphs 14 and 15 of the document. In terms of the level of support or "threshold" for triggering a full-fledged referral discussion in the Governing Body, any threshold should be indicative, as it governed the submission of a request, rather than the decision-making process itself. Under the existing legal framework, there were no limits on members or groups raising a matter of interpretation. However, in the interest of obtaining a practical framework, the group could support an indicative threshold of 20 Governing Body members for filing a referral request, on the understanding that it would not constitute a receivability rule in legal terms. The alternative threshold of at least 30 Member States should be adapted or deleted; although it made sense to allow non-Governing Body members to submit requests, clarification was needed regarding the Employers' and Workers' groups. In addition, although the introductory note mentioned the possibility of referring requests that did not achieve the required level of support to the Officers of the Governing Body, that matter should be addressed in the text of the procedural framework in order to ensure consistency with the Organization's legal framework, which did not contain any thresholds. Five of the six cases submitted to the predecessor to the ICJ had been initiated by single Member States, and they had been key questions requiring clarification.

240. In terms of time frame, it was essential to ensure that Governing Body decisions were not delayed indefinitely; it was correct to state that recourse to article 37(1) should be considered as a last resort in case of a serious and persistent interpretation issue. However, the words "last resort" should not be understood as requiring endless procedures to be completed prior to referral. Recognition of the importance of social dialogue did not preclude the possibility of referring matters to a court; disputes needing an authoritative legal opinion might arise even where highly developed social dialogue and collective bargaining systems existed. Furthermore, the failure of social dialogue to resolve a matter should not be a formal precondition for referral. It had been agreed at the 344th Session that interpretation disputes regarding legal matters, such as the authoritative interpretation of a Convention, could not be solved by social dialogue, as that did not provide the necessary legal certainty. The Workers' group therefore supported the wording in paragraph 5 of the proposed framework; the inclusion of any further requirements to be fulfilled by the Governing Body prior to referral would go against article 37(1), which had no such requirements. The group also agreed that the discussion of the referral and the legal question should be combined, as stated in paragraph 6.

241. Concerning paragraph 21 of the document, she stressed that the Governing Body had full competence to take referral decisions based on the mandate given to it by the International Labour Conference in 1949. Opening up the Governing Body's decision-making on referrals under article 37 to all Member States would set the wrong precedent and call its position into question; her group did not support such a move. However, the proposal to allow Member States that were not Governing Body members to submit written comments, as per paragraph 8 of the proposed framework, was acceptable. If governments had strong views on involving the Conference in some way, her group would consider a provision allowing it to validate the Governing Body's decision, as long as that took place as a limited exercise on a case-by-case basis, as outlined in paragraph 22 of the document. The group therefore supported the text proposed in paragraph 10 of the procedural framework.

242. Turning to the provisions of article 37(2) of the Constitution, she noted that there had not previously been an appetite for the establishment of a tribunal. Indeed, the Employers' group had stated at the 344th Session of the Governing Body that such a tribunal would not be suited to resolving long-standing, complex and contentious issues such as the Committee of Experts' interpretation of the right to strike in Convention No. 87; she would be interested to know if it still held that view. Her group shared the analysis of the Office and Legal Adviser that article 37(2) was intended for settling narrow technical questions, rather than serious disputes with broader systemic implications, and that it did not guarantee legal certainty. Combined with the fact that a potential internal tribunal could interfere with the authority and independence of the current supervisory system, including the Committee of Experts, and the requirement to deal with disputes with serious, far-reaching implications through article 37(1), it did not make sense to invest in a process under article 37(2), as there was no assurance that it would provide the necessary legal certainty. The Workers' group therefore strongly advised against developing further proposals for establishing an internal tribunal based on article 37(2), as that would not help resolve the current issue regarding the right to strike, which could only be addressed through article 37(1). It therefore proposed the following amendment to subparagraph (b) of the draft decision:

> (b) continue to discuss the implementation of article 37(2~~), and to this end, requested the Director-General to organize tripartite consultations with a view to preparing draft rules for the establishment of a tribunal for its consideration at its 352nd Session (November 2024)~~.

243. Concerning the amendment proposed by the Employers' group, she objected to the proposal to postpone discussions still further, as extensive consultations had already been held. Despite stressing the need for consensus, that group had already gone against existing consensus in challenging the interpretation of Convention No. 87 in relation to the right to strike. The proposed subparagraph (c) to place an item for discussion on the agenda of the International Labour Conference was unclear, and suggested that a mechanism for achieving legal certainty did not already exist, when it was in fact adequately covered by article 37 of the Constitution, as expressed in the Governing Body's decision of March 2022 concerning the work plan on the strengthening of the supervisory system. Therefore, the Workers' group did not support the amendment proposed by the Employers' group.

244. **Speaking on behalf of the Africa group,** a Government representative of Malawi highlighted the importance of social dialogue in dispute resolution. Her group recognized the agreed criteria for referring questions to the ICJ under article 37(1). Any procedural framework should be uniformly applied to all requests. She noted the proposal to include all Member States in the discussion to trigger referrals, and agreed that the Governing Body, meeting as a Committee of the Whole, was a suitable forum for filtering, analysing and debating referral

requests, which would be approved by a resolution of the International Labour Conference. She reiterated the need for the Office to remain neutral and impartial throughout the referral process.

245. Concerning the proposals relating to article 37(2), she said that the ICJ should be a last resort. Thus, an in-house tribunal should be established as a mechanism to resolve disputes in the first instance, which could be permanent or ad hoc in nature. Parties that were dissatisfied with the outcome of that tribunal would then have recourse to a higher authority. She agreed with the proposed eligibility criteria for judges, emphasizing the need to safeguard their independence and impartiality, while ensuring the representation of different legal systems. The tripartite selection process should be transparent and inclusive. A balance should be struck between the tribunal's functions of supervision and interpretation. No restrictions should be imposed if a party felt aggrieved by an award of the tribunal. While it was possible that a tribunal award may be challenged, she noted that the Governing Body would still have to endorse the referral of any item to the ICJ.

246. Her group had several outstanding questions. She asked the Office to clarify whether the advisory opinions of the ICJ would be binding on all Member States. She questioned why the referral procedure under article 37(1) was to be adopted prior to agreement being reached on the establishment of an in-house tribunal. The Office should clarify: why an in-house tribunal could not have jurisdiction over all matters of interpretation; the criteria to be used to determine the issues of most importance; the role of the Governing Body and International Labour Conference in determining whether a case should be referred to the proposed in-house tribunal or the ICJ; and the procedure and time frame for referring a dispute to the latter.

247. **Speaking on behalf of GRULAC,** a Government representative of Colombia said that article 37 provided a framework for addressing discrepancies in the interpretation of Conventions. A simple, transparent and equitable procedure under article 37(1) would provide stability, without creating any additional provisions. She supported setting an indicative threshold for referring a dispute to the ICJ that could include Governing Body members or Member States, ensuring any Member State was able to initiate an article 37 procedure. A time frame should be established for Governing Body discussions on possible referrals. The International Labour Conference should approve the referral of a dispute to the ICJ, following detailed analysis by the Governing Body. Care should be taken to ensure that all interested governments could participate in those discussions in accordance with the procedural rules. She agreed that regular supervision should not be suspended following the referral of a case to the ICJ.

248. Concerning the proposed procedural framework, she agreed with the purpose of referring a dispute to the ICJ under article 37(1), the role of the Governing Body in the referral process, the time frame for Governing Body discussions in that regard, and the participation of Member States that were not Governing Body members in those discussions. The Office should ensure discretion, neutrality and impartiality throughout the process. GRULAC agreed that the opinion of the ICJ and an analysis of any required follow-up action should be submitted to the Governing Body, and that the time frame for those discussions should not exceed two consecutive sessions. Any procedure agreed by the Governing Body should be added to its procedural rules.

249. GRULAC said that the establishment of an in-house tribunal required further study. Any such tribunal could only be used to resolve disputes of a more limited or less complex scope, focusing solely on the interpretation of standards.

250. **Speaking on behalf of IMEC,** a Government representative of the United States emphasized the value of legal certainty in the supervisory system and in maintaining international labour

standards. Article 37 provided a clear provision for the resolution of interpretation disputes. The dispute relating to the right to strike was long-standing and impeded the functioning of the supervisory system, particularly in cases relating to the application of Convention No. 87. The Governing Body had an obligation to resolve that dispute. Therefore, IMEC supported the establishment of a procedural framework for action under article 37(1) and emphasized that appropriate disputes should be referred to the ICJ without prejudice to the ongoing discussions of provisions under article 37(2).

251. **Speaking on behalf of the majority of countries of Asia and the Pacific,** a Government representative of China said that any dispute in the world of work should be resolved through tripartite social dialogue where possible, including matters relating to the interpretation of ILO Conventions. Article 37 was a last resort and should only be used with caution. The proposed procedural framework under article 37(1) and its introductory note did not address some of his group's major concerns. While decision-making authority had been delegated to the Governing Body, the International Labour Conference was a more suitable forum for discussing the referral of any dispute to the ICJ. Any follow-up action to be taken relating to an advisory opinion should also be determined by the Conference. Given the binding nature of an ICJ advisory opinion, a referral decision should be made by consensus, not majority vote. Thus, a time frame of two consecutive Governing Body sessions would be appropriate, with the discretion to extend discussions if necessary. A threshold should be established for the Governing Body to examine a referral request, and he asked the Office to clarify its proposals regarding the exact number of States required to trigger a discussion. A higher number would best reflect the severity of the issue.

252. His group welcomed the preliminary proposals relating to the establishment of an in-house tribunal, including to establish procedural rules for that body, which warranted further tripartite consultations. Article 37(2) clearly provided for the referral of any dispute relating to the interpretation of a Convention to an in-house tribunal, the mandate of which should therefore not be limited. A tribunal should be ad hoc, to ensure that judges examining a dispute had appropriate expertise. The composition of a tribunal should ensure a balanced representation of legal systems, regions and gender.

253. The Governing Body should approve procedures for the implementation of both paragraphs of article 37 before referring any dispute to the ICJ. Therefore, his group supported the amendments to the draft decision proposed by the Employers' group and could not support the draft decision in its original form.

254. **Speaking on behalf of the EU and its Member States,** a Government representative of Sweden said that Albania, North Macedonia, Republic of Moldova, Montenegro, Serbia, Georgia, Iceland and Norway aligned themselves with his statement. He aligned his statement with that delivered by IMEC. The protracted disagreement on the right to strike, in the context of Convention No. 87, should be resolved under the provisions of article 37(1). The ICJ was well placed to examine that dispute, and he called for the Governing Body to refer the dispute without delay.

255. The proposed procedural framework to implement the provisions of article 37(1) should not change the procedural rules of the Governing Body. The threshold for submitting a referral request should be indicative, not prescriptive; should include regional support; and could be determined by a simple majority vote. His group agreed that the final decision on referral could be made by the International Labour Conference, rather than the Governing Body. The preparation of any dossier would be the sole responsibility of the Director-General, and the Office should remain neutral and impartial at all times. The proposed procedural framework

and the proposals relating to the implementation of article 37(2) should be considered as separate entities. Therefore, his group supported the amendment to the draft decision proposed by the Workers' group.

256. **Speaking on behalf of a group of countries consisting of Australia, Canada, New Zealand, the United Kingdom and the United States,** a Government representative of Australia said that the proposed procedural framework under article 37(1) provided a clear and ready-to-use methodology, the adoption of which was not a precondition to making a request for an advisory opinion to the ICJ. The proposed framework would facilitate a sound, efficient and time-bound referral process, which was a key element of good governance. Her group agreed to an indicative threshold of support of 20 Governing Body members or 30 Member States; supported a maximum time frame of two Governing Body sessions for discussions on whether to refer a dispute to the ICJ and determine the legal question to be considered; and agreed that the decision on referral may be sent to the International Labour Conference for approval. While her group did not see value in further exploring article 37(2) at present, she expressed support for the draft decision and the amendment proposed by the Workers' group. The Governing Body should decide on the proposed procedural framework at the current session. Her group could not support the amendment proposed by the Employers' group.

257. **A Government representative of Argentina** said that a mechanism for referring disputes to the ICJ would strengthen the supervisory system. However, no additional procedure was required to implement the provisions of article 37. The proposed procedural framework would guarantee legal certainty and strengthen governance within the ILO, thereby contributing to achieving decent work for all. He welcomed the proposals for the establishment of an in-house tribunal to implement article 37(2), but said that they needed further analysis. The Governing Body was only ready to decide on the implementation of article 37(1), and as such he supported the draft decision with the amendment proposed by the Workers' group.

258. **A Government representative of China** recognized the long-standing issues relating to the interpretation of Conventions and the need for legal certainty to ensure the stability and credibility of the supervisory system. The implementation of article 37 should be the basis of any such work, and no legislative process should be established. The proposed procedural framework under article 37(1) would have a significant impact on the tripartite constituents. All Member States should be able to participate in discussions and decision-making relating to the referral of disputes to the ICJ, while ensuring efficiency and fairness. The proposed framework should be revised on the basis of the comments made, in order to address the concerns of all parties and ensure that it could be adopted by consensus. Regarding the establishment of the in-house tribunal, the tripartite constituents emphasized the importance of resolving disputes through dialogue. The Chinese Government reiterated that it was the only channel for resolving disputes and ensuring the functioning of the supervisory mechanism, by strengthening cooperation and avoiding confrontation. He urged the Office to explore other alternative institutional arrangements. China supported the draft decision as amended by the Employers' group.

259. **A Government representative of Germany** said that the connection between freedom of association and the right to strike had repeatedly been called into question, limiting the effective monitoring of related ILO standards. That was unacceptable, and he called for the resolution of the matter as soon as possible. The proposed procedural framework was well thought out, balanced, viable, and rooted in the ILO Constitution, and took into account the concerns and comments of all constituents. He urged the Governing Body to approve that solution for the implementation of article 37(1).

260. **A Government representative of Colombia** recognized the need for a procedure for the referral of disputes on the interpretation of standards to the ICJ under article 37(1). She welcomed efforts to prepare a procedural framework that was clear, objective and transparent. Given the potential impact of any recommendation issued by a supervisory body on national legislation, the proposal to establish an in-house tribunal under article 37(2) should be examined further. Any such tribunal should ensure the representation of different legal, economic and social systems. The Office should address any potential budgetary implications and ensure that any new mechanism did not have a negative impact on the existing mechanisms of the supervisory system. She supported the draft decision and the amendment proposed by the Workers' group; she did not support the amendment proposed by the Employers' group.

261. **A Government representative of Mexico** emphasized the need for legal certainty in the interpretation of Conventions. Article 37(1) provided the basis for addressing disputes, and the provisions of that article did not require any additional interpretation. The Governing Body should adopt, at its current session, a simple, transparent and equitable procedure for the referral of disputes to the ICJ. The proposals relating to the implementation of article 37(2) required further exploration. Therefore, she supported the draft decision with the amendment proposed by the Workers' group.

262. **A Government representative of Japan** emphasized the importance of moving forward on the issue. Tripartite discussion must be the basic principle for any difficult problem, but then the need to solve a problem must be recognized. The proposed procedural framework for referral under article 37(1) could be a basis for consensus in the Governing Body. He requested further clarification of the principle of tripartite consultation in an exhaustive manner and indicated his openness to discussion on any specific concern.

263. **A Government representative of Chile** agreed that strengthening the ILO supervisory system and ensuring legal certainty in the face of discrepancies in interpretation of Conventions should occur by way of a simple, transparent and fair procedure. He supported the draft decision, with the amendment to subparagraph (b) proposed by the Workers' group.

264. **A Government representative of Bangladesh** said that tripartism was the bedrock principle that guided the ILO's work; in deciding on an exception to it, the Governing Body was at a critical point. He did not support introducing an approach that had the potential of inviting cascading impact. Divergent views on the issue of legal certainty under article 37 had been expressed in the group discussions and should be taken into account going forward. He proposed that discussion continue towards achieving a consensus-based decision and that an in-house approach be taken towards interpretation matters, whereby legacy, inter-institutional jurisprudence and institutional culture set the right direction. The two subparagraphs of article 37 should be treated as a package for decision through further discussion.

265. **A Government representative of India** said that the robust system of international labour standards that the ILO and its constituents had helped develop and maintain had been pivotal in promoting decent and productive working conditions for the global workforce. Questions relating to the interpretation of those standards must be resolved to ensure effective supervision and implementation. As the only tripartite UN agency, the ILO had effectively resolved interpretation issues in the past. The implementation of standards through social dialogue and tripartite consultations was at the heart of ILO action. Recourse to using the ICJ's mandate to settle interpretation questions under article 37(1) must therefore be contingent on exhausting all avenues for resolution through tripartite consultation. The referral of questions of interpretation to the ICJ or an in-house tribunal should be considered only when a

reasonably high threshold had been reached, including a high degree of support from a majority of States parties to the Convention concerned. A prescriptive rather than indicative approach would ensure that recourse to article 37 was taken only on serious and persistent issues. Any question of interpretation should be referred first to the in-house tribunal set up under article 37(2) before it was sent to the ICJ; the ILO should therefore first establish the in-house tribunal to deal with such matters. She expressed confidence that any disputes or deadlocks could be resolved through ILO tripartite consultations or structures.

266. **A Government representative of the Russian Federation** said that one takeaway from the informal consultations held on the matter had been that a significant number, if not the majority, of States saw recourse to article 37(1) as a measure of last resort in the event of a serious and persistent interpretation dispute. The Russian Federation shared that view. The procedural framework for implementation must therefore strike a careful balance between the rather broad wording of article 37(1) and the principle of needing to have exhausted internal ILO dispute resolution mechanisms, first and foremost through social dialogue. That aim could be achieved, first, by setting a high threshold for the Governing Body to begin formal consideration of recourse to article 37: consensus, or at least a qualified majority of the Governing Body members, should be sought. Consideration should also be given to involving States parties to the Convention under dispute. Second, the final decision for referral should be taken by the International Labour Conference. That was important not only as a safeguard but also because the eventual advisory opinion by the ICJ would have implications for the interpretation and application of ILO legal instruments as a whole, beyond the specific terms of the dispute leading to the referral. The broadest possible number of Member States should therefore be involved in those considerations, with emphasis on States parties to the Convention that could be affected by the advisory opinion.

267. The involvement of the International Labour Conference should not be limited to merely validating a decision by the Governing Body but must include the opportunity for the Conference to consider the issue on substance. He did not agree with the proposal to establish timelines for consideration of an issue: rushing the matter risked undermining attempts to resolve the dispute through social dialogue. The wording of article 37(1) was sufficiently broad to accommodate such safeguards without going against the article's object and purpose. Further, in-depth consideration was needed of article 37(2). He saw no value in proceeding to prepare rules for the tribunal, at least not according to the timeline proposed in the draft decision.

268. **A representative of the Director-General** (Legal Adviser) thanked the Governing Body for its rich contributions, which did justice to the paramount institutional importance of the topic. Legal certainty was indeed a foundational principle of every legal system, which a contrario meant that legal uncertainty constituted a direct and serious threat to any legal system. He thanked all members who had engaged in the series of consultations and briefings held by the Office over the past four months with a view to better explaining the constitutional, legal and historical dimensions of the issue and thereby permitting the Governing Body to take an informed decision.

269. Responding to the questions asked about the legal effect of ICJ advisory opinions, he clarified that under the ICJ Statute advisory opinions had no binding force in and of themselves. They could, however, be attributed binding effect – also termed decisive, conclusive or authoritative – through other means. Section 32 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies was an example of a clause that specifically attributed binding effect to an otherwise non binding advisory opinion. Roberto Ago, former ICJ judge and former member of the Committee of Experts on the Application of Conventions and

Recommendations, in an article entitled *"Binding" Advisory Opinions of the International Court of Justice* had stated that the constituent instruments of certain organizations, including the ILO, provided for such binding advisory opinions by characterizing the opinion requested of the Court as a "decision". Accordingly, for the ILO, the binding effect of advisory opinions flowed from the letter of article 37(1) which referred explicitly to a "decision", but also from the spirit of the same article as a dispute settlement clause providing for the compulsory means of action to be taken as a last resort. Equally important, it was a unanimous and deep-seated understanding of all ILO constituents that advisory opinions delivered under article 37(1) were binding, final and authoritative pronouncements for the Organization, its organs and its membership. Footnote 11 of the document contained a hyperlink to a compilation of statements of representatives of all ILO constituents affirming the binding nature of advisory opinions delivered by the ICJ. All recent Office documents produced on the matter had been clear and consistent with respect to the legal effect of advisory opinions requested from the ICJ under article 37(1) of the ILO Constitution.

270. Regarding the indicative level of support, or "threshold", for a referral request to be examined, and in particular the view expressed by the Employers' group that only if the majority of the Member States having ratified the Convention in question supported the referral, could it be addressed to the Governing Body, he noted that from a strictly legal point of view there seemed to be no valid reason to differentiate between ratifiers and non-ratifiers. If such a differentiation were made, it would mean that a State would have to ratify a Convention before it could raise any question about that Convention, yet most of the requests for informal opinions the Office received came from Member States that had not yet ratified the Convention in question. Moreover, defining the threshold exclusively by reference to ratifiers of a given Convention would necessarily exclude the possibility of a referral request by Employers or Workers, as only States could ratify international labour Conventions. In paragraph 18 of the document, the Office reflected the view expressed during the consultations regarding a majority but considered that placing the indicative threshold so high would be excessively restrictive.

271. With reference to the proposed indicative time frame, namely a maximum of two sessions of the Governing Body, he stated that this compared to similar indicative timelines for other procedures and processes of the Governing Body, such as the procedure for placing an item on the agenda of the Conference, as reflected in paragraph 54 of the Introductory note to the Compendium of rules applicable to the Governing Body, which referred to two sessions. The proposed timeline would be only a guideline and, if it were to present any difficulty, it would be for the Governing Body to decide how to proceed.

272. He clarified that the rationale for specifying, in paragraph 2 of the procedural framework, that a referral request should be filed by "at least 20 regular Governing Body members" had been to ensure that the referral would not be too far from achieving the majority required if a vote were to be called. As non-governmental groups had 14 Governing Body members each, that "threshold" of 20 would necessarily include a non-governmental group. The alternative of "at least 30 Member States (whether members of the Governing Body or not)" was intended to capture the legitimate expectation of non-members of the Governing Body to be able to refer to the Governing Body something that they considered to be an important interpretation question, in the unlikely event that there were not enough regular Government members in favour of filing the request. The wording of paragraph 2 of the procedural framework did not exclude a non-governmental group from associating itself with the group of 30 Member States. The formula was thus designed to accommodate the interests of all constituents. The Workers' suggested addition to paragraph 2 of the procedural framework of what was already in the

introductory note, namely that the Officers would need to consider how to follow up if the level of support was less than required or expected, could be incorporated when preparing a proposed revised version of the text if there was agreement in the room.

273. Responding to questions raised by the Africa group, he said that the legal implications of an eventual ICJ advisory opinion for Member States that had ratified a Convention would depend on the question(s) put to the Court and the guidance received from the Court. However, the opinion would be binding, first of all, for the Organization and its supervisory organs. It would then be through that supervisory system that the Court's authoritative pronouncement would pass down to States that had ratified, and which were thus bound to fully implement the Convention in question.

274. He said that elaborating a methodology for going to the ICJ and the establishment of an in-house tribunal were unconnected issues, which meant that the procedural framework could be adopted immediately. If an in-house tribunal were to be established subsequently, the impact on the procedural framework would be very limited, requiring, for instance, amendment of the paragraphs in the procedural framework under the heading "Governing Body debate and decision" to include guidance as to how the Governing Body would determine whether to send an interpretation question or dispute to the ICJ or to the in-house tribunal. As the two tribunals were part of the same constitutional design for the resolution of interpretation disputes, the Governing Body should not define narrowly the competence of the in-house tribunal; the in-house tribunal could eventually examine any interpretation dispute or question, and it would be for the Governing Body to assess its importance and decide where it should be sent.

275. The information about the legal and historical context in which article 37(2) had come about in the constitutional amendment of 1946 had been provided in response to a specific request made during the consultations. At the time of preparing the constitutional amendment, it had been clarified that the article 37(2) in-house tribunal would be responsible for expeditious determination of questions of lower importance or so meticulous that it would not merit going all the way to The Hague. It was also explained that an internal tribunal was needed for those questions that would fall somewhere in between those addressed to the Office for an informal opinion and those that warranted referral to the ICJ.

276. Regarding the possible time frame for requesting and obtaining an advisory opinion, he referred the Governing Body to the graphic representation of the procedural framework in Appendix II, as well as to the sample letter of how a Governing Body resolution might read if a letter were to be sent to the ICJ, presented in Appendix I to document GB.322/INS/5. Considering each stage in turn as reflected in the proposed procedural framework, he indicated that in addition to the two months required for the preparation of the Office report, two Governing Body sessions would be needed to take the referral decision and draft the question(s) to be put to the Court, followed by validation by the International Labour Conference in June. To that would be added the time the Court would take to deliver its advisory opinion, which would be at the entire discretion of and depend on the workload of the Court but might be expected to take between 1 year and 18 months. He recalled in this respect that there was provision in article 103 of the Rules of Court for the submission of an urgent request.

277. The question raised by GRULAC whether the procedural framework could become part of the Compendium of rules applicable to the Governing Body would be for the Governing Body to decide. He reaffirmed that the proposed level of support or "threshold" was indicative and not prescriptive in nature. The possibility of the Committee of the Whole was already stated in the

document. The point made by the Government representative of China that the body under article 37(2) should be competent for all interpretation disputes irrespective of their seriousness was consistent with the indications contained in the document before the Governing Body while recalling that it would be, in any event, for the Governing Body to decide to which judicial body it should refer the matter. Finally, the view that the procedural framework should specify that only the International Labour Conference would be competent to discuss and decide a possible referral would necessitate an abstraction of the 1949 resolution delegating authority to the Governing Body; it would be legally inaccurate to produce a procedural framework that provided for discussion and decision exclusively by the Conference as long as the Conference had not revoked its 1949 resolution.

278. **The Worker spokesperson** said there came a time when it was necessary to move forward. She drew attention to the remarks by the German Government. She hoped that all governments supported the fundamental nature of freedom of association and its relationship with the right to strike. Over the previous 11 years the Government group had never challenged that relationship and the important and authoritative role of the Committee of Experts to interpret it. The ILO had a conflict resolution mechanism in its own Constitution. She urged the Governing Body to decide that enough had been done; too much time had already been devoted to the matter and she saw no merit in continuing social dialogue on the matter when consensus had not been achievable. Consensus could not be achieved if positions were mutually exclusive: members either accepted there was a relationship between Convention No. 87 and the right to strike – as previously established not only by the Committee of Experts, but also by the tripartite Committee on Freedom of Association – and respected the authority of the ILO's supervisory system and the Committee of Experts – or they did not. Some disagreements could not be resolved through dialogue but only by turning to an authority. The ILO had such an authority in its Constitution, and that was the ICJ. Although the Workers' group would always support the tripartite nature of the ILO and the importance of constituents seeking solutions among themselves, a conflict resolution mechanism was part and parcel of every social dialogue system. The ILO should make good use of the conflict resolution it had in its system.

279. She acknowledged the clear explanation given by the Legal Adviser about thresholds not being legally accepted because the Governing Body was not supposed to change the ILO's Constitution or its own legal framework. It had always been logical that a group that disagreed with an existing, prevailing position might want to submit it to a court; the Workers' group would therefore not wish to prevent the Employers' group from asking the Governing Body to discuss and resolve such an issue, even on matters on which they disagreed. She considered it illogical and beyond the ILO's legal system to expect a particular group to have the support of more than half the ratifying States before it could refer a question to the Governing Body. The Governing Body agendas were full of issues on which there was not yet agreement, which were then decided according to its normal procedures – seeking consensus, and if consensus could not be achieved, then deciding by majority vote. Within the UN system it was important to never be blocked by a requirement for unanimity because the world was diverse and considerable debate was needed, and sooner or later a majority decision would be needed. The Workers' group could therefore not agree to change the ILO's good practice in that regard.

280. She was grateful that many governments had understood that adoption of the procedural framework must be taken as separate from the discussion on article 37(2), which the Governing Body should not spend more time developing at that stage. However, the intention of the Workers' amendment had been to respect the fact that some did wish to continue the conversation. That would allow the Governing Body to continue it on the merits and risks of

article 37(2) and take the decision as to whether to move forward with its establishment in due course. In contrast, the ICJ already existed, and so could provide a final opinion – something a tribunal could not do. The Workers' group thus believed it was time to adopt the procedural framework and make good use of it going forward.

281. **The Employer spokesperson** said that the Office had missed an opportunity to build consensus, since its proposals did not take into account the differing opinions expressed by Governments during the tripartite consultations. It should make every effort to propose a way forward that brought the groups together.

282. While there was no legal basis for distinguishing between countries that had ratified a Convention and those that had not, it was logical that a decision to bring a case to the ICJ should be endorsed by a majority of States that had ratified the Convention in question. It made little sense for countries that had not ratified a Convention to bring a case to the ICJ to decide how a ratifying country should implement that Convention. Countries that were considering ratifying a Convention sought the opinion of the Office in order to gain an understanding of their obligations should they decide to do so. She emphasized that she had referred to "ratifying countries" rather than to "ratifying Governments", as employers and workers would also be involved in the decision-making process.

283. If ICJ decisions were legally binding, all countries that had ratified Convention No. 87 would be bound by all the recommendations on that Convention by the Committee of Experts on the Application of Conventions and Recommendations, which had meticulously defined the scope of the right to strike. However, the definition of that right varied enormously from country to country and the ILO should respect those differences; for example, political strikes were prohibited in some States, but were a constitutionally guaranteed right in others. The right to strike was enshrined in various sources of international law, but it was defined and enforced at the national level. The ILO must not undermine that approach. Her group did not question the right to strike, which was a legitimate exercise of freedom of association. However, it was not an absolute right. Furthermore, countries that had ratified Convention No. 87 should not be bound by an overly restrictive interpretation of that Convention.

284. Existing channels within the ILO should be used to resolve the interpretation issue regarding the right to strike; the remedies established under article 37 of the Constitution were not the sole means of achieving legal certainty, which merely required a solution that was widely accepted. She disagreed with the Workers that the discussion had been exhausted, since the Governments had, since 2015, expressed willingness to start a dialogue on the substantive issues related to the right to strike. She proposed that the substantive issues should be discussed and, if necessary, the matter could be taken to the ICJ once all tripartite social dialogue solutions had been implemented.

285. **The Worker spokesperson** said that, had a decision been taken to refer the matter to the ICJ in 2014, there was a good chance that the ICJ would have upheld the prevailing situation at the ILO, which was perhaps why the Employers were reluctant to go before that Court. The views of the Committee of Experts on the Application of Conventions and Recommendations were authoritative and not binding, and were taken into account by national judges when interpreting national legislation on the right to strike. The question to be put to the ICJ was whether it would uphold the prevailing view of the Governing Body regarding that right. Even if the ICJ agreed with the Employers, the ILO's approach to the right to strike would have to be discussed, with the involvement of all constituents; it would not require changes to national law or practice overnight. She failed to see how a consensus could be reached on the issue through further discussions if no progress had been made over the previous decade.

286. **The Employer spokesperson** said that her group had at no point stated that it would never be willing to go to the ICJ and she strongly objected to her group's views being misrepresented. She would welcome clarification as to how the Governing Body should proceed.

287. **Speaking on behalf of the Africa group,** a Government representative of Malawi said, with respect to article 37(1), that the International Labour Conference should endorse the referral of a dispute to the ICJ. Her group would welcome information on how the resolution concerning the procedure for requests to the International Court of Justice for advisory opinions of 1949 (1949 resolution) could be amended to establish that the Conference should be the final authority, given that its membership had evolved considerably since 1949. Further discussions were needed on article 37(2) and on the draft decision.

288. **A Government representative of Italy** said that a solution needed to be found in order to strengthen the credibility of the ILO as the international forum for social dialogue and standard-setting. It was the responsibility of the constituents to resolve questions or disputes relating to interpretation in accordance with article 37(1), which provided for their referral to the ICJ. As there was no link between article 37(1) and article 37(2), article 37(1) should be implemented without delay.

289. **Speaking on behalf of the EU and its Member States,** a Government representative of Sweden said that North Macedonia, Montenegro, Iceland and Norway aligned themselves with her statement. After more than a decade of discussions, the time had come to refer the dispute to the ICJ. The continuing disagreement on the right to strike was affecting the supervisory system and other parts of the ILO. A large majority of Governing Body members were willing to make progress to resolve the deadlock. Article 37(2) had no conditional link with article 37(1). Accordingly, article 37(1) should be implemented without delay. She therefore supported the draft decision, as amended by the Workers' group.

290. **The Worker spokesperson** referred to paragraph 10 of the proposed procedural framework contained in Appendix I to the document, which stated that the Governing Body "may" refer its decision to the International Labour Conference for approval at its next session. The Workers' group could accept that approach. The Governing Body had been given the mandate to decide on such matters by the Conference in 1949; it could not now decide that the mandate should be removed.

291. **The Employer spokesperson** reiterated that her group was not questioning the right to strike. She recalled that, in 2015, the Employers had issued a joint statement with the Workers affirming that right. Convention No. 87 could not, however, provide the basis for rules on the scope and limits of the right as determined by the Committee of Experts. The legislative history of the Convention illustrated clearly that the right to strike was governed by national laws and regulations. Any attempts to establish international rules in that regard must follow a regular standard-setting or equivalent process and be based on tripartite agreement. A procedural framework for referring disputes on the interpretation of Convention No. 87 to the ICJ was not necessary, as there was precedent in that regard that should be followed.

292. As to article 37(1), the Employers could not support the procedural framework proposed by the Office because it did not incorporate the majority of views emerging from the informal consultations. The Employers did not consider the text ready for adoption. However, recalling that the Workers' group had questioned the need for a procedural framework, she said it was unclear on what basis a procedural framework had been presented and was being discussed, if one was not needed. She did not agree that the procedure in article 37(2) was optional and to be viewed separately from article 37(1); on the contrary, the two articles were connected and should be considered in parallel.

293. Noting that, if a tribunal were to be established, the procedural framework for article 37(1) would need to be revised to include a dispute settlement clause, she said that the Employers were in favour of holding a full discussion of the available options.

294. A discussion by the Conference would not preclude the options under articles 37(1) and 37(2). Instead, such a discussion would provide an opportunity to review the right to strike in an inclusive and representative forum and would enable the Governing Body to prepare better and understand the risks involved, should the Governing Body subsequently decide to proceed with a referral to the ICJ. Only a tripartite agreement would constitute a valid practice for establishing the agreement of the parties on the question of interpretation. If a number of parties sought consensus on this issue, then the Governing Body should attempt to achieve it.

295. **A Government representative of India** said that justice must not only be done but must also be seen to be done. She reiterated that an in-house, issue-based tribunal within the ILO should be the first level of adjudication. India welcomed the proposal to organize tripartite consultations for the preparation of draft rules for such a tribunal and agreed with the Employers' group that, upon decision by the in-house tribunal, referral to ICJ should be routed through the Conference instead of only the Governing Body, making for a fairer and more inclusive process. She noted that the proposed procedural framework referred to a majority in the Governing Body instead of a consensus, which was contrary to the principle of natural justice. It should be altered accordingly.

296. **A Government representative of China**, speaking on behalf of a significant majority of Member States of ASPAG, expressed support for the statement made by the Government representative of India. An issue of such great institutional importance deserved comprehensive deliberation. He also agreed with the Africa group that the final decision to refer a request to the ICJ should be made by the Conference and not the Governing Body. The context since 1949 had evolved significantly. He sought clarification on the current procedure for revisiting the 1949 resolution and reiterated his group's preference for the higher threshold for the submission of a referral under article 37(1). Further discussion was needed on article 37(2); the issue was not ripe for decision at the current session.

297. **A Government representative of Australia** reiterated her Government's endorsement of the proposed procedural framework and said that she was strongly in favour of making a commitment to take a decision within two sessions of the Governing Body on whether to refer an issue to the ICJ and on what the legal question would be. The Governing Body should be able to take a decision in that regard immediately.

298. **A Government representative of Japan** reiterated that exhaustive tripartite discussions leading to consensus were the best way of moving forward on the issue.

299. **Speaking on behalf of ASPAG,** a Government representative of the Philippines noted that it had not been possible to reach consensus within ASPAG.

300. **The Worker spokesperson** said that it was still not clear why the Employers were against applying to the ICJ for its authoritative legal opinion. It would clearly not be possible to reach consensus on the matter, no matter how much time was spent on discussions and consultations. The Legal Adviser had confirmed that the procedural framework was not a necessity. The Office had developed the framework to be used as a tool, at the express request of the Governing Body at its 344th Session (March 2022), after it had become apparent that social dialogue would never resolve the issue and the use of article 37 had been advanced. She did not recall that, at that session, a majority had requested a completely different framework. While some concerns had been taken into consideration, others had not because they were

not shared by the majority. Informal consultations could, however, not be described as decisive because there was no guarantee of proper representation of Government participants. Decisions at the Governing Body were the proper avenue and it was disingenuous of the Employers' group to claim that consensus could be reached after 11 years. The Workers' group was a strong proponent of social dialogue and tripartism, but they should not be used as obstacles to progress. The Workers' group was not against the validation of the procedure by the Conference; however, selecting that option might not be a wise course of action given the difficulties being faced in reaching consensus in the Governing Body. Article 37(2) had not been written to deal with complicated legal matters such as the one at issue and should not be used for that purpose. Relying on a tribunal instead of article 37(1) would consume time and energy and might not provide the desired legal certainty.

301. **The Employer spokesperson** did not share the same recollection as the Worker spokesperson of the discussions at the 344th Session. As reflected in the minutes of that session, she had emphasized that the framework should be developed on the basis of tripartite social dialogue. The Employers' position in that regard had not changed. Regarding the scope, extent and content of the right to strike, she recalled that the opinions of the Committee of Experts were not legally binding. In interpreting Convention No. 87, the applicable instrument was the 1969 Vienna Convention on the Law of Treaties. There had never been a substantive debate among the tripartite constituents on the right to strike, which was necessary if consensus was to be achieved.

302. **The Chairperson** announced that a vote should be held, given the divergent views.

303. **The Employer spokesperson** said that she was not in favour of a vote as many Governments had stated that a decision could not be made. The Governing Body was considering the procedural framework for the first time, and the members should not be forced to make a decision given the complexity of the situation and the divergence of opinion. The decision should be deferred.

304. **The Worker spokesperson** recalled that it was the Chairperson's prerogative to take decisions on procedural matters. There had been extensive discussions on the proposed procedural framework and the Workers' group had made its position very clear: a framework was not required in legal terms, but it would be helpful for organizing future work. Legally, there was no threshold for triggering a referral discussion at the Governing Body, since either a single Government or group could decide on referral. A decision should be made as to whether or not to adopt the procedural framework.

305. **A Government representative of China** said that it would be regrettable if the matter went to a vote. If such a vote proved necessary, it should be held towards the end of the session to allow Government representatives time to consult with their capitals, given the complex and legal nature of the issue at hand.

306. **Speaking on behalf of the Africa group,** a Government representative of Malawi said that the Africa group was not ready for a vote.

307. **The Worker spokesperson** said she fully understood that Governments needed more time. It was regrettable that a vote would be held, but necessary because the issue had been under discussion for 11 years.

308. **The Employer spokesperson** asked the Office to confirm that the procedural framework was being discussed by the Governing Body for the very first time.

309. **A Government representative of France** said that the item had been on the Governing Body agenda since March 2022 and many preparatory meetings had been held; no country's delegation could claim that it was unaware of the issues. Since all the facts were available, she saw no need to defer the vote.

