



# Governing Body

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## 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](#).

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## ► Introduction

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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).<sup>1</sup>
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”.<sup>2</sup>
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,<sup>3</sup> 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.<sup>4</sup>
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.<sup>5</sup> 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.<sup>6</sup> Due to the cancellation of the 338th

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<sup>1</sup> GB.344/PV, para. 201

<sup>2</sup> 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.

<sup>3</sup> GB.329/INS/5(Add.)(Rev.); GB.329/PV, paras 95–148.

<sup>4</sup> 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.

<sup>5</sup> GB.335/INS/5, para. 84(g).

<sup>6</sup> 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).<sup>7</sup> 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,<sup>8</sup> 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)

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### 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.<sup>9</sup>

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<sup>7</sup> GB.344/INS/5.

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup>
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,<sup>11</sup> 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.

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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.

<sup>10</sup> 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.

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> On specific occasions, however, having regard to the institutional importance or seriousness of the

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<sup>12</sup> 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.

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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

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<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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