310. **The representative of the Director-General** (Legal Adviser) recalled that, at the 344th Session (March 2022), the Office had been requested to prepare proposals on a procedural framework for the referral of questions or disputes regarding the interpretation of international labour Conventions to the ICJ for decision in accordance with article 37(1) of the ILO Constitution, and additional proposals for the implementation of article 37(2), for discussion at the current session.

311. **The Employer spokesperson** recalled that the first tripartite consultation had in fact taken place only in January 2023. The majority of the participants had strongly criticized the proposal and yet it had been submitted for consideration at the current session without any changes. It was unacceptable that the Office had failed to take into account the points raised or requests made during that consultation. The 1949 resolution must be changed before a procedural framework could be adopted. Therefore, more time was needed and no decision could yet be made.

312. **A Government representative of Algeria** requested an explanation of the concept of a "majority" since members seemed to use the word differently.

313. **Speaking on behalf of a significant majority of Member States of ASPAG,** a Government representative of China said that, while he fully respected the Chairperson's prerogative to decide on how to proceed with each agenda item, the matter should not be put to a vote and further constructive and meaningful discussion was needed.

314. **The Chairperson** said that, in view of the differing opinions, a vote was needed and a decision must be made as to the timing of the vote.

315. **The representative of the Director-General** (Legal Adviser) said that only the International Labour Conference could revoke or amend the 1949 resolution under the *"parallélisme des formes"* (parallelism of forms) principle of law, according to which legal acts could only be amended following the same procedure by which they had been adopted. The proposal before the Governing Body required no formal change to the 1949 resolution since the Governing Body had already been authorized by the Conference to request advisory opinions from the ICJ. The decision was whether, for reasons of inclusiveness and owing to the potential seriousness and institutional importance of some disputes, the final decision on referral should be made by the Conference. As recalled in the document (footnote 14), at the time of seeking the Conference's approval in 1949, the Office had clarified that the Governing Body should ascertain the views of the Conference on matters, such as standard-setting, that fell primarily under the responsibility of the Conference. As regards the use of the expression "majority view" in the context of Governing Body discussions, he indicated that "majority" referred not to an exact numerical calculation on the basis of individual members, whether titular or deputy, or the overall membership of regional groups but rather to the speaker's own perception of the prevailing view on a particular topic and at a given point in time of the discussion.

316. **The Employer spokesperson** said that it was highly unusual for the Chairperson to force a vote on an issue after a substantial number of Governments had asked for more time. She called for the decision to be deferred pending further tripartite consultations, with a view to reaching consensus and allowing time to consider all the implications that the procedural

framework would have for Member States. It would be extremely unfortunate for the Governing Body to make a decision against the wishes of many members.

317. **The Worker spokesperson** said that, since opinions were divided on all issues, including whether the matter was ready for discussion and decision, the only way forward was to vote. There was no clear majority for any single course of action. Representatives would have more than sufficient time to consult their capitals, as they had under previous agenda items, and the vote should be held before the final sitting of the current session.

318. **A Government representative of Cameroon** suggested that the Office should hold further consultations to determine whether a vote was necessary. Some members were not ready to hold a vote and decisions should not be made in haste.

319. **A Government representative of India** proposed amending paragraph 10 of the procedural framework to make it mandatory for the Governing Body to refer its decision on referral of an interpretation question or dispute to the Conference when that decision had been adopted by a simple majority vote, and optional when the decision had been adopted by consensus.

320. **A Government representative of Indonesia** said that her Government had not had enough time to consider the issue and was not ready to make a decision. Other ways of building consensus, such as that proposed by India, should be explored.

321. **Speaking on behalf of the EU and its Member States,** a Government representative of Sweden said that the EU and its Member States supported the Chairperson's proposal to hold a vote.

322. **A Government representative of Nigeria** suggested that the Office should submit proposals on a way forward. His Government was not ready to vote on such a complex and technical issue that required extensive discussion and negotiation.

323. **The Worker spokesperson** said that no further discussion was required and, legally speaking, the situation was very clear-cut.

324. **Speaking on behalf of GRULAC,** a Government representative of Colombia said that her group fully supported the Chairperson's proposal to hold a vote.

325. **The Chairperson** said that a vote would be taken on the draft decision and the amendments proposed by the Employers and the Workers once the Government representatives had been able to hold consultations with their respective capitals.

326. **Speaking on behalf of the EU and its Member States,** a Government representative of Sweden said that her delegation had engaged in consultations with different Governments, Employers and Workers. While her group considered the procedural framework proposed by the Office to be fit for purpose, it was clear that many questions remained unresolved with regard to its content and timeline. Some members had indicated that a vote on the item felt forced. The EU and its Member States valued the tripartism of the Governing Body and the fact that thus far it had managed to take the vast majority of its decisions by consensus. Taking a vote was a mechanism of last resort at its disposal, but not one that should be used on a regular basis, especially on matters of such a fundamental nature, as doing so could be counterproductive in the long run. Therefore, in order to take into account the concerns of all parties and allow the matter to be resolved in a consensual manner, the EU and its Member States proposed that the debate be closed and deferred to a future session.

327. **The representative of the Director-General (**Legal Adviser), referring to paragraph 5.7.6 of the Standing Orders of the Governing Body, noted that in the case of motions as to procedure, no notice in writing needed to be made available to the person chairing the sitting or

distributed. Motions as to procedure included a motion to adjourn a debate on a particular question. It was his understanding that the motion was to adjourn the debate on the whole of the agenda item INS/5, that is to say in respect of both the procedural framework under article 37(1) and the additional proposals for the implementation of article 37(2). Accordingly, it was for the Chairperson to open the discussion so that a decision could be made with regard to the motion.

328. **The Worker spokesperson** said that she too had consulted other members, and it was her understanding that there were more concerns about the procedural framework than about the issue of the right to strike. She would be interested in exploring the option proposed, but would need to have further consultations with her group.

329. **The Employer spokesperson** said that her group had been clear from the outset that the issue was not yet ripe for a decision. It was the first time that the Governing Body had discussed the procedural framework, and in a house of dialogue the constituents needed to be given sufficient time to work towards a consensus. Putting the matter to a vote would put many Governments in a difficult situation, as the complex legal issues required coordination with their capitals. She supported the motion to defer consideration of the item as a whole, as that would provide an opportunity to find a solution based on consensus. It was a political decision, not a legal one, and the way forward should be coordinated by policymakers and the ILO's most senior management.

330. **Speaking on behalf of the Africa group,** a Government representative of Malawi said that her group wanted to believe that the ILO was a house of social dialogue and therefore the Governing Body should try as hard as possible to reach consensus. Voting on critical matters undermined the nature of the ILO. Consultation to reach consensus was key. The procedural framework had only been recently introduced, with tripartite consultations being held for the first time in January 2023 with follow up in February 2023, and it was the first time that it had been discussed at the Governing Body. With more time for discussion, she hoped that consensus could be reached the next time it was discussed by the Governing Body. Her group supported the motion presented by the EU Member States.

331. **A Government representative of Mexico** said that her delegation had fully supported the Chairperson's decision to hold a vote. It was important to implement article 37(1) as quickly as possible. Having listened to the discussions and consulted with other groups and delegations, she believed that the Governing Body was close to reaching an agreement on the procedural framework. In the interest of promoting further discussion and social dialogue, she was prepared to support the motion.

332. **A Government representative of India** fully supported the motion. However, when the Governing Body resumed its discussion of the item, it would need to re-examine the procedural framework, which currently contained a number of points that did not strictly adhere to the principles of natural justice. The framework should be redrafted to be more fair, more transparent, more inclusive and more representative.

333. **A Government representative of Pakistan** supported a consensus-based approach on matters of such significance; accordingly, the procedure for referring a matter to the ICJ should be based on the agreement of all parties. He acknowledged the concerns that had been raised by the Workers' group, and noted that further discussion was needed and urged all parties involved to find points of consensus, in order to protect everyone's rights and needs in a more meaningful and constructive manner.

334. **Speaking on behalf of a significant majority of ASPAG Member States,** a Government representative of China welcomed the motion proposed by the EU Member States, which would restore the spirit of social dialogue and tripartite cooperation. He noted that there had been a significant number of votes during the current session and that a vote on an issue of such institutional significance would be detrimental to the spirit of social dialogue.

335. **Another Government representative of China** said that her Government supported the motion, noting that achieving consensus among the constituents was one of the key characteristics and advantages of the ILO. It appreciated the flexibility and spirit of compromise that had been shown by all members, and agreed that it was important to hold further in-depth discussions on such an important subject.

336. **A Government representative of Guatemala** said that, as consensus had not yet been reached, he supported the motion, which reaffirmed that social dialogue had not broken down. It was important to move forward on the basis of consensus.

337. **A Government representative of Colombia** welcomed the motion presented by the EU Member States and stressed how important it was for decisions to be taken by consensus.

338. **A Government representative of Indonesia** said that the constituents needed more time to develop a procedural framework that could be accepted by all. He therefore also supported the motion that had been presented.

339. **A Government representative of the United States** also supported the motion. It was clear that substantial concerns remained with regard to the procedural framework, which her Government was not sure was even necessary.

340. **The Worker spokesperson** acknowledged that the motion presented by the EU Member States had garnered a significant amount of support. Before agreeing to it, she would need to consult her group.

341. **The Employer spokesperson** recalled that, at the outset of the discussion, her group had submitted an amended version of the draft decision calling for the deferral of the discussion to a future session of the Governing Body. As the discussion could not be held at the 348th Session (June 2023), which was too short to allow for such a difficult, substantive discussion, it should be deferred to the 349th Session (October–November 2023). The discussion must be preceded by serious substantive consultations, on which basis the Office should produce a revised version of the proposed procedural framework.

342. **The Worker spokesperson** recalled that the procedural framework was not legally binding and while such a framework was not necessary, it was intended to be a helpful tool. Developing such a tool to deal with any possible future conflict of interpretation of a persistent, serious nature required further discussion, it seemed. She was prepared to accept the motion to adjourn the debate and to defer it to a future session, as proposed by the EU Member States.

Decision

343. **In accordance with paragraph 5.7.6 of the Standing Orders, the Governing Body decided to defer the consideration of item GB.347/INS/5 to a future session.**

(GB.347/INS/5, paragraph 62, as amended by the Governing Body)

344. **The Worker spokesperson**, noting the applause, expressed the hope that Governing Body would soon be in a position to celebrate having resolved an outstanding conflict, which in her group's view could only be done by referring the case to the ICJ. She recognized that it might be useful to have a non-binding procedural framework to serve as a tool for debates on

conflicts of interpretation, and that all parties should have a clear understanding of how to use it.

345. It was already clear that any Member of the Organization could raise an issue of interpretation and submit a request to the Director-General to ask him to put the issue before the Governing Body for referral to the ICJ. One specific issue of interpretation had been waiting long enough and her group could not wait much longer for it to be resolved. Indeed, it was considering submitting a request to the Director-General in the coming months to put the issue before the Governing Body at its 349th Session and hoped to receive the support of governments in this respect. There needed to be a debate on that specific issue as soon as possible.

346. She echoed the concerns that had already been expressed by others that the Governing Body seemed no longer to be able to decide on anything serious without a vote, even when there was a clear majority. All parties needed to reconsider whether the ILO continued to be an efficient, effective, fair and properly functioning house. Lastly, she reiterated that her group was committed to seeking consensus and to making progress in resolving issues.

6. Final report of the tripartite working group on the full, equal and democratic participation in the ILO's tripartite governance (GB.347/INS/6)

347. The Governing Body had before it an amendment to the draft decision, proposed by the Africa group and circulated by the Office, which read:

> 21. The Governing Body:
>
> (a) took note of the final report of the tripartite working group on the full, equal and democratic participation in the ILO's tripartite governance;
>
> (b) welcomed the significant progress made in the ratification of the 1986 constitutional amendment since the establishment of the working group;
>
> (c) urged the eight Members of chief industrial importance which have not yet ratified the 1986 constitutional amendment to consider favourably such ratification in the shortest possible time;
>
> (d) requested the Director-General to take all necessary initiatives aimed at bringing the 1986 constitutional amendment into effect, ~~and~~ keep the Governing Body regularly informed and to provide a road map for this process which will be reviewed every two years;
>
> (e) decided that the matter should become a standing item on the agenda of subsequent March and November Governing Body sessions until the amendment enters into force.

348. **The Co-Chairperson of the tripartite working group** said that the full contribution of constituents could be assured only through their full, equal and democratic participation in the Organization's tripartite governance. Although the COVID-19 pandemic and travel restrictions had further complicated the already challenging task of the working group, the collaborative spirit, support and cooperation of the social partners and Member States had made the virtual meetings constructive. The process of actualizing universal ratification of the Instrument for the Amendment of the Constitution of the International Labour Organization, 1986 (the 1986 Amendment) had been somewhat slow. The world of work had changed considerably over the past three decades and the desire to institute democratic governance in the Organization had become more urgent than ever before.

Document No. 42

PCIJ, Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion No. 1, 31 July 1922, pp. 9, 11

PERMANENT COURT OF INTERNATIONAL JUSTICE.

1922,
July 31st.
File: F. a. III,
Docket. 1 : 2.

FIRST (ORDINARY) SESSION.

PRESENT:

M. LODER, President,
M. WEISS, Vice-President,
Lord FINLAY,
MM. NYHOLM,
MOORE,
DE BUSTAMANTE,
ALTAMIRA,
ODA,
ANZILOTTI, Judges,
MM. BEICHMANN,
NEGULESCO, Deputy-Judges.

ADVISORY OPINION No. I.

By a Resolution dated May 12th, 1922, the Council of the League of Nations requested the Court, in accordance with Article 14 of the Covenant, to give an advisory opinion on the following question :

„*Was the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles ?*"

The request for an advisory opinion on this question was transmitted to the Court by a letter from the Secretary-General of the League of Nations, by virtue of authority received from the Council.

In conformity with Article 73 of the Rules of Court, notice of the request was given to the Members of the League of Nations through the Secretary-General of the League, to the States mentioned in the Annex to the Covenant and to the following organisations :

The International Association for the Legal Protection of Workers ;

the International Federation of Christian Trades Unions, and

the International Federation of Trades Unions.

The request was also communicated to Germany and Hungary.

Finally, the Court decided to hear, at a public sitting, the representatives of any Government and international organisation which, within a fixed period of time, expressed a desire to be so heard. This decision was brought to the knowledge of all the Members, States and organisations mentioned above, and to the International Labour Office at Geneva.

The Court thus had at its disposal, when pronouncing its opinion, the following documents :

1) A letter from the Director of the International Labour Office to the Secretary-General, dated March 17th, 1922, together with the Annexes accompanying this letter.

2) A memorandum from the Netherlands Government, dated June 14th, 1922.

3) A memorandum from the Netherlands General Confederation of Trades Unions (*Algemeen Nederlandsch Vakverbond*).

4) A telegram from the Swedish Government.

The Court also heard oral statements :

1) On behalf of the British Government,

2) on behalf of the Netherlands Government,

3) on behalf of the International Federation of Trades Unions,

4) on behalf of the International Federation of Christian Trades Unions,

5) on behalf of the International Labour Office.

As a result of this information, the following facts are established :

The Minister of Labour of the Netherlands, with the object of bringing about the agreement prescribed in Article 389, paragraph 3 of the Treaty of Versailles, invited the

Document No. 43

PCIJ, Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion No. 2, 12 August 1922, pp. 9, 11

PERMANENT COURT OF INTERNATIONAL JUSTICE.

1922.
August 12th.
File : F. a. II.
Docket I : I.

FIRST (ORDINARY) SESSION.

PRESENT :

M. LODER,	President,
M. WEISS,	Vice-President,
Lord FINLAY,	
MM. NYHOLM,	
MOORE,	
DE BUSTAMANTE,	
ALTAMIRA,	
ODA,	
ANZILOTTI,	Judges,
M. NEGULESCO,	Deputy-Judge.

ADVISORY OPINION No. 2.

By a Resolution adopted on May 12th, 1922, the Council of the League of Nations, in conformity with Article 14 of the Covenant, requested the Court to give an Advisory Opinion on the following question :

"*Does the competence of the International Labour Organisation extend to international regulation of the conditions of labour of persons employed in agriculture ?*"

By virtue of authority conferred by the Resolution, the request of the Council was transmitted to the Court by the Secretary-General of the League of Nations, by a letter dated at Geneva, May 22nd, 1922. Accompanying this letter there was a certified copy of the Resolution, and also a Memorandum prepared by the International Labour Office, which the Council had, by the same Resolution, requested to afford the Court all the assistance which it might require in the consideration of the question submitted to it.

In conformity with Article 73 of the Rules of Court, notice

of the request was given to the Members of the League of Nations through the Secretary-General of the League, to the States mentioned in the Annex to the Covenant and to the following organisations :

The International Federation of agricultural Trades Unions ;

The International League of Agricultural Associations (*Internationaler Bund der Landwirtschaftlichen Genossenschaften*) :

The International Agricultural Commission ;

The International Federation of Christian Unions of Landworkers ;

The International Federation of Land-workers ;

The International Institute of Agriculture at Rome ;

The International Federation of Trades Unions ;

The International Association for the Legal Protection of Workers ;

The request was also communicated to Germany and Hungary.

Finally, the Court decided to hear, at a public sitting, the representatives of any Government and international organisation which, within a fixed period of time, expressed a desire to be so heard. This decision was brought to the knowledge of all the Members, States and organisations mentioned above, and of the International Labour Office at Geneva.

The Court had at its disposal, when pronouncing its opinion, the following documents :

1) A certified copy of a letter (undated) from the Director of the International Labour Office to the Secretary-General of the League of Nations, together with a note annexed thereto ; also a supplementary note dated July 20th, 1922 ;

2) A certified copy of a letter dated June 13th, 1922, from the Foreign Minister of the Government of the French Republic to the Secretary-General of the League of Nations, together with a note from that Government, and a note annexed thereto from the Society of Agriculturists of France ; also a supplementary note dated

Document No. 44

PCIJ, Competence of the ILO to Regulate Incidentally the Personal Work of the Employer, Advisory Opinion No. 13, 23 July 1926, p. 8

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE B — N° 13

Le 23 juillet 1926

RECUEIL DES AVIS CONSULTATIFS

COMPÉTENCE DE L'ORGANISATION INTERNATIONALE DU TRAVAIL POUR RÉGLEMENTER ACCESSOIREMENT LE TRAVAIL PERSONNEL DU PATRON

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE.

SERIES B. — No. 13

July 23rd, 1926

COLLECTION OF ADVISORY OPINIONS

COMPETENCE OF THE INTERNATIONAL LABOUR ORGANIZATION TO REGULATE, INCIDENTALLY, THE PERSONAL WORK OF THE EMPLOYER

Société d'Editions
A. W. Sijthoff
Leyde

A. W. Sijthoff's
Publishing Company
Leyden

"The Secretary-General will be prepared to furnish any assistance which the Court may require in the examination of this matter, and will, if necessary, arrange to be represented before the Court."

In conformity with Article 73 of the Rules of Court, notice of the Request was given to the Members of the League of Nations and to the States mentioned in the Annex to the Covenant.

Under the same article, notice of the Request was also given to the International Labour Organization and to the following further international organizations considered as likely to be able to furnish information on the question submitted to the Court :

International Organization of Industrial Employers ;
International Federation of Trades Unions ;
International Confederation of Christian Trades Unions.

It was further brought to the knowledge of the four Organizations notified that, should they desire to furnish information on the question at issue, they would have to file applications in this respect ; at the same time, a delay for the presentation of written memoranda was fixed. Such memoranda were received from all the organizations concerned, except the International Confederation of Christian Trades Unions.

At the request of the Organizations, their representatives furnished information at the hearings held on June 28th and 29th, 1926. These representatives were :

(1) For the International Labour Organization, *M. Albert Thomas*, Director of the International Labour Office.
(2) For the International Organization of Industrial Employers, *Me. Borel*, of Geneva, and *Me. Lecocq*, of Brussels, the Secretary-General of the Organization.
(3) For the International Federation of Trades Unions, *Me. Mendels*, of Amsterdam.
(4) For the International Confederation of Christian Trades Unions, *M. Serrarens*, of Utrecht, the Secretary-General of the Confederation.

The International Labour Office finally submitted to the Court, in conformity with the Resolution of the Council of the League of Nations, a set of documents concerning the treatment by the

Document No. 45

PCIJ, Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 15 November 1932, pp. 367–368

COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE A/B

ARRÊTS, ORDONNANCES ET AVIS CONSULTATIFS

FASCICULE N° 50

INTERPRÉTATION DE LA CONVENTION DE 1919 CONCERNANT LE TRAVAIL DE NUIT DES FEMMES

AVIS CONSULTATIF DU 15 NOVEMBRE 1932
XXVIme SESSION

1932

XXVIth SESSION
ADVISORY OPINION OF NOVEMBER 15th, 1932

PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES A./B.

JUDGMENTS, ORDERS AND ADVISORY OPINIONS

FASCICULE No. 50

INTERPRETATION OF THE CONVENTION OF 1919 CONCERNING EMPLOYMENT OF WOMEN DURING THE NIGHT

LEYDE
SOCIÉTÉ D'ÉDITIONS
A. W. SIJTHOFF

LEYDEN
A. W. SIJTHOFF'S
PUBLISHING COMPANY

the Council adopted the above-mentioned Resolution of May 9th, 1932; subsequently, the relevant extract from the Council minutes was also sent to the Court.

Under cover of a letter dated June 6th, 1932, the Secretary-General further sent to the Registrar a number of documents relating to the request for an advisory opinion, collected by the International Labour Office [1]. These documents have been duly placed at the disposal of members of the Court.

In conformity with Article 73, paragraph 1, sub-paragraph 1, of the Rules of Court, the request was communicated to Members of the League of Nations (through the Secretary-General of the League of Nations) and to other States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication dated May 21st, 1932, drew the attention of the governments of States which had ratified the Convention of 1919 concerning the employment of women during the night, to the terms of Article 73, paragraph 1, sub-paragraph 3, of the Rules. As a result of this communication, the Government of the United Kingdom of Great Britain and Northern Ireland informed the Registrar, by a letter of June 11th, 1932, that it desired to be represented before the Court in this case. The Court decided to grant this request.

The Registrar, by letters dated May 27th, 1932, also sent to four international organizations considered by the President —the Court not being in session—as likely to be able to furnish information on the question referred to the Court for advisory opinion, the special and direct communication mentioned in Article 73, paragraph 1, sub-paragraph 2, of the Rules; of these organizations—namely, the International Labour Organization, the International Federation of Trades Unions, the International Confederation of Christian Trades Unions and the International Organization of Industrial Employers—the first three stated that they desired to submit written and oral statements to the Court.

By an Order made on May 27th, 1932, the President of the Court—the latter not being in session—fixed August 1st, 1932, as the date by which written statements upon the

[1] See list in Annex.

question might be filed with the Registry by the interested States and Organizations, and September 12th, 1932, as the date by which second written statements, if in due course admitted, might be filed.

On August 4th, 1932, the Court decided, in the first place, to allow the filing, within the time thus fixed, of second written statements by the States or organizations which had already filed such statements and, in the second place, that the other States and organizations which had been notified of the request might, if they so desired, be permitted to submit a statement within the same time-limit. In pursuance of this decision, the President of the Court—the latter not being in session—by an Order made on September 6th, 1932, granted a request made by the German Government for permission to submit a written statement; by the same Order, the President extended until September 20th, 1932, the time-limit which was to have expired on September 12th.

Statements were filed on behalf of the Government of the United Kingdom and of the German Government, as well as by the International Labour Organization, the International Federation of Trades Unions and the International Confederation of Christian Trades Unions.

The statements of the International Confederation of Christian Trades Unions and of the German Government were filed after the expiration of the time-limit, but the President, exercising the powers conferred upon him by Article 33 of the Rules, decided to accept them.

The above-mentioned Governments and Organizations were also represented before the Court, which, in the course of public sittings held on October 14th, 1932, heard the oral arguments submitted by Mr. A. P. Fachiri, Counsel, on behalf of the Government of the United Kingdom, Dr. J. Feig, Assistant Agent, on behalf of the German Government, Mr. Phelan, Head of the Diplomatic Division of the International Labour Office, on behalf of the International Labour Organization, M. Serrarens on behalf of the International Confederation of Christian Trades Unions, and by M. Schevenels on behalf of the International Federation of Trades Unions.

Document No. 46

PCIJ, Revision of the Rules of Court, Acts and Documents concerning the Organization of the Court, Series D, Addendum to No. 2, pp. 223–228

PUBLICATIONS DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE

SÉRIE D

ACTES ET DOCUMENTS

RELATIFS

A L'ORGANISATION DE LA COUR

ADDENDUM AU N° 2

REVISION DU RÈGLEMENT DE LA COUR

PUBLICATIONS OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

SERIES D.

ACTS AND DOCUMENTS

CONCERNING

THE ORGANIZATION OF THE COURT

ADDENDUM TO No. 2

REVISION OF THE RULES OF COURT

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Le PRÉSIDENT répond que le nombre des juges composant la majorité finit toujours probablement par être connu. D'ailleurs, si la minorité est composée de juges qui pensent que ce n'est pas aller contre l'intérêt de la Cour que d'émettre un avis dissident, il y a aura peut-être autant d'avis dissidents que de juges dissidents ; mais, si la minorité se compose de juges qui pensent qu'un avis dissident est de nature à porter préjudice à la Cour, ces juges n'en émettront pas, et, dans ce cas, le public pourra penser qu'un arrêt rendu à une majorité, par exemple, de sept voix contre quatre aura été rendu à l'unanimité. Donc, étant donné la faculté laissée aux juges de rendre publique ou non leur opinion dissidente, sous le régime actuel, des situations absolument différentes peuvent avoir aux yeux du public une apparence égale, de même que des situations identiques peuvent créer des apparences différentes. Pour ces raisons, l'équité vis-à-vis des Parties exige, de l'avis du Président, que l'on introduise une disposition du genre de celle que propose M. Moore, afin d'éviter d'induire le public en erreur. Il est vrai que l'article 57 ne laisse aucun doute qu'il s'agit d'une faculté, pour les juges, de joindre une opinion dissidente au jugement ou à l'arrêt. Il n'est donc pas juste de conclure, par exemple, de l'absence d'opinions dissidentes à l'existence d'une décision unanime. Il est toutefois très probable qu'une interprétation erronée de ce genre sera donnée par l'opinion publique.

M. NYHOLM tient à mettre la Cour en garde contre le danger de permettre, par ses votes, au monde extérieur de pénétrer dans le secret de son fonctionnement, ce qui serait contraire à l'esprit du Statut.

M. ALTAMIRA espère que M. de Bustamante ne refusera pas de se rallier à la formule qui vient d'être proposée par M. Moore et qui ne constitue qu'un élargissement très opportun de sa propre proposition.

M. DE BUSTAMANTE se déclare prêt à voter sur la proposition de M. Moore ; mais, si elle n'est pas adoptée, il préfère pouvoir revenir sur la sienne propre.

Le PRÉSIDENT met aux voix la motion suivante, qui serait ajoutée à l'énumération de l'article 62 :

« 10. Le nombre des juges constituant la majorité visée à l'article 55 du Statut. »

(Ce texte est adopté par six voix contre cinq (MM. Pessôa, Oda, Nyholm, Weiss et Loder).)

114. — Règlement. Titre 2, articles 72 et 73.

Le PRÉSIDENT ouvre la discussion sur les divers amendements proposés relativement aux articles 72 à 74.

En ce qui touche à l'article 72, le Président signale une nouvelle rédaction, émanant de MM. Loder et Weiss [1], et qui comporte plutôt une modification de forme ;

[1] Voir pp. 284-285 et 290-291.

The PRESIDENT replied that, probably, the number of judges composing the majority always became known in the end. Moreover, if the minority were composed of judges who thought that it was not against the interests of the Court to record a dissenting opinion, there would perhaps be as many dissenting opinions as dissenting judges ; but, if the minority were composed of judges who thought that a dissenting opinion was calculated to be harmful to the Court, those judges would not do so, and, in that case, the public might think that a judgment given by a majority, for instance by seven votes to four, had been given unanimously. Therefore, having regard to the option given to judges to make their dissenting opinions public or not, absolutely different situations might, under present conditions, appear to be the same in the eyes of the public, whilst identical situations might appear to differ. For these reasons the President thought that, in equity to the Parties, they should introduce a rule of the kind proposed by Mr. Moore, in order to avoid misleading the public. It was true that Article 57 left no room for doubt that it was optional for judges to attach a separate opinion to the judgment or opinion. It was not therefore fair to conclude, for instance, from the absence of dissenting opinions, that the decision was unanimous. It was however very probable that an erroneous conclusion of that kind would be drawn by public opinion.

M. NYHOLM wished to warn the Court against the danger, as a consequence of the publicity of its votes, of allowing the outside world to penetrate the secrecy of its working, a thing which would be contrary to the spirit of the Statute.

M. ALTAMIRA hoped that M. de Bustamante would not refuse to accept the draft just proposed by Mr. Moore, and which merely amounted to a very expedient extension of M. de Bustamante's own proposal.

M. DE BUSTAMANTE said that he was ready to vote for Mr. Moore's proposal, but that, if it were not adopted, he preferred to be able to fall back upon his own.

The PRESIDENT took a vote on the following proposal which was to be added to the list contained in Article 62 :

"10. The number of the judges constituting the majority mentioned in Article 55 of the Statute."

(This clause was adopted by 6 votes to 5 (MM. Pessôa, Oda, Nyholm, Weiss and Loder).)

114. — Rules. Heading 2, Articles 72 and 73.

The PRESIDENT opened the discussion on the various amendments proposed in regard to Articles 72 to 74.

In regard to Article 72, the President drew attention to a new draft prepared by MM. Loder and Weiss [1], which was more in the nature of an amendment of

[1] See pp. 284-285 and 290-291.

à cet amendement, il y a un sous-amendement de M. Anzilotti.

Passant ensuite à l'examen de l'article 73, le Président attire l'attention de la Cour sur le nouveau texte établi par le Greffier (p. 87 du Document Distr. 794) [1].

M. DE BUSTAMANTE déclare retirer sa proposition relative à l'article 73 [2].

M. ALTAMIRA demande s'il est bien entendu que le mot « requête » sera remplacé par « demande » dans les articles 72 et 73.

Le PRÉSIDENT répond affirmativement.

M. PESSÔA propose de supprimer les mots : « par l'entremise du Secrétaire général de la Société des Nations », dans la pensée que cette notification peut être faite directement par le Greffier.

Le GREFFIER rappelle que, pour la communication tout à fait analogue des requêtes introductives d'instance, l'article 40 du Statut prescrit de passer par l'intermédiaire du Secrétaire général à l'égard des Membres de la Société. Pour les États qui ne sont pas Membres de la Société des Nations, les requêtes, dans les deux cas, leur sont communiquées directement. Il ajoute qu'il existe également pour cela des raisons d'ordre pratique : il est plus simple d'expédier les cinquante-six communications à Genève aux fins de transmission, que de les envoyer à chacun des États intéressés.

M. PESSÔA n'insiste pas, si le procédé actuel offre des avantages pratiques.

Le PRÉSIDENT aborde la proposition de M. Anzilotti, relative à la définition de la notion d'« organisations internationales ».

M. ANZILOTTI pense qu'il peut y avoir des inconvénients à admettre une organisation internationale quelconque à venir devant la Cour. Lorsqu'il s'agit d'un organisme non officiel, les personnes qui parlent en son nom n'encourent en réalité aucune responsabilité. Par suite, il pourrait arriver qu'elles missent la Cour dans une situation difficile.

M. Anzilotti reconnaît que, d'après la proposition du Greffier, ce danger n'existerait guère, puisqu'il s'agirait d'une initiative à prendre par la Cour elle-même. Néanmoins, il avait cru que l'article 50 du Statut suffisait pour permettre à la Cour de s'adresser à des organisations privées pouvant fournir des renseignements utiles. Mais il ne fait pas de proposition précise, car tout ira bien, sans doute, si la Cour conserve l'initiative : elle ne manquera pas, en effet, de s'adresser exclusivement à des organisations internationales offrant toutes les garanties nécessaires.

Le PRÉSIDENT a toujours interprété l'expression « organisations internationales » comme équivalente à « organisations officielles », par exemple le Bureau international du Travail. Mais, à l'heure actuelle, on a

[1] Voir p. 315.
[2] » pp. 262-263.

form. To that amendment there was a further amendment by M. Anzilotti.

Proceeding, next, to consider Article 73, the President called attention to the new draft prepared by the Registrar (p. 87 of Document Distr. 794) [1].

M. DE BUSTAMANTE said that he withdrew his proposal in regard to Article 73 [2].

M. ALTAMIRA asked whether it were clearly understood that the word *requête* should be altered to *demande* in Articles 72 and 73.

The PRESIDENT replied in the affirmative.

M. PESSÔA proposed to delete the words "through the Secretary-General of the League of Nations" as he held that that notice might be given directly by the Registrar.

The REGISTRAR recalled that in the entirely analagous case of notice of applications instituting proceedings, Article 40 of the Statute laid down that notice was to be given through the Secretary-General, in so far as Members of the League were concerned. As regarded States which were not Members of the League, the applications were in both cases communicated to them directly. He added that there were also reasons of a practical nature ; it was easier to send the fifty-six notices to Geneva for transmission, than to send them to each of the States concerned.

M. PESSÔA did not insist if the present procedure had practical advantages.

The PRESIDENT then approached M. Anzilotti's proposal regarding the definition of the conception of "international organizations".

M. ANZILOTTI thought that there might be some drawbacks to allowing any kind of international organization to come before the Court. In the case of an unofficial organization, the persons who spoke on its behalf in reality incurred no responsibility. Consequently they might sometimes place the Court in a difficult position.

M. Anzilotti recognized that, according to the Registrar's proposal, that danger would hardly exist, since the initiative would rest with the Court itself. Nevertheless, he had thought that Article 50 of the Statute sufficed to enable the Court to apply to private organizations capable of supplying useful information. He did not, however, make a definite proposal, because no doubt everything would work out satisfactorily if the Court retained the initiative, for it would undoubtedly be careful only to approach international organizations offering all the necessary guarantees.

The PRESIDENT had always construed the expression "international organizations" as tantamount to "official organizations", for instance, the International Labour Office. But now a species of precedent had been

[1] See p. 315.
[2] „ pp. 262-263.

créé une sorte de précédent, en admettant également les grandes organisations industrielles, ouvrières ou patronales, et il serait bien difficile de les écarter maintenant, en raison de leur très grande importance. Au surplus, ces grandes organisations sont reconnues, du moins d'une façon indirecte, comme étant des éléments de l'Organisation internationale du Travail, qui est fondée d'une part sur une représentation des États, et, d'autre part, sur une représentation égale des organisations patronales et ouvrières.

M. ANZILOTTI déclare que c'était précisément la situation des organisations en question devant la Cour qui l'avait préoccupé ; mais, si c'est la Cour elle-même qui doit prendre l'initiative, il n'insiste pas.

Le PRÉSIDENT constate que M. Anzilotti ne maintient pas sa proposition.

M. DE BUSTAMANTE, se référant au texte de la dernière phrase du 1° de l'article 73 amendé (p. 87, Distr. 794) [1], se demande ce qui arrivera s'il n'est pas donné suite aux questions posées par la Cour.

Le GREFFIER explique qu'il existe des moyens permettant d'éviter à la Cour toute chicane de ce genre ; par exemple, la question ne sera pas posée à l'État ou à l'organisation intéressée sans que l'on se soit assuré, au préalable, que cette question sera suivie d'un effet quelconque.

Le PRÉSIDENT constate que la suppression de la dernière phrase du premier alinéa n'est pas demandée, et ouvre la discussion sur l'alinéa suivant, dont lecture est donnée.

Le GREFFIER déclare qu'il s'agit là d'un point assez important. C'est au fond la question de l'intervention qui se pose, transportée dans le domaine des avis consultatifs.

Si la Cour admet le principe qu'il lui appartient de prendre l'initiative pour faire connaître aux États intéressés qu'ils peuvent formuler une demande aux fins d'être entendus, elle doit admettre aussi un correctif, pour le cas où elle aurait omis d'adresser la notification à un État réellement intéressé ; c'est ce correctif que le paragraphe en question a pour objet de fournir.

Le PRÉSIDENT fait observer que le paragraphe reproduit, en l'adaptant à la procédure consultative, le principe des articles 62 et 63 du Statut.

Ayant constaté que la Cour est d'accord pour maintenir le texte dont il s'agit, le Président passe au paragraphe 2 de l'article 73 amendé, dont il donne lecture.

M. WEISS demande la substitution du mot « discuter » au mot « commenter », comme dans un article antérieur.

M. DE BUSTAMANTE demande si l'intention est bien que tous les États qui ont présenté des exposés écrits ou oraux soient admis à discuter les exposés des autres. Dans ce cas, c'est un double débat qui va s'instituer

[1] Voir p. 315.

created by also admitting great industrial organizations, whether of workers or of employers, and it would be very difficult now to leave them out, owing to their very great importance. Moreover, these great organizations were at any rate indirectly recognized as constituting elements of the International Labour Organization, which was composed partly of representatives of States and partly of representatives of an equal number of employers' and workers' organizations.

M. ANZILOTTI stated that it was exactly the situation of those organizations, when they came before the Court, which he had had in mind, but as the initiative rested with the Court itself, he would not press the matter.

The PRESIDENT observed that M. Anzilotti did not maintain his proposal.

M. DE BUSTAMANTE, referring to the wording of the last sentence of No. 1 of Article 73 as amended (p. 87, Distr. 794) [1], wondered what would happen if questions put by the Court were not answered.

The REGISTRAR explained that there were means of protecting the Court from incidents of that kind : for instance, a question would not be put to the State or organization concerned without previously ascertaining that some reply would be given.

The PRESIDENT observed that there was no motion for the deletion of the last sentence of the first paragraph and he opened the discussion on the next paragraph, which was read.

The REGISTRAR stated that that was a point of some importance. It was in reality the question of intervention as it arose in connection with advisory opinions.

If the principle were accepted that it rested with the Court to take the initiative of informing interested States that they might submit a request for a hearing, provision must also be made for a case where the Court might have omitted to give notice to a State which was really interested ; the paragraph in question was intended to provide for such a case.

The PRESIDENT observed that the paragraph reproduced the principle contained in Articles 62 and 63 of the Statute, adapting it to advisory procedure.

Having satisfied himself that the Court agreed to maintain the clause in question, the President passed to paragraph 2 of Article 73 amended, which he read.

M. WEISS asked that the word "comment" should be replaced by the word "discuss" as in a previous article.

M. DE BUSTAMANTE asked whether the intention really was that all States who had submitted written or oral statements should be allowed to discuss the statements of others. In that case a twofold discussion

[1] See p. 315.

entre les États, et ce débat sera encore suivi de la procédure orale : c'est trop. Selon M. de Bustamante, c'est au cours de la procédure orale seulement qu'il conviendra de permettre à un État de discuter les exposés des autres, car il ne s'agit pas d'une procédure contradictoire, mais de renseignements à fournir.

M. ANZILOTTI fait observer que les avis consultatifs sont de nature très différente ; si, dans certains cas, les suggestions de M. de Bustamante sont bien à leur place, il n'en est pas de même en d'autres circonstances. M. Anzilotti pense aux cas où la Cour est saisie, sous forme d'avis consultatif, de véritables litiges entre États. Afin d'éviter de créer des difficultés aux États disposés à accepter le renvoi de leurs différends à la Cour, M. Anzilotti aurait préféré laisser les articles à peu près tels qu'ils sont ; mais comme, dans le nouveau texte, il n'y a rien qui lie absolument la Cour, elle pourra dans chaque cas d'espèce faire ce qu'elle croira préférable.

Le PRÉSIDENT demande s'il est fait une proposition tendant à la suppression du texte dont il s'agit.

M. DE BUSTAMANTE répond affirmativement.

Le PRÉSIDENT propose, en conséquence, de statuer sur le paragraphe 2 de l'article 73 amendé.

(Ce texte est adopté par neuf voix contre deux (MM. Pessôa et de Bustamante).)

Le PRÉSIDENT aborde le paragraphe 3 du même article 73 amendé (pp. 87 et 88 du Document Distr. 794) [1]. (Lecture en est donnée.)

M. ANZILOTTI déclare avoir des difficultés à accepter ce paragraphe 3, étant donné qu'il semble préjuger de questions assez graves : il n'est pas toujours facile de se rendre compte de la portée de cette « application par analogie ». L'application du texte visé dépend nécessairement de la nature de l'avis consultatif ; il serait impossible de comparer à cet égard, par exemple, l'affaire des décrets de nationalité tunisienne à celle du travail de nuit des patrons boulangers. Il propose donc de supprimer dans le nouveau texte les nos 3 et 4, étant donné que les énumérations de ce genre peuvent présenter parfois de réels inconvénients.

Le GREFFIER explique qu'en rédigeant son texte, il s'est efforcé de consigner par écrit la manière de procéder suivie par la Cour depuis 1922. Elle a, en fait, appliqué dans la pratique, à la procédure consultative, tous les articles énumérés dans le premier alinéa du n° 3. Le Greffier ajoute que l'insertion, dans le Règlement au moins, des dispositions visées aux alinéas *b* et *c*, présenterait au point de vue pratique de réels avantages.

M. ANZILOTTI se demande si la pratique de la Cour ne fournit pas au Greffier un appui suffisant vis-à-vis des intéressés.

[1] Voir pp. 315 316.

would take place between States, and, following that discussion, there would be still the oral proceedings : that was too much. In M. de Bustamante's opinion, States should only be allowed to discuss the statements of others in the course of the oral proceedings, because it was not a question of a contested case but of the supply of information.

M. ANZILOTTI pointed out that advisory opinions were of very different natures. Though, as applied to some cases, M. de Bustamante's suggestions were quite sound, they were not so in other circumstances. M. Anzilotti was referring to cases in which the Court had before it, in the form of an advisory opinion, real disputes between States. In order to avoid creating difficulties for States which were prepared to accept the reference of their disputes to the Court, M. Anzilotti would have preferred to leave the articles more or less as they were, but as, in the new text, there was nothing which absolutely bound the Court, it might in each case act as it thought best.

The PRESIDENT asked whether there was any proposal for the deletion of the clause under discussion.

M. DE BUSTAMANTE replied in the affirmative.

The PRESIDENT therefore proposed to vote on paragraph 2 of Article 73, as amended.

(This clause was adopted by 9 votes to 2 (MM. Pessôa and de Bustamante).)

The PRESIDENT then proceeded to open the discussion on paragraph 3 of the same Article 73 as amended (pp. 87 and 88 of Document Distr. 794) [1]. (This paragraph was read.)

M. ANZILOTTI said that he found it difficult to accept paragraph 3, because it seemed to prejudge questions of some importance. It was not always easy to appreciate fully the effects of this "application by analogy". The application of the clause in question would necessarily depend upon the nature of the advisory opinion. It would be impossible in this respect to compare, for instance, the question of the Tunisian nationality decrees with that of the night work of master bakers. He proposed, therefore, in the new draft to delete numbers 3 and 4, because enumerations of this kind sometimes had serious disadvantages.

The REGISTRAR explained that in drafting his proposal he had endeavoured to commit to writing the practice followed by the Court since 1922. It had, in fact, applied in practice to advisory procedure all the articles enumerated in sub-paragraph 1 of paragraph 3. The Registrar added that the insertion in the Rules of at all events the provisions mentioned under *b* and *c*, would offer real advantages from a practical standpoint.

M. ANZILOTTI wondered whether the Court's practice did not constitute adequate authority for the Registrar in his dealings with interested Parties.

[1] See pp. 315-316.

M. DE BUSTAMANTE craint que l'énumération de certains articles du Statut et du Règlement ne soit de nature à faire croire que l'application des articles non mentionnés est exclue, ce qui pourrait être grave si l'énumération n'était pas absolument complète. Dans cet ordre d'idées, M. de Bustamante se demande pourquoi, dans la liste des articles, la mention de l'article 52 du Statut, ainsi conçu, a été omise :

« Après avoir reçu les preuves et témoignages dans les délais déterminés par elle, la Cour peut écarter toutes dépositions, tous documents nouveaux qu'une des Parties voudrait lui présenter sans l'assentiment de l'autre. »

Le GREFFIER explique que les documents déposés dans la procédure consultative présentent le caractère technique de renseignements produits sur demande de la Cour ; dès lors, la règle de l'article 52 n'a pas semblé nécessaire ; mais il reconnaît que c'est là une question d'appréciation.

M. DE BUSTAMANTE pense qu'il vaudrait mieux supprimer l'énumération des articles du Règlement et du Statut en la remplaçant par une référence générale.

Le PRÉSIDENT pense également qu'il serait dangereux d'introduire une clause fixant les conditions d'application par analogie d'autres clauses, d'autant plus qu'ainsi on risquerait de priver la Cour d'une liberté dont elle a joui jusqu'à ce jour. Si, en effet, les intéressés ont, de par le règlement, un droit à réclamer tel ou tel traitement, ils pourraient objecter à la Cour qu'elle a eu tort, soit de faire, soit d'omettre telle ou telle autre chose.

Il met aux voix la suppression, demandée par M. Anzilotti, des trois premières lignes contenant les énumérations des articles du Statut et du Règlement.

(La suppression de ce texte est décidée à l'unanimité, M. MOORE déclarant que son vote ne peut-être compris comme préjugeant aucune des questions qui seront discutées ultérieurement.)

Le PRÉSIDENT, ayant consulté la Cour sur la suppression de l'alinéa *a*, cette suppression est décidée à l'unanimité.

Le PRÉSIDENT met aux voix l'alinéa *b*, dont la suppression est décidée par neuf voix contre deux (MM. Altamira et Huber).

Le PRÉSIDENT consulte la Cour sur la suppression de l'alinéa *c* ; cette suppression est décidée par neuf voix contre deux (MM. Altamira et Huber).

Le PRÉSIDENT constate que le vote négatif émis sur le n° 3 du texte proposé ne signifie pas, dans la pensée de la Cour, que ce texte ne soit pas une codification exacte de la pratique, ni que la Cour soit opposée au maintien de cette pratique jusqu'à nouvelle décision.

M. DE BUSTAMANTE feared that the enumeration of certain articles of the Statute and Rules might be calculated to create an impression that the application of articles not mentioned was excluded ; that might be serious if the enumeration were not absolutely complete. In that connection M. de Bustamante wondered why Article 52 of the Statute, which was as follows, had been omitted from the list of articles :

"After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one Party may desire to present unless the other side consents."

The REGISTRAR explained that documents submitted in advisory proceedings were technically information produced at the request of the Court. The rule contained in Article 52 did not therefore seem necessary, but he admitted that that was a question of opinion.

M. DE BUSTAMANTE thought it would be better to omit the enumeration of articles of the Rules and Statute and to substitute for it a general reference.

The PRESIDENT also thought that it would be dangerous to introduce a clause laying down the conditions for the application by analogy of other clauses, more especially as by so doing they might deprive the Court of a freedom which it had hitherto enjoyed. For if interested Parties had a right, under the Rules, to claim some particular treatment, they might make objections and say to the Court that it had been wrong to do or to omit to do some particular thing.

He took a vote on the deletion proposed by M. Anzilotti of the first three lines containing the enumeration of articles of the Statute and Rules.

(The deletion of these lines was unanimously adopted, Mr. MOORE stating that his vote must not be regarded as prejudging any of the questions subsequently to be discussed.)

The PRESIDENT, having taken the opinion of the Court on the deletion of sub-paragraph *a*, it was unanimously decided to delete that clause.

The PRESIDENT took a vote on sub-paragraph *b*, the deletion of which was approved by 9 votes to 2 (MM. Altamira and Huber).

The PRESIDENT took the opinion of the Court on the deletion of sub-paragraph *c*, and the deletion of that clause was decided upon by 9 votes to 2 (MM. Altamira and Huber).

The PRESIDENT observed that the negative vote on paragraph 3 of the proposed draft did not mean that in the Court's opinion that draft did not constitute an exact codification of the Court's practice, nor that the Court was opposed to the maintenance of that practice until otherwise decided.

Le Président aborde le n° 4 de l'article 73 amendé et il signale que l'article 35 du Règlement vient de subir certaines modifications.

Le GREFFIER fait observer que, si l'on supprime les trois premières lignes du paragraphe 3, il faut supprimer également le n° 4 qui soulève les mêmes objections.

Le PRÉSIDENT constate que, dans ces conditions, il est inutile de statuer sur le paragraphe en question.

115. — Règlement. Titre 2, article 74.

Le PRÉSIDENT invite le Greffier à donner quelques explications sur le nouveau texte de l'article 74 [1].

Le GREFFIER explique qu'il s'agit d'une simple codification de la pratique de la Cour, codification qui semble désirable en raison de la nature d'ordre public des dispositions dont il s'agit.

Le seul point réellement important qui se trouve dans ces propositions, c'est la règle d'après laquelle, au moment où un avis est rendu public, il doit déjà se trouver entre les mains du Secrétaire général.

Le PRÉSIDENT rappelle que M. Pessôa a fait au sujet de cet article une proposition qui figure à la page 11 du Document Distr. 899 [2].

M. PESSÔA fait observer qu'en substance son amendement est analogue à celui du Greffier ; si donc ce dernier était adopté, il n'y aurait pas lieu de voter sur le sien. M. Pessôa retire la seconde partie de sa proposition, une proposition analogue, relative aux arrêts, ayant déjà été retirée par lui.

Le PRÉSIDENT met aux voix le nouveau texte de l'article 74 inséré à la page 88 du Document Distr. 794 [1].

(Ce texte est adopté par dix voix contre une (M. Moore).)

Le PRÉSIDENT, qui n'est pas sûr d'avoir tenu compte de toutes les propositions faites au sujet des articles 71-74, prie ceux de ses collègues qui estiment qu'une proposition importante a été laissée de côté de bien vouloir la lui signaler.

M. ODA présente une observation sur le dernier alinéa de l'article 74, lequel a été inséré afin précisément d'assurer la publicité des avis consultatifs. Sous sa nouvelle forme, l'article semble avoir perdu un peu de ce caractère. D'ailleurs, étant donné que des dispositions semblables sont applicables aussi bien aux avis et aux arrêts de la Cour, il y aurait peut-être intérêt, au lieu de laisser subsister le dernier paragraphe de l'article 74 amendé à la place qu'il occupe maintenant, de l'insérer, développé de façon à viser en même temps l'arrêt et l'avis consultatif, sous une rubrique nouvelle spéciale qui constituerait un titre 4.

[1] Voir p. 316.
[2] » » 271.

The President then proceeded to deal with paragraph 4 of Article 73 as amended, and he pointed out that Article 35 of the Rules had recently been modified in certain respects.

The REGISTRAR pointed out that, if the first three lines of paragraph 3 were deleted, paragraph 4 must also be deleted, as it encountered the same objections.

The PRESIDENT said that in those conditions it was unnecessary to deal with that paragraph.

115. — Rules. Heading 2, Article 74.

The PRESIDENT called on the Registrar to explain the new draft of Article 74 [1].

The REGISTRAR explained that it simply constituted a codification of the Court's practice, which codification seemed desirable owing to the public nature of the rules in question.

The only really important point in these proposals was the rule to the effect that, when an opinion was made public, it should already be in the hands of the Secretary-General.

The PRESIDENT recalled that M. Pessôa had made a proposal in regard to this article which appeared on page 11 of Document Distr. 899 [2].

M. PESSÔA observed that his amendment was substantially the same as that of the Registrar, so that if the latter were adopted, there would be no occasion to vote on his own amendment. He withdrew the second part of his proposal, as he had already withdrawn a similar proposal in regard to judgments.

The PRESIDENT took a vote on the new text of Article 74 appearing on page 88 of Document Dist. 794 [1].

(This text was adopted by 10 votes to 1 (Mr. Moore).)

The PRESIDENT, who was not certain whether he had remembered all proposals made in connection with Articles 71-74, asked any of his colleagues who thought that some important proposal had been left out to be so good as to call his attention to it.

M. ODA made an observation regarding the last paragraph of Article 74, which had been inserted with the definite object of ensuring the publicity of advisory opinions. In its new form, the article seemed somewhat to have lost this characteristic. Moreover, seeing that similar rules were applicable both to opinions and judgments, it would perhaps be well, instead of leaving the last paragraph of the amended Article 74 in its present position, to insert it, modified so as to cover both judgments and advisory opinions, under a new special heading which would constitute Heading 4.

[1] See p. 316.
[2] „ „ 271.

Document No. 47

Letter of the PCIJ Registrar to the ILO Director, dated 26 March 1926

[Unofficial translation]

26 March 1926

Dear Minister,

I have just received from the Secretariat of the League of Nations the request for an opinion concerning the competence of the International Labour Organisation to address the personal work of employers.

As soon as the request is printed, it will, of course, be communicated to the International Labour Office in accordance with Article 73, paragraph 2, of our Rules.

The question arises, however, whether there are other "international organisations" within the meaning of the provision in question, to which official notifications should also be sent.

It is difficult for me to form a precise idea on this subject at the moment, as the complete file of the case has not yet reached me - indeed, I understand that it will be composed and sent by mutual agreement between the International Labour Office and the Secretariat. In the meantime I have personally considered that, as the question is worded, the only three organisations which could possibly come into consideration would be:

1) the International Federation of Trade Unions,
2) the International Confederation of Christian Trade Unions; and
3) the International Organisation of Industrial Employers

I should be much obliged if you would kindly give me your opinion on this point.

Please accept, Mr. Minister, the assurances of my highest consideration.

The Registral of the Court,

Hammarskjöld [signature]

Document No. 48

Minute of ILO Legal Adviser, Jean Morellet, dated 10 April 1926

[Unofficial translation]

Minute

(elements of a response to Mr Schifferstein's letter dated 6 April 1926)

1) According to Article 73 of the Rules of the Permanent Court of International of Justice, when the Court is seized of an application requesting an advisory opinion, "notice of such request shall also be given to any international organisations which are likely to be able to furnish information on the question".

No text provides for the representation before the Court of international organisations consulted during the advisory procedure. In fact, the Court has decided, each time an international organisation has been consulted, to hear its representative in a public audience if it so wishes. It is therefore almost certain that the Court will invite the international organisations consulted on the question of the international regulation of employers' work to be represented before it. If by chance the Court does not extend such an invitation to the organisations concerned, the latter may take the initiative of requesting that their representative be heard.

2) The Registrar of the Court has asked the Director of the ILO to inform him of the organisations to be consulted and he has already announced his intention to communicate the request to the International Federation of Trade Unions, the International Confederation of Christian Trade Unions and the International Organisation of Industrial Employers. Although the Food Federation is affiliated to the International Federation of Trade Unions, which will be consulted, it would undoubtedly be in the interest of Mr. Schifferstein's organisation to be specially consulted as well, and the ILO will inform the Registrar of Mr. Schifferstein's wish.

Jean Morellet [signature]

10 April 1926

Document No. 49

PCIJ, Third annual report (15 June 1926 – 15 June 1927),
Series E – No. 3

SERIES E.—No. 3

THIRD ANNUAL REPORT

OF THE

PERMANENT COURT OF INTERNATIONAL JUSTICE

(June 15th, 1926—June 15th, 1927)

filed by the other. These observations would be in writing, but the Court (April 21st, 1925) reserved the right to consider on its merits any subsequent request for a hearing.

On August 24th, 1923 (Advisory Opinion No. 7), the Court decided to inform the Roumanian Government (which had requested a hearing, citing Articles 62 and 63 of the Statute) that Articles 62 and 63 of the Statute and the corresponding articles of the Rules only related to contentious procedure. The Court was, however, disposed to hear the Roumanian representative under the terms of Article 73 of the Rules.

The question of the international organizations permitted to furnish information (Rules, Article 73) was considered during the revision of the Rules in 1926 and it was established that the initiative always rested with the Court both in the case of a State and of an international organization. (See Series D., No. 2, Add., pp. 224-225.)

The following is a list of International Organizations so far admitted to furnish information in one or more questions:

International Agricultural Commission.
International Federation of Trades Unions.
International Labour Organization.
International Association for Legal Protection of Workers.
International Confederation of Agricultural Trades Unions.
International Federation of Landworkers.
International Institute of Agriculture (Rome).
International Federation of Christian Trades Unions of Landworkers.
International Organization of Industrial Employers.
International Confederation of Christian Trades Unions.

In the case of Advisory Opinion No. 13, the "Union internationale des Fédérations des Ouvriers et Ouvrières de l'Alimentation" which is established at Zurich was desirous to furnish information. The President of the Court, however, did not communicate the request for an advisory opinion to that Organization, the reason being that it was not of the same status as the organizations notified, to one of which (the International Federation of Trades Unions) it was affiliated. If it desired to submit observations it could do so through the International Federation of Trades Unions.

In connection with the revision of the Rules it was established that the question of intervention only arose in advisory procedure in the form of a request for a hearing from a State (or organization) which should have received an invitation from the Court, but had not done so.

A proposal for the enumeration of the articles of the Statute and Rules applicable by analogy to advisory procedure was rejected

Document No. 50

Introductory note to the Standing Orders of the ILO Governing Body, para. 23

Introductory note

1. The Governing Body of the International Labour Office (hereinafter "the Governing Body") is established pursuant to articles 2 and 7 of the Constitution of the International Labour Organization. The functioning of the Governing Body is governed by a set of rules dispersed among different texts and publications, as well as a number of practices and arrangements developed over the years since its First Session on 27 November 1919 in Washington, DC. Since 2006, all these rules have been consolidated into the present Compendium prefaced by an introductory note that reflects certain practices without fixing them as a legal rule. [1]

2. The Compendium was amended in 2009 to include further sets of rules and to promote gender equality, [2] and in 2011 to reflect modifications resulting from the reform package arising out of the work of the Working Party on the Functioning of the Governing Body and the International Labour Conference (hereinafter "the Conference"). Further modifications were made to the Standing Orders and the Introductory note as a result of the review of the reform package in 2014 and 2015. [3] The annexes in the Compendium have similarly been adjusted as and when decided by the Governing Body. [4]

3. The consolidation of the rules applicable to the Governing Body should provide members with an overview of the rules and practices governing its work. It contains not only texts, but also practical solutions that have either served to deal with situations not covered in specific written provisions and which have not occurred again since, or, through repetition, have become precedents that the Governing Body follows, as in the case of the "rule" of geographical rotation of the office of Chairperson of the Governing Body. A number of these practices, in particular those in regular use, are described in the introductory note. This also applies to points on which the Governing Body has not seen fit to adopt rules so as to maintain

[1] GB.291/LILS/3; GB.291/9(Rev.), paras 33–42.

[2] GB.306/LILS/1; GB.306/10/1(Rev.), paras 2–8.

[3] GB.320/WP/GBC/2 and GB.323/WP/GBC/2.

[4] Each annex contains a reference to the date of its adoption or amendment by the Governing Body.

The Employers' and Workers' groups

23. It has been a constant practice that the Employer and Worker Vice-Chairpersons of the Governing Body chair their respective groups. Each group may also designate other spokespersons for various sections and segments of the Governing Body. The group secretaries are designated by the groups and traditionally provided by the International Organisation of Employers (IOE) for the Employers and the International Trade Union Confederation (ITUC) for the Workers. These nominations are to be communicated to the Chairperson of the Governing Body at the beginning of each new period of office of the Governing Body, or at the occasion of any change during that period.

Report of the Chairperson of the Governing Body to the Conference

24. The Chairperson of the Governing Body, after consulting the Vice-Chairpersons, reports directly to the Conference on the work of the Governing Body over the previous year.

Procedure and functioning of Governing Body sessions

Frequency and timing of sessions

25. Since 1995 the Governing Body's work has been distributed between a full session in November and another in March, as well as a half-day session in June immediately after the Conference.

26. From November 2011, the Governing Body holds its sessions in continuous plenary, with the exception notably of the Committee on Freedom of Association and certain working parties. This functioning avoids having more than one meeting at any time, meetings of other bodies excepted, in order to allow the participation of Governing Body members in all discussions.

27. The length of sessions is determined by its agenda. The plan of work of the March and November sessions provides for group meetings before and during the proceedings of the Governing Body.

Document No. 51

ILO, Explanatory note on the role of international employers' and workers' organizations enjoying general consultative status at the ILO, 17 April 2023

EXPLANATORY NOTE

Role of international employers' and workers' organizations enjoying general consultative status at the ILO

Introduction

1. By reason of the tripartite structure of the International Labour Organization (ILO), representatives of employers and workers are integrated into its governance organs, i.e. the International Labour Conference and the Governing Body, alongside representatives of governments. International organizations of employers and workers are not members as such of the governance organs, but they do enjoy close institutional relationship with the ILO.

2. By granting "general consultative status" to a non-governmental international organization, the ILO recognizes that collaboration with the organization concerned has special institutional significance.[1] There are currently six organizations that enjoy general consultative status:
   - International Organisation of Employers (IOE)
   - International Trade Union Confederation (ITUC)
   - World Federation of Trade Unions (WFTU)
   - International Cooperative Alliance (ICA)
   - Organization of African Trade Union Unity (OATUU)
   - Business Africa[2]

3. In addition to their consultative status, two of these organizations -- the IOE and ITUC -- act as the secretariats of the Employers' and the Workers' representatives sitting in the ILO governance organs.

General consultative status with the ILO

4. As early as 1920, arrangements were put in place by the ILO to promote interaction with international organizations of employers and workers and facilitate those organizations

[1] In the ILO, a distinction is made between the following categories of international non-governmental organizations:
(a) organizations enjoying general consultative status, established by the Governing Body in 1948;
(b) organizations enjoying regional consultative status established by the Governing Body in 1964;
(c) INGOs included in the "Special List" of INGOs established by the Governing Body in 1956;
(d) other organizations.

[2] Only three other organizations have enjoyed general consultative status in the past: the International Confederation of Free Trade Unions (ICFTU), the World Confederation of Labour (WCL), and the International Federation of Agricultural Producers (IFAP) which was dissolved in 2010. The ICFTU and the WCL merged in 2006 to become the ITUC.

when following the work of the Organization.[3] This practice was codified in 1946 in article 12(3) of the ILO Constitution, which was inspired by Article 71 of the UN Charter and reads as follows: *"The International Labour Organization may make suitable arrangements for such consultation as it may think desirable with recognized non-governmental international organizations, including international organizations of employers, workers, agriculturists and cooperators."*

5. The "suitable arrangements" referred to in this provision were established through several decisions of the Governing Body. The general consultative status was the first such arrangement adopted by the Governing Body at its 105th Session (June 1948) in the form of a resolution. This resolution continues to embody the rules applicable to non-governmental international organizations enjoying that status.[4] To give effect to the resolution, the Governing Body adopted amendments to its Standing Orders and proposed amendments to the Standing Orders of the Conference.[5]

6. Over the years, the ILO has reviewed the scope of collaboration and nature of facilities afforded to international non-governmental organizations. Yet, to date, the general consultative status represents the most advantageous collaborative framework an international employers' or workers' organization can benefit from at the ILO.

7. General consultative status is granted to non-governmental international organizations "with an important interest in a wide range of ILO activities". Its purpose is to facilitate "the reference to the [ILO] by non-governmental organizations of proposals which such organizations may desire to make for official international action upon matters primarily within the competence of the [ILO]".[6]

8. The main facility afforded to these organisations is the possibility to be represented in a wide range of ILO meetings, most notably the meetings of the Conference and the Governing Body, without the need for a specific invitation. As regards the Conference, these organizations are entitled to accredit an unlimited number of representatives and are thereby enabled to participate in work of the various committees of the Conference

[3] The practice was recalled by the ILO Director-General when the question of the relations with the World Federation of Trade Unions was examined by the Governing Body at its 103rd Session (December 1947); see minutes of the Governing Body of the 103rd Session, p. 48. Based on this well-established practice, international employers' and workers' organizations were invited by the Permanent Court of International Justice to furnish information in the six advisory proceedings brought before the Court between 1922 and 1932 concerning the interpretation of the ILO Constitution and one international labour Convention.

[4] Compendium of rules applicable to the Governing Body of the International Labour Office, Annex V *Representation of non-governmental international organizations at ILO meetings, including international employers' and workers' organizations*, *Rules applicable to non-governmental international organizations enjoying general consultative status*, Resolution adopted by the Governing Body at its 105th Session (14 June 1948).

[5] Minutes of the 105th Governing Body Session (June 1948), p. 34-42, p. 92-93. The applicable provisions are articles 2.2 (j), 14 (9) and 36 (6) of the Standing Orders of the Conference as well as article 1.10 of the Standing Orders of the Governing Body.

[6] Resolution adopted by the Governing Body at its 105th Session (14 June 1948).

(with exception of administrative or financial matters or meetings of the Credentials Committee and the Drafting Committee). They can decide the committees in which they wish to participate without requesting specific authorization from the Conference. This includes the Conference committees negotiating draft international labour standards and the standing Conference Committee on the Application of Standards responsible for examining the application of standards by Member States. Representatives of these organizations may also make or circulate statements if they are so authorized by the Officers of the Committees or the Conference.

9. In practice, the six non-governmental international organizations mentioned above are represented at each session of the annual Conference. The participation in the Governing Body is more variable – with the exception of the IOE and the ITUC which take part as the secretariats of the Employers' and the Workers' groups respectively. Outside the meetings of the ILO governance organs, these non-governmental international organizations play an important role in the functioning of the ILO supervisory procedures as they may submit observations on the application of ratified Conventions by Member States, which are then examined by the ILO Committee of Experts on the Application of Conventions and Recommendations. Moreover, these organizations may file representations under article 24 of the Constitution against a Member State for allegedly failing to secure the observance of a Convention to which it is party, and they can also submit complaints under the special procedures for the examination of complaints alleging violations of freedom of association.

Secretariats of the Employers' and Workers' groups

10. Consistent with the tripartite setup of the Organization, ILO constituents representing governments, employers and workers organize themselves through autonomous groups. The "principle of the autonomy" of these three constituent groups is well established under ILO constitutional theory and practice. It is guaranteed by the Constitution as regards the International Labour Conference.[7] It constitutes an institutional assurance that the ILO tripartite constituents enjoy wide discretion with regard to organizing, coordinating and representing themselves within the executive or deliberative organs of the Organization, subject to the provisions of the Constitution and the applicable standing orders. [8]

11. The effective exercise of the duties and responsibilities of the Employers' and Workers' representatives is very much dependent on the support and coordination provided by the respective secretariats. Employers' and Workers' representatives also need a permanent

[7] Article 4(1) of the Constitution provides that every delegate in a tripartite delegation of a Member State "shall be entitled to vote individually on all matters which are taken into consideration by the Conference".

[8] The principle is spelled out in the Standing Orders of the International Labour Conference (article 5, paragraph 1), the Standing Orders of the Governing Body (article 7.1), the Rules for Regional Meetings (article 14) as well as in rules applicable to other ILO meetings or bodies. It has also been codified in an instrument of amendment to the Constitution, which was adopted in 1986 but has not yet entered into force.

structure to support them in the preparation of ILO-related work and to represent their interests within the Office on a continuous basis –- similar to the representation of governments ensured through each country's permanent mission. Further, the secretariats of the Employers' and the Workers' groups exercise political functions and may have recourse to the technical support of the competent services of the International Labour Office.

12. Each group elects its secretary for the meetings of the Conference and the meetings of the Governing Body. The election of a secretary by the Employers' and the Workers' groups at the Conference has been provided for by the Standing Orders of the Conference since 1927. The members of the secretariat of the Employers' and the Workers' groups are officially listed as participants to the Conference.[9] The Standing Orders for technical meetings and meetings of experts provide that the members of the secretariats of the two groups may attend these meetings, including those of any subsidiary body, and intervene in the debates.[10]

13. Although the two non-governmental groups are free to appoint the secretaries of their choice, the secretariats of the Employers' and Workers' groups have traditionally been provided by the IOE and the ITUC respectively.[11] This practice is reflected in the introductory note of the Standing Orders of the Governing Body[12] and the introductory note of the Standing Orders for technical meetings and meetings of experts.[13]

14. The fact that the IOE and the ITUC traditionally provide those important services to the Employers' and the Workers' groups defines the special relationship they entertain with the ILO. More concretely, due to their responsibilities as secretaries of the two groups, the IOE and the ITUC play a key role in facilitating tripartite dialogue within the Organization, for instance through participating in the tripartite screening group responsible for fixing the agenda of Governing Body sessions,[14] discussing with the Office the composition and other organizational matters of tripartite meetings, being directly involved in informal consultations on a wide range of issues and receiving multiple Office communications for transmission to the respective groups. They play a major role in the work of the ILO supervisory bodies with a tripartite composition, such as the Conference Committee on the Application of Standards, the Governing Body Committee on Freedom of Association or tripartite committees appointed by the Governing Body to review representations submitted under article 24 of the Constitution. They ensure the continuity of the groups' positions within the Organization, during and outside of the sessions of the Conference and the Governing Body.

[9] The relevant provisions are articles 2 (2)(m) and 5 of the Standing Orders of the Conference.
[10] Articles 9 (7) and 13(2) of the Standing Orders for technical meetings and article 9(6) of the Standing Orders for meetings of experts.
[11] Before the creation of ITUC in 2006, it was the ICFTU that acted as secretariat of the Workers' group.
[12] Paragraph 23 of the introductory note.
[13] Section 4 of the introductory note.
[14] Paragraph 3.1.1 of the Standing Orders of the Governing Body.

15. In August 2019, in recognition of the institutional role and international stature of the IOE and the ITUC, the Governments of France, Germany and Türkiye requested that these two organizations be granted observer status at the UN General Assembly. The request included a letter of support from the ILO Director-General underlining the international scope of action of both organizations, their active role in the multilateral system in general and the United Nations system in particular.[15]

Conclusion

16. Since its early days, the ILO has attached great importance to working with non-governmental international organizations of recognized standing on matters of mutual interest. The six organizations enjoying general consultative status exemplify the degree of involvement and institutional role that employers' and workers' organizations can play in ILO activities. More particularly, the IOE and ITUC by acting as secretariats of the Employers' and Workers' groups, stand as the main institutional interlocutors representing ILO's non-governmental constituents.

17 April 2023

[15] A/74/291 (IOE) A/74/292 (ITUC). The request followed a discussion at the 335th Session (March 2019) of the Governing Body during which the Governing Body "welcomed the objective of the International Trade Union Confederation (ITUC) and the International Organisation of Employers (IOE) to be granted observer status in the United Nations General Assembly". The decision of the General Assembly has been deferred to its 78th Session (2023).

Appendix

Summary information on the six NGOs with ILO general consultative status

1. International Organisation of Employers (IOE)

The IOE had its general consultative status recognized at the 118th session (March 1952) of the Governing Body.[16] Based in Geneva, Switzerland, the IOE was established in March 1920. It is composed of more than 150 employer and business organizations in more than 140 countries, representing a total of more than 50 million companies. Its stated vision is "to create a sustainable economic environment worldwide, promoting free enterprise that is fair and beneficial to both business and society".[17] The IOE's statutory objectives are, in particular, "to provide an international forum to bring together, represent and promote the interests of national business and employers' organisations and their members throughout the world" and "to coordinate the interests of business and employers at the international level, particularly within the ILO and other international institutions".[18] Its governance structure comprises the General Council, the Management Board and a Secretariat. The IOE received general consultative status with the ECOSOC in 1947.

The IOE Statutes include several references to the ILO; for instance, the Management Board includes a Vice-President for the ILO which is elected amongst the titular Employer members of the ILO Governing Body. This Vice-President is also nominated the Employers' group Spokesperson in the Governing Body. The Statutes also specify that the Secretary-General of the IOE provides the Secretariat of the Employers' Group at the ILO.

2. International Trade Union Confederation (ITUC)

The ITUC had its general consultative status recognized at the 297th session (November 2006) of the Governing Body.[19] Based in Brussels, Belgium, the ITUC was formed on 1 November 2006 out of the merger of the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL).[20] The ITUC has 338 national affiliates and represents approximately 200 million workers in 168 countries and territories. Its stated mission is "the promotion and defence of workers' rights and interests, through international cooperation between trade unions, global campaigning and advocacy within the major global institutions." Its main areas of activity include "trade union and human rights; economy, society and the workplace; equality and non-discrimination; and international solidarity". The ITUC is governed

[16] Governing Body, minutes, 118th session (March 1952), p. 48, and Appendix XX.
[17] See document "IOE in brief" (April 2023), available at https://www.ioe-emp.org/about-us.
[18] IOE Statutes, article 2, available at https://www.ioe-emp.org/about-us/our-governance.
[19] Governing Body, minutes, 297th session (November 2006), paras 276-280, and GB.297/19/7.
[20] The general consultative status of the ICFTU had been recognized by the Governing Body at its 111th session (March 1950) (minutes, p. 76-78 and Appendix XXV), whereas that of the WCL, known at the time as the International Confederation of Christian Trade Unions, had been recognized by the Governing Body at its 105th session (June 1948) (minutes, p. 43-47).

by a World Congress, a General Council and an Executive Bureau.[21] The ITUC received general consultative status with the ECOSOC in 2007.[22]
One of the ITUC's aims, as set out in its Constitution, is to "work to strengthen the role of the ILO, and for the setting and universal application of international labour standards, and to win representation at other international and regional organisations with a view to having their policies and activities contribute coherently to the achievement of decent work, social justice and sustainable development".[23]

3. World Federation of Trade Unions (WFTU)

The WFTU was granted general consultative status by the Governing Body at its 103rd Session (December 1947).[24] Based in Athens, Greece, the WFTU was established on 3 October 1945.[25] Its membership is open to trade union organizations. Currently, it represents 105 million members from 133 countries.[26] According to its Constitution, the WFTU is a "class-oriented international trade union organisation" that "has as its prime objective the emancipation of the working people by means of struggle".[27] It is composed of the World Trade Union Congress, a General Council, a Presidential Council and a Secretariat and further organizes itself on the basis of affiliated National Centres (grouped under Regional Offices in each region or continent) and industrial branch organisations named Trade Union Internationals. WFTU received general consultative status with ECOSOC in 1946.[28]

4. International Cooperative Alliance (ICA)

The ICA's general consultative status at the ILO was recognized by the Governing Body at its 107th session (December 1948).[29] Based in Brussels, Belgium, the ICA was established on 19 August 1895.[30] Its membership comprises more than 310 organisations from 107 countries.[31] According to its Articles of Association, the ICA, a "global networking organisation, organised at global, regional, sectoral and thematic levels", is "a worldwide representative of co-operative organisations of all kinds" aiming at "serving as a forum for exchange of experience and as a source of information on co-operative development, research and statistics", "co-ordinating actions for the promotion of co-operative development", and "collaborating with global and regional institutions including the United Nations organisations, and with any other government and non-governmental international and national organisations which pursue aims of

[21] https://www.ituc-csi.org/about-us
[22] https://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=3119
[23] ITUC Constitution, available at https://www.ituc-csi.org/ituc-constitution-en.
[24] Governing Body, minutes, 103rd Session (December 1947), pp. 47-54, and Appendix XX, p. 239.
[25] https://www.wftucentral.org/history/
[26] https://www.wftucentral.org/the-wftu-general-secretary-addressed-the-17th-congress-of-citu/
[27] WFTU Constitution, available at https://www.wftucentral.org/constitution/.
[28] https://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=462
[29] Governing Body, minutes, 107th session (December 1948), p. 100-101, and Appendix XX, p. 210.
[30] https://www.ica.coop/en/cooperatives/history-cooperative-movement
[31] https://www.ica.coop/en/about-us/our-members/global-cooperative-network

importance to co-operatives".[32] The ICA consists of a governing Board, a General Assembly, four Regions, and eight Sectoral Organisations, in addition to several thematic committees and networks.[33] ICA received general consultative status with the ECOSOC in 1946.[34]

5. Organization of African Trade Union Unity (OATUU)

The OATUU was granted general consultative status by the Governing Body at its 212th session (March 1980).[35] Based in Accra, Ghana, the OATUU was established in April 1973.[36] It has 61 affiliated organizations in Africa covering approximately 25 million individuals. Its stated mission is "to strengthen the capacity of trade unions in Africa and coordinate affiliates' activities to achieve unity and solidarity among African workers at the national, sub-regional and continental levels for the defense, protection and promotion of the rights and interests of workers and African citizens at large".[37] It is governed by a Congress, an Executive Committee and a Secretariat.

6. Business Africa

Business Africa (formerly known as the Pan-African Employers' Confederation) was granted general consultative status by the Governing Body at its 235th session (March 1987).[38] Based in Nairobi, Kenya, Business Africa was established on 12 October 1986. It is composed of employers' organizations from more than 45 African countries. Business Africa "works in the areas of labour, employment and social affairs and within the context of international organizations" such as the ILO. Part of its mission is to "seek to influence policy at continental level by enhancing business voice in continental and international bodies", "build on relations developed within the United Nations system", "pursue its relations with European and American business groups [and] build partnerships with business federations from emerging economies" and "seek to strengthen regional integration to boost intra-African trade". Business Africa's structure comprises a General Assembly, an Executive Council and a Secretariat.[39]

[32] ICA Articles of Association, article 4, available at https://www.ica.coop/en/about-us/our-structure/alliance-rules-and-laws.
[33] https://www.ica.coop/en/about-us/our-structure/alliance-organigram
[34] https://esango.un.org/civilsociety/consultativeStatusSummary.do?profileCode=579
[35] Governing Body, minutes, 212nd Session (March 1980), p. VIII/17, and GB.212/18/34.
[36] https://www.oatuuousa.org/about-us/
[37] https://www.oatuuousa.org/
[38] Governing Body, minutes, 235th session (March 1987), p. IX/11, GB.235/17/19 and GB.319/INS/INF/3.
[39] https://businessafrica-emp.org/en-US/About-Us/About-BUSINESSAfrica

Document No. 52

IOE, Statutes, articles 2, 6–8

IOE Statutes

Adopted by the IOE General Council on 29 May 2022

A powerful
and balanced
voice for business

International Organisation of Employers | Organisation Internationale des Employeurs | Organización Internacional de Empleadores

Article 1 Constitution

1. An international organisation established in 1920 composed of the central business and employers' organisations which in the national sphere deal with the issues compatible with those set out in Article 2 below is hereby constituted under the name "International Organisation of Employers" (the “IOE” or the “Organisation”).
2. The IOE is organised corporately in the form of a Swiss not-for-profit association in accordance with Articles 60 et seq. of the Swiss Civil Code and the present Statutes.
3. The headquarters of the IOE are in the Canton of Geneva, Switzerland.

Article 2 Objectives

The objectives of the IOE are:

a) to promote the economic, employment and social policy environment necessary to sustain and develop free enterprise and the market economy;

b) to provide an international forum to bring together, represent and promote the interests of national business and employers’ organisations and their members throughout the world in all employment and socio-economic policy issues;

c) to assist, advise, represent and provide relevant services and information to the members of the IOE (“the Members”), to establish and maintain permanent contact among them and to coordinate the interests of business and employers at the international level, particularly within the International Labour Organization (the “ILO”) and other international institutions;

d) to promote and support the advancement and strengthening of independent and autonomous business and employers’ organisations and to enhance their capabilities and services to Members;

stipulated in the Statutes. In the event of deadlock, the President shall have the casting vote.

9. The General Council may only pass resolutions on items that have been brought to the agenda. The manner in which votes are taken at the assembly (e.g. secret or open vote) shall be determined by the President.

10. Minutes of the meetings shall be drawn up by the Secretary-General and submitted to the next session of the General Council for approval.

Article 6 Management Board

1. The Management Board shall be composed of:

   a) a President, who will assume the presidency of the Management Board;

   b) five Regional Vice-Presidents, elected by the General Council on the proposal of each of the five regions. They will serve for a mandate of three years, with the possibility of re-election, or for a shorter mandate if completing the mandate of an incumbent who has stepped down. They will advise the President and co-ordinate the activities of their respective regions;

   c) A Vice-President for the ILO, elected by the General Council amongst the titular Employers members of the ILO Governing Body and who is also to be nominated by the Employers' Group to become the Employers' Spokesperson in the ILO for a mandate of three years with the possibility of re-election;

   d) a Treasurer;

   e) the representative of each of the Members in subscription-table categories 1-5 unless elected in one of the capacities listed in (b) or (c) above;

   f) the representative of eight other Members elected by the General Council for a mandate of three years, with the possibility of re-election (two for Africa, two for the Americas, two for Asia, two for Europe);

g) up to three representatives from Members co-opted by the Management Board for a fixed period on the proposal of the President after consultation with the Regional Vice-Presidents and the Secretary-General. Such Members may be co-opted for one or more periods.

2. The Management Board shall:

a) ensure that the objectives of the IOE and the decisions of the General Council are implemented and the activities necessary to the proper functioning of the IOE are undertaken;

b) in between meetings of the General Council, elaborate policy positions and formulate appropriate strategies;

c) prepare the decisions to be taken by the General Council concerning admission to and withdrawal of membership;

d) prepare the decisions to be taken by the General Council concerning financial and budgetary matters, on the basis of proposals from the Treasurer;

e) take decisions on the proposals made by the Secretary-General concerning the functioning and organisation of the Secretariat;

f) draw up an annual programme of action for submission to the General Council;

g) draw up an annual report on IOE activities for submission to the General Council.

3. In performing any of the responsibilities contained in Article 6.2, the Management Board may be assisted by Committees, consisting of Management Board members, operating within terms of reference decided by the Management Board.

4. The Management Board shall adopt its own rules.

Article 7 President

1. The IOE President (the "President") shall be elected for a period of three years by the General Council on the

proposal of the Management Board, with the possibility of re-election.

2. The President shall represent the IOE at the highest level and shall preside over the General Council and the Management Board. In the President's absence, these functions will be carried out by one of the Regional Vice-Presidents.
3. To the extent possible, the President will be elected giving due consideration to rotation among the geographical regions.
4. The President shall be the IOE's main spokesperson outside the ILO and assume responsibility for implementing policy in conformity with the directions fixed by the General Council and the Management Board.

Article 8 Secretary-General

1. The Management Board shall appoint a Secretary-General, who shall not be a member of the said Board. The position of Secretary-General shall be one of paid full-time employment.
2. The Secretary-General shall be responsible to the General Council and the Management Board and must enjoy their confidence, failing which the Management Board shall have the authority to dismiss the Secretary-General according to its Rules of Procedure and in accordance with Swiss law.
3. The duties of the Secretary-General shall include:
   a) the management of the Secretariat;
   b) the appointment of staff and the organisation of their responsibilities;
   c) the financial management of the IOE, under the supervision of the Treasurer;
   d) the preparation of policy position papers;
   e) the permanent liaison and communication with Members;
   f) carrying out technical cooperation programmes for business and employers' organisations;

g) under the supervision of the Spokesperson of the ILO Employers' Group providing, together with his staff, the Secretariat of the Employers' Group at the ILO;

h) maintaining permanent contacts with ILO management and officials at all levels;

i) maintaining frequent contacts with public organisations and enhancing the image of the IOE to interest groups and the public in general.

Article 9 Auditors

1. The Management Board shall appoint an external Auditor for one year and the Auditor may be reappointed. The Auditor shall be independent from the Organisation, and more particularly from the Management Board. The Auditor proceeds to an audit of the accounts of the IOE and submits a yearly financial report to the General Council.

Article 10 Authorised Signatories

1. Any two of the joint signatures of the President, the Treasurer and the Secretary-General shall be authorised for the purposes of official and legal documents.
2. Within the strict framework of daily management in the ordinary course of business, the IOE shall be validly represented vis-à-vis third parties by the Secretary-General.

Article 11 Finances

1. The Treasurer shall be elected for a period of three years by the General Council on the proposal of the Management Board. The Treasurer must enjoy the confidence of the Council and the Board throughout their mandate.
2. The IOE's resources shall be composed of subscriptions from the Members, investment income, donations, legacies and other payments. The table of

Document No. 53

ITUC, Constitution, Aims

INTERNATIONAL TRADE UNION CONFEDERATION

CONSTITUTION

DECLARATION OF PRINCIPLES

The International Trade Union Confederation (ITUC) salutes the sacrifice and conquests of generations of working women and men who through their trade union struggle have fought for the cause of social justice, freedom, democracy, peace and equality. It pledges to carry forward their struggle for the emancipation of working people and a world in which the dignity and rights of all human beings are assured, and each is able to pursue their well-being and to realise their potential at work and in society.

The Confederation recognises the urgent need to transform social, economic and political structures and relations which stand as obstacles to that vision. It assumes the task of combating poverty, hunger, exploitation, oppression, and inequality through the international action required by the conditions of the globalised economy, and for its democratic governance in the interests of labour, which it holds superior to those of capital.

The Confederation exists to unite and mobilise the democratic and independent forces of world trade unionism in giving effective representation to working people, wherever they work and in whatever conditions. It is committed to provide practical solidarity to all in need of it, and to confront the global strategies of capital with global strategies of labour.

The Confederation considers universal respect of the rights of workers, and access to decent work as indispensable to just and sustainable development. Their denial anywhere constitutes an immediate threat to human security everywhere.

The Confederation commits itself to promote and to act for the protection of democracy everywhere, so that the conditions for the full exercise of all human rights, universal, indivisible and inalienable, may be enjoyed by all. It shall defend everywhere collective rights and individual liberties, including freedom of thought, expression and assembly.

The Confederation further commits itself to securing comprehensive and equitable economic and social development for workers everywhere, in particular where poverty and exploitation are greatest.

The Confederation condemns all forms of discrimination as an affront to human dignity and to the equality into which each person is born and has the right to live, and pledges to uphold respect for diversity at work and in society.

The Confederation upholds fervently the maintenance and strengthening of peace and commits itself to a world free of weapons of mass destruction and to general disarmament. It proclaims the right of all peoples to self-determination and to live free from aggression and totalitarianism under a government of their own choosing. It rejects recourse to war to resolve conflict, and condemns terrorism, colonialism and militarism, as well as racism and sexism.

The Confederation expresses unwavering support for the principles and role of the United Nations, and for its unique legitimacy and authority to stand as an effective guarantee of peace, security and development, commanding the respect and adherence of all in the international community.

Unitary and pluralist, the Confederation is open to affiliation by democratic, independent, and representative trade union centres, respecting their autonomy and the diversity of their sources of inspiration, and their organisational forms. Its rules are to guarantee internal democracy, full participation of affiliates, and that the composition of the Confederation's governing bodies and its representation respect its pluralist character.

The Confederation's decisions are taken, and its activities implemented, in full independence of all external influence, be they state, political, employer, religious, economic, or other.

AIMS

The Confederation is inspired by the profound conviction that organisation in democratic and independent trade unions and collective bargaining are

crucial to achieving the well-being of working people and their families and to security, social progress and sustainable development for all.

It has been the historic role of trade unionism, and remains its mission, to better the conditions of work and life of working women and men and their families, and to strive for human rights, social justice, gender equality, peace, freedom and democracy. More than ever in its history, confronted by unbridled capitalist globalisation, effective internationalism is essential to the future strength of trade unionism and its capacity to realise that mission.

The Confederation calls on the workers of the world to unite in its ranks, to make of it the instrument needed to call forth a better future for them and for all humanity.

It shall be the permanent responsibility of the Confederation:

To defend and promote the rights and interests of all working people, without distinction, and to obtain, in particular, a fair return for their labour in conditions of dignity, justice, and safety at work and in society in general.

- It shall strive for the universal respect of fundamental rights at work, until child labour and forced labour in all their forms are abolished, discrimination at work eliminated and the trade union rights of all workers observed fully and everywhere.

- It shall denounce violations of freedom of association, of the right to strike including cross-border action, and of the right to collective bargaining, and shall mobilise international solidarity to have them brought to an end.

- It shall fight for the right to freely chosen, productive employment and social security for all.

- It shall act to end all discrimination on the basis of sex, religion, colour, nationality, ethnicity, sexual orientation, gender identity, political opinion, social origin, age or disability, and to uphold respect for diversity in society and employment.

To promote the growth and strength of the independent and democratic trade union movement.

- It shall render practical support to strengthen the capacities and membership of national trade union movements, through the coordinated provision of international development assistance.

- It shall initiate and support action to increase the representativeness of trade unions through the recruitment of women and men working in the informal as well as the formal economy, through extension of full rights and protection to those performing precarious and unprotected work, and through lending assistance to organising strategies and campaigns.

To be a countervailing force in the global economy, committed to securing a fair distribution of wealth and income within and between countries, protection of the environment, universal access to public goods and services, comprehensive social protection, life-long learning and decent work opportunities for all.

- It shall work to strengthen the role of the ILO, and for the setting and universal application of international labour standards, and to win representation at other international and regional organisations with a view to having their policies and activities contribute coherently to the achievement of decent work, social justice and sustainable development.

- In cooperation with the Global Union Federations and TUAC, it shall promote and support the coordination of international trade union policies and activities on multinational enterprises and social dialogue with international employer organisations.

To make the trade union movement inclusive, and responsive to the views and needs of all sectors of the global workforce.

- It shall advance women's rights and gender equality, guarantee the full integration of women in trade unions and promote actively full

gender parity in their leadership bodies and in their activities at all levels.

- It shall combat racism, xenophobia and exclusion and defend the rights and interests of migrant workers and their families and work for tolerance, equality and dialogue between different cultures.

- It shall ensure the full integration of young people in the trade union movement and act to support the access of young people to adequate education and training and to decent work, and to oppose precarity in working life.

- It shall strengthen solidarity between generations and support the rights of retired workers to decent incomes, and work to advance their interests.

- It shall defend and promote the rights of working women and men with disabilities.

To mobilise the strength, energy, resources, commitment, and talent of its affiliates and their members in the achievement of these goals, making trade union internationalism an integral part of their daily work.

- It shall promote and organise campaigns, solidarity activities, days of action, and other mobilisations considered necessary to this end and gather and disseminate information required to ensure the timely and effective provision of global solidarity.

- It shall seek to establish arrangements for optimal cooperation with other trade union organisations sharing its aims in order to maximise the coherence and impact of action at the different levels of the democratic and independent international trade union movement.

- It shall develop links and cooperation with other civil society organisations and political groupings, without compromising trade union independence, in pursuit of the objectives of the Confederation.

The Confederation, with the highest standards of democratic governance, transparency and accountability historically embedded in the organisation, pledges to pursue these goals with determination, and in accordance with the enduring trade union values of solidarity, democracy and justice. It will not desist from their achievement nor be deterred by the enemies of progress, sure in the conviction that it lies in the hands of working people to determine their own future.

MEMBERSHIP

Article I: Affiliation

(a) All democratic, independent and representative national trade union centres adhering to the Constitution of the Confederation shall be eligible for membership.

(b) The General Council shall have the power to decide on applications for affiliation. It may admit organisations into membership where it is satisfied that the applicant meets, both in its principles and its practices, the criteria established in Article I (a), and that its affiliation is desirable and in the interests of the Confederation.

(c) The General Council shall, on the basis of affiliation procedures laid down by the General Council, decide on applications for affiliation by a majority of three-quarters of its members and report its decisions to the Congress for ratification.

Article II: Rights and Responsibilities

(a) Member organisations shall have equal rights and responsibilities. Each has the right to be regularly informed of, and to participate in the life and the activities of the Confederation in line with the provisions of this Constitution and to receive the solidarity and assistance of the Confederation in case of need.

Document No. 54

Constitution of the ILO, articles 19–21

Constitution of the International Labour Organization

International Labour Office, Geneva, 2021

Article 19

Conventions and Recommendations

1. When the Conference has decided on the adoption of proposals with regard to an item on the agenda, it will rest with the Conference to determine whether these proposals should take the form:

(a) of an international Convention, or

(b) of a Recommendation to meet circumstances where the subject, or aspect of it, dealt with is not considered suitable or appropriate at that time for a Convention.

2. In either case a majority of two thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference.

3. In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

4. Two copies of the Convention or Recommendation shall be authenticated by the signatures of the President of the Conference and of the Director-General. Of these copies one shall be deposited in the archives of the International Labour Office and the other with the Secretary-General of the United Nations. The Director-General will communicate a certified copy of the Convention or Recommendation to each of the Members.

5. In the case of a Convention:

(a) the Convention will be communicated to all Members for ratification;

(b) each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action;

(c) Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;

(d) if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;

(e) if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

6. In the case of a Recommendation:

(a) the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise;

(b) each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action;

(c) the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them; and

(d) apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

7. In the case of a federal state, the following provisions shall apply:

(a) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal state shall be the same as those of Members which are not federal states;

(b) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system, in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall:

(i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action;

(ii) arrange, subject to the concurrence of the state, provincial or cantonal governments concerned, for periodical consultations between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal state coordinated action to give effect to the provisions of such Conventions and Recommendations;

(iii) inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal state, provincial or cantonal authorities with particulars of

the authorities regarded as appropriate and of the action taken by them;

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;

(v) in respect of each such Recommendation, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

8. In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation.

9. Acting on a proposal of the Governing Body, the Conference may, by a majority of two thirds of the votes cast by the delegates present, abrogate any Convention adopted in accordance with the provisions of this article if it appears that the Convention has lost its purpose or that it no longer makes a useful contribution to attaining the objectives of the Organization.

Article 20

Registration with the United Nations

Any Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the

United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it.

Article 21

Conventions not adopted by the Conference

1. If any Convention coming before the Conference for final consideration fails to secure the support of two thirds of the votes cast by the delegates present, it shall nevertheless be within the right of any of the Members of the Organization to agree to such Convention among themselves.

2. Any Convention so agreed to shall be communicated by the governments concerned to the Director-General of the International Labour Office and to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations.

Document No. 55

Standing Orders of the International Labour Conference, articles 44–52

Standing Orders of the International Labour Conference

International Labour Office, Geneva, 2021

Part 5. Procedure in relation to Conventions and Recommendations

Article 44

Procedure for placing an item on the agenda of the Conference

The procedure to be followed by the Governing Body for placing an item on the agenda of the Conference is governed by the Standing Orders of the Governing Body. *

Article 45

Preparatory stages of a single-discussion procedure

1. When a question is governed by the single-discussion procedure, the Office shall prepare as soon as possible a summary report setting out the law and practice in the different countries and any other useful information, together with a questionnaire drawn up with a view to the preparation of Conventions or Recommendations. This questionnaire shall request governments to consult the most representative organizations of employers and workers before finalizing their replies and to give reasons for their replies. The Office shall communicate the report and questionnaire to the governments so as to reach them not less than 18 months before the opening of the session of the Conference at which the question is to be discussed.

2. The replies should reach the Office as soon as possible and not less than 11 months before the opening of the session of the Conference at which the question is to be discussed. In the case of federal States and countries where it is necessary to translate questionnaires into the national language or languages, the period of seven months allowed for the preparation of replies shall be extended to eight months if the government concerned so requests.

3. On the basis of the replies received the Office shall prepare a final report, which may contain one or more draft Conventions or Recommendations. This report shall be communicated by the Office to the governments as soon as possible and every effort shall be made to ensure that the report reaches them not less than four months before the opening of the session of the Conference at which the question is to be discussed.

* Editor's note: The relevant provisions are contained in articles 5.1 to 5.4 and 6.2 of the Standing Orders of the Governing Body.

4. These arrangements shall apply only in cases in which the question has been included in the agenda of the Conference not less than 26 months before the opening of the session of the Conference at which it is to be discussed. If the question has been included in the agenda less than 26 months before the opening of the session of the Conference at which it is to be discussed, a programme of reduced intervals shall be approved by the Governing Body, or, if not practicable, by the Officers of the Governing Body in consultation with the Director-General.

5. If a question on the agenda has been considered at a preparatory technical conference, the Governing Body shall decide whether the Office should either:

(a) communicate to the governments a summary report and a questionnaire as provided for in paragraph 1; or

(b) prepare the final report provided for in paragraph 3 directly on the basis of the work of the preparatory technical conference.

Article 46

Preparatory stages of a double-discussion procedure

1. When a question is governed by the double-discussion procedure, the Office shall prepare as soon as possible a preliminary report setting out the law and practice in the different countries and any other useful information, together with a questionnaire requesting the governments to consult the most representative organizations of employers and workers before finalizing their replies and to give reasons for their replies. The Office shall communicate the report and questionnaire to the governments so as to reach them not less than 18 months before the opening of the session of the Conference at which the first discussion is to take place.

2. The replies should reach the Office as soon as possible and not less than 11 months before the opening of the session of the Conference at which the first discussion is to take place. In the case of federal States and countries where it is necessary to translate questionnaires into the national language or languages, the period of seven months allowed for the preparation of replies shall be extended to eight months if the government concerned so requests.

3. On the basis of the replies received, the Office shall prepare a further report indicating the main questions which require consideration by the Conference. This report shall be communicated by the Office to the governments as soon as possible and every effort shall be made to ensure that the report

reaches them not less than four months before the opening of the session of the Conference at which the first discussion is to take place.

4. These reports shall be submitted to a discussion by the Conference either in plenary or in committee. If the Conference decides that the question is suitable to form the subject of a Convention or Recommendation, it shall adopt such conclusions as it considers appropriate after having referred them to the Drafting Committee, and may either:

(a) decide that the question shall be included in the agenda of the following session in accordance with article 16(3) of the Constitution; or

(b) ask the Governing Body to include the question in the agenda of a later session.

5. The arrangements referred to in paragraphs 1 to 4 shall apply only in cases in which the question has been included in the agenda of the Conference not less than 18 months before the opening of the session of the Conference at which the first discussion is to take place. If the question has been included in the agenda less than 18 months before the opening of the session of the Conference at which the first discussion is to take place, a programme of reduced intervals shall be approved by the Governing Body, or by the Officers of the Governing Body in agreement with the Director-General if the approval of a detailed programme by the Governing Body is not practicable.

6. On the basis of the replies received to the questionnaire referred to in paragraph 1 and on the basis of the first discussion by the Conference, the Office may prepare one or more draft Conventions or Recommendations and communicate them to the governments so as to reach them not later than two months from the closing of the session of the Conference, asking them to state within three months, after consulting the most representative organizations of employers and workers, whether they have any amendments to suggest or comments to make.

7. On the basis of the replies received, the Office shall prepare a final report containing the draft Conventions or Recommendations with any necessary amendments. This report shall be communicated by the Office to the governments so as to reach them not less than three months before the opening of the session of the Conference at which the second discussion is to take place.8.

The arrangements referred to in paragraphs 6 and 7 shall apply only in cases in which there is a period of 11 months between the closing of the session of the Conference at which the first discussion took place and the opening of the next session of the Conference. If the period between the two sessions of the Conference is less than 11 months, a programme of reduced intervals shall be approved by the Governing Body, or by the Officers of the Governing Body in

agreement with the Director-General if the approval of a detailed programme by the Governing Body is not practicable.

Article 47

Consultation with the United Nations and specialized agencies

Where an item placed on the agenda of the Conference with a view to the adoption of a Convention or a Recommendation relates to matters which are of direct interest to the United Nations or one or more specialized agencies, the Office shall consult with the organization or organizations concerned, at the same time as it requests governments for their comments on the draft Convention or Recommendation. The outcome of these consultations shall be reflected in the report submitted to the Conference.

Article 48

Procedure for the consideration of draft instruments

1. Unless the Conference decides otherwise, it shall take as the basis of discussion the draft Conventions or Recommendations prepared by the Office, and refer them to a committee for report.

2. When the Conference has referred to a committee a draft Recommendation only, a decision by the committee to propose a Convention to the Conference for adoption (in place of or in addition to the Recommendation) shall require a two-thirds majority of the votes cast.

3. If the draft Convention or Recommendation is referred to a committee, the provisions of the draft instrument as adopted by the committee shall be referred to the Drafting Committee for the preparation of a final text. After the final text of the Convention or Recommendation is approved by the committee, or by its Officers under the delegated authority of the committee, it shall be submitted to the Conference for adoption article by article.

4. No amendment shall be allowed to that text, except where the President of the Conference, in agreement with the three Vice-Presidents, decides to admit it.

5. After the adoption article by article of the text of the Convention or Recommendation, the Conference shall proceed to take a final vote on the adoption of the Convention or Recommendation in accordance with article 19 of the Constitution.

6. The final vote shall not take place before the day following that on which the text approved by the committee has been made available to delegates and in no case less than 14 hours after the text has been made available.

Article 49

Procedure if a Convention fails to obtain a two-thirds majority

If a Convention fails to obtain the necessary two-thirds majority in a final vote, but obtains a simple majority, the Conference shall decide immediately whether the Convention shall be referred to the Drafting Committee to be redrafted as a Recommendation. If the Conference approves the referral to the Drafting Committee, the proposals contained in the Convention shall be submitted for the approval of the Conference in the form of a Recommendation before the end of the session.

Article 50

Official translations

After the adoption of the English, French and Spanish texts, official translations of the Conventions and Recommendations may, at the request of interested governments, be drawn up by the Director-General. The governments concerned may consider such translations as authoritative in their respective countries for the application of the Conventions and Recommendations.

Article 51

Procedure in the event of the revision of a Convention or Recommendation

1. When the revision in whole or in part of a Convention or Recommendation which has been previously adopted by the Conference is included in the agenda, the Office shall submit to the Conference draft amendments drawn up in accordance with any conclusions of the report of the Governing Body recommending the revision in whole or in part and corresponding to the question or questions in respect of which a proposal for revision has been placed on the agenda.

2. Unless the Conference decides otherwise, it shall take as the basis of discussion the draft amendments prepared by the Office, and refer them to a committee for report.

3. If the draft amendments are referred to a committee, the amendments together with consequential amendments of the unamended provisions of the Convention or Recommendation under revision, as adopted by the committee, shall be referred to the Drafting Committee, which shall combine with them the unamended provisions of the Convention or Recommendation under revision, so as to establish the final text of the instrument in the revised form. After this text is approved by the committee, or by its Officers under the delegated authority of the committee, it shall be submitted to the Conference for adoption article by article.

4. No amendment shall be allowed to that text, except where the President of the Conference, in agreement with the three Vice-Presidents, decides to admit it.

5. After the adoption article by article of the text of the Convention or Recommendation in the revised form, the Conference shall proceed to take a final vote on the adoption of the Convention or Recommendation in accordance with article 19 of the Constitution.

6. The final vote shall not take place before the day following that on which the text approved by the committee has been made available to delegates and in no case less than 14 hours after the text has been made available.

7. In accordance with article 14 of the Constitution and subject to the provisions of article 16(3) of the Constitution, the Conference shall not at any stage of the revision procedure revise in whole or in part a Convention or Recommendation which has previously been adopted by it except in respect of a question or questions placed on the agenda of the session by the Governing Body.

Article 52

Procedure to be followed in the event of the abrogation or withdrawal of Conventions and Recommendations

1. When an item on abrogation or withdrawal is placed on the agenda of the Conference, the Office shall communicate to the governments, so as to reach them not less than 18 months before the opening of the session of the Conference at which the item is to be discussed, a short report and questionnaire requesting them to indicate within a period of 12 months their position, and the reasons for their position, on the subject of the proposed abrogation or withdrawal, along with the relevant information. This questionnaire shall request governments to consult the most representative organizations of employers and

workers before finalizing their replies. On the basis of the replies received, the Office shall prepare a report containing a final proposal and shall make it available to governments four months before the session of the Conference.

2. The Conference may decide to examine this report and the proposal which it contains directly in a plenary sitting or to refer it to the General Affairs Committee. At the end of this examination in the plenary or in the light of the report of the General Affairs Committee, as appropriate, the Conference shall decide by consensus or, failing that, by a preliminary vote by a two-thirds majority, to submit the formal proposal for the abrogation or withdrawal to a final vote. This record vote shall take place no earlier than the day following the preliminary decision.

Document No. 56

Standing Orders of the Governing Body, articles 5.1–5.4

Compendium of rules applicable to the Governing Body of the International Labour Office

Standing Orders of the Governing Body

Adopted by the Governing Body on 23 March 1920. Amended by the Governing Body on 12 and 13 October 1922; 2 February, 12 April and 18 October 1923; 13 June 1924; 10 January and 4 April 1925; 27 and 28 April 1928; 5 June 1930; 21 and 22 April and 17 October 1931; 6 April and 26 October 1932; 24 January, 27 April, 1 June and 28 September 1934; 2 February 1935; 2 June 1936; 5 February 1938; 20 June 1947; 19 March, 14 June and 11 December 1948; 4 June 1949; 3 January, 11 March, 16 June and 21 November 1950; 2 June 1951; 12 March 1952; 29 May 1953; 9 March 1954; 2 March 1955; 6 March 1956; 8 March and 14 November 1963; 1 June 1973; 15 November 1974; 5 March and 19 November 1976; 2 March and 27 May 1977; 3 March 1978; 1 June 1979; 18 November 1982; 28 February 1985; 14 November 1989; 3 March and 16 November 1993; 20 November 1997; 27 March 1998; 18 November 1999; 17 November 2005; 20 March 2008; 19 November 2009; 20 June 2011; 18 November 2011; and 21 March 2016.

Section 5 – Procedures

Article 5.1

Procedure for placing an item on the agenda of the International Labour Conference

5.1.1. When a proposal to place an item on the agenda of the Conference is discussed for the first time by the Governing Body, the Governing Body cannot, without the unanimous consent of the members present, take a decision until the following session.

5.1.2. When it is proposed to place on the agenda of the International Labour Conference an item which implies a knowledge of the laws in force in the various countries, the Office shall place before the Governing Body a concise statement of the existing laws and practice in the various countries relative to that item. This statement shall be submitted to the Governing Body before it takes its decision.

5.1.3. When considering the desirability of placing a question on the agenda of the Conference, the Governing Body may, if there are special circumstances which make this desirable, decide to refer the question to a preparatory technical conference with a view to such a conference making a report to the Governing Body before the question is placed on the agenda. The Governing Body may, in similar circumstances, decide to convene a preparatory technical conference when placing a question on the agenda of the Conference.

5.1.4. Unless the Governing Body has otherwise decided, a question placed on the agenda of the Conference with a view to the adoption of a Convention or Recommendation shall be regarded as having been referred to the Conference for a double discussion.

5.1.5. In cases of special urgency or where other special circumstances exist, the Governing Body may, by a majority of three fifths of the votes cast, decide to refer a question to the Conference for a single discussion with a view to the adoption of a Convention or Recommendation.

5.1.6. When the Governing Body decides that a question shall be referred to a preparatory technical conference it shall determine the date, composition and terms of reference of the said preparatory conference.

5.1.7. The Governing Body shall be represented at such technical conferences which, as a general rule, shall be of a tripartite character.

5.1.8. Each delegate to such conferences may be accompanied by one or more advisers.

5.1.9. For each preparatory conference convened by the Governing Body, the Office shall prepare a report adequate to facilitate an exchange of views on all the issues referred to the said preparatory conference and, in particular, setting out the law and practice in the different countries.

Article 5.2

Procedure for placing on the agenda of the Conference the question of revising a Convention in whole or in part

5.2.1. When the Governing Body, in accordance with the provisions of a Convention, considers it necessary to present to the Conference a report on the working of the Convention and to examine if it is desirable to place the question of its revision in whole or in part on the agenda of the Conference, the Office shall submit to the Governing Body all the information available to it, particularly on the legislation and practice relating to the Convention in those countries which have ratified it and on the legislation relating to the subject of the Convention and its application in those which have not ratified it. The draft report of the Office shall be communicated to all Members of the Organization for their observations.

5.2.2. After a lapse of six months from the date of circulation to members of the Governing Body and to governments of the draft report of the Office referred to in paragraph 5.2.1, the Governing Body shall fix the terms of the report and shall consider the question of placing the revision, in whole or in part, of the Convention on the agenda of the Conference.

5.2.3. If the Governing Body takes the view that it is not desirable to place the revision in whole or in part of the Convention on the agenda, the Office shall communicate the above-mentioned report to the Conference.

5.2.4. If the Governing Body takes the view that it is desirable that the question of placing the revision in whole or in part of the Convention on the agenda of the Conference should be further pursued, the Office shall send the report to the governments of the Members and shall ask them for their observations, drawing attention to the points which the Governing Body has considered specially worthy of attention.

5.2.5. The Governing Body shall, on the expiry of four months from the date of the despatch of the report to the governments, taking into account the replies of the governments, adopt the final report and define exactly the question or questions which it places on the agenda of the Conference.

5.2.6. If at any time other than a time at which the Governing Body, in accordance with the provisions of a Convention, considers it necessary to present to the Conference a report on the working of the Convention in question, the Governing Body should decide that it is desirable to consider placing on the agenda of the Conference the revision in whole or in part of any Convention, the Office shall notify this decision to the governments of the Members and shall ask them for their observations, drawing attention to the points which the Governing Body has considered specially worthy of attention.

5.2.7. The Governing Body shall, on the expiry of four months from the date of the despatch of this notification to the governments, taking into account the replies of the governments, define exactly the question or questions which it places on the agenda of the Conference.

Article 5.3

Procedure for placing on the agenda of the Conference the question of revising a Recommendation in whole or in part

5.3.1. If the Governing Body considers it to be desirable to consider placing on the agenda of the Conference the revision in whole or in part of any Recommendation, the Office shall notify this decision to the governments of the Members and shall ask them for their observations, drawing attention to the points which the Governing Body has considered specially worthy of attention.

5.3.2. The Governing Body shall, on the expiry of four months from the date of the despatch of this notification to the governments, taking into account the replies of the governments, define exactly the question or questions which it places on the agenda of the Conference.

Article 5.4

Procedure for placing on the agenda of the Conference the abrogation of a Convention in force, or the withdrawal of a Convention which is not in force or of a Recommendation

5.4.1. When an item to be placed on the agenda of the Conference concerns the abrogation of a Convention in force, or the withdrawal of a Convention that is not in force or of a Recommendation, the Office shall place before the Governing Body a report containing all relevant information which the Office possesses on this subject.

5.4.2. The provisions of article 6.2 concerning the fixing of the Conference agenda shall not apply to the decision to place on the agenda of a given session of the Conference an item on such an abrogation or withdrawal. Such a decision shall as far as possible be reached by consensus or, if such a consensus cannot be reached in two successive sessions of the Governing Body, by a four-fifths majority of members of the Governing Body with a right to vote during the second of these sessions.

Document No. 57

United Nations Conference on the Law of Treaties, Official Records, First Session, 1968, Meetings of the Committee of the Whole, Seventh Meeting, Statement of the Observer for the International Labour Organisation, pp. 36–37

UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES

First session

Vienna, 26 March–24 May 1968

OFFICIAL RECORDS

Summary records of the plenary meetings and of the meetings of the Committee of the Whole

UNITED NATIONS

INTRODUCTORY NOTE

This volume contains the summary records of the plenary meetings and of the meetings of the Committee of the Whole held during the first session of the Conference. The documents of the Conference will be printed after the closure of the second session.

* * *

The summary records of the plenary meetings were originally circulated in mimeographed form as documents A/CONF.39/SR.1 to SR.5, and those of the Committee of the Whole as documents A/CONF.39/C.1/SR.1 to SR.83. They include the corrections to the provisional summary records that were requested by delegations and such editorial changes as were considered necessary.

* * *

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A/CONF.39/11

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state that those rules were not applicable by virtue of the convention. The last part of sub-paragraph (*b*) was not clear and for that reason the Swiss delegation had proposed its deletion. The amendment was one of drafting only, and the Swiss delegation was prepared to withdraw it in favour of the Gabon amendment (A/CONF.39/C.1/L.41).

48. Mr. DE CASTRO (Spain) explained that his delegation's amendment (A/CONF.39/C.1/L.34) was only concerned with a matter of drafting in the Spanish text.

The meeting rose at 1.10 p.m.

SEVENTH MEETING

Monday, 1 April 1968, at 3.20 p.m

Chairman: Mr. ELIAS (Nigeria)

Consideration of the question of the law of treaties in accordance with resolution 2166 (XXI) adopted by the General Assembly on 5 December, 1966 *(continued)*

Article 3 (International agreements not within the scope of the present articles) *(continued)*

1. The CHAIRMAN invited the Committee to continue its consideration of article 3 of the International Law Commission's draft [1].

2. Mr. JENKS (Observer for the International Labour Organisation), speaking at the invitation of the Chairman, said he was gratified at the Committee's decision to recommend that the question of agreements to which subjects of international law other than States were parties should be examined by the International Law Commission. The International Labour Office would be glad to co-operate fully in that task, which must include the question of how any codification of such rules was to become binding on the international organizations concerned, how it was to provide for any adaptations of the general rules necessary to meet the special circumstances of particular organizations and how it was to permit future development and growth.

3. Articles 3 and 4 of the draft stated principles of vital significance for the long-term development of international organizations and of international law. Article 4 stated both a rule and an exception. The rule was that treaties adopted within an international organization were subject in principle to the general law of treaties, and the exception was that the rule was not applicable in respect of matters for which a *lex specialis* existed by virtue of any relevant rules, including the established practice of the organization concerned.

4. The rule was important because it would create confusion if there were a different law of treaties for the instruments adopted within each of the forty international and regional organizations, a number which might continue to increase. Few of them could be expected to evolve a distinctive body of practice and none could claim that its practice or needs were special in respect of the whole of the law of treaties. The ILO certainly made no such claim.

5. The exception was equally important because there were cases in which an organization had special rules and a well-established body of practice governing conventions which created a body of international obligations more coherent, stable and better-adapted to requirements of the situation than could be secured by applying the more flexible provisions of the general law. The International Labour Organisation was responsible for 128 international labour conventions ratified by over 115 member States, and some 1,200 declarations of application in respect of other territories. That network of obligations was governed by the provisions of the ILO Constitution and by a well-established body of practice tested over almost fifty years. The ILO was not the only organization with a distinctive body of treaty practice, but only the League of Nations and the United Nations together possessed comparable experience as to duration, scale and variety of action. The Conference was entitled to know how the draft articles would affect the ILO's discharge of its responsibilities, and the ILO was entitled to expect that the Conference would give full regard to the obligations of members of the United Nations as members of the International Labour Organisation.

6. In some cases there was a clear incompatibility between ILO's rules and practice and the provisions of the draft articles and a change in the former, which could not in any case operate retroactively in respect of conventions to which member States had already become parties, would be inconsistent with the Organisation's constitutional structure and with the object of labour conventions. In other cases, the ILO's rules and practice and the provisions of the draft articles could be rendered compatible only by a strained interpretation of the one or the other or by some artificial modification of the ILO's existing rules, for which there was no particular need. In still other cases, in order to obtain a reasonable and equitable result, the draft articles would have to be read in the light of established ILO rules and practice.

7. In some instances it would be unprofitable to discuss to which of those categories a case belonged.

8. Article 8 provided that the adoption of a text drawn up at an international conference took place by a vote of two-thirds of the states participating in the conference, unless by the same majority it was decided to apply a different rule. The ILO rule was quite different; there a two-thirds majority was required of the votes cast by the delegations present, and half of the delegates eligible to vote did not represent Governments.

9. Article 9 provided that the text of a treaty was established as authentic and definitive by such a procedure as might be provided for in the text or was agreed upon by participating States, or failing that by authentication of the representatives of States, whereas under the ILO Constitution, ILO conventions were authenticated by the signatures of the President of the Conference and the Director-General.

10. Article 12 dealt with accession. ILO conventions were concluded within the constitutional obligations relating to their application, and accessions which did not include those obligations were therefore inconceivable.

[1] For the list of the amendments submitted, see 6th meeting, footnote 4.

11. Articles 16 to 20 dealt with reservations. According to ILO practice, reservations incompatible with the object and purpose of the treaty were inadmissible, and that principle had been maintained consistently. The procedural arrangements concerning reservations embodied in the draft articles were inapplicable to the Organisation because of its tripartite character. Great flexibility was necessary in the application of certain international labour conventions to widely varying circumstances, but the provisions regarded by the International Labour Conference as wise and necessary were embodied in the terms of the conventions, and if proved inadequate could be revised at any time in accordance with regular procedures. Any other method would destroy the international labour code as a code of common standards.

12. ILO practice on interpretation had involved greater recourse to preparatory work than was envisaged in article 28.

13. On the subject of the relationship between successive treaties on the same subject and the amendment and modification of treaties, the ILO had wide experience and had created a substantial body of law and practice.

14. The ILO's rules governing the procedure for the revision of conventions and the legal consequences of revision differed from and were better adapted to those needs than article 36, which contained the saving clause " unless the treaty otherwise provides ". Only some of the relevant rules were contained in the conventions; some derived from the Constitution and some from the procedural rules in the form of standing orders.

15. A few international labour conventions expressly permitted the modification of certain provisions by *inter se* agreements generally, on condition that the rights of other parties were not affected and that the *inter se* agreement provided equivalent protection. However, in the majority of labour conventions such agreements would be regarded as incompatible with the effective execution of the object and purpose of the treaty as a whole, as would be the case with a convention relating to one of the fundamental human rights. Such problems could not conveniently be dealt with by reference to article 37 of the draft. The ILO Constitution conferred rights to initiate proceedings relating to the application of a convention upon interested parties other than governments that were parties to the convention, and those rights which flowed directly from the Constitution would not be affected by any *inter se* arrangements.

16. Article 57 defined the consequences of a material breach of a multilateral treaty, while articles 62 to 64 set out the procedure to be followed when a breach was alleged. Articles 24 to 34 of the ILO Constitution specified the procedures applicable in the event of any failure by a member to secure the effective observance of an international labour convention it had ratified. They included provision for the appointment by the Governing Body, in appropriate cases, of a commission of inquiry to examine the alleged failure. Those articles of the Constitution constituted a *lex specialis* more appropriate for the application of international labour conventions than the necessarily general provisions of article 62 to 64.

17. He was not suggesting any modification of the general law as proposed in the draft articles, but asked for a clear recognition that an international organization might have a *lex specialis* that could be modified by regular procedures, in accordance with established constitutional processes. The questions at issue were not limited to procedural ones and were too complex to be dealt with by detailed amendments to the draft articles and could only be properly covered by a broad and comprehensive provision. The practical importance of those procedures for member States depended on the extent to which they were parties to international labour conventions and must be assessed in the light of long-range considerations of general international policy.

18. The principle that conventions adopted within an international organization might be subject to a *lex specialis* was of long term as well as immediate importance.

19. International legislative techniques remained so defective that the way must be left open to develop specialized procedures for special purposes as the need arose. One of the prior requirements in codifying international law had been to ensure that it did not operate as a bar rather than as a stimulus to progressive development. If the law of treaties had been codified a generation ago, much of the present draft would have found no place in it. Article 4 provided the necessary flexibility for the progressive attainment of the long-term purposes of the United Nations Charter, and he hoped that it would be adopted substantially in its present form.

20. Mr. AUGÉ (Gabon) said his delegation had submitted an amendment (A/CONF.39/C.1/L.41) which was intended for the Drafting Committee's consideration and the purpose of which was to achieve greater clarity in article 3. The words " to which they would be subject independently of these articles " had been dropped, as no mention was made of them in the Commission's commentary. The introductory phrase " the fact that the present articles do not relate " had also been dropped.

21. Mr. KEBRETH (Ethiopia) said that article 3 was an important one, the purpose of which was to state the binding character of oral agreements and those concluded between States and other subjects of international law or between such other subjects. The Commission's main concern appeared to have been the question whether oral agreements and agreements not concluded strictly between States remained outside the purview of the law of treaties. The draft convention being worked out would have to become a parent instrument providing substantive rules to cover as far as possible all international agreements, for in the final analysis international organizations were the creation of States. In a broader sense, it might be said that article 3 was intended to serve as a vital link between the convention on the law of treaties and the customary laws of treaties that were as yet uncodified.

22. His delegation felt considerable uncertainty about the words " to which they would be subject independently of these articles ". Through the use of those words, customary laws and the many practices and procedures, especially of international organizations, would apply. But the question remained of the application of the progressive and substantial principles contained in the convention. Any suggestion of a difference between the

Document No. 58

ILC, 70th Session, 1984, Report of the Director-General, pp. 3–70

International Labour Conference
70th Session 1984

Report of the Director-General

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CONTENTS

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INTRODUCTION

This Report is made up of two Parts. The second corresponds to the obligation of the Director-General of the ILO to submit a report on the activities of the Organisation to the Conference each year.

Part I deals with the ILO's standard-setting activities. The Conference will recall that at the 69th Session, in June 1983, I informed it of my intention to put this question before it as the subject for discussion. Why?

The first reason is that, since the ILO was set up, the standard-setting activities have been the essential instrument for promoting social justice as part of a general movement in which all member States without exception participated, regardless of when they joined the ILO or of their level of development or economic and political system.

From the beginning, the ILO's tripartite structure served as a strong incentive for this legislative work since its purpose has always been to protect workers and improve their situation through the combined action of the authorities and the social partners. In other words, the ILO's standard-setting activities stem from the very essence of the institution, its structure, its aims, its ambitions: the promotion of social justice under conditions capable, moreover, of checking the consequences of unfair competition between nations.

The work that has been carried out for 65 years, unique in the United Nations system and impressive in its scope, is beyond dispute remarkable for the range and diversity of the prescriptions contained in the 159 international labour Conventions and 168 international labour Recommendations.

This work of "sedimentation", carried out at an average rate of five instruments per year, has been directed by the Governing Body, which is responsible for fixing the agenda of the Conference, and by the Conference itself with its determination to meet the needs of the working world as effectively as possible.

Over the years, the Governing Body and the organs that come under it, as well as the Conference, have on many occasions assessed the work accomplished and decided on or planned measures for improving it.

There is general agreement that the results achieved by the ILO in the vast field for which it is responsible are a credit to all who have devoted their intelligence, skill and faith to the cause of social justice in this extraordinarily troubled period we are going through. If, on the whole, the results can be considered good, does that mean that there are no imperfections? Certainly not. Although some Conventions have received broad support, reflected in an impressive number of ratifications, their implementation often leaves much to be desired and at times is marred by flagrant violations of the principles involved, as sometimes occurs. Other Conventions have not received the necessary number of ratifications to come into force or have been ratified by only a small number of States.

Criticism has been voiced from various sides and numerous questions have been raised with reference to the preparation of standards, their examination by the Conference, their ratification, application and supervision. These criticisms and questions will be dealt with at length in the analysis that is submitted to the Conference in Part I of this Report.

In this analysis we have tried, on the basis of facts, to draw lessons for the future from past activities. I trust indeed that this report is oriented towards the future and answers the question of what the ILO can and should do through standard-setting activities (as well as through other instruments at its disposal) to improve the conditions of the workers — of all workers, in factories, on the land and in services, whatever their race, sex and political, religious or other beliefs. Expressed in these terms, the question involves the entire international community but does so in the historic perspective marked by the enormous gap between rich and poor countries (what is known as the North-South problem), by the crisis which is widening this gap and, finally, by the technical and structural changes whose consequences are barely beginning to be perceived, particularly in labour matters and for the working community. In this perspective what line should the ILO follow?

As regards our past activities, although certain Conventions may be deemed outdated or ineffective, the vast majority have lost none of their value. An appreciable number, particularly those dealing with the protection of workers, employment policy and human resources development, the conditions of the most vulnerable groups, fundamental freedoms (right of association and collective bargaining, discrimination, etc.), should be ratified by all States and strictly applied. If their implementation continues to present the developing countries with problems — as is the case — it should be recalled that the ILO's entire activities, especially its research work and its technical co-operation and advisory services, are designed to afford them the help they need.

As regards the future, the ILO's activities should unfailingly draw inspiration from the principles of justice and freedom laid down in its Constitution and in the Declaration of Philadelphia. The texts are clear. The discussion the Conference is about to embark on should not lead to any concessions in respect of the principles on which the ILO's activities are based or the tripartite framework within which these activities have been developed over the past six decades.

Nevertheless in the future the ILO's activities must take greater account of the growing interdependence of the countries making up the international community in East and West, North and South. This means that the ILO must take up the double challenge involved in meeting the basic needs of the greatest number and in mastering the consequences of technical change in both social and labour matters. It is the ILO's duty to recall that human needs must shape the economy and cannot be subordinated to it. The economy is not an end in itself. This must mark the ILO's entire approach and all its means of action must be committed to this purpose. Among these means, standard-setting activities can play a major role, probably greater than in the past, which already witnessed impressive legislative achievements.

For our future activities to have the desired impact, it will be necessary to choose carefully the items to be placed on the agenda of the Conference and to ensure the broadest participation not only of all States but also of the social partners in the preparation, discussion and adoption of international standards. Furthermore it will be necessary to bring greater resources into play to provide member States with the assistance they need to overcome the difficulties that may well arise in implementing certain texts. The Office should increase direct contacts, particularly in situations of disagreement or dispute. The ILO's role would thus consist not only in supervising compliance with obligations assumed by member States as regards standards but also in helping in their implementation. Recourse to the complaints and representations procedures would then be called for only in serious situations affecting compliance with Conventions on human rights and workers' rights.

In view of the foregoing, the ILO's standard-setting activities should also command the attention of the other international agencies especially those responsible for economic, financial or monetary questions such as the International Monetary Fund and the World Bank. These agencies have had, and continue to have, a major impact and, in the short term, the International Monetary Fund in particular is undertaking essential work in helping the States which apply to it to redress particularly difficult situations. But what really matters, in both the medium and the long term, is to construct a world founded on solidarity, a world in which the economy alone will not dictate decisions affecting millions of men and women at work or without work. That is the purpose of the ILO's work, including the standard-setting activities which are the subject of this Report.

Though the preceding considerations may appear to some to go beyond the scope of this Report, they are not in fact alien to it. For the ILO, the standard-setting activities remain the favoured means of achieving its objectives of economic progress and social justice and of exerting a growing influence in the international community. It is for this role, this responsiblity that it must prepare itself. The discussion on this Report will, I trust, make a contribution.

Allow me to add two observations:

1. While the Conference offers a suitable framework for the wide-ranging reflection to which this Report will give rise, it cannot exhaust the subject through a discussion in plenary sitting of the Report of the Director-

General. I therefore intend, immediately after the Conference, to have an analysis made of the discussions and to make a careful study of the views expressed. It will then be possible to determine how consideration of these matters may be continued by the appropriate bodies of the Conference and of the Governing Body. The latter, on the basis of proposals by the Office, might decide to set up a working party to examine some of the questions raised which call for solution.

2. It would consequently be desirable for delegates taking part in the Conference to refrain from submitting draft resolutions under article 17 of the Standing Orders of the Conference on the theme of the present Report.[1]

1 March 1984 FRANCIS BLANCHARD

Note

[1] It is recalled that while it is usual for the Conference to be seized of the Report of the Director-General, it is not an item on the agenda within the meaning of article 17 of the Standing Orders.

PART I

INTERNATIONAL LABOUR STANDARDS

INTERNATIONAL LABOUR STANDARDS

INTRODUCTION

The development of a system of international labour standards was the principal purpose behind the creation of the International Labour Organisation. Today, this remains one of the essential activities of the Organisation. Over 300 instruments have been adopted. A network of more than 5,000 ratifications of ILO Conventions has come into existence. A comprehensive system of supervisory procedures has been developed over the years with a view to evaluating and ensuring compliance with ILO standards. Countless instances have been recorded where, on the basis of ILO standards and as a result of the work of supervisory bodies, improvements have been brought about in social conditions and in the protection of working men and women.

The significance of ILO standard setting stems from the Organisation's aims and purposes. By its Constitution, the ILO is committed to seeking the realisation of certain normative objectives, with a view to ensuring that all human beings, irrespective of race, creed or sex, are able to pursue their material well-being and their spiritual development in conditions of freedom and dignity, economic security and equality. All member States, by virtue of their membership, have a common responsibility to work towards the attainment of these goals. The Conventions and Recommendations adopted by the Conference provide a means of translating the constitutional objectives into more specific rules and guide-lines. They also provide a unity of vision for ILO action. Technical co-operation, research and other practical activities undertaken by the Organisation ought to be guided by the standards and policies defined in these instruments. In turn, such activities can be used to promote the implementation of ILO standards, and may serve also to ascertain the extent of the realisation of standards, their suitability in changing conditions, and the opportunities and needs for reviewing existing instruments or drawing up new ones.

ILO member States have recognised the role which ILO standards can play as a means of ensuring balanced economic and social development and in securing recognition of the need for improved living and working conditions

both as a contributing factor to and as the ultimate purpose of economic development.[1]*

The ILO's standard-setting activities also have important implications for strengthening tripartism, both internationally and nationally. Employers and workers play a major role in the drawing up of standards and in the procedures for supervising their application. ILO instruments contain many provisions requiring tripartite involvement in their implementation at the national level. Beyond this, the tripartite Conference discussions tend to exert a general influence on the climate of relations between governments and employers and workers in their own countries.[2]

A concomitant of the importance attached to ILO standard-setting activities is the concern to ensure their effectiveness, both in terms of the relevance of ILO instruments to the current problems of member States and as regards the impact of ILO supervisory mechanisms in helping to bring about improved conditions of work and life. It is therefore necessary to review periodically the way in which the standard-setting system is operating. These questions have in fact been regularly discussed. In 1963 and 1964, within the framework of a general review of ILO programmes, the Conference had occasion to consider the future of standard setting. In 1968 the Conference discussion of the ILO's work in the field of human rights necessarily touched on issues concerning standards and supervision. Over a period of five years as from 1974 the Governing Body was engaged in an in-depth review of international labour standards, which led both to adaptations in the supervisory arrangements and to a systematic examination of all existing Conventions and Recommendations with a view to identifying those standards whose implementation should be regarded as priority objectives and in order to plan ahead in the selection of items for future standard setting. Revised standing orders for the examination of representations under article 24 of the Constitution were adopted by the Governing Body in 1980. The review of the ratification and application of Conventions within the different regions has constituted a regular feature of the work of regional advisory committees and regional conferences. In 1982 the Office innovated by holding a tripartite seminar for countries in Asia and the Pacific on procedures for formulating international labour standards.

The ILO supervisory bodies have likewise kept their methods under review. The Committee of Experts on the Application of Conventions and Recommendations last undertook a general examination of its methods of work in 1977. In 1978 it reviewed the means available to it for assessing the practical application of Conventions, and in 1979 it analysed the experience gained in the first ten years of operation of the direct-contacts procedure. The Conference Committee on the Application of Conventions and Recommendations re-examined its methods of work in 1979 and 1980, and as a result adopted certain changes in the latter year. The Governing Body Committee on Freedom of Association has

* The footnotes will be found at the end of this Part.

repeatedly considered its procedures and made proposals to the Governing Body for their adaptation and development, last in 1979.

While there has been strong and continuing support for the standard-setting and supervisory work from the broad range of the Organisation's constituents, a number of preoccupations have been voiced in recent years concerning the functioning of the system.

Spokesmen for governments of developing countries have expressed concern that greater account should be taken of their countries' needs, priorities, aspirations and possibilities in the choice of subjects for the adoption of standards and in determining the contents of instruments. They have stressed the importance of drafting instruments in a sufficiently flexible manner, and of ensuring that Third World countries enjoy adequate opportunities to make known their views at the preparatory stages and in the course of the Conference discussions. These various concerns were recalled, for instance, by the Union Minister for Labour and Rehabilitation of India in his address to the Conference in 1983, in which he welcomed the trend in recent years towards greater flexibility in ILO standards and suggested that "the process of consultations needs to be improved and the opinion of the developing world to be better reflected in the formulation of the standards".[3] Similar views found expression at the Regional Tripartite Seminar on Practice and Procedures in Formulating Labour Standards, held in Bangkok in April 1982.[4]

Employers' spokesmen have called for improvements in the procedures for drawing up ILO standards and for measures to ensure greater participation in the process by employers and workers. They have particularly stressed the desirability of reducing the number of items brought before the Conference for the adoption of standards, of improving arrangements for prior consultations of member States, including employers' and workers' organisations, and of organising the work of Conference committees in a manner which would permit a more thorough examination of proposals, with full regard to actual conditions in the world.[5]

Criticism of the functioning of ILO supervisory mechanisms has been voiced over a period of years by representatives of socialist countries. In 1983 a memorandum was presented to the Conference on behalf of a number of socialist governments which, while emphasising their support for ILO standard-setting activities as one of the most effective instruments for protecting the rights of workers in all countries, called for re-examination of the Organisation's supervisory procedures. These governments considered that the ILO supervisory bodies had failed to take account of the objective realities of the contemporary world and had thus been led to make tendentious and one-sided assessments of the law and practice of socialist and developing countries. They called for reform of the composition, powers and procedures of the ILO supervisory bodies.[6]

Apart from particular currents of thought of the kind mentioned above, there is a wider background against which the future role and direction of ILO standard setting should be considered. What are the implications for ILO standard setting of the substantial changes in the world economic scene and of the

continuing rapid changes in technology and social structures? In the current fluid and precarious setting, what contribution can international standards make in providing basic guarantees of social policy and social protection while also producing answers to newly emerging problems?

These various considerations suggest that the time is ripe for a new discussion of the ILO's standard-setting work. The present Part of the Report is aimed at providing a basis for such a discussion. In the light of the views which will find expression at the Conference, the various organs which determine the course of the standard-setting and supervisory processes will be better placed to see what aspects may call for re-examination and how best to proceed to any such re-examination.

Part I consists of four main sections. The first deals with the preparation and contents of international labour standards. The second concerns the system of supervision of the implementation of these standards. The third examines promotional measures in the field of standards. A final section considers measures for collaboration between the ILO and other international organisations in the drawing up and implementation of international standards.

A question which has been the subject of considerable discussion for a number of years is whether, on the basis of ILO Conventions and Recommendations, agreement could be reached on a body of minimum labour standards which all States would be expected to implement concurrently with their efforts to promote economic development and international trade and which could contribute to the establishment of a new international economic order. This matter was extensively discussed in the Governing Body some ten years ago.[7] It has been considered in connection with negotiations between the European Economic Community and the developing countries in Africa, the Caribbean and the Pacific which are parties to the Lomé Convention, and was also raised in the report of the Brandt Commission.[8] The question has been the subject of further careful study within the ILO in recent years, in the light of which informal consultations have been initiated with a view to further discussion in the Governing Body. It is a complex issue which requires detailed discussion as a distinct problem, on the basis of a detailed analysis of all relevant elements. In all these circumstances, it has been considered preferable not to take it up in the context of the present report.

THE PREPARATION AND CONTENTS OF INTERNATIONAL LABOUR STANDARDS

The main questions to be examined in this section are whether the existing body of Conventions and Recommendations is adapted to the current needs of the ILO's membership, and what can and should be done in future to make ILO standards fully responsive to those needs. This requires consideration not only of the type of subjects to be treated and the manner of dealing with them but also of the procedures by which ILO standards are drawn up, since those procedures will

determine the extent to which the membership as a whole (including the large number of Third World countries) can effectively participate in the process and thus influence its outcome, the adequacy of tripartite consultation and participation, and more generally the adequacy of opportunities for full discussion and mature reflection on proposals.

Principal characteristics of ILO standard setting

At the outset, it seems useful to recall certain significant characteristics of ILO standard setting. It represents a regular and major part of the work of the Conference which follows an established procedure. As a result, ILO Conventions and Recommendations are not a haphazard collection of instruments but constitute a comprehensive body of standards covering most areas of ILO concern. This enhances their influence because, even in the absence of obligations arising out of ratification, it becomes normal for those concerned with social problems to refer to them for guidance, as reflecting the considered views of a representative world assembly. The drawing up of ILO instruments in accordance with a clearly established procedure also ensures that the process is carried out with an economy of means. In other organisations lacking such a procedure, the elaboration of international instruments is often a drawn-out process involving a long succession of meetings.

A further special feature of ILO standard setting is, of course, that it is based on tripartite discussions and decisions. This has a significant influence on the content of ILO instruments, on their authority, and on the attention which they receive in the formulation of policy at the national level. That influence is the result not only of the voting strength of employers' and workers' representatives, but also of government exposure to their views in the course of tripartite consultations and deliberations.

In the past 65 years the Conference has adopted a total of 159 Conventions and 168 Recommendations. Looking at this body of standards, one is led to ask a series of questions. Can the Organisation go on adopting standards in the same manner as hitherto? What scope is there for meaningful new standards? To what extent are the older standards still relevant, and what need is there for revising them? Are ILO instruments sufficiently flexible? Should priority in the years ahead be given to seeking wider and better implementation of the existing standards rather than the adoption of new ones?

Some of these issues were considered by the Governing Body Working Party which from 1977 to 1979 made a systematic review of existing instruments and of possible items for revision or new standards.[9] It identified 19 topics for possible revision of existing instruments and 43 subjects on which new standards might be contemplated. Five of the topics identified for possible revision have either been dealt with in the intervening years or are currently before the Conference. In two other cases, after consideration by the Governing Body of reports prepared by the Office and consultation of member States, it was concluded, in the absence of agreement as to the nature of revision, that it would be inappro-

priate to initiate such action. On the other hand, revised instruments have in the meantime been adopted on three subjects in respect of which revision had not been suggested by the Working Party. Of the subjects listed for possible new standards, only three have been selected to be brought before the Conference.

It was understood that the conclusions of the above-mentioned Working Party should be reviewed from time to time in the light of changing circumstances. The Programme and Budget for 1984-85 provides for initiation of such a review during that period. It is appropriate to note certain limitations in the results of the previous review. Many items were included as possible subjects for new standards on which prior study was still needed and which might not in fact easily lend themselves to standard setting or on which it would be difficult to secure a sufficient measure of consensus. Moreover, no indication was provided as to a possible order of priority. It is therefore my intention, on the occasion of the forthcoming re-examination, to provide a series of annotations to the earlier lists which would enable a stricter, more realistic selection of topics to be made.

The prospects for standard setting cannot be divorced from the world economic outlook. In the present adverse conditions one notices a reluctance in many quarters to discuss innovative social measures which would arouse new expectations at a time when the maintenance of existing levels of protection is beset by difficulties. Questions which deserve consideration in this connection are how to ensure observance of basic social guarantees in a period of recession and how far standard setting could contribute to adaptation to change, for example on such issues as the relationship between working time and employment or the function of social security amid changing patterns of population and employment structures.

It may be instructive to recall the questions which have been the subject of standard setting by the Conference in recent times. In the period 1971-83 it adopted 25 Conventions and 26 Recommendations. All but two of the Recommendations were instruments supplementing Conventions. A number of instruments have dealt with workers' organising and bargaining rights (rural workers, workers in public service, protection and facilities of workers' representatives in the undertaking, collective bargaining, and tripartite consultation in regard to ILO standards and activities). The concern for equality and the special needs of disadvantaged groups has found expression in instruments on migrant workers, older workers, workers with family responsibilities and disabled persons. Employment security has been dealt with in instruments on termination of employment at the initiative of the employer and in instruments to promote employment stability for particular categories, such as seafarers and dockworkers. A number of instruments have addressed problems in the field of industrial safety and health, both as regards the general policy and institutional framework and as regards particular hazards (benzene, occupational cancer, air pollution, noise and vibrations, safety in dock work). Others have concerned conditions of particular categories of workers, such as seafarers, dockers, nursing personnel,

and workers in road transport (hours and rest). There have also been instruments dealing with labour administration, vocational guidance and training, minimum age for employment, paid educational leave, and migrants' social security rights.

Without seeking to evaluate the merits of the individual instruments, it may be observed that the above list covers a significant range of concerns, many taken up for the first time, others approached from new perspectives. The question nevertheless arises whether an indefinite accretion to the body of ILO standards is desirable, or whether the sheer mass of instruments may not in the end obscure the more pressing objectives.

It has at various times been suggested that efforts should be made to select a smaller number of instruments to serve as targets for national action and for ratifications. In its previous review of existing standards, the Governing Body identified approximately half the Conventions and Recommendations adopted up to 1978 as "priority instruments".[10] It is of interest to note that the ratifications received in recent years have overwhelmingly related to Conventions of this kind. In the last six years, over 90 per cent of new ratifications (i.e. exclusive of ratifications representing the confirmation of obligations by States joining the ILO) concerned Conventions adopted since the Second World War; 60 per cent of the new ratifications related to Conventions adopted since 1971.

The ratification record

At 31 December 1983 the total number of ratifications of ILO Conventions was 5,137. The average number of ratifications per member State was 34. Average ratifications per State in the various regions were: Europe — 57 (Western Europe — 60, Eastern Europe — 50), Americas — 38, Africa — 26, Asia and the Pacific — 20.

In the ten-year period from 1974 to 1983 a total of 1,177 ratifications were registered. Of these, approximately one-third came from industrialised countries and two-thirds from developing countries. If one leaves aside ratifications representing the confirmation of obligations by States upon joining the ILO, the total number of new ratifications in this period was 786 (a yearly average of 79), of which 45 per cent came from industrialised countries and 55 per cent from developing countries.

It is instructive to examine the ratification record of Conventions adopted in the 30-year period 1951 to 1980. Table 1 shows the average number of ratifications of Conventions adopted during each of the three decades, and the rate at which these ratifications have accrued.

These figures appear to bear out a number of conclusions which also emerge from information available from other sources (such as documents relating to the submission of ILO instruments to the national competent authorities and first reports on the application of ratified Conventions), namely that ILO Conventions set standards which are not just the common denominator of existing national practice, but for most countries require the raising or further develop-

Table 1. Progress in ratification of Conventions adopted from 1951 to 1980[1]

	Average number of ratifications per Convention at		
	End of 1963	End of 1973	End of 1983
Conventions adopted 1951 to 1960	20	35	44
Conventions adopted 1961 to 1970	—	18	27
Conventions adopted 1971 to 1980	—	—	21

[1] Excluding the Final Articles Revision Convention, 1961 (No. 116).

ment of national standards; that efforts are made gradually to attain the protection called for in the Conventions; and that most governments undertake ratification in a cautious and deliberate manner, conscious of the responsibilities flowing from their commitment.

Table 2 shows the extent of ratification of Conventions according to subject-matter.

It will be noted that among the Conventions which have received the largest number of ratifications are the main instruments dealing with freedom of association, the abolition of forced labour and equality in employment, as well as the Conventions on employment policy, employment services, labour inspection in industry and commerce, minimum wage-fixing machinery and protection of wages.

However, only 43 Conventions have received more than 40 ratifications and, of these, a third have been revised and thus no longer represent priority objectives.

At first sight it is disturbing to note that, of the 157 Conventions listed in table 2, as many as 61 have received fewer than 20 ratifications and that for another 53 Conventions the number of ratifications lies between 20 and 40. These figures, however, call for clarification.

In the first place, the Conventions with relatively few ratifications include those adopted in recent years in respect of which the process of ratification is only just starting or is still far from having attained its full potential. This can be said of 20 to 25 Conventions.

Many Conventions have been revised and as a result have frequently been closed to further ratification. Out of a total of 41 revised Conventions, 27 are among those whose ratifications do not exceed 40.

Some Conventions relate to questions of concern only to a limited number of countries. Thus, four Conventions applicable to non-metropolitan territories lent themselves to ratification only by States having responsibility for such territories. Five Conventions concerning recruiting and contracts of employment of indigenous workers were of interest mainly to colonial territories, and are now practically obsolete. Other instruments of relevance to only part of the ILO membership are those concerning seafarers and plantations.

Table 2. Ratifications of ILO Conventions (referred to by Convention numbers and excluding the Final Articles Revision Conventions, Nos. 80 and 116)

Subject-matter	Number of ratifications					
	Under 20	20-40	41-60	61-80	81-100	Over 100
Freedom of association and collective bargaining	151, 154	141	135		87	11, 98
Forced labour						29, 105
Equality of opportunity and treatment	156					100, 111
Employment and training	34*, 158, 159	96, 142	2	88, 122		
Social policy		117				
Labour administration		63, 129, 144, 150				81
Wages		131	94, 99		26, 95	
Hours, rest and leave	20, 31*, 43, 46, 47, 49, 51, 61, 67*, 132, 153	30, 140	1, 52*, 101*, 106		14	
Occupational safety and health	28*, 148, 155	32*, 62, 115, 119, 127, 136, 139	13, 27, 120			
Social security	25*, 35*, 36*, 37*, 38*, 39*, 40*, 44, 48, 121, 128, 130, 157	24*, 102, 118	18*, 42*	12*, 17*		19
Employment of women		3*, 41*, 103	4*	89	45	
Employment of children and young persons	60*, 79	33*, 59*, 77, 78, 90, 124, 138	6*, 10*, 123*	5*		
Migrant workers	66*, 143	21, 97				
Indigenous peoples and workers in non-metropolitan territories	82, 83, 84, 85	50, 64, 65, 86, 104, 107				
Seafarers, fishermen and dockworkers	54*, 55, 56, 57*, 70, 71, 72*, 75*, 76*, 93*, 109, 125, 126, 133, 145, 146, 147, 152	9, 23, 53, 68, 69, 73, 74, 91*, 92, 112*, 113, 114, 134, 137	7*, 8, 22, 58*, 108	15*, 16		
Plantations	110					
Nursing personnel	149					
Total	61	53	22	8	5	8

*Convention revised.

Subject to the preceding observations, the figures in table 2 nevertheless suggest that difficulties in securing extensive ratifications have been marked in certain areas. Thus, in the field of hours of work, eight Conventions applicable to particular occupations have failed to enter into force, and even the Forty-Hour Week Convention adopted in 1935 has received no more than eight ratifications. It is not without significance that the only general instrument on hours of work adopted since 1945 took the form of a Recommendation.

The Conventions in the field of social security also have, for the most part, secured only a limited number of ratifications, and this notwithstanding the efforts made to include a variety of flexibility devices.

Another area with a relatively low ratification record, even allowing for the narrower range of countries affected, is the employment of seafarers.

Ratification is of course not the only measure of response to ILO standards, and there is much evidence that unratified Conventions have influenced the evolution of national law and practice. This has been recognised, for example, in the case of a number of maritime Conventions which, in terms of ratification, have not appeared successful.[11] In such circumstances, the question arises whether Conventions were necessarily the most suitable form for the standards in question. A Convention which is ratified by only a handful of States has, for the bulk of the Organisation's membership, the same value as a Recommendation.

The question has at different times been raised whether a Government should vote in favour of the adoption of a Convention if it is not in a position to proceed to its ratification. In this connection, reference is made to the figures in table 1 concerning average ratifications for Conventions adopted between 1951 and 1980, which show that States only gradually reach the position where they are able to assume the obligation, arising upon ratification, of full implementation of a Convention. They may therefore legitimately express themselves in favour of the adoption of standards as representing a desirable objective for the world community as a whole or as a goal for the further development of their own social policy and legislation. Should they wish to avoid any misunderstanding as to their position, delegates are free to make a statement in explanation of their vote — as indeed they frequently do.

The preceding general inferences drawn from the figures in table 2 deserve to be borne in mind in reaching decisions as to future standard setting, the identification of subjects for revision, and efforts to promote wider implementation of ILO standards.

Denunciations

Some reference should also be made to the denunciation of Conventions. Leaving aside the 248 cases in which denunciations occurred as a result of the ratification of revising Conventions, and thus merely involved a substitution of obligations, there have been 45 "pure" denunciations leading to the termination of obligations. In the first 50 years of the ILO's existence there were only 13 such

denunciations, as compared with 32 in the 14 years since then. Concern has sometimes been expressed at this increasing trend. However, the total of such denunciations still represents less than 1 per cent of total ratifications. Half of them relate to Conventions in three fields where changes in outlook or technology have led to widespread questioning of the continuing validity of the standards: night work of women (13 denunciations), underground work in mines by women (3) and night work in bakeries (6). There have also been three denunciations each of the Unemployment Convention, 1919 (No. 2), the Maintenance of Migrants' Pension Rights Convention, 1935 (No. 48), and the Employment Service Convention, 1948 (No. 88). The denunciations of Convention No. 48 have come from Eastern European countries and are attributable to the change of regime subsequent to ratification. In the case of the other two Conventions mentioned, they have been due to diverse reasons, mostly of a limited, technical nature.

Since the mid-1930s the general practice has been to provide, in the final articles of Conventions, for the possibility of denunciation at ten-yearly intervals from the date of their first coming into force. Earlier practice had been to permit denunciation at any time after ten years had elapsed from first entry into force (Conventions Nos. 1 to 25); a limited number of Conventions, mainly dating from the 1930s, are open to denunciation at five-yearly intervals. The rate of "pure" denunciations in relation to total ratifications has been 1.1 per cent for the early Conventions, which for most of their existence have been open to denunciation at any time; 0.9 per cent for Conventions with five-year intervals between denunciation periods, and 0.8 per cent for Conventions with ten-year intervals. These figures suggest that the ten-year interval provided for in the majority of Conventions represents a reasonable balance between the concern for stability of obligations and the need to allow for changes of outlook or national situations, particularly if regard is had to the fact that the ratifications of the earlier Conventions containing more flexible denunciation clauses go back over a much longer period and are liable to have been affected more by changes of circumstances.

Revision and consolidation of ILO standards

Repeated emphasis has been placed on the importance of revising older standards in order to ensure their adaptation to current conditions. Over the years, a considerable effort has been made to this end. Altogether 41 Conventions have been the subject of revision, including half those adopted prior to 1945. As already noted, a number of the Working Party's suggestions concerning revisions adopted by the Governing Body in 1979 have already been acted upon. The need for revisions should again receive close attention in the further review due to be made.

In one case revision represented a significant act of consolidation: the Minimum Age Convention, 1973, revised ten earlier Conventions with the aim of gradually replacing them. The question has been raised whether similar action

might not be possible in other fields. Theoretically this would be possible, but one may wonder how far it could bring about a genuine merging of earlier standards — as in the case of the minimum age standards — rather than a stringing together in a global instrument of unwieldy proportions of the provisions of the various earlier Conventions (for example, in such fields as social security or occupational safety and health). Certain Conventions adopted in recent years establish a general framework for policy, regulation and administration, for example as regards occupational safety and health and maritime employment. This may represent an alternative to the more complex process of consolidation, but raises the question of how to relate more detailed standards to them and whether such more detailed standards should be in the form of Conventions or of non-mandatory recommendations or guide-lines. Even in the case of minimum age, the effects of comprehensive revision will make themselves felt only in the longer term, since for the time being the earlier sectoral Conventions remain in force for a significant number of States and some of them may still constitute valid interim objectives.

There exists no procedure for abrogating ILO Conventions. A certain number have been still-born, in that they have not received the ratifications necessary for their entry into force. Some of these have been revised and are no longer capable of ratification. Others, even though in principle still open to ratification, are unlikely to be further ratified (for example, in the fields of hours of work and maritime employment, mentioned earlier). Certain measures of a practical nature have already been taken to reflect this situation: the omission of obsolete instruments from the published compilation of ILO Conventions and Recommendations and the omission of certain Conventions from the chart of ratifications. These measures could now be taken a step further. For example, the chart of ratifications might be further simplified by the omission of selected Conventions which have not entered into force and can be regarded as spent, even though still open to ratification. One might also consider discontinuance of detailed reporting on certain Conventions which have lost their relevance, such as those relating to the minimum age of trimmers and stokers (No. 15), the inspection of emigrants on emigrant ships (No. 21), and indigenous workers (Nos. 50, 64, 65, 86, 104). The Governing Body could decide that, subject to review if necessary, such Conventions should henceforth be covered only in governments' general reports.

Limitations on standard setting

In considering future approaches to standard setting, one should recognise the limitations on this form of action. Not all the social problems which call for attention by the ILO necessarily lend themselves to standard setting. Some involve broad questions of policy where standards of a legal nature can play only a secondary role as tools of implementation rather than as determinants of basic approaches. This appears to be the case, for example, as regards rural development programmes and work in certain unorganised sectors. In such circum-

stances, general discussions aimed at clarifying issues and providing guidance to policy-makers may be preferable to the adoption of Conventions and Recommendations. General discussions will, however, attain their objective only if they involve a genuine exchange of experience and do not transform themselves into a process of pseudo standard setting concentrating on the adoption of defined conclusions rather than on a thorough discussion of substance.

Similarly, while ILO standard setting must be responsive to economic, social and technological changes, it cannot in itself determine the course of these changes. Frequently, extensive research and discussion on the issues emerging from major transformations will be necessary in order to determine on what aspects and in what form standards should be drawn up. The adoption of Conventions and Recommendations is normally undertaken only when, in the light of experience at the national level, the subject appears sufficiently ripe to secure the requisite measure of agreement.

The form of regulation of a question at the national level will also have a bearing on the scope for ILO standard setting. A number of Conventions provide for the possibility of implementation by means of collective agreements, and the supervisory bodies have accepted that even certain Conventions which do not contain a specific clause to that effect may be made effective through collective agreements. This approach however is not free from difficulty, particularly where the coverage of collective agreements falls short of the requirements of the ILO instrument or where individual agreements fail to ensure the observance of its substantive provisions. The extent to which, for example, certain aspects of industrial relations are determined by means of collective bargaining in member States, and the resulting variations in practice, may make it difficult to proceed to the adoption of ILO standards on such questions otherwise than in the form of a Recommendation.

The respective roles of Conventions and Recommendations and the use of "promotional" Conventions

The preceding remarks lead to the consideration of the respective roles of Conventions and Recommendations and the use of "promotional" Conventions.

Over the years, the view of Recommendations as second-class standards has gained increasing currency in the Conference. In earlier times many subjects were dealt with in Recommendations, particularly where matters of general policy or practical programmes were involved or where, in the absence of sufficient development of national experience, standards of an exploratory nature appeared to be called for. That approach is now rare. Whereas in the period from 1951 to 1970 well over half of the Recommendations adopted (i.e. 31 out of 55) were autonomous instruments unrelated to a Convention, since 1971 only two out of 26 Recommendations have been of this nature, the remainder all being instruments supplementing a Convention. There has also been increasing recourse to "promotional " Conventions calling for the pursuit of a national

policy in the field dealt with rather than laying down precise standards. Where the objective to be attained can be defined with relative precision (as was the case with the earlier promotional Conventions on equal remuneration and discrimination in employment and occupation), such Conventions can be a powerful stimulus to national action. Increasingly, however, promotional Conventions have dealt with less clearly defined objectives, at times calling for action over wide areas of public policy, where it becomes difficult both for ratifying States to know what measures of implementation are required of them and for the ILO supervisory bodies to evaluate compliance with international commitments. It is true that the couching of standards in the form of Conventions will, in the event of ratification, lead to more regular review, both nationally and internationally, than can be expected for Recommendations. On the other hand, the lack of certainty in States' obligations is liable to erode the credibility of the Conventions and, more generally, of ILO standard setting.

One of the basic questions for the future is therefore whether greater use should not again be made of non-mandatory instruments, reserving Conventions for important issues capable of precise definition and action.

It is also worth remembering that Recommendations adopted within the constitutional framework are not the only form of non-mandatory instruments available. Certain questions, both of policy and of a predominantly technical nature, can be dealt with effectively and economically through other non-mandatory guide-lines.[12]

Flexibility of standards

There exists a general consensus that ILO standard setting should continue to be on a universal basis and that differences in national conditions and levels of development should be taken into consideration by the inclusion of appropriate flexibility devices.[13] A consistent effort has been made, in the preparation of ILO instruments, to consider the need for flexibility, and a series of "flexibility devices" have been developed. These include the possibility of ratifying Conventions in parts, the acceptance of alternative parts containing more or less strict requirements, limitations on scope, "escalator" clauses permitting the gradual raising of the level of protection or the extension of the scope of protection, temporary exceptions, and flexibility in the methods of application. Promotional Conventions, while stating objectives, generally leave a great deal of freedom in deciding on the methods by which to seek their attainment. Two points nevertheless stand out: only limited use has been made of the flexibility clauses contained in certain Conventions; at the same time, representatives of developing countries frequently consider that ILO standards are not sufficiently flexible.

As regards the former point, reference may be made, by way of example, to the Social Security (Minimum Standards) Convention, 1952 (No. 102). It can be ratified on the basis of acceptance of its provisions for a minimun of three out of a total of nine branches of social security. The Convention has been ratified by 18

industrialised countries and 12 developing countries. The average number of branches of social security for which the Convention has been accepted is the same for both groups of countries, namely six. Only three countries have availed themselves of the possibility for countries with insufficiently developed economies and medical facilities to specify lower levels of protection. The Guarding of Machinery Convention, 1963 (No. 119), has been ratified by 36 countries, 24 of which are developing countries; only one country (Norway) has availed itself of the possibility permitted by Article 17 of limiting its scope. The Minimum Age Convention, 1973 (No. 138), has been ratified by 27 States, including 11 developing countries. Four of the latter have availed themselves of the possibility for countries with insufficiently developed economies and educational facilities initially to specify a general minimum age of 14, instead of 15 years. Only one State has made a declaration initially limiting the scope of the Convention, and only two of the countries which have so far reported on the application of the Convention (one a developed, the other a developing country) have indicated that they have used the power to exclude limited categories of work for which substantial problems of application would arise.

The foregoing indications lead one to ask not only whether countries which ratify Conventions examine sufficiently the possibilities of flexibility offered by them but also whether other countries might not find ratification possible through wider use of the flexibility clauses. This in turn raises the question, considered further on, of the need for more ample information and advice to member States on matters of this kind.

While there is general agreement on the need for flexibility in ILO standards, opinions tend to vary, both among the different groups represented at the Conference and among delegations from different countries, as to the precise degree of flexibility to be permitted in any given case. Ultimately this is a matter of judgement. It must also be recognised that the scope for flexibility will depend on the subject-matter to be regulated. Subject to these qualifications, certain questions would merit discussion. Are some Conventions unduly detailed, and should a greater effort be made in future to limit Conventions to essential principles and to leave matters of detail to be taken up in supplementary Recommendations? Do the procedures for the drawing up of standards provide adequate opportunities for all member States, both at the stage of prior consultations and during discussions at the Conference, to make known their views and special problems? Should the Office do more to initiate suggestions concerning flexibility devices, either in the initial questionnaires or at later stages?

These questions make it necessary to examine the procedures through which ILO standards are drawn up, and possible improvements in those procedures.

Determination of the Conference agenda

The formal point of departure for ILO standard setting is the decision by the Governing Body to include an item on the agenda of the Conference. The

Governing Body bases its choice of agenda items on suggestions presented by the Office, drawing upon decisions and discussions of the International Labour Conference, the Governing Body, regional meetings, industrial committees, and expert meetings, as well as on its own studies and research. In recent years, regard has been had especially to the Final Report (1979) of the Governing Body Working Party on International Labour Standards and to the indicative elements contained in the Medium-Term Plan.

In suggesting items for the Conference agenda with a view to the adoption of standards, the Office has been concerned to ensure that the subjects are ripe for action, in the sense that the matters to be regulated are clearly defined, that there has been adequate technical preparation, and that a sufficient measure of agreement can be secured. In the course of the in-depth review of international labour standards undertaken by the Governing Body, a number of criteria were suggested to guide the choice of items, such as the numbers affected, the extent to which the subject would affect workers in the lower economic stratum, and the severity of the problem. Although no specific decision was taken on these suggestions, factors of this kind would generally be taken into account by the Office when considering proposals for possible agenda items for submission to the Governing Body. Representatives of developing countries have emphasised that particular regard should be had to subjects which correspond to their priority needs. It is a matter for consideration whether under present procedures this concern receives sufficient attention, or whether some wider method of consultation should be contemplated. One possibility would be to replace the present system of consideration of the Conference agenda at two sessions of the Governing Body by a preliminary written consultation of all member States, following which proposals for the agenda would be made to the Governing Body for discussion and decision at one session only. It would also be possible to seek the views of ILO regional conferences on the results of the forthcoming re-examination by the Governing Body of potential items for standard setting.

Although many potential topics for standard setting have been noted, difficulty has been experienced in recent years in presenting to the Governing Body a sufficient range of subjects which were ripe for action in the sense indicated above. This makes it necessary to consider whether, at least for the time being, a somewhat slower rhythm of standard setting might not be desirable. The view has been expressed in various quarters, particularly by Employers' spokesmen, that a reduction in the number of items on the Conference agenda would permit better preparation of those standards that are adopted.

Measures to facilitate participation by member States in the standard-setting process and to improve procedures at the Conference

One wish expressed in this connection is that more member States would make known their views in the consultations preceding discussion at the Conference. At present, replies to the questionnaires sent out prior to a first discussion are normally received from one-third to one-half of the membership of the

Organisation. It would clearly be desirable to obtain a fuller response, particularly from developing countries. It is also important to allow adequate time for governments to consult employers' and workers' organisations concerning their replies, as they are required to do if they have ratified the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and as has been recommended to States generally by the Governing Body. Possible measures to strengthen administrative and institutional arrangements in these respects will be considered in a later section. One might also envisage a change in the timing of Governing Body decisions concerning the Conference agenda, with final decisions being taken in May rather than in November, subject to the possibility to make minor modifications at the meeting of the Governing Body immediately following the Conference should decisions by the latter make that necessary. Such arrangements would allow additional time for preparation of the first, so-called "law and practice" report by the Office and, if that report were sent to member States at the beginning of the following year, would allow them twice as much time as at present to examine the questionnaire and to prepare their replies. As a result, consultation of employers' and workers' organisations would also be greatly facilitated.

In view of the number of agenda items, countries which are unable to finance large delegations to the Conference find it difficult to follow the discussions in the various committees. This limits especially the contribution which developing countries can make to Conference committee discussions and their influence on the outcome of deliberations on new standards. It may be recalled that the question of facilitating the participation in the Conference of tripartite delegations from member States through the financing of expenses by the Organisation was examined by a Governing Body working party from 1974 to 1976 but was not pursued in view of budgetary constraints. It remains an important question of principle for the balanced functioning of the Organisation, on which renewed discussion ought to be undertaken.

Pending any further action on this general issue, attention has to focus on more specific measures to facilitate the contribution by developing countries to the process of formulating standards. A reduction in the number of Conference agenda items would diminish, but not eliminate, the difficulties experienced by these countries. Among measures which might be taken to improve their situation would be greater efforts to co-ordinate the positions of regional or subregional groups or other like-minded groups of countries. Groups such as the European Economic Community and the Nordic countries already seek to act in this manner, and there would be evident advantages in similar action by other groups, both in terms of their ability to make their views felt and in bringing about greater clarity in committee discussions. The governments concerned could communicate to one another the written comments sent to the ILO on agenda items intended to lead to the adoption of standards and, above all, arrange for systematic consultation among their delegations at the Conference with a view to co-ordinating their participation in committees and, wherever possible, adopting common positions.

Another possibility which deserves serious consideration is greater recourse to a single discussion at the Conference, preceded by a technical meeting and consultation of member States within time-limits leaving ample time for consideration of the matter. Such a procedure could reduce both the number of occasions on which member States had to be consulted and the number of items before the Conference at any one time. If it became widely used, it could significantly lighten the workload of the Conference and would strengthen arguments in favour of holding this at two-yearly intervals or of alternating between Conference sessions with a full agenda and sessions with a limited or lighter agenda.[14]

One problem which has become increasingly acute in recent years is the difficulty for Conference committees to discuss large numbers of amendments in the limited time available. This has inevitably reflected on the quality of the instruments adopted. Amendments tend to be considered in the context of the provision to which they refer without there being time to examine their possible impact on the instrument as a whole. Any difficulties resulting from amendments adopted in the course of a first discussion can be eliminated but this is not so with amendments adopted in a second discussion.[15]

The volume of work faced by Conference committees has also resulted in problems at the drafting committee stage. The pressure on the secretariat in translating and issuing the multitude of amendments submitted has resulted on occasion in the texts adopted having different meanings in the different languages.

Furthermore, committees sometimes refer to their drafting committee decisions on amendments which raise questions of substance and not merely of drafting. Drafting committees are thus called upon to perform a major task, sitting on average for six or seven hours, at a stage in the Conference when the strain of two weeks' meetings is beginning to be felt, but the Conference timetable does not permit of any delay in the completion of their task.

The above-mentioned difficulties might be reduced to a certain extent by some of the measures suggested above, such as providing more time for prior consultations and more extensive recourse by regional, subregional or other groupings to the adoption and statement of common positions. Another procedure, which has already been used, is for committees to discuss major issues and then to refer proposed amendments to working groups. This leaves actual drafting in the hands of smaller bodies and reduces the number of meetings of the full committee, and consequently also the pressure on smaller delegations. More systematic use of this approach would be desirable.

A further improvement which might be contemplated would be to invite delegations to forward to the Office, in advance of the opening of the Conference, the texts of amendments which they intended to submit. Even though the actual submission would have to wait until the committees had been constituted and proposals could also be made thereafter, up to the time fixed by the committee, this practice would reduce pressure on the secretariat and ensure the early circulation of the texts in question.

While the regular pattern of the procedure for the drawing up of ILO instruments has obvious advantages, one should not regard it as inflexible. The ultimate objective must be to obtain realistic texts which will have the greatest possible impact. Where, therefore, it is found in any particular case that adequate time is not available for the thorough examination of the points or texts before a committee, it could be decided to defer the question for further discussion at the subsequent session of the Conference. The implications of such decisions for the workload of subsequent sessions would of course have to be examined, and consequential changes might have to be made in their agenda.

The general practice in the Conference for items considered under the double-discussion procedure has been to take decisions as to the form of instrument for the proposed standards at the first discussion, so as to allow for the preparation of draft texts and consultation on those drafts prior to the second discussion. On a number of occasions in recent years, a decision taken during the first discussion to adopt a Recommendation has been reversed during the second discussion in favour of the adoption of a Convention supplemented by a Recommendation.[16] Such decisions have the double disadvantage of making it necessary to draft the final texts under great time pressure and of leading to the adoption of instruments which have not been the subject of "adequate consultation of the Members primarily concerned", as required by article 14 of the ILO Constitution and the Standing Orders made pursuant to that article. It would therefore be desirable to revert, as a general principle, to deciding on the form of the instrument at the first discussion. Alternatively, in any case where that decision is changed at the second discussion, the final consideration of the question ought to be deferred to a subsequent session of the Conference, so that the draft instruments can be the subject of the careful preparation and consultation of member States which the rules governing the double-discussion procedure are intended to ensure.

One problem which has recently arisen, as a consequence of the development of consultation of employers' and workers' organisations concerning Government replies to preparatory reports on items before the Conference, is how to reflect the views expressed by such organisations. The most appropriate practice, which is followed by a number of States, is for governments to take these views into account in formulating their replies. Some governments however communicate the organisations' observations separately. The practice of the Office has been not to reproduce such information. Employers' representatives have urged that this practice be changed, and it is proposed, on an ad hoc experimental basis, to summarise comments from employers' and workers' organisations in one of the reports to be submitted to the 70th Session of the Conference (for the second discussion concerning employment policy). However, apart from questions of a legal nature which might arise from the fact that the present Standing Orders provide for the Conference reports to be prepared on the basis of "the replies from governments", the systematic summary of the views of organisations could give rise to practical problems concerning the volume, timely production and cost of Conference reports. As the practice of consultation becomes more wide-

spread, and since in many countries a number of different organisations are involved in the consultation process, these practical problems could assume considerable magnitude. It would therefore be preferable for all governments to take the organisations' comments into account in drawing up their own replies rather than appending them. This procedural matter might usefully be the subject of agreement among the parties to national tripartite consultation arrangements.

Questionnaires included in initial reports for a first discussion always have a section concerning particularities of national law and practice which may create difficulties of application. It is aimed at identifying points on which flexibility may have to be permitted in the proposed instruments. At present, the subsequent treatment of these matters is determined by the majority trends in the replies received. It may be desirable in future to give closer attention to the views on these aspects expressed by developing countries, particularly where there is some imbalance in the number of replies received respectively from developed and developing countries. It may also be desirable to pay special attention to minority views expressed during a first discussion, where this may help to address the question of flexibility during the subsequent consultations and in the course of the second discussion.

"Substantial equivalence" clauses

It has at times been suggested that it would facilitate acceptance of Conventions if it were possible to ratify them on the basis of "substantial equivalence" in the protection provided. Some Conventions already contain clauses of this kind. Recent social security Conventions, for example, permit the exclusion of seafarers and of public servants if they are protected by special schemes which provide in the aggregate benefits at least equivalent to those required by the Convention. The Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), requires ratifying States to have safety standards, social security measures and conditions of employment substantially equivalent to those laid down in specified earlier Conventions. The most recent Convention on safety and health in dock work (No. 152) permits variations in the technical measures it prescribes if they provide corresponding advantages and the overall protection afforded is not inferior to that which would result from the application of the Convention. While clauses of this kind may be useful in relation to particular technical problems, they are not free from difficulty. They lay a considerable responsibility on the supervisory bodies in determining what can be regarded as substantially equivalent protection, and may lead to controversy and uncertainty. In general, it would appear preferable to introduce flexibility by means of specific alternatives to the rules contained in the various articles. As regards provisions of a secondary character, one should examine in the first place to what extent their inclusion in the Convention is in fact necessary and then seek either to express them in a flexible manner or to envisage alternative means of attaining the desired result. In other words, while "substantial equivalence" clauses may in

some circumstances prove useful, in general it would appear preferable to aim at more precise delimitation of flexibility.

Conditions for entry into force of Conventions

The question has been raised whether the entry into force of Conventions should not be subject to stricter conditions, so that the supervisory system would operate only once a significant network of ratifications had come into being. At present, apart from special cases (such as maritime Conventions), a Convention generally enters into force 12 months after receipt of the second ratification. Examination of the ratifications received in respect of the Conventions adopted in the past 20 years shows that, had the requirement been six ratifications, entry into force would have been delayed only slightly. Even with a requirement of ten ratifications, it would generally have been delayed by only one or two years, except for a few Conventions relating to seafarers, fishermen, social security and migrants. One advantage of early entry into force of Conventions is that problems examined by the supervisory bodies may help to clarify issues for the benefit of States which are still considering the possibility of ratifying them. In the course of the forthcoming review of existing instruments by the Governing Body, special consideration could be given to Conventions which, although adopted already some time ago, have failed to attract an appreciable number of ratifications. In addition to determining the causes of such situations and the desirability of remedying them by means of revision, the Governing Body could examine what general conclusions might be drawn for future approaches to standard setting.

SUPERVISION OF THE IMPLEMENTATION OF ILO STANDARDS

Two points deserve to be highlighted in discussing the arrangements established by the ILO for supervising the implementation of the standards adopted by the Conference. Certain basic provisions of the existing supervisory system — such as the obligation to report on measures taken to give effect to ratified Conventions and procedures for the presentation of complaints and representations — were included in the original Constitution. The system has however been substantially developed over the years.[17] Some of these developments (such as reporting on the measures taken to submit newly adopted instruments to the national competent authorities and the obligation to report, when requested by the Governing Body, on the position in regard to unratified Conventions and Recommendations) were brought about by amendments to the Constitution. Other important developments resulted from decisions of the Governing Body or the Conference, including the establishment of the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations, and the creation of special machinery to examine complaints of violation of trade union rights. The methods of work of the supervisory bodies have also evolved over the years.

Principal features of ILO supervision

The effectiveness of the ILO supervisory system is influenced by a number of distinctive features.

In the first place, ILO standards — and therefore the obligations resulting from their ratification — are generally defined in a precise manner as compared with a number of instruments adopted both at the universal and at the regional levels.

Secondly, ILO supervision is cohesive. A single set of procedures (routine supervision by a committee of experts and a tripartite conference committee, supplemented by machinery for examining complaints and representations) operates in respect of all Conventions. This approach may be contrasted with the practice of certain other organisations (particularly the United Nations) of establishing distinct and varying supervisory arrangements for each instrument adopted.

Thirdly, as already noted, the ILO system makes provision both for regular supervision on the basis of reports and for the examination of complaints and representations.

Fourthly, ILO supervisory bodies enjoy the technical support of a qualified staff. This permits not only a more thorough analysis of implementation, but also uniformity in the treatment of cases, by making documentation and information available to the supervisory bodies in a systematic manner, as a basis for their decisions.

Fifthly, the ILO system combines technical evaluation by independent experts and tripartite review. The former is designed to obtain an impartial, objective assessment of compliance with obligations. The latter enables those directly concerned to examine the situation, make known their views and suggest solutions to problems.

Sixthly, the ILO system involves the active participation of employers' and workers' organisations in the implementation of standards. There are three levels at which this participation manifests itself. Employers' and workers' organisations have an important role to play in contributing to the adoption and review of implementing measures at the national level. They can be sources of information for ILO supervisory bodies or initiators of complaints or representations. Their representatives participate directly in the work of supervision, especially in the tripartite Conference Committee.

Lastly, the uniform system applicable to all ILO standards is supplemented by several special procedures in specific areas, such as the freedom of association complaints machinery and the possibility of special studies concerning discrimination in employment and occupation. There is also the general competence of the International Labour Office, under article 10 of the Constitution, to carry out special investigations which has been resorted to in a number of instances as a basis for important ad hoc studies. All these special procedures may be invoked even when the country concerned has not ratified the relevant ILO Conventions.

As already mentioned, ILO supervisory arrangements have not remained static, but on the contrary have been the subject of gradual development and adaptation. Until 1958 reports on ratified Conventions had to be submitted every year. Then the periodicity of detailed reporting was changed to a two-yearly pattern. In 1977 the system was changed again to detailed reporting at yearly, two-yearly or four-yearly intervals according to the subject-matter of the Convention and the nature of any problems of implementation. The Committee of Experts on the Application of Conventions and Recommendations, from an original composition of eight members in 1927, has grown into a body of 20 members, reflecting the widening membership of the Organisation. Since 1957, to focus attention on the more important issues, only part of the Experts' comments have been published in the Committee's reports, the remainder being addressed in the form of direct requests to the States concerned. The Conference Committee on the Application of Conventions and Recommendations, as from 1957, developed the system of drawing special attention in its reports to cases of serious difficulty in complying with obligations. This system has been repeatedly reviewed and adapted, last in 1980. During the past ten years a series of measures have been taken to promote a more active contribution by employers' and workers' organisations to supervisory procedures. Since 1969 the procedure of direct contacts has been developed to provide for discussion, during missions to individual countries, of problems encountered in complying with obligations relating to ILO standards and of means of overcoming such problems. The direct-contacts procedure has been supplemented by less formal advisory missions and, more recently, by the appointment of regional advisers on international labour standards.

Impact of ILO supervision

Much attention has been given to studying the impact of ILO standards and supervision. In 1954 the Committee of Experts made a survey of the effectiveness of its observations.[18] Starting in 1955, a series of articles reviewing the influence of Conventions and Recommendations in individual countries have been published in the *International Labour Review*, and in 1976 the Office published a general study on this subject.[19] Since 1964 the Committee of Experts has listed in its report the cases in which, following comments, it has been able to note progress in the application of ratified Conventions. The total of such cases recorded in the 20-year period between 1964 and 1983 is over 1,500.

For the purpose of the present Report, the 761 cases of progress in the application of ratified Conventions noted by the Committee of Experts in the past ten years (1974-83) have been analysed. Table 3 shows the regional distribution of these cases and also indicates the regional share of ratifications. In comparing these figures, it must be borne in mind that the number of comments made by the Committee of Experts (and therefore of potential cases of progress) for any given country does not bear a fixed proportion to the number of Conventions ratified by it. Furthermore, the figures do not distinguish between cases

Table 3. Cases of progress in the application of ratified Conventions noted by the Committee of Experts on the Application of Conventions and Recommendations, 1974-83, by region

Region	Total number of cases of progress noted	Percentage of total cases of progress noted	Percentage of ratifications of ILO Conventions
Africa	145	19	26
Americas	274	36	24
Asia and Pacific	110	14	14
Europe	232	31	36

according to the importance of the measures taken. They include both cases where the discrepancies in the application of a Convention previously noted by the Committee of Experts have been wholly eliminated and cases of partial progress. Even so, they show responsiveness to ILO supervision in all regions.

Table 4 analyses the cases of progress according to subject-matter, distinguishing between developed and developing countries.

In recording the cases of progress arising out of action taken by governments following comments by the Committee of Experts, that Committee has emphasised that they were not the only instances in which ILO standards have influenced national law and practice. For example, since 1975 the Committee has noted 77 cases (two-thirds concerning developed countries) in which the first report on the application of a ratified Convention showed that new measures with a view to its implementation had been adopted shortly before or after ratification. Evidence of the influence of ILO standards on the adoption of national measures is frequently to be found also in reports on unratified Conventions and on Recommendations made pursuant to article 19 of the Constitution.[20] ILO studies show that in other cases the adaptation of national law and practice to the requirements of a Convention is carried out gradually over a period of time before a decision to ratify is taken. Governments are aware that, in the case of ratification, their compliance with a Convention will be the subject of scrutiny, and most of them are anxious to ensure that such compliance exists already at the time of ratification. The impact of ILO supervision procedures is thus not confined to cases where critical comments after ratification lead to remedial measures. They also exert a significant indirect influence of a preventive character.

The foregoing remarks have a bearing on the spirit in which the whole question of international supervision is approached. ILO procedures can assist member States in understanding the full import of the standards which they have undertaken to observe and prompt them to make good any shortcomings in meeting these requirements. The essential purpose of the system is, however, to ensure that freely assumed obligations are honoured, and thus to maintain the credibility of the act of ratification.

Table 4. Cases of progress in the application of ratified Conventions noted by the Committee of Experts on the Application of Conventions and Recommendations, 1974-83, by subject-matter

Subject-matter of the Conventions concerned	Number of cases of progress noted	
	Developed countries	Developing countries
Basic human rights	80	94
Employment and training	11	21
Labour administration	26	52
General conditions of work (wages, hours, rest, leave)	12	58
Occupational safety and health	9	44
Social security	59	80
Employment of women, children and young persons	15	78
Seafarers, fishermen, dock workers	31	68
Others (social policy, migrant workers, indigenous workers, plantations, nursing personnel)	3	20
Total	246	515

While the procedures to secure the implementation of ILO standards have been held up as one of the most far-reaching and effective systems of international supervision, they have also encountered criticism, particularly from socialist countries. The position of these countries was set out in the memorandum which they presented to the Conference in 1983 the substance of which was confirmed in its entirety in a communication addressed to the Director-General on 18 November 1983 by the Government of the USSR on behalf of a number of socialist countries. The adoption in plenary session of the report of the Conference Committee on the Application of Conventions and Recommendations has encountered difficulty on several occasions in recent years, and three times (in 1974, 1977 and 1982) the Conference, for lack of a quorum, failed to adopt the report. The main issues which call for consideration in the light of these discussions concern the composition, powers and methods of work of the supervisory bodies.

Composition of the Committee of Experts

As regards the Committee of Experts, it is to be recalled that, while its members are appointed in their individual capacity from among persons of independent standing, they are drawn from all parts of the world so as to possess first-hand experience of different legal, economic and social systems. The composition of the Committee was last discussed by the Governing Body in March 1983.[21] In my view, following the recent appointment of an additional member from Africa and a member from an Arab country, a reasonable balance has been achieved. Since the aim of having a broadly based committee is to ensure that the members have first-hand experience of the different legal, economic and social

Table 5. Geographical distribution of membership of the Committee of Experts on the Application of Conventions and Recommendations and of ratifications of Conventions

	Number of members of the Committee of Experts	Percentage of membership of the committee	Percentage of total ratifications of Conventions
Africa	3	15	26
Americas	5	25	24
Asia	4[1]	20	14
Western Europe	5	25	26
Eastern Europe	3	15	10

[1] Including a member from a West Asian country.

systems existing in the countries whose legislation and practice they are called upon to examine, it may be of interest to note how the composition of the committee compares with the ratifications from various regions. Figures concerning this matter are given in table 5.

Methods of evaluation used in ILO supervision

As regards the methods used in evaluating compliance with ratified Conventions, one of the principal points of discussion has turned on the extent to which account should be taken of a country's economic, social and political system. Representatives of socialist countries have consistently urged that it was necessary to take account of these factors, and that the refusal of the Committee of Experts to do so led to tendentious and one-sided assessments of the law and practice of socialist and developing countries and an intolerable interference in the sovereign affairs of States. They have considered that, as a result, the supervisory system was being turned into a kind of supranational tribunal which sought to impose its own interpretation of national legislation, whereas a valid interpretation of legislation could be given only by those who adopted the legislation, namely, the governments of the countries concerned.[22]

The Committee of Experts has considered this matter. Its position was made clear in the restatement of its fundamental principles and methods of work contained in its report of 1977, in the following terms:

> The Committee discussed the approach to be adopted in evaluating national law and practice against the requirements of international labour Conventions. It reaffirms that its function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country. Subject only to any derogations which are expressly permitted by the Convention itself, these requirements remain constant and uniform for all countries. In carrying out this work the Committee is guided by the standards laid down in the Convention alone, mindful, however, of the fact that the modes of their implementation may be different in different States. These are international standards, and the manner in which their implementation is evaluated must be uniform and must not be affected by concepts derived from any particular social or economic system.[23]

A similar position has been taken by the majority of members of the Conference Committee on the Application of Conventions and Recommendations. They have considered that diversity of national conditions was a factor to be taken into account at the stage of drafting ILO standards by introducing a certain flexibility, as required by the ILO Constitution, but that, once a Convention was ratified, there could be no room for flexibility beyond what was expressly permitted by the Convention. They have insisted that evaluation of observance of ratified Conventions must be according to uniform criteria for all countries, and that any other approach would be incompatible with the principle of equality of States and would leave every State free to intepret its obligations as it saw fit. Every State was free to decide whether or not to ratify a Convention, but once it did so it had to accept the obligations arising from ratification and could not invoke questions of sovereignty as an obstacle to implementation.[24]

Methods of the Conference Committee

Another major issue concerns the methods adopted by the Conference Committee in drawing special attention in its general report to some of the cases discussed by it, particularly as regards the application of ratified Conventions.

The terms of reference of the Committee, in this respect as defined in article 7, paragraph 1, of the Standing Orders of the Conference, are "to consider the measures taken by Members to give effect to the provisions of Conventions to which they are parties and the information furnished by Members concerning the results of inspections". According to article 7, paragraph 2, of the Standing Orders, the Committee is required to submit a report to the Conference.

The practice of the Committee, in view of the limited time at its disposal, is to select for discussion a number of cases in respect of which observations have been made by the Committee of Experts. When the discussion of a case is completed, the Chairman makes a statement summing up the discussion, in which note is generally taken of explanations and assurances given by the government concerned and the hope expressed that such measures as may be necessary to ensure compliance with the Convention under consideration will be adopted. Sometimes a specific form of wording for the Committee's conclusions is proposed by members of the Committee, particularly by spokesmen for the non-governmental groups. The record of the discussions of individual cases is included in the Committee's report.

In 1957 the Conference Committee decided upon the inclusion of a new feature in its report to the Conference. While continuing to include its conclusions in the record of the discussions of cases, the Committee felt that "in some instances the discrepancies noted are of such a basic character or are of such long standing that the special attention of the Conference should be drawn to this unsatisfactory state of affairs. The Committee has therefore decided to highlight certain of these cases."[25]

It was from that decision that the present system of giving special mention to certain cases was developed. At various times the system has been reviewed by

the Conference Committee. In 1979 and 1980 it was examined in detail by a working party established by the Committee. As a result, certain changes of form were adopted. However, the system has continued to be the subject of controversy. The main issues around which the debate revolves concern the legal basis for the Committee's practice, its effectiveness and its fairness.

On the one hand, it has been argued that the highlighting of problems in the application of ratified Conventions by the mention of cases in a special list or in special paragraphs constitutes a sanction for the imposition of which there is no constitutional basis, that it discourages States from ratifying Conventions, that the system has been used for improper political ends, and that it diverts the supervisory system from its true purpose of assisting member States to improve their national legislation on the basis of dialogue, exchange of experience and co-operation.[26]

On the other hand, the majority view in the Conference Committee has been that the use of the special list and special paragraphs does not constitute a legal sanction, since it has no effect beyond its moral force as an expression of the view of the Committee and of the Conference that the Committee has the right and the duty to state conclusions on the cases considered by it and that, without such appraisal, Conventions and ratifications were liable to lose all meaning.[27]

A first point to note is that the Committee's long-standing practice of stating conclusions on the cases considered and of including them in the record of the discussions embodied in its report has not given rise to objections. The debate concerns the practice of selecting certain cases for special mention in the Committee's general report. The nature of the decisions taken pursuant to this practice is indicated by the Committee in its reports. It remains the same today as when this method was first introduced in 1957, namely to draw the attention of the Conference to the discussions concerning certain cases.[28] The adoption of this practice thus constitutes a decision as to the form in which to report to the Conference, in pursuance of the requirement stated in article 7, paragraph 2, of the Standing Orders.

A further aspect which it appears useful to examine relates to the character and functions of the Committee of Experts and the Conference Committee.

The Committee of Experts is called upon to examine compliance with obligations in regard to ILO instruments, and in particular with the obligation, laid down in article 19 of the ILO Constitution, to make effective the provisions of ratified Conventions. The Committee has pointed out that, in order to carry out its functions, it has to consider and express views on the meaning of provisions of Conventions. At the same time, it has noted that competence to give interpretations of Conventions is vested in the International Court of Justice by article 37 of the Constitution.[29] While, on account of the standing and expertise of the members of the Committee of Experts, the Committee's views merit the closest attention and respect and in the great majority of cases find acceptance from the governments concerned, they do not have the force of authoritative pronouncements of law. The Committee is not a court able to give decisions binding upon member States.

The Conference Committee, in contrast to the Committee of Experts, is composed not of independent experts, but of representatives of those directly interested in the application of Conventions. The Committee's proceedings provide an opportunity for democratic participation of the ILO's membership in reviewing the effect given to the Organisation's instruments. Its assessments, as well as any assessments adopted by the Conference on the basis of the Committee's report, likewise are not legal pronouncements and have no binding force. They are expressions of views of persuasive, moral value.

It is thus evident that a State cannot be compelled to accept and to act upon the views of either the Committee of Experts or the Conference Committee. It would however not be satisfactory, either for the Organisation or for the State concerned, to leave unresolved important issues affecting the implementation of ratified Conventions when, after full consideration, a government rejects the conclusions stated by those Committees. The ILO Constitution provides avenues for dealing with such situations, through its provisions regarding commissions of inquiry and reference of questions to the International Court of Justice. Article 26 of the Constitution permits the initiation of the complaints procedure in respect of the observance of a ratified Convention, inter alia, by the Governing Body, action which it could take even at the request of the State concerned. Under articles 31 and 32, the International Court of Justice has the competence to give final decisions, as regards both findings and recommendations, in cases where a government concerned in a complaint does not accept the recommendations of a commission of inquiry. Under article 37, the Court has competence to decide any question or dispute relating to the interpretation of ILO Conventions. It is a matter for consideration whether recourse should be had to these mechanisms for persisting unresolved major issues concerning the application of ratified Conventions.

The preceding remarks have been concerned with the legal nature of the work of the supervisory bodies. It is necessary also to consider the practical and political aspects of these questions. In particular, notwithstanding the full discussion in 1979 and 1980 of the methods of work of the Conference Committee, differences of views persist as to whether the use of special listing and special paragraphs to highlight shortcomings in the application of ratified Conventions acts as a stimulus to improved implementation or, on the contrary, is counterproductive by indisposing governments towards the ILO's endeavours to secure the widest possible acceptance and implementation of its standards. Reference has been made, in this connection, to the non-adoption by the Conference of the Committee's report on three occasions in the past ten years.

The Conference may find it useful to have an analysis of the extent to which action to improve the application of ratified Conventions has been taken in cases which have been the subject of special listing or special paragraphs since the Conference Committee started this practice in 1957. Tables 6, 7 and 8 contain indications on this matter.

Table 6 shows global results, grouped by eight-year periods, plus a final period covering the last three years. It will be seen that, while the number of

Table 6. Progress in the application of ratified Conventions noted by the Committee of Experts in cases which had been the subject of special listing or special paragraphs by the Conference Committee, 1957-83

	1957-64	1965-72	1973-80	1981-83	Total
Number of countries given special mention	23	17	23	11	45
Number of cases given special mention	55	53	54	27	161
Partial progress					
— number of countries	3	11	18	14	22
— number of cases	3	33	31	22	49
Total progress					
— number of countries	4	10	13	3	20
— number of cases	4	23	28	3	58
Number of cases of progress after direct contacts	—	4	25	4	33
Denunciations	2	1	—	—	3

N.B. The number of countries and of cases are given for each of the periods indicated. As some countries and cases were the subject of special mention during more than one of these periods, the totals shown in the final column are less than the aggregate of the preceding figures.

Some cases were the subject of partial progress on more than one occasion. Others were the subject initially of partial progress and subsequently total elimination of the discrepancies concerned. The overall total of cases of partial progress is therefore less than the aggregate of the preceding figures.

countries affected has varied somewhat from one period to another, the number of cases mentioned has been more or less the same in each period. The table also shows a steady record of action resulting in partial or total elimination of shortcomings in the application of ratified Conventions, if account is taken of the time lag which appears to have affected the first period covered and the fact that in the final period, which is of limited duration, the progress noted has resulted partly from special mentions in earlier periods. Altogether, since 1957, 161 cases have been the subject of special listing or special paragraphs. In 58 (or 36 per cent) of these cases, the discrepancies giving rise to such mentions were eliminated. In 49 cases (or 30 per cent), partial progress has been noted. A total of 45 countries have been involved. In 20 countries cases of total elimination of shortcomings have been noted. In 22 countries partial progress has occurred. In some countries there have been both cases of total elimination of shortcomings for some Conventions and partial progress in regard to others. Altogether, there has been some progress (total or partial) in 33 of the 45 countries affected by special listing or special paragraphs.

Two further points deserve to be noted. In a substantial number of cases, progress occurred after direct contacts missions, a procedure in use since 1969. Most of these (29 out of 33) concerned countries in the American region. In three cases Conventions which had been the subject of special listing were denounced. These denunciations occurred between 1961 and 1965. Two concerned the Night

Table 7. Progress in the application of ratified Conventions noted by the Committee of Experts in cases which had been the subject of special listing or special paragraphs by the Conference Committee, 1957-83, in developed countries and developing countries

	1957-64	1965-72	1973-80	1981-83	Total
A. *Developed countries*					
Number of countries given special mention	8	3	4	4	12
Number of cases given special mention	8	4	8	5	20
Partial progress					
— number of countries	3	1	1	—	1
— number of cases	3	1	1	—	1
Total progress					
— number of countries	2	3	2	1	7
— number of cases	2	3	3	1	9
B. *Developing countries*					
Number of countries given special mention	15	14	19	7	33
Number of cases given special mention	47	49	46	22	141
Partial progress					
— number of countries	—	10	17	14	21
— number of cases	—	32	30	22	48
Total progress					
— number of countries	2	7	11	2	13
— number of cases	2	20	25	12	49

N.B. See notes in table 6.

Work (Women) Convention, 1919 (No. 4). The third concerned the Maternity Protection Convention, 1919 (No. 3). However, in this instance the country in question ratified the revised Convention (No. 103) four years later.

Table 7 analyses the figures for developed and developing countries respectively. The number of countries affected in each group roughly reflects their numerical importance in the membership of the ILO. The number of cases concerning developing countries is proportionately much greater. This is due to the fact that developing countries have more often been the subject of special listing or special paragraphs in respect of a series of Conventions. For developed countries progress has been noted in half the cases mentioned, almost all of which involved total elimination of the shortcomings in question. For developing countries the proportion of cases having led to some action is higher (69 per cent), but only half of these have involved total elimination of shortcomings.

Table 8. Progress in the application of ratified Conventions noted by the Committee of Experts in cases which had been the subject of special listing or special paragraphs by the Conference Committee, 1957-83, by subject-matter of the Conventions concerned

	1957-64	1965-72	1973-80	1981-83	Total
A. *Conventions concerning basic human rights (freedom of association and collective bargaining, forced labour, discrimination in employment and occupation and equal remuneration)*					
Number of cases given special mention	7	15	31	14	48
Partial progress	—	2	8	7	13
Total Progress	—	1	6	1	8
B. *Other Conventions*					
Number of cases given special mention	48	38	23	12	113
Partial progress	3	31	23	15	36
Total progress	4	22	22	2	50

N.B. See notes in table 6.

Table 8 contains a breakdown of the figures according to the subject-matter of the Conventions concerned, distinguishing between instruments dealing with certain basic human rights and other Conventions of an essentially technical nature. It shows that over the years there has been a gradual increase in the number of cases of special listing or special paragraphs concerning basic human rights Conventions, accompanied by a decline in cases concerning other Conventions. In respect of the former group of Conventions, the shortcomings concerned have been eliminated in one-sixth of the cases and there has been partial progress in just over a quarter of the cases. For technical Conventions, the results have been greater: total progress in 44 per cent and partial progress in 32 per cent of the cases. The extent to which cases concerning technical Conventions have been the subject of progress in application may partly explain the decline in their number. The figures also reflect the more complex nature of the problems encountered in the application of the Conventions dealing with freedom of association, forced labour and discrimination.

The figures set out in the above-mentioned tables should not be taken as expressing the sum total of experience in the functioning of the system of highlighting employed by the Conference Committee. The Committee has frequently deferred a decision to give special mention to a case after receiving an undertaking that action would be taken to deal with the shortcomings in the application of the Convention under discussion. Members of the Committee have also given warning at various times that, failing improvement in the situation when a case was next discussed, they would propose special listing or a special paragraph. The possibility of special mention thus constitutes an inducement to adopt remedial measures.

The preceding analysis leads to the conclusion that the method of highlighting employed by the Conference Committee has had an impact in leading to improved application of ratified Conventions, particularly when it is borne in mind that it has been used mainly for cases in which the comments of the supervisory bodies had not been acted upon over a considerable period of time. There nevertheless remains the fact that a number of member States feel that the system does not give guarantees of fair and equitable application and that decisions are largely influenced by political considerations. There are two ways of looking at these arguments. One would be to consider that, while expert evaluation is an essential part of ILO supervision, review of compliance with Conventions should not be the affair solely of experts, and that the governments, employers and workers who make up the Organisation's constituents should also have an opportunity, in the light of the experts' conclusions, to examine and state their position on the problems encountered. Delegates and advisers who attend the Conference no doubt feel that they should have a say in these matters. Another view would be that, even though the Committee's conclusions have no binding force, they constitute an assessment of compliance with obligations and that the making of such an assessment by means of a majority decision in a politically composed body does not square with the notion of due process of law.

A related matter to be taken into account concerns the difficulties which have been encountered on several occasions at the stage of consideration of the Conference Committee's report by the Conference. As already recalled, there have been three occasions when, for lack of a quorum in plenary session of the Conference, the report was not adopted. Although this did not prevent the Committee's discussions from remaining part of the record nor in any way affect the conclusions of the Committee of Experts, such occurrences, when repeated, tend to weaken the moral thrust of the supervisory system.

Having regard to these various factors, it is a matter for consideration by the Conference Committee and by the Conference itself whether it would be desirable and potentially fruitful to examine the Committee's methods further.

One point which it may be well to remember in this discussion is that the different parts of the ILO supervisory system do not operate in isolation, but constitute complementary components. Although the discussions in the Conference Committee and in the Conference mark the final stage of what we term regular supervision, any failure to reach a consensus there or to secure acceptance of the views of the supervisory bodies by the government concerned need not be left as the final outcome of ILO supervision. There remains the possibility (already mentioned) of having the issue considered under the constitutional complaints procedure and by the International Court of Justice. Recourse to those procedures would obviate the fear of conclusions determined by political considerations and provide all parties with the guarantees inherent in a quasi-judicial or judicial process.

Recourse to the many procedures set forth in the Constitution or developed over the years by the Governing Body should clearly be backed by all necessary

guarantees of objectivity. These procedures should be resorted to only in the most responsible manner in clear cases of violation of fundamental Conventions, particularly those relating to human rights. Approached in this manner, recourse to these procedures offers the only genuine means of respecting the rules of due process of law. It would give its true meaning to the work of the Conference Committee on the Application of Conventions and Recommendations, which retains an essential role, for, by reason of its tripartite composition and through the information it receives from the Committee of Experts, the questions it addresses to governments and the replies which it obtains, this Committee is particularly well placed to appreciate the conditions in which international labour Conventions are applied. Over the years the Committee has reported on its discussions with increasing care, recording progress as well as expressing its concern at cases of failure to comply with the requirements of ILO Conventions or at the refusal or omission of governments to supply the reports due from them. The tripartite debates in the Committee ought to be as thoroughgoing as possible and they should be reported with the greatest care. An opportunity remains for delegates to make comments in plenary sitting at the Conference not only on the report of the Conference Committee but also on the report of the Committee of Experts, which must remain the essential instrument for critical evaluation of the application of Conventions. The work thus performed by the Conference Committee and carried forward, where necessary, in plenary sitting at the Conference, should make it possible to project each year, for the benefit of all governments, of employers and workers, and of public opinion, a complete image of the situation with respect to international labour Conventons, progress in their ratification and application, and the difficulties encountered.

On this basis, it would be for the Conference, when adopting or noting the report submitted by the tripartite Committee, to include in its record the comments made in plenary sitting by delegates who wished to express their views. Beyond this, in critical situations, particularly with respect to fundamental Conventions, there would remain the possibility, to which I have referred above, to have recourse to the complaints procedure and, in what I would presume to be exceptional cases, to seek an interpretation from the International Court of Justice.

The preceding remarks have concerned the Conference Committee's manner of highlighting serious problems in the application of ratified Conventions. The Committee also draws attention to various cases of failure to supply reports and information, by reference to a series of factual, objective criteria.[30] It decided in 1980 no longer to enumerate these cases in a composite list, but to set them out in the corresponding sections of its report. It also decided to mention any explanations of difficulties encountered in meeting their reporting obligations provided by the governments concerned. These changes have generally been welcomed. Only a relatively limited number of countries have been mentioned in recent years under the criteria in question. Almost all were least developed countries suffering from administrative difficulties or countries suffering dis-

ruption due to natural calamities or armed conflict. Sometimes the mentions refer to shortcomings of a rather limited nature, such as the non-supply for two years of a single first report (even when other first reports due have been submitted) or the failure to reply to one or two comments by the Committee of Experts if they happen to be the only ones calling for a reply. Such cases are hardly comparable in gravity to such shortcomings as failure for five years to provide any of the reports requested on unratified Conventions and on Recommendations or failure to provide indications regarding submission to the competent authorities of the instruments adopted at seven consecutive sessions of the Conference. The Conference Committee may wish to consider whether some further refinement of the so-called objective criteria used would be justified, in terms of their quantitative or qualitative importance.

When it revised its methods in 1980, the Conference Committee decided to introduce an additional factual criterion for countries which in the preceding three years have failed to indicate the representative organisations of employers and workers to which, in accordance with article 23 (2) of the ILO Constitution, copies of the reports and information supplied to the ILO under articles 19 and 22 have been communicated. It is of interest to note that so far no country has had to be listed under this criterion.

One aspect of the work of the Conference Committee which has continued to be a source of complaint by certain countries is the fact that States which have not ratified a particular Convention and thus are immune from criticism may nevertheless participate freely in discussions and in reaching conclusions concerning its application by States which have ratified it. The legal position in this respect appears clear. All delegates and advisers are on an equal footing regarding participation in the work of Conference committees. Furthermore, the work of the Committee is concerned with reviewing the manner in which States fulfil their obligations in respect of ILO standards towards the Organisation as a whole. The fact that a State has not itself ratified a Convention under discussion affects the moral and political credibility of any criticism which it directs at other States rather than its legal rights of participation in the work of the Conference. The only legal disability to which a government is subject is that it cannot file a complaint under article 26 (1) of the Constitution in respect of the application by another State of a Convention which it has not itself ratified.

Complaints and representations

As has already been recalled, the regular or routine supervision procedures are supplemented by the possibilities of having particular problems in the application of ratified Conventions examined under the constitutional procedures of representations or complaints. Under article 24 of the Constitution, a representation may be made by any employers' or workers' organisation, whereas under article 26 the complaints procedure may be initiated by another State which has ratified the Convention concerned or by the Governing Body,

acting on its own initiative or on a complaint from a delegate to the Conference. When the Governing Body undertook its in-depth review of international labour standards in 1974, it was pointed out that, although only limited recourse had been had to these procedures, they provided a useful means for thorough examination of important cases which it had not been possible to resolve within the framework of regular supervision. The only proposal then made in regard to the constitutional procedures was to update the standing orders for the examination of representations.[31] That action has since been taken.[32]

Although the total number of complaints and representations submitted (respectively 14 and 20) is not great, there has been increasing resort to them, particularly — though not exclusively — in respect of Conventions concerning basic human rights. The first 40 years of the ILO's existence saw only one complaint (settled without reference to a commission of inquiry) and seven representations. Since 1961 there have been 13 complaints and 13 representations (seven of the latter lodged in the past three years). Of the 13 complaints, seven were referred to a commission of inquiry, three were referred to the Committee on Freedom of Association, one was settled to the satisfaction of the parties, and two related complaints were the subject of direct contacts by agreement between the parties, followed by an ILO technical co-operation mission. Of the 13 representations received since 1965, two were found irreceivable, two led to denunciation of the Convention concerned, one was settled to the satisfaction of the organisation which had submitted the representation, one was referred to the Committee on Freedom of Association, and two are currently under examination. In the remaining five cases, following conclusion of their consideration by the Governing Body, the issues involved have continued to be the subject of examination by the regular supervisory bodies. In only one case did the Governing Body decide, in accordance with article 25 of the Constitution, to publish the representation and the reply received.

The increasing resort to the constitutional procedures suggests not only a growing awareness of the possibilities of more comprehensive investigation offered by them, but also that their functioning in previous cases has been considered by the ILO's constituents to have yielded useful results. Reference has been made earlier in this section to the role which the complaints procedure may play as a means of dealing with unresolved major issues in the application of ratified Conventions and as a further stage of supervision beyond the discussions in the Conference Committee. In view of the composition of commissions of inquiry and their powers of investigation (including the taking of formal evidence and on-the-spot inquiries), they are particularly well placed to assume such responsibilities. The representations procedure, on the other hand, offers less extensive possibilities as a means of impartial fact finding and adjudication. Under the standing orders governing this procedure, when a representation has been communicated to the Governing Body, the latter may at any time initiate the complaints procedure in respect of the matters raised, that is, refer them to a commission of inquiry in exercise of its powers under article 26 (4) of the Constitution.[33] Where a representation involves complex matters of fact or law,

it would be desirable for the Governing Body to examine carefully whether its reference to a commission of inquiry would not be the appropriate course.

It should also be remembered that employers' and workers' organisations may submit comments for consideration by the Committee of Experts. In recent years, following action by the Office to acquaint the organisations better with the opportunities open to them and to inform representative national organisations of the comments of the Committee of Experts relating to their country, there has been a considerable increase in the number of such comments. Any observations received by the ILO from employers' or workers' organisations regarding the implementation of ILO standards are brought to the attention of the Committee of Experts at the next session, even when a detailed report on the Convention is not due from the government concerned. Organisations might usefully consider the communication of comments for examination by the Committee of Experts as a simpler and frequently more expeditious alternative to lodging a representation.

There are also other means for seeking solutions to unresolved issues in the application of ratified Conventions relying on discussion and mediation rather than adjudication. The direct-contacts procedure is aimed at providing an opportunity, through dialogue with the governments concerned, to examine more fully issues raised in the comments of the Committee of Experts. In practice, in the many cases where a government has recognised the validity of the comments but wished to have advice on the best way of removing the discrepancies concerned, direct contacts have assumed the character more of technical assistance. In some instances, however, they have been used for the purpose of clarifying the considerations underlying the comments made by the supervisory bodies, enabling the government to explain its view of the situation in greater detail and exploring ways of complying with the Conventions in question which would at the same time take account of national concerns. A particularly interesting example is provided by the suggestion made by the representative of the Netherlands trade unions at the Conference in 1983, and subsequently accepted by the Government of the Netherlands, to request direct contacts in respect of the Freedom of Association and Protection of the Right to Organise Convention to consider the restrictions on free collective bargaining resulting from wage limitation measures which have been in force for a number of years and to which objections have been voiced by Netherlands employers' organisations as well as by the trade unions.

Special machinery for examining allegations of violation of trade union rights

Following the adoption of Conventions relating to freedom of association, the right to organise and collective bargaining in 1948 and 1949, the Governing Body decided in 1950 to establish special machinery for the examination of allegations of violation of trade union rights. It was clearly understood that this machinery would operate not as a substitute for, but as a supplement to, the general procedures for supervising the application of ratified Conventions. The

system of regular supervision through the Committee of Experts and the Conference Committee on the Application of Conventions and Recommendations, as well as the constitutional provisions relating to complaints and representations, apply to the Conventions dealing with trade union rights in the same way as to other Conventions. The special machinery was seen particularly as affording facilities for the impartial and authoritative investigation of allegations concerning questions of fact.

Two essential concerns underlie the special machinery for the protection of trade union rights. On the one hand, there is recognition of the major contribution which free and effective organisations can make to the promotion of social progress and development. The affirmation in the ILO Constitution that "freedom of expression and of association are essential to sustained progress" has been echoed on many occasions by the International Labour Conference and other ILO meetings. In the second place, there is the importance of freedom of association for the functioning of the ILO itself, as a tripartite organisation.

Although the freedom of association complaints machinery was created by decision of the Governing Body, subsequently endorsed by the Conference, its basis is to be found in the commitment of all member States to the constitutional objectives of the ILO which include recognition of the principle of freedom of association. During consideration of the procedure at the 33rd Session of the Conference in 1950, it was observed that, when accusations were made against a member State regarding trade union rights, "it is the duty of the Organisation to examine the foundation of these accusations".[34] The Committee on Freedom of Association, in its first report, emphasised that the ILO "must not hesitate to discuss in an international forum cases which are of such a character as to affect substantially the attainment of the aims and purposes of the International Labour Organisation as set forth in the Constitution of the Organisation, the Declaration of Philadelphia and the various Conventions concerning freedom of association".[35]

The special complaints machinery was established in agreement with the United Nations, whose Economic and Social Council decided in 1950 to accept the services of the Fact-Finding and Conciliation Commission on behalf of the United Nations. Consequently, on occasion, cases concerning States which at the time were members of the United Nations but not of the ILO have been referred to the Commission, with the consent of the governments concerned. Following the establishment in 1951 of the Governing Body Committee on Freedom of Association, the Economic and Social Council also decided, in 1953, that allegations of infringements of trade union rights received by the United Nations which related to member States of the ILO should be forwarded to the Governing Body.

The scope for investigation offered by the special machinery is, in several respects, wider than under the general system of supervision applicable to ratified Conventions. Since the procedure has its basis in the constitutional principle of freedom of association, it can be invoked whether or not the country concerned has ratified the relevant Conventions. Furthermore, although the Com-

mittee on Freedom of Association and the Fact-Finding and Conciliation Commission draw upon the provisions of those Conventions in examining cases and take account of any obligations existing as a result of ratifications,[36] they have also had occasion to consider and to reach conclusions on aspects of the exercise of trade union rights which are not specifically dealt with in existing Conventions.

To date only five cases have been referred to the Fact-Finding and Conciliation Commission. The main responsibility for the examination of complaints has fallen on the Committee on Freedom of Association, which over a period of 30 years has dealt with more than 1,200 cases. Incidental to its primary role of seeking to clarify and to suggest solutions for the situations brought before it, the Committee has been instrumental in building up an important body of decisions indicating the manner in which the principles of freedom of association should apply in many varied circumstances.[37] These decisions can exert a useful preventive influence in enabling governments and organisations to take account of the relevant standards and principles in their activities and relations and in encouraging them to resolve problems without the need for recourse to the ILO.

In the great majority of cases the governments concerned have co-operated in the examination of complaints, although not always as expeditiously as would have been desirable. It has been stressed that, while the procedure is aimed at protecting organisations against infringements of trade union rights, it is also designed to protect governments against unfair or unsubstantiated accusations.[38] It is therefore in the interest of governments to provide detailed replies to complaints. The extent to which they have collaborated in the operation of the procedure shows the confidence which it has secured among member States.

There has been a marked increase in the number of cases submitted to the Committee on Freedom of Association in recent years. Before 1980 they averaged around 30 a year. Since then the numbers have been as follows: 1980 — 66 cases; 1981 — 88 cases; 1982 — 70 cases; 1983 — 76 cases. This increase reflects both an overall aggravation of the problems encountered by occupational organisations at a time of considerable economic and political instability and a greater awareness of the opportunities afforded by the ILO machinery for impartial international examination of national conflicts and difficulties. In the past seven years, complaints have been considered in respect of 72 of the 150 member States. An increasing number of complaints are being submitted in respect of countries where trade union freedom in general is not at stake. While the issues raised in these cases tend to be relatively narrow in scope, they are often also of considerable complexity. These cases suggest that authoritative guidance from the Committee is seen as a useful contribution to the development of industrial relations in the countries concerned.

As has already been recalled, when the procedure was established, particular emphasis was placed on the means it would provide for examining issues of fact. Although the Committee on Freedom of Association is regularly called upon to examine matters relating to legislation, the greater part of its work is concerned

with allegations of a factual nature or arising from the application of law. In the past five years, 45 per cent of the cases examined have involved questions of life and liberty (arrests, detention, persecution, exile, deaths or disappearances). In 30 per cent there have been allegations of government interference in the activities of trade unions. Thirty per cent have involved issues of unfair labour practices (dismissals, transfers and other forms of anti-union discrimination, recognition questions, etc.) Twenty-five per cent have involved issues concerning collective bargaining and strikes.

The Committee on Freedom of Association has constantly endeavoured to develop its methods, particularly with a view to accelerating the consideration of cases and in order to obtain clear information on the issues before it. In its 193rd report, in 1979, the Committee reviewed improvements in its procedure made in the past and put forward a series of further recommendations, which the Governing Body approved in May 1979. The matters reviewed included quicker communication with complainants and with governments, on-the-spot missions including preliminary contact missions immediately following the receipt of a complaint, and arrangements for hearing parties to a complaint.

It may be useful to indicate the extent to which various procedural formulas have been used since the beginning of 1980. On three occasions a representative of the government concerned has appeared before the Committee on Freedom of Association. There have been 19 direct contacts or other on-the-spot missions, two of which took place as a matter of urgency very shortly after the receipt of the complaint. Seven of these missions were accepted by the government concerned in response to a request by the Committee. In two other cases, a similar request has not so far received an answer. In six cases, the Chairman of the Committee had discussions during sessions of the Conference with representatives of governments from which replies to complaints or to requests for information had been outstanding for a considerable time. In five of these cases the government concerned subsequently sent information. In 32 cases the Committee has addressed urgent appeals to governments which had failed to submit information or observations, indicating that, if no reply was received by its next session, it would nevertheless examine the substance of the complaints. In 30 cases, following such appeals, the governments concerned provided information. On the other hand, in two cases the Committee has had to examine the complaints without a reply from the government.

The Committee's procedure provides for the possibility of inviting governments to indicate the action taken on recommendations approved by the Governing Body. The Committee has been making increasing use of this power, which enables it to maintain the thrust of its work and to ascertain the impact of its recommendations. Among the positive developments noted by the Committee in recent years in cases which had come before it have been the release of a substantial number of trade unionists from arrest or detention or their return from exile, the reinstatement of workers dismissed as a result of labour disputes, the cancellation of decisions dissolving an organisation or removing trade union leaders from office, the grant or restoration of the legal personality of trade

unions, the restoration of the right to strike, the ending of government supervision of trade unions, and in some instances major changes in trade union legislation, particularly in connection with changes in a country's political regime.[39]

The great increase in the number of complaints coming before the Committee on Freedom of Association and their growing complexity have imposed strains both on the staff responsible for servicing the Committee and on the Committee itself. It will be important to ensure that adequate resources and time are made available to permit the satisfactory operation of this important procedure.

As has been noted, complaints have been submitted to the Committee on Freedom of Association in recent years in respect of roughly half the ILO's membership. The cases have related to countries in all parts of the world, with varied political, economic and social systems. Notwithstanding this diversity in the coverage of the Committee's work, a proportionately larger number of complaints has continued to be received in respect of countries in Latin America and the Caribbean than for other regions. In the past five years, 46 per cent of cases have concerned these countries. From the information available from other sources, including the examination of reports by the Committee of Experts, it is evident that this is not a true reflection of the relative gravity of the difficulties encountered by trade unions in that region as compared with countries elsewhere and that serious restrictions on trade union rights are also to be found in a number of countries which have not been the subject of complaints. The lack of recourse to the ILO complaints procedure may at times reflect the weakness or vulnerability of trade union movements. The geographically uneven utilisation of the procedure may be regretted, but it is not a matter which the ILO as such can correct. By definition, a complaints procedure is a facility whose activation depends on the initiative of outside parties. While the ILO can take measures to promote the widest possible knowledge and understanding of its standards and procedures (a question further examined later in this section), it is not the task of the Organisation to promote the presentation of complaints. For an evaluation of the extent of enjoyment of freedom of association among ILO member States as a whole, reliance has to be placed rather on the regular supervision procedures, including the general surveys made by the Committee of Experts. It will be recalled that in 1983 such a survey was made in respect of freedom of association and collective bargaining.[40]

There has always been concern to make the freedom of association complaints procedure operate more quickly and more incisively. The developments in the procedure introduced over the years have been directed essentially to these ends. Two considerations need to be borne in mind in this connection.

In the first place, the ultimate success of the procedure depends on securing the co-operation of the States concerned. The methods employed must accordingly maintain an appropriate balance between the moral pressure exerted by the Organisation in favour of observance of freedom of association and the realisation by the governments concerned of their own interest in collaborating in the

procedure. Governments, as well as complainants, must be convinced that all cases will be examined with the utmost thoroughness and fairness. Consequently, the need to secure the greatest possible knowledge of the facts from all the parties may have to take precedence over the speedy disposition of cases.

The second point relates to the adequacy of the measures at the disposal of the Committee on Freedom of Association to reach conclusions on questions of fact. Essentially, the procedure is still based on written submissions. Where the Committee is presented with contradictory statements as to the facts, it faces great difficulty in reaching decisions. In such cases, more direct methods of fact finding are called for. It would be desirable in the years to come to promote greater use of such methods. They could take the form of direct contacts and other on-the-spot missions which are carried out by a representative of the Director-General who can be either an ILO official or an independent person. Consideration might also be given to referring certain complaints to the Fact Finding and Conciliation Commission or to a Commission of Inquiry appointed under article 26 of the ILO Constitution, if the issues involved the observance of a Convention ratified by the State in question.

It is of course the duty of complainants to substantiate their allegations. In cases requiring urgent action, this may not always be immediately possible, but even then every effort should be made to provide full information in support of the complaint at the earliest opportunity. In other cases, it would be desirable for complainants to present all relevant information at the time of submitting their allegations, so as to enable both the government concerned and the Committee on Freedom of Association to have a clear understanding of the issues and to facilitate rapid consideration of the case.

It does not appear necessary to envisage any changes in the rules governing receivability of complaints. Like other ILO complaints procedures — and in contrast to many other international procedures of investigation and settlement of disputes — the freedom of association complaints procedure does not impose any requirement to exhaust local remedies before submitting a complaint, although the Committee on Freedom of Association may defer consideration of a case where proceedings are pending in a national court and has also in certain cases in its examination of substance taken account of failure to have recourse to national remedies. Leaving aside the legal aspects of the question, organisations should as a matter of practice, at least in cases of a more limited or technical character, seek to resolve their difficulties through discussions or other action at the national level before invoking the ILO procedure.

The foregoing remarks have been concerned with procedural questions. A more general issue, concerning the composition of the Committee on Freedom of Association, also calls for comment. Spokesmen for socialist countries have complained that they are not represented on the Committee, and have called for re-examination of its composition on the basis of equitable representation of various regions and socio-economic systems.[41] This is a matter for consideration by the Governing Body, as the authority which determines the membership of its committees.

In any case in which it is felt that the procedure of the Committee does not afford a sufficient opportunity for the government's position to be justly assessed or where a government feels that the Committee's conclusions and recommendations are misconceived, it may, apart from providing clarification to the Governing Body itself, request the latter to refer the case for further examination of all the issues to the Fact-Finding and Conciliation Commission or, as appropriate, to a Commission of Inquiry.

The question has at times been raised whether, in cases of serious violations of trade union rights in which the recommendations made by the Committee and the Governing Body remain unimplemented, measures such as the withholding of technical co-operation might be taken.[42] It has been recognised that it would be difficult to lay down any general rule in this respect, each case having to be considered in the light of its particular circumstances. There may be situations in which serious obstacles would stand in the way of effective implementation of certain technical co-operation projects, and where therefore the question of their feasibility has to be carefully examined. There are others in which ILO projects would still contribute to the improvement of living and working conditions, and where an ILO presence and the opportunity which it offered for contacts with local organisations and institutions could also help to prepare the ground for a more positive response to the Organisation's endeavours to ensure the enjoyment of trade union freedom. It is appropriate to recall the discussions which took place in the Governing Body in 1968 on the relationship of technical co-operation and observance of human rights. The Governing Body decided, in particular, that "it is the policy of the ILO to take decisions concerning requests or proposals for aid to or co-operation with any member State on the basis of the extent to which the request or proposal will further the aims and purposes of the ILO and in particular the central aim defined in the Declaration of Philadelphia that 'all human beings, irrespective of race, creed or sex have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'". The Governing Body at the same time made it clear that the grant of assistance was "subject to the normal supervision and control that the ILO exercises over all its technical co-operation programmes in the interest of its Members".[43]

The promotion of freedom of association should not be seen solely in terms of the procedures for supervising the implementation of the Conventions in this field and of the examination of violations of trade union rights. It should be recalled that one of the purposes of the latter procedure was to provide facilities for conciliation in the event of disputes. While this aspect of the complaints procedure has tended to be obscured against the background of the treatment mainly on a documentary basis of a large volume of allegations, direct contacts missions have frequently provided an opportunity, through discussions with the various parties, to explore possible solutions. It would clearly be desirable to develop further all forms of action through which the Organisation can contribute to the settlement of conflicts in this vital area.

It is also in the perspective of measures to promote freedom of association

that it appears appropriate to review the programme of special studies concerning the trade union situation and industrial relations in selected countries in Europe which was initiated during the 1982-83 budget period.

Special studies of the trade union situation and industrial relations system in selected countries in Europe

These studies were undertaken in response to resolutions adopted by the Second and Third European Regional Conferences held in 1974 and 1979. Their aim is to provide an objective analysis of the trade union situation and industrial relations in the countries concerned and to consider the basic issues which arise in these fields in the light of the relevant ILO standards.[44] So far two studies, relating to Norway and Hungary, have been completed. Two more, in respect of Yugoslavia and Spain, are in progress. A fifth study is provided for in the budget for 1984-85, with a sixth contemplated for the following biennium.

It is appropriate to recall that this is not the first occasion on which the ILO has undertaken studies in the field of freedom of association outside the framework of its supervision procedures. Comprehensive studies were undertaken in the 1920s. In the 1950s there was the inquiry into the freedom and independence of employers' and workers' organisations undertaken by a committee under the chairmanship of Lord McNair. Between 1959 and 1962 missions were undertaken to a number of countries to make factual surveys of freedom of association.

The current studies concerning European countries are carried out by ILO officials. They are based on a thorough examination of all available documentary material concerning the legal situation (including judicial decisions and legal literature) and practice, as well as visits to the countries for discussions with a wide range of persons involved in or having specialised knowledge of the operation of the trade union and industrial relations system. The studies are reviewed by a tripartite working group of the Governing Body before being presented to the Governing Body. They are due to be brought to the attention of the next European Regional Conference.

These studies are not intended to replace or in any way prejudice the functioning of the various supervisory and complaints procedures. They differ significantly in purpose and nature from those procedures. The latter, by reason of their function, necessarily concentrate on identifying shortcomings, in terms of legal principles and obligations. Where called upon to examine complaints, supervisory bodies must deal with the specific issues submitted to them, without making any general evaluation of the trade union situation; furthermore, as has been noted, in the absence of complaints, they are unable to intervene, even if the exercise of trade union rights in a given country encounters serious problems. The studies, on the other hand, are undertaken in the absence of any complaint, and indeed would be difficult to carry out in a situation where serious tensions existed in relation to ILO standards on freedom of association and industrial

relations. The discussions during the missions to the countries concerned are wide-ranging and, since they are unrelated to any conflictual situation, can more easily permit a frank and calm examination of problems and difficulties. The resulting reports seek to give an overall indication of the situation which is not purely descriptive but also involves critical analysis. The reports, as indeed the whole process leading to their preparation, can serve to clarify and suggest improvements in policies and practices, in the light of the relevant ILO standards. Their value in promoting a wider knowledge and understanding of ILO standards and in stimulating new thinking on the best means of implementing these standards has been acknowledged by both governments and organisations in the countries which have been the subject of studies.

In two resolutions adopted by the Sixth African Regional Conference in October 1983, relating respectively to international labour standards and to freedom of association, the Governing Body was invited to undertake studies analysing the labour relations systems in Africa as a basis for frank and objective exchanges of ideas and experience.[45]

There may thus be an opportunity in the years to come to extend to selected African countries, and indeed to other regions, the kind of studies already undertaken in Europe.

PROMOTIONAL MEASURES IN THE FIELD OF INTERNATIONAL LABOUR STANDARDS

Since the beginning of 1960, the membership of the ILO has almost doubled, rising from 80 to 150. Most of the new Members were newly independent countries, almost all of them developing countries. Generally, their labour administrations were not well prepared to deal with all the questions arising out of membership of the ILO, including those concerning the adoption, ratification, implementation and reporting on the application of ILO standards. They looked to the ILO to provide advice and assistance on ways of meeting these new responsibilities. The Office accordingly found it necessary to intensify its activities in this field, in addition to technical co-operation aimed generally at the improvement of labour administration and social legislation. The range of measures available today includes direct contacts and less formal advisory missions; the appointment of regional advisers and other forms of advice on questions relating to international labour standards, seminars, training and manuals, measures aimed at securing more active involvement of employers' and workers' organisations and the promotion of tripartite consultations at the national level on questions concerning ILO standards; regional discussions concerning the ratification and implementation of ILO standards, and measures aimed at closer integration of standards in operational activities. ILO regional meetings have repeatedly emphasised the value of these measures and called for their intensification. It is appropriate to review the various forms of action and to examine how far they might be strengthened or supplemented.

Direct contacts, advisory missions, regional advisers

The procedure of direct contacts was originally proposed by the Committee of Experts on the Application of Conventions and Recommendations as a means of permitting more direct and thorough discussion of cases in which its normal procedure, based on the exchange of written reports and written comments, had not led to the elimination of difficulties in the application of ratified Conventions. The procedure started to operate in 1969. Ten years later it had been resorted to by 28 countries concerning 222 cases of application of ratified Conventions, involving 68 different Conventions. By then, progress had been noted by the Committee of Experts in 23 of the countries concerned, affecting 115 cases and relating to 56 of the Conventions in question.[46]

In practice, direct contacts have been used for much more varied ends than originally envisaged. In regard to the application of ratified Conventions they have served, according to circumstances, three main purposes: in some cases, to clarify and seek solutions to unresolved issues; in others, to ascertain facts in relation to the observance of Conventions; in yet others, where the substance of the comments made by the supervisory bodies was not contested, to examine and provide advice on the best means of eliminating shortcomings. The scope of direct contacts was also widened to include questions relating to the discharge of other obligations, such as the submission of Conventions and Recommendations to the competent authorities and reporting obligations, as well as questions concerning measures to be taken with a view to ratification of particular Conventions. In one instance, in 1976, direct contacts missions were carried out in a group of States (the Andean Group) to assess the possibilities of applying and ratifying 25 selected Conventions as a means of harmonising their labour legislation; since then, the total number of ratifications of the selected Conventions by the States concerned has increased from 51 to 83. The direct contacts procedure has also been used extensively within the framework of the examination of complaints of violation of trade union rights by the Committee on Freedom of Association.

The practice of less formal advisory missions by ILO officials was also developed, permitting a general review of questions concerning the implementation and ratification of Conventions and of arrangements for meeting reporting requirements. During both direct contacts and less formal missions, advice and training have frequently been provided on administrative arrangements to deal effectively with matters concerning the adoption and the implementation of ILO instruments.

The benefits of these various activities to member States and the Organisation itself were widely recognised and led to the suggestion, particularly at regional meetings, of the appointment of regional advisers on international labour standards. As from 1980, arrangements were made for part-time detachment of officials from the International Labour Standards Department to provide such advisory services in Africa, Asia and the Pacific, and Latin America. In 1983 full-time regional advisers were appointed for the last two of these regions.

For Africa the system of part-time detachments of headquarters staff has continued to operate; the budget for 1984-85 provides the same level of resources for this purpose as in the other regions. In Western Asia the regional adviser on labour administration is also providing advice on questions concerning ILO standards.

The regional advisers have been assigned the following responsibilities:

1. To advise governments in all matters relating to the carrying out of their obligations under ratified Conventions or under the ILO Constitution in respect of international labour standards. This includes: advising governments on their replies to questionnaires concerning items on the agenda of the International Labour Conference as well as their comments on proposed texts to be discussed by the Conference; clarifying the nature and scope of the various reporting obligations; explaining the comments made by the ILO's supervisory bodies; advising on measures to be taken in order to overcome difficulties encountered, including assistance in the drafting of necessary legislative amendments, etc.; assistance, where necessary, in the drafting of government reports; advice in connection with the submission of Conventions and Recommendations to the national competent authorities; advice in respect of the ratification of further Conventions; promoting tripartism in matters relating to ILO standards, in particular the establishment of procedures for tripartite consultations along the lines set out in Convention No. 144.

2. To provide information as regards matters arising under the special complaints procedure in cases of alleged violations of trade union rights and, in particular, to approach governments which delay in transmitting the information or observations requested from them.

3. To establish and maintain the closest possible relations with employers' and workers' organisations, informing and advising them in matters relating to ILO standards and procedures.

4. Within the context of 1 to 3 above, to carry out informal advisory missions to countries of the region concerned as well as more formal missions (direct contacts) as appropriate.

5. To convey systematically to the International Labour Standards Department, to the Regional Director and to other ILO offices in the region all pertinent information arising out of the performance of functions as described above.

6. To assist in the preparation and carrying out of standards-related meetings (seminars, symposia, etc.) to be held in the region, as well as of any direct contacts missions which may be carried out from headquarters.

7. To contribute to the preparation of reports on standards-related matters for submission to meetings of regional advisory committees and regional conferences and to participate in such meetings.

8. To advise staff of ILO offices and technical co-operation experts on all aspects of standards having a bearing on their work, with a view to ensuring that

relevant ILO standards are taken fully into account in ILO action in the region.

Other advisory services

Advice on questions concerning international labour standards may be obtained from the Office in various ways other than in the course of visits by ILO officials to individual countries. At sessions of the International Labour Conference and also at regional conferences there is a special service to provide information on such questions, which may concern substantive problems encountered in seeking to give effect to Conventions, both before and after ratification, the clarification of comments made by supervisory bodies, or procedural questions arising out of the constitutional obligations of member States. Where necessary, discussions also take place with the relevant technical departments of the Office. Contacts at conferences may also provide an opportunity for examining the needs for further assistance, whether through technical co-operation projects, advisory missions or fellowships for training in procedures relating to Conventions and Recommendations.

Governments frequently seek guidance from the Office on the meaning of particular provisions in Conventions, either when they are contemplating ratification or, after ratification, when implementing measures are under consideration. It has always been the practice of the Office to respond to such requests, while making it clear that the ILO Constitution does not confer any special competence upon it to give authentic interpretations of Conventions and that, in the event of ratification, compliance with the standards in question would be subject to the established supervisory procedures. Office opinions on the meaning to be attached to Convention provisions seek to draw attention especially to relevant elements in the preparatory work leading to their adoption and to views already expressed by the supervisory bodies.[47]

Seminars

Since 1964 the ILO has organised a series of regional seminars for the purpose of familiarising officials from labour ministries with procedures relating to ILO Conventions and Recommendations and reviewing problems that arise in their application. Initially these seminars were arranged in rotation for English-speaking African countries, French-speaking African countries, Latin American countries, and countries in Asia and the Pacific. Subsequently, the programme was extended to include seminars for countries in the Caribbean, for Arab countries and for countries in the South Pacific.

More recently, a number of tripartite seminars have also been organised. Some have been on a regional or subregional basis, such as those held in Bangalore in 1981 and in Bangkok in 1982 (the latter devoted to practice and procedures in the drawing up of ILO standards). Others have been held on at the national level.

Altogether, in the three-year period 1981-83, the ILO has organised or participated in a total of 20 seminars dealing with international labour standards: seven were regional or subregional seminars for government officials, three were tripartite regional or subregional seminars, six were national tripartite seminars, three were national seminars for government officials, for trade unions and for employers respectively, and one was a national seminar for a wide audience including public officials, academics, employers and trade union representatives.

In addition, during the 67th Session of the International Labour Conference, in 1981, a tripartite seminar was held on national procedures for implementation of the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), and its supplementary Recommendation (No. 152). Immediately prior to the Sixth African Regional Conference in Tunis, in October 1983, the ILO organised a tripartite seminar there on freedom of association for participants from Africa to review problems in the region in the application of the relevant ILO standards and ILO procedures for the protection of trade union rights.

Training and manuals

The regional and subregional seminars for officials from labour ministries referred to above aim at training of officials responsible for dealing with matters relating to the adoption and implementation of standards. They provide an opportunity for a complete review of the relevant procedures, including practical work, for discussion of certain substantive problems, and for a useful exchange of experience among the participants.

The ILO also provides individual training to officials during stays at its headquarters offices. In the period 1980-83 officials from 34 countries benefited from such training.[48]

To provide systematic information on the relevant rules and practices, as a guide principally for government officials called upon to deal with these questions, a *Manual on procedures relating to international labour Conventions and Recommendations* was published in 1965. It has been periodically revised, last in 1980.

Following the holding of the Regional Tripartite Seminar on Practice and Procedures in Formulating Labour Standards, in Bangkok in 1982, a book on the proceedings of this Seminar, including working papers and conclusions, was published under the Asian and Pacific Project for Labour Administration (ARPLA), as well as a brochure to provide guidance on these questions for delegates attending the International Labour Conference.

A memorandum has also been prepared by the Office to provide guidance on the establishment and functioning of national tripartite consultation arrangements in accordance with Convention No. 144 and Recommendation No. 152.

Measures aimed at securing more active involvement of employers' and workers' organisations and the promotion of tripartite consultations at the national level on questions concerning ILO standards

Reference has been made earlier to the various ways in which employers' and workers' organisations are called upon to participate in the functioning of ILO supervisory mechanisms. The importance of their contribution to the implementation of Conventions and Recommendations has been repeatedly stressed by the supervisory bodies and also by the Conference, more particularly in the resolutions calling for the strengthening of tripartism adopted in 1971 and 1977. The Committee of Experts has examined closely the manner in which States fulfil the requirements in Conventions regarding the association and consultation of employers' and workers' organisations in their implementation.[49] The Office has adopted various measures to inform employers' and workers' organisations of the opportunities available to them for participating in supervising the implementation of Conventions, as well as of the position of individual countries with regard to ILO standards. Each year it sends letters to central employers' and workers' organisations in member States, informing them of the instruments on which reports are currently due from their government, together with copies of any comments made by the Committee of Experts on the Conventions concerned. In response to requests from Workers' delegates at the Conference, the Office has organised study courses on ILO standard-setting and supervisory procedures for worker representatives attending sessions of the International Labour Conference and regional conferences.

These measures — together with regular discussions at regional meetings concerning the implementation of standards — have led to a more active interest in the implementation of ILO instruments among occupational organisations. This has found reflection, for example, in a marked increase in the number of comments from employers' and workers' organisations brought to the attention of the Committee of Experts. In the period 1979 to 1983 an average of 65 such comments were noted by the Committee of Experts each year, a fivefold increase as compared with the situation ten years earlier. Three-quarters of the comments came from workers' organisations, one quarter from employers' organisations.

If one compares the number of comments from occupational organisations with the total number of reports examined each year and also with the total number of ratifications (since comments may be communicated irrespective of whether a detailed report is then due on the Convention concerned), one is led to wonder whether there would not be much greater scope for using this relatively simple method of bringing problems in the implementation of Conventions to the attention of the supervisory bodies. That question appears all the more pertinent when one compares the position of developed and developing countries. In the past five years the great majority of the comments received from employers' and workers' organisations (namely 78 per cent) have concerned developed countries, and they have involved three-fifths of member States in that category. On the other hand, among developing countries, only one in eight

member States has been the subject of comments.[50] This raises the question how far occupational organisations in less developed countries are equipped to deal with the range of questions arising in relation to international labour standards.

One of the most important measures taken to follow up the 1971 Conference resolution on the strengthening of tripartism was the adoption in 1976 of the Tripartite Consultation (International Labour Standards) Convention (No. 144) and the Tripartite Consultation (Activities of the International Labour Organisation) Recommendation (No. 152). The Convention has so far been ratified by 34 States, of which 16 are in Europe (all of them in Western Europe), five in Africa, nine in the American region, and four in Asia and the Pacific. The Office has given special attention in its advisory work and other contacts with governments to the establishment of consultation arrangements as provided for in these instruments. As mentioned earlier, a memorandum to provide guidance on the matter was prepared. The functions of the regional advisers on international labour standards include responsibility for promoting the establishment of such arrangements. The General Survey prepared by the Committee of Experts on the Application of Conventions and Recommendations in 1982, following the submission of reports on the above-mentioned instruments under article 19 of the Constitution, served to clarify a number of aspects and to stimulate new efforts to implement these standards.[51] It is evident from that survey and from other sources[52] that in a considerable number of countries which have not yet ratified Convention No. 144 consultative procedures of the kind provided for in the Convention exist.

The operation of effective tripartite consultation on the matters covered in Convention No. 144 offers the best guarantee that questions concerning the formulation and implementation of ILO standards will receive systematic and thorough consideration by those directly concerned. The establishment and strengthening of national arrangements for these purposes must therefore constitute a priority objective for the ILO in the years ahead. The Organisation should seek to increase its assistance to member States in this connection, through advice not only on the form of the consultation procedures but also on the administrative arrangements which are required, both in the responsible government services and within the central organisations of employers and workers, to provide a firm infrastructure for regular and meaningful discussions. Such assistance could extend to questions concerning the organisation and training of secretariat services, documentation, and patterns of meetings or other forms of consultation, having regard to the timing and sequence of the various ILO procedures and activities in relation to which consultation should take place.

Developments on these lines should make it possible to resolve a number of issues through discussions at the national level without their becoming the subject of comments by ILO supervisory bodies and also to determine reasonably rapidly the action to be taken in response to any comments made by such bodies.

In so far as these measures are aimed at assisting employers' and workers' organisations to give systematic attention to questions arising in connection with ILO standards and to participate effectively in national discussions on these matters, they will need to be co-ordinated with the general ILO programme of activities for the benefit of such organisations. A workers' education manual on international labour standards was first published in 1978 and an updated edition issued in 1982. The budget for 1984-85 makes provision for the preparation, within the framework of the workers' education programme, of a training guide on tripartite consultation and of booklets on the involvement of trade unions in the application of international labour standards.

Regional discussions

Since the early 1970s it has become the regular practice of advisory committees and of regional conferences in Africa, the Americas and Asia and the Pacific to review the position in their region as regards the application and ratification of ILO Conventions. The reports presented to these meetings, in addition to outlining the general situation and problems encountered, have also examined the position with respect to the Conventions in particular fields such as freedom of association, forced labour, discrimination in employment and occupation, employment policy, labour inspection, wages and social security. These discussions have led to the adoption of a series of resolutions and conclusions which reveal a number of common preoccupations: insistence on the need for flexibility in the formulation of standards to take due account of the problems faced by developing countries, recognition of the importance of ILO instruments in defining development policy objectives and of tripartite consultation in this connection, and a desire for the development and full use of all forms of ILO assistance to promote the application of the Organisation's standards.

These regional discussions have been an important factor leading to the intensification of ILO practical action in the standards field which has been noted above. There is a clear desire in all the regions for the continued review of these questions by the regional bodies concerned.

As already mentioned, the reports presented to regional meetings on the question of the ratification and application of Conventions have analysed the position in selected fields. However, the limited time available at these meetings has precluded any detailed discussion of such analyses, as distinct from an examination of the general problems encountered by member States in regard to ILO standards. It is only in the framework of the discussion of particular technical items on the agenda of the regional meetings that it has been possible to consider specific substantive questions. It would be useful if, in future, problems arising in the implementation of ILO standards in given fields could be the subject of discussion at separate meetings, such as tripartite seminars. An example of this type of meeting is provided by the tripartite seminar on freedom of association for African countries organised on the occasion of the recent

Regional Conference. Seminars of this kind might also be organised independently of meetings of the regional bodies.

Regional seminars on questions concerning ILO standards have not so far been organised for European member States. It would be useful to make good this omission in years to come.

ILO standards and technical co-operation

It has been generally recognised that ILO standard-setting activities and technical co-operation should be mutually supporting. Technical co-operation should be one means of promoting the implementation of Conventions and Recommendations. These instruments should be taken into account in the conception of projects, in their execution and in any recommendations which result from a project. The briefing of experts should cover the standards implications of their work, and they should be made aware of the obligations binding the country concerned as a result of the ratification of relevant Conventions as well as of any problems noted in the application of those Conventions. A memorandum for the use of technical co-operation experts defines their responsibilities in regard to ILO standards. It draws their attention to the need to respect the requirements of ratified Conventions, to take full account of Conventions dealing with basic human rights (even when not ratified) and to draw also, as far as practicable, on other unratified Conventions and Recommendations as a source of authoritative guidance. There are also arrangements for the checking by the competent department of draft reports on technical co-operation projects involving standards-related issues.

The responsibilities of the regional advisers on international labour standards include the provision of advice to technical co-operation experts on all aspects of ILO standards having a bearing on their work. The regional advisers can themselves furnish certain forms of assistance to governments, for example advice on the type of measures to be taken to implement Conventions, information on corresponding measures adopted in other countries, and assistance in drafting legislative amendments to eliminate discrepancies or gaps in the application of Conventions. In addition, they can be instrumental in identifying needs and making recommendations for more extensive forms of technical co-operation.

In principle, therefore, the basis exists for a close relation between the ILO's standard-setting and operational activities. The relevance of ILO standards to operational activities, however, varies greatly according to the subject-matter and the nature of projects.

In some instances, an entire activity has as its objective the implementation of particular standards. This is the case with the strengthening and development of rural workers' organisations for which the Convention and Recommendation on this subject adopted in 1975 provide the basic terms of reference, even though many of the actual activities are essentially practical and down to earth in nature.

In general, ILO standards can constitute an important source of guidance for

projects aimed at advising on basic policies, on legislation or on the establishment or improvement of certain types of institutions, such as labour administration or inspection services. Many projects, however, involve practical action dependent more on technical considerations than on policies and legal standards.

One sees this distinction, for instance, in technical co-operation in the field of social security.[53] One part is concerned with the conception, establishment and improvement of social security schemes. Here ILO standards are directly relevant and are consistently taken into account. Other activities involve the provision of financial and actuarial expertise or advice on the management of social security schemes, where questions related to ILO standards are much less likely to arise.

One finds a similar distinction in the field of vocational training between activities aimed at promoting a systematic and coherent approach to training (including measures for the participation of employers' and workers' organisations in the formulation and implementation of training policies and programmes) and projects at a lower, predominantly operational level. The Human Resources Development Convention and Recommendation of 1975 provide the normative framework for the former type of action, for which a continuing need is expected to exist in the years to come.[54]

Even in areas where the majority of projects are at a technical, operating level, ILO standards may be drawn upon to ensure the observance of certain safeguards. Thus the guide-lines for the organisation of special labour-intensive works programmes refer to the observance of ILO Conventions and Recommendations on questions such as recruitment of workers (in particular, to ensure that their participation in work programmes is voluntary), minimum age for employment, remuneration, hours of work, safety and compensation for employment injuries.[55] Similarly, under arrangements made with the World Food Programme, ILO scrutiny of project requests under that programme is concerned not only with their technical feasibility but also with their compatibility with ILO standards.[56]

The above indications show the manner in which ILO standards and technical co-operation interact; however, there has been no systematic study of the subject. It would be useful to undertake such a study in order to determine more precisely the cases in which standards can provide significant guide-lines for operational activities, the limitations on this type of influence, the adequacy of briefing of technical co-operation experts in regard to standards and the extent to which experts actually draw on standards in the execution of projects.

There is also the question of how far governments, in establishing their policies and priorities in seeking technical co-operation, see such assistance as a means of implementing their obligations under Conventions which they have ratified or of attaining objectives defined even in instruments by which they are not bound. Could technical co-operation not be used more frequently to overcome difficulties in the application of ratified Conventions, particularly when these arise from major material or institutional shortcomings?

Practical application of Conventions

In view of the foregoing questions, it is appropriate to look at the problems affecting the practical application of Conventions.

The obligation accepted by a State when it ratifies an international labour Convention is to make the provisions of the Convention effective. This requires not merely that the provisions of the Convention find reflection in laws and other formal instruments, but also that in practice the national texts through which it is sought to implement the Convention are applied and observed, which gives rise to problems at two levels. Do countries have the necessary administrative machinery to ensure such effective practical application? Do the ILO supervisory bodies have adequate means to ascertain the extent of practical application of Conventions?

The first of these questions, while raised in relation to the application of ILO Conventions, is of much wider scope. How many States have solidly structured and equipped labour administrations able to discharge efficiently the functions defined in the Labour Administration Convention (No. 150) and Recommendation (No. 158) of 1978, and in the Conventions and Recommendations dealing more specifically with labour inspection?[57] Even in highly developed countries, against a background of constraints on public expenditure and growth in the range and complexity of the problems to be addressed, difficulties have been encountered in maintaining inspection services at a satisfactory level. In developing countries, all too often, their lack of resources permits labour inspection services to play only a marginal role, and one finds a glaring gap between the desired protection written into the statute book and everyday reality. The general survey of the effect given to the ILO's labour inspection standards, due to be made in 1985 by the Committee of Experts on the Application of Conventions and Recommendations, will provide a timely opportunity to assess these problems and to review the action which the ILO can take to help its member States to improve the situation. One has to realise that in many developing countries the strengthening of labour administrations cannot be divorced from the wider problem of how to maintain the efficiency of the public administration in the face of daunting economic difficulties.

From the very beginning of its work, the Committee of Experts on the Application of Conventions and Recommendations realised the importance of ascertaining the extent of application of Conventions not only in law but also in practice, as well as the difficulty of obtaining adequate information on this aspect. This concern led to the inclusion in the report forms for ratified Conventions of a series of questions aimed at eliciting information of a statistical nature as well as on inspection and other enforcement measures, judicial decisions, observations from employers' and workers' organisations and any general documentation throwing light on the manner in which the Convention is applied. The Committee of Experts has from time to time reviewed the means at its disposal to examine the practical application of Conventions,[58] and in each report gives an indication of the extent to which such information has been

available to it (including from such sources as reports on labour inspection services, statistical year books, reports on direct contacts missions, and reports on technical co-operation projects).

The Committee of Experts has realised that the scope for providing information on practical application will vary considerably according to the subject-matter of the Conventions. It concentrates its attention on those instruments for which specific questions on the matter are included in the report forms. In recent years, the proportion of cases in which indications concerning practical application have been available for those Conventions has ranged from two-fifths to one-half. The significance of such information, however, varies enormously. Relatively seldom does it permit a comprehensive view of the extent of practical application. On a number of occasions serious shortcomings of a practical nature have come to light only as a result of special studies, missions or inquiries.[59]

It would be useful for the Office to consider means of improving the systematic collection and analysis of information bearing upon the implementation in practice of ILO standards, as a basis for further examination of this question by the supervisory bodies.

COLLABORATION BETWEEN ORGANISATIONS IN THE DRAWING UP AND IMPLEMENTATION OF INTERNATIONAL STANDARDS

The ILO is not alone in undertaking the setting of international standards. A great amount of standard setting is taking place in other organisations, both within the United Nations system and at the regional level. The ILO has endeavoured to ensure the greatest possible measure of collaboration and co-ordination in this respect. In 1973 the Administrative Committee on Co-ordination, at the initiative of the ILO, considered this question and defined the fundamental concerns in the co-ordination of the legislative work of international organisations, within and outside the United Nations system as follows: *(a)* to prevent unnecessary duplication; *(b)* to prevent conflict between the obligations undertaken by States under different instruments, as well as in the interpretation of instruments adopted by various organisations; and *(c)* to ensure that statutory provisions on complex technical subjects are established and supervised by those most competent to do so. The Committee considered, further, that, with a view to achieving uniform interpretation of standards, analysis of compliance should be carried out by those with the greatest competence in the field and that, where more than one organisation was concerned in an instrument, it was desirable to provide for co-operation in the instrument itself, covering both mutual representation and full exchange of information and observations, as appropriate.[60]

It is proposed to indicate, in the first instance, how the ILO has taken account of these principles in its own standard-setting work. In numerous instances, it has sought the collaboration of other agencies in the United Nations system when preparing standards on subjects which involved aspects of concern to them. Examples are the instruments on indigenous and tribal populations, the

Convention on basic aims and standards of social policy, and instruments dealing with the safety of seafarers, vocational training, rural workers' organisations, nursing personnel and migrant workers. The Preambles to the instruments in question record the fact that they have been drawn up in collaboration with the other organisations concerned and the intention to seek the continuing co-operation of those organisations in promoting and securing their application. Accordingly, the ILO has made arrangements with the various agencies to transmit to them copies of governments' reports on these instruments as well as the texts of previous comments by the ILO supervisory bodies, inviting them to provide any relevant information in their possession or comments which may assist the Committee of Experts on the Application of Conventions and Recommendations in its work. The other organisations are also invited to be represented at the meetings of the Committee of Experts when it considers the application of the standards in question.[61] The United Nations are invited to be represented throughout the Committee's sessions.

The ILO has also sought to collaborate with other organisations in establishing and supervising the implementation of standards in fields of common concern. Examples are the preparation, in co-operation with UNESCO, of the Recommendation concerning the Status of Teachers, which was adopted in 1966; the establishment of a Joint ILO/UNESCO Committee of Experts to examine reports on the implementation of that Recommendation which are requested periodically from the States Members of the two organisations; and the collaboration of the ILO with UNESCO and WIPO in the establishment and implementation of standards for the protection of performers, producers of phonograms and broadcasting organisations (Rome Convention of 1961). The ILO has also collaborated closely with the Council of Europe in the drawing up and implementation of various instruments in the social field, such as the European Social Charter, the European Code of Social Security and its Protocol and the European Convention on Social Security. Apart from the technical contribution made to the drafting of the European Social Charter, the ILO convened, at the request of the Council of Europe, a tripartite Conference to examine the draft. Under the terms of the Social Charter, an ILO representative participates in a consultative capacity in the deliberations of the Committee of Independent Experts which examines the reports of States Parties. The European Code of Social Security was based on ILO Convention No. 102, and in this case the examination of reports from ratifying States is entrusted in the first instance to an ILO body, namely the Committee of Experts on the Application of Conventions and Recommendations.[62] The ILO is also participating in the current discussions relating to the updating of the European Social Charter and the revision of the European Code of Social Security.

In the case of standards drawn up by the United Nations, the ILO is entitled, under the UN-ILO agreement, to participate in the meetings of the various organs concerned and also to present written comments. It made a significant contribution, for example, to the drawing up of the International Covenant on Economic, Social and Cultural Rights, and is currently, in accordance with a

policy approved by the Governing Body, taking an active part in the discussions of the working group established by the United Nations General Assembly to draft an international convention on the protection of the rights of all migrant workers and their families. Its participation is aimed at ensuring, in particular, full awareness of existing ILO standards and the avoidance, as far as possible, of conflict or duplication of standards. In this instance, the Office has also, at the request of a group of European countries which have submitted the proposals taken as a basis for discussion, provided them with continuing technical advice.

A series of supervisory mechanisms have been established under United Nations instruments, with varying degrees of involvement by the specialised agencies. In particular, the Covenant on Economic, Social and Cultural Rights makes provision, in Article 18, for arrangements between the Economic and Social Council and the specialised agencies for reporting by the latter on progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities. In May 1976, by resolution 1988(LX), the Council called upon the specialised agencies to submit such reports. In November 1976, in agreeing to this request on behalf of the ILO, the Governing Body decided to entrust to the Committee of Experts on the Application of Conventions and Recommendations the task of examining reports and other available information on the implementation of the provisions of the Covenant which fall within the scope of the ILO's activities. These relate to questions of employment, conditions of work, trade union rights, social security, the employment of women, and the employment of children and young persons. Since 1978 the Committee of Experts has submitted six reports to the Economic and Social Council under these arrangements. The reports have been brought to the attention of the Governing Body and of the Conference Committee on the Application of Conventions and Recommendations. The ILO has also been represented at meetings of the working group of governmental experts established by the Council to assist it in examining reports on the implementation of the Covenant.[63]

The International Covenant on Civil and Political Rights, although dealing with certain matters within the field of activity of the specialised agencies (in the case of the ILO, the prohibition of forced labour and the right to form and join trade unions) does not contain any specific provisions calling for a contribution to its implementation by the agencies. After the establishment in 1976 of the Human Rights Committee, the supervisory organ elected by the States Parties to the Covenant, the ILO offered its collaboration through the provision of information and documentation, particularly as regards the situation under the relevant ILO instruments. Following a decision by the Committee at its eighth session, in 1979, such information is now regularly supplied, for the information of the members of the Committee, in respect of countries whose reports are due to be examined by it. The Committee has also invited the specialised agencies to attend its meetings, but without the right to intervene unless requested.[64]

Arrangements for the exchange of information and mutual representation at

meetings of their supervisory bodies have been made by the United Nations, the ILO and UNESCO in regard to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, the ILO's Discrimination (Employment and Occupation) Convention, 1958, and the UNESCO Convention against Discrimination in Education. In the case of the United Nations Convention, the participation of the ILO and UNESCO in the meetings of the supervisory committee is aimed at providing information on general questions, to the exclusion of comments concerning individual reports.

The United Nations Convention on the Elimination of All Forms of Discrimination against Women, which includes provisions relating to discrimination in fields of concern to certain specialised agencies (such as employment and education), provides, in Article 22, for the right of the specialised agencies to be represented at meetings of the supervisory Committee elected by States Parties during consideration of the implementation of provisions falling within the scope of their activities. The Committee may also invite the specialised agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities. At its second session, in August 1983, the Committee decided to extend such an invitation to the specialised agencies concerned. The Office has also prepared a note on the compatibility of the provisions of the United Nations Convention and ILO standards relating to the employment of women, for presentation to the Committee.

A working group of the United Nations Commission on Human Rights has for some years been engaged in the preparation of a convention on the rights of the child. The ILO has been concerned to ensure that provisions which are contemplated on such matters as child labour and social security protection in respect of children are consistent with ILO standards, and has presented papers for this purpose to the working group.

Several questions will continue to require attention in attempting to bring about an orderly development of international standards. They concern respect for the division of responsibilities within the United Nations system, the adequacy of arrangements for co-ordination in the formulation of standards, co-ordination in supervisory processes, and the relationship between standard-setting and implementation procedures at both the universal and the regional level.

Arrangements have been made by the legal services of organisations of the United Nations system for a yearly exchange of information on proposed legislative activities, and informal consultations also take place periodically among human rights services of international organisations in order to review questions of common interest. These arrangements at secretariat level cannot, however, ensure that the decisions of policy-making organs will always bring about the best division of work or the most appropriate forms of collaboration among organisations.

In recent years, a matter which caused particular concern to the ILO was the decision by the United Nations General Assembly to undertake the preparation of a convention on the rights of all migrant workers and their families. The ILO's

constitutional mandate has always included "protection of the interests of workers when employed in countries other than their own". In 1947 arrangements were agreed upon between the United Nations and the ILO for co-ordinating action in the field of migration according to which the competence of the ILO was to include the rights and situation of migrants in their quality as workers while the competence of the United Nations would include the rights and situation of migrants in their quality as aliens.[65] The ILO's activities on behalf of migrant workers have included the adoption of a number of Conventions and Recommendations, particularly in 1949 and 1975. On both these occasions, its action was welcomed by the United Nations.[66] In these circumstances, it would have been desirable to start by analysing the international standards that already existed to protect migrant workers so as to determine on what matters additional standards were needed and in which forum it would be most appropriate to adopt them. Proposals to that effect were however rejected by the United Nations General Assembly.[67]

The draft standards on the rights of migrant workers, now under discussion in the working group of the General Assembly, deal with two types of questions. On the one hand, there are a series of provisions, based on the International Covenant on Civil and Political Rights, which are aimed at guaranteeing protection against arbitrary interference with individual liberty and security of the person and the enjoyment of various freedoms. These are matters which affect migrant workers in their capacity as aliens, irrespective of the exercise of economic activity. They are proper subjects for United Nations action, according to the arrangements agreed upon in 1947.[68] On the other hand, there are a series of provisions which concern the interests of migrants as workers, such as recruitment procedures, access to employment, equality of treatment in employment, exercise of trade union rights and social security. In principle, these are matters for action by the ILO. In relation to them, there will inevitably be overlapping with existing ILO standards and also considerable variations from those standards. Once the United Nations convention is adopted and enters into force, there will thus be two distinct sets of standards on this important question, with separate supervision procedures, in the United Nations and the ILO respectively. Because the new standards will have been formulated in an organisation of purely governmental composition, employers and workers will have been excluded from participation in standard setting in an area of direct concern to them. Likewise, employers' and workers' organisations would not be able to participate in the operation of the supervisory arrangements so far proposed for the United Nations convention as they are entitled to do under ILO procedures. Lastly, the existence of the United Nations standards may in practice constrain the exercise by the ILO of its constitutional competence in this field in years to come.

There is also the problem of the relationship between ILO Conventions and comprehensive conventions adopted or in course of preparation by the United Nations, such as the instruments on the elimination of discrimination against women and on the rights of the child. Such instruments tend to be expressed in

terms of general principles, leaving methods of implementation largely to national discretion. Even without expressly contradicting the more precise standards laid down in ILO Conventions, they may erode those standards and obligations accepted in respect of them.

Questions of a somewhat different nature arise in certain areas of interest both to UNESCO and to the ILO. Reference has already been made to joint action by the two organisations in regard to the teaching profession. UNESCO has also adopted Recommendations relating to research workers, translators and artists, and is currently contemplating the adoption of instruments concerning journalists and personnel in higher education. The work of the Joint ILO/UNESCO Committee of Experts on the Application of the Recommendation on the Status of Teachers has given rise to the question whether certain aspects of the conditions of teachers might be the subject of an international convention. All these questions make it necessary to consider the most appropriate organisational context within which to draw up possible standards, the nature and extent of inter-agency collaboration, and the type of instruments best suited for dealing with the various issues. There is the obvious desirability of ILO involvement in the adoption and implementation of standards which affect the interests of workers. There has generally been reluctance to use the ILO constitutional standard-setting process for regulating the conditions of relatively narrow occupational categories. Other forms of guide-lines, such as conclusions of meetings or model regulations, may be indicated in such cases. One could also seek to identify problems common to a number of professional groups which could lend themselves to treatment by means of a Convention or Recommendation.

Reference has been made to the association of the ILO in standard-setting activities by the Council of Europe in the social field. A series of regional human rights conventions have also been adopted, by the Council of Europe in 1950, by the Organisation of American States in 1969, and by the Organisation of African Unity in 1981. None of these conventions specifically provides for collaboration with other organisations in measures of implementation and supervision. Although they deal predominantly with civil and political rights, each of them contains some provisions of direct interest to the ILO.[69] It is therefore necessary for the ILO to follow closely the manner in which these various regional instruments are interpreted and applied. Even though variations of detail have at times led to decisions by the organs of the European Convention that differ from the conclusions reached in relation to ILO standards,[70] no major conflicts of interpretation have so far occurred, and care has been taken to study the relevant ILO instruments, their background and the views of the ILO supervisory bodies.[71]

Apart from convention-based supervisory arrangements, there are also a number of more general investigatory procedures, such as the United Nations procedure for examining communications alleging a persistent pattern of gross violation of human rights, studies of the human rights situations in particular countries by special rapporteurs appointed by United Nations human rights organs, the UNESCO procedure for examination of communications concerning

violations of human rights within UNESCO's competence, and the general competence of the Inter-American Commission on Human Rights to examine communications addressed to it concerning human rights violations in States which are not parties to the American Convention on Human Rights. There is a risk that human rights principles and standards may be differently interpreted, and particular situations variously evaluated, under these procedures and under ILO procedures. There have frequently been exchanges of information at secretariat level which have sought to reduce this risk. The fact that some of the procedures — such as the United Nations and UNESCO procedures for examining communications alleging human rights violations — are governed by strict rules of confidentiality makes it impossible to know whether issues within the competence of the ILO have been dealt with and, if so, how they have been determined.

Apart from substantive problems which may be encountered in seeking to ensure co-ordination and consistency in standard-setting and supervision by international organisations, the proliferation of instruments and supervisory mechanisms gives rise to resource problems. Already, the range of universal and regional standard-setting activities and supervisory procedures in which the ILO is called upon to collaborate or whose work at least it must follow imposes a substantial workload, particularly on more senior staff. This presents a dilemma. On the one hand, it is obviously desirable to seek the greatest measure of order and co-operation in such activities. On the other hand there is a danger that, increasingly, a disproportionate volume of resources will be diverted from tasks of direct importance for advancing the ILO's own work. There is also evidence that States are finding the growing number of international supervisory procedures an undue burden, leading to a serious backlog of overdue reports on a number of United Nations instruments.[72]

The foregoing indications suggest that care will have to be exercised in the years ahead not to bring into existence an unmanageable mass of international standards and procedures. They also underline the importance of efforts to rationalise the legislative work of international organisations in accordance with the principles approved by the Administrative Committee on Co-ordination in 1973. Whenever problems in the application of those principles are perceived, they should be the subject of thorough and timely study and consultation with a view to arriving at the most effective and, if possible, agreed solutions.

CONCLUDING REMARKS

The foregoing review of the functioning of the system of standard setting and supervision has brought out both the efforts which have been made over the years to adapt and to reinforce this essential means of ILO action and the fact that this process can never come to a halt. Also today many questions deserve discussion with a view to seeing how the contents of Conventions and Recommendations can best meet the challenge of changing circumstances and how, through a judicious combination of measures of a promotional nature and of

impartial evaluation of States' compliance with their obligations, these instruments can best attain their objective of improving the life of ordinary men and women and the solidity of the social fabric of the world community.

All human institutions must find the proper equilibrium between stability and change. This also applies to the system of international labour standards. Accordingly, in discussing the future course of standard setting, one must recognise that, while in many areas new concepts and approaches may need to be contemplated, there are others where Conventions lay down standards of fundamental importance for the establishment and maintenance of a free and just social order. They are among the most widely ratified of ILO instruments, and their continuing and universal validity has been repeatedly affirmed by the principal deliberative bodies of the Organisation. The maintenance and ever-widening acceptance and observance of these standards must remain a priority objective for the ILO.

The Organisation must also continue to seek ways of assisting its member States to give effect to Conventions and Recommendations and to meet their obligations in regard to these instruments. It must always remain attentive to the way in which the various supervisory mechanisms function and how States' reponsiveness to them can be enhanced. Full and frank dialogue must be a central feature of supervision. So must its capacity for objective, independent and fearless evaluation of compliance with freely accepted obligations. Obligations arising out of ILO membership and as a result of ratification of Conventions must retain their credibility as solemn commitments.

I welcome the forthcoming discussion of these questions by the Conference as a further opportunity for constructive development of the ILO standards system. It is my hope that this discussion will help to determine the Organisation's policies on the main issues which have been reviewed in the present report, such as:

- the general approach to the adoption, revision, consolidation and implementation of standards;
- improvements in the procedures for the adoption of Conventions and Recommendations with a view to ensuring that the subjects chosen for standard setting and the contents of the instruments adopted respond as fully as possible to the needs and aspirations of the entire membership of the Organisation, that the adoption of standards benefits from wide-ranging prior tripartite consultations as well as from thorough discussion at the Conference, and that the right balance is secured between the aim of promoting social advancement and the need to make allowance through elements of flexibility for differences in levels of development;
- clarification of the principles underlying supervision of compliance with the obligations accepted in respect of ILO standards and of the legal nature and effects of the work of the various supervisory bodies;
- means of resolving situations in which the views of the supervisory bodies are contested by the State concerned;

- measures to assist member States to participate more actively in drawing up Conventions and Recommendations and to promote the implementation of these instruments;
- measures to ensure adequate co-ordination of the standard-setting work of international organisations.

Notes

[1] See, for example, the resolution concerning the ratification and implementation of international labour standards in Africa adopted by the Sixth African Regional Conference (Tunis, October 1983), doc. GB.224/6/15, p. 19; the resolution concerning international labour standards in Asia, in particular those relating to human rights and trade union freedoms, adopted by the Eighth Asian Regional Conference (Colombo, September-October 1975), *Official Bulletin* (Geneva, ILO), 1976, Series A, No. 1, p. 56; and the resolution concerning the role of international labour standards in the countries of the Americas, adopted by the Tenth Conference of American States Members of the ILO (Mexico City, November-December 1974), *Official Bulletin*, 1975, Series A, No. 2, p. 167.

[2] See L.-E. Troclet and E. Vogel-Poski: "The influence of international labour Conventions on Belgian labour legislation", in *International Labour Review* (Geneva, ILO), Nov. 1968, p. 389, pp. 404-406.

[3] ILO: *Record of Proceedings*, International Labour Conference, 69th Session, 1983 (subsequent references will indicate merely ILC and the year of the session), p. 9/3.

[4] The proceedings of this seminar have been published by the Asian and Pacific Project for Labour Administration (ARPLA). See ILO: *Labour administration: Developing countries and ILO standards*, ARPLA Series No. 15 (Bangkok, 1983).

[5] The Employers' members of the Governing Body addressed comments on these questions to the Director-General in October 1982. Their views were reflected in statements made by several Employer delegates at the Conference in 1983; see, in particular, the statements by Mr. von Holten and Mr. Decosterd in ILO: *Record of Proceedings*, ILC, 1983, pp. 21/26 and 36/13-14 respectively.

[6] *Record of Proceedings*, ILC, 1983, pp. 7/18-19.

[7] See docs. GB.185/2/4, GB.185/2/19, GB.186/3/7, GB.189/4/10, GB.191/6/3, and Minutes of the 192nd Session of the Governing Body (February-March 1974), pp. IV/1-8.

[8] See *North-south: A programme for survival*, Report of the Independent Commission on International Development Issues (Cambridge, Mass., MIT Press, 1980), pp. 182-183 and 288.

[9] See Final Report of the Working Party on International Labour Standards, *Official Bulletin*, 1979, Series A, Special Issue.

[10] ILO Regional Conferences have also, in a number of resolutions, called for priority attention to be given by States in the regions concerned to the application and ratification of selected Conventions.

[11] See ILO: *The impact of international labour Conventions and Recommendations*, (Geneva, 1976), pp. 19-20.

[12] Reference may be made to the numerous model codes, codes of practice, guides and manuals in the field of occupational safety and health, and to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

[13] See docs. GB.199/9/22(Rev.), Appendix, para. 15, summarising the main points emerging from the discussion of the in-depth review of international labour standards by the Programme, Financial and Administrative Committee of the Governing Body in February 1976; and GB.215/5/1, Appendix II, para. 7 (conclusions of a working party of the Ninth Asian Regional Conference, Manila, 1980).

[14] For previous discussions on these questions, see Minutes of the 141st Session of the Governing Body (March 1959), p. 69; *Report of the Director-General*, Report I (Part I), ILC, 1964, pp. 128-130; *Fourth Report of the Working Party on the Programme and Structure of the ILO, Report of the Director-General*/Part II (Supplement), ILC, 1967, pp. 11-17.

[15] An example is provided by the transfer, during the second discussion of the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), of a provision relating to equality of treatment from Part II (which concerns equality of opportunity and treatment) to Part I (relating to migrations in abusive conditions). This has given rise to difficulties of interpretation — see memorandum of the International Labour Office in *Official Bulletin*, 1979, Series A, No. 3, p. 156 — and appears to have constituted an obstacle to ratification of the Convention by countries of immigration.

[16] This occurred in connection with standards concerning workers' representatives (1971), rural workers' organisations (1975), nursing personnel (1977), collective bargaining (1981) and vocational rehabilitation and employment of disabled persons (1983).

[17] For a general description of the development and functioning of ILO supervisory procedures, see N. Valticos: *International labour law* (Deventer, Kluwer, 1979), pp. 225-261.

[18] See also E. A. Landy: *The effectiveness of international supervision: Thirty years of ILO experience*, (London, Stevens; Dobbs Ferry, New York, Oceana Publications, 1966).

[19] ILO: *The impact of international labour Conventions and Recommendations*, op. cit.

[20] See, generally, the examples quoted in ILO: *The impact of international labour Conventions and Recommendations*, op. cit., Ch. 3.

[21] See Minutes of the 222nd Session of the Governing Body, March 1983, doc. GB.222/PV(Rev.), pp. IV/2-4.

[22] See the memorandum presented to the Conference in 1983 on behalf of a number of socialist governments, op. cit. (note 6); see also the statements by the Government delegates of Czechoslovakia and the USSR, in ILO: *Record of Proceedings*, ILC, 1983, pp. 25/3 and 29/7, and the Report of the Committee on the Application of Conventions and Recommendations, in *Record of Proceedings*, ILC, 1982, Part One, para. 5, pp. 31/2-3.

[23] ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 1977, Part One, para. 31, pp. 10-11. This was a unanimous statement by the Committee. However, in dissenting opinions concerning the application of certain Conventions in socialist countries, two members based themselves on the need to take account of the economic and social systems existing in those countries. ibid., pp. 82 and 134-135.

[24] See, for example, Report of the Committee on the Application of Conventions and Recommendations, in ILO: *Record of Proceedings*, ILC, 1982, Part One, para. 6, p. 31/3.

[25] ibid., 1957, p. 657, para. 30.

[26] See the Report of the Committee on the Application of Conventions and Recommendations, in ILO: *Record of Proceedings*, ILC, 1980, Part One, paras. 22-23, p. 37/6 and Appendix, paras. 3 and 10, pp. 37/19-20; see also the Memorandum presented to the Conference in 1983 on behalf of a number of socialist countries, op. cit. (note 6).

[27] See the Report of the Committee on the Application of Conventions and Recommendations, in ILO: *Record of Proceedings*, ILC, 1980, Part One, paras. 16-21, pp. 37/4-6, and Appendix, para. 5, p. 37/20.

[28] ibid., 1983, Part One, p. 31/16, paras. 84 and 87.

[29] ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 1977, Part One, para. 32, p. 11.

[30] These criteria relate to the following matters: failure during the past two years to supply any reports on ratified Conventions; failure to supply first reports on ratified Conventions for at least two years; failure during the past five years to supply any reports on unratified Conventions and on Recommendations requested under article 19 of the Constitution; failure to provide indications on the steps taken to submit to the national competent authorities the Conventions and Recommendations adopted during the last seven Sessions of the Conference for which such information was due; failure to provide replies to all or most of the observations and direct requests of the Committee of Experts; failure during the preceding three years to indicate the representative organisations of employers and workers to which, in accordance

with article 23 (2) of the Constitution, copies of the reports and information supplied to the ILO under articles 19 and 22 have been communicated; failure, despite repeated invitations by the Conference Committee, to take part in the discussion concerning the country in question.

[31] Doc. GB.194/PFA/12/5, paras. 103-109.

[32] See ILO: *Official Bulletin*, 1981, Series A, No. 1, pp. 93-95.

[33] Article 10 of the standing orders.

[34] Report of the Subcommittee of the Selection Committee on the Fact-Finding and Conciliation Commission on Freedom of Association, ILC, 1950, para. 8 *(b)*.

[35] First Report of the Governing Body Committee on Freedom of Association, para. 32.

[36] The Committee on Freedom of Association regularly brings to the attention of the Committee of Experts on the Application of Conventions and Recommendations aspects of cases examined which throw light on the observance of ratified Conventions.

[37] See ILO: *Freedom of association: Digest of decisions of the Freedom of Association Committee of the Governing Body of the ILO* (Geneva, 2nd edition, 1976). A new edition is in preparation.

[38] See First Report of the Committee on Freedom of Association, para. 31, and 193rd Report, para. 37.

[39] See, generally, A. J. Pouyat: "The ILO's freedom of association standards and machinery: A summing up", in *International Labour Review*, May-June 1982, p. 287.

[40] ILO: *General survey on the application of the Conventions on freedom of association, the right to organise and collective bargaining and the Convention and Recommendation concerning rural workers' organisations*, Report III (Part 4B), ILC, 1983.

[41] See Minutes of the 210th Session of the Governing Body (May-June 1979), pp. IV/12-13, and the Memorandum presented to the Conference in 1983, op. cit., note 6.

[42] See, for example, 193rd Report of the Committee on Freedom of Association, paras. 33-39.

[43] See Minutes of the 173rd Session of the Governing Body (November 1968), pp. 41-43 and 124.

[44] Doc. GB.214/4/2 (November 1980).

[45] Doc. GB.224/6/15, paras. 44 and 45 and 48, and Appendix II.

[46] See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 1979, Part One, paras. 42-89. In subsequent years, additional progress resulting from direct contacts has been noted.

[47] See the note on Office interpretations of international labour Conventions presented to the Governing Body in November 1982, in doc. GB.221/19/1.

[48] These countries were: Bahrain, Bulgaria, Colombia, Czechoslovakia, Democratic Yemen, Egypt, Equatorial Guinea, Ethiopia, French Polynesia, Gabon, Ghana, Guinea, Guinea-Bissau, Indonesia, Kuwait, Malaysia, Mauritius, Mexico, Mongolia, Nigeria, Panama, Peru, Philippines, Poland, Romania, Somalia, Sri Lanka, Sudan, Swaziland, Syrian Arab Republic, USSR, United Arab Emirates, Venezuela and Viet Nam. Similar training was also provided to an official of the Arab Labour Organisation.

[49] For a fuller indication of the measures adopted by the Committee of Experts, see the Committee's reports of 1972, 1973 and 1974 respectively, Report III (Part 4A), ILC, 57th Session, Part One, paras. 28-98; ibid., 58th Session, Part One, paras. 56-77; ibid., 59th Session, Part One, paras. 43-51.

[50] Of the 14 States concerned, eight were in the American region, three in Africa and three in Asia.

[51] ILO: *General Survey of the Reports relating to Convention No. 144 and Recommendation No. 152*, Report III (Part 4B), ILC, 1982.

[52] See, for example, the reports presented to the Inter-American Advisory Committee in 1982 (doc. AM/AC/VI/3), pp. 17-18, to the Asian Advisory Committee in 1983 (doc. AAC/XVIII/3), para. 98, and to the Sixth African Regional Conference in 1983 (*Report of the Director-General*, Report I (Part 2)), paras. 106-108.

[53] See the paper on ILO operational activities in 1982, presented to the Governing Body in November 1983, doc. GB.224/OP/1/3, paras. 272-281.

[54] See *Report of the Director-General*, ILC, 1980, Part I, p. 44; and UNDP/ILO: *Thematic evaluation study on training of industrial manpower* (New York and Geneva, Sep. 1983), paras. 6-8 and 365-400.

[55] See E. Costa, S. Guha, M. I. Hussain, N. T. B. Thuy and A. Fardet: *Guidelines for the organisation of special labour-intensive works programmes*, (Geneva, ILO, second impression with modifications, 1980; mimeographed World Employment Programme research working paper; restricted). These questions have also been given attention in training courses under this programme and at the annual joint UNDP/ILO meetings for support to special public works programmes.

[56] See FAO: *The application of international labour standards to WFP activities*, WFP Intergovernmental Committee, 4th Session, Rome, November 1963 (doc. WM/IGC: 4/10; mimeographed).

[57] The Labour Inspection Convention, 1947 (No. 81), has been ratified by 105 States (for industry and commerce by 86 States, for industry only by 19). The implementation of the Convention encounters serious difficulties in many of these States, particularly as regards ensuring sufficiency in the number of labour inspectors, in the material facilities (especially transport) placed at their disposal, and as a consequence in the breadth and frequency of inspections. In many countries the work of the inspection services appears to be confined essentially to the investigation of complaints and intervention in disputes. The Labour Inspection (Agriculture) Convention, 1969 (No. 129), has been ratified by only 23 States.

[58] See *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part IV), ILC, 1963, Part One, paras. 17-62; ibid., Report III (Part 4A), 64th Session, 1978, Part One, paras. 40-70.

[59] Reference may be made to recent studies and discussions concerning child labour — see *Report of the Director-General*, ILC, 1983, Part I: "Child labour"; and *Exploitation of child labour*, Final report by A. Bouhdiba (New York, United Nations, doc. E/CN.4/Sub. 2/479/Rev.1, 1982).

[60] See United Nations Economic and Social Council: *Annual Report of the Administrative Committee on Co-ordination for 1973-74* (doc. E/5488, 20 May 1974; mimeographed), paras. 200-208.

[61] See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4A), ILC, 1983, Part One, paras. 25 and 26.

[62] ibid., paras. 23 and 24.

[63] Information on the composition, mandate and activities of this working group has been provided to the Governing Body — see docs. GB.211/IO/3/6, paras. 14-19; GB.214/IO/5/3, paras 10-15; GB. 218/IO/2/11, paras. 7-13; GB.221/IO/2/6, paras. 9-13.

[64] See docs. GB.205/IO/5/5; GB.208/IO/3/5, paras. 19-22; GB.212/IO/5/7, paras. 10-11.

[65] See ILO: *Official Bulletin*, 1947, No. 5, pp. 417-420.

[66] See Resolutions 85 (V) and 1789 (LIV) in respectively *Resolutions adopted by the Economic and Social Council during its Fifth Session, July-August 1947* (Lake Success, New York, United Nations) (Sales No. 1947.1.20) and *Economic and Social Council Official Records, Fifty-fourth Session: Resolutions*, Supplement No. 1 (New York, United Nations, doc. E/5367, 1973), p. 25.

[67] See GB.212/IO/1/8, paras. 14-21.

[68] Another working group of the United Nations General Assembly is concurrently engaged in drafting a declaration on the human rights of aliens.

[69] The European and American Conventions both prohibit forced labour. The former provides for the right to form and join trade unions, while the latter recognises the right to associate, inter alia, for economic, labour and social purposes. States Parties to the American Convention also undertake to adopt measures with a view to the progressive realisation of the rights implicit in the economic and social standards set forth in the Charter of the Organisation of American States. The African Charter of Human and Peoples' Rights provides, in general terms, for the right to free association, for the right of every individual to work under equitable and satisfactory conditions and to receive equal pay for equal work, and for the right of all peoples to their economic, social and cultural development. It also prescribes a series of duties for the individual, including the duty to serve his national community by placing his physical and intellectual abilities at its service and the duty to work to the best of his abilities and competence.

[70] For example, the European Commission of Human Rights concluded that the use of convict labour by private undertakings is not contrary to the European Convention since, unlike the ILO's Forced Labour Convention, it does not prohibit this practice. On the other hand, in the case of Young, James and Webster (1981), the European Court of Human Rights considered certain situations resulting from union security agreements to be contrary to the provisions relating to freedom of association of the European Covention on Human Rights, whereas ILO standards neither authorise nor prohibit union security clauses. See Council of Europe, European Court of Human Rights: *Case of Young, James and Webster: Judgement* (Strasbourg, 13 Aug. 1981).

[71] See, for example, the judgements of the European Court of Human Rights in the case of Young, James and Webster (1981) (note 70 above), and in the case of Van der Mussele (1983), concerning an allegation of forced labour. idem: *Case of Van der Mussele: Judgement* (Strasbourg, 23 Nov. 1983).

[72] See United Nations General Assembly: *Elimination of all forms of racial discrimination* indicating that, at the end of 1982, 94 reports were overdue from States Parties to the International Covenant on Economic, Social and Cultural Rights, 76 reports from States Parties to the Convention on the Elimination of All Forms of Racial Discrimination, and 74 from States Parties to the International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, doc. A/38/393, 30 Sep. 1983; mimeographed), pp. 8 and 9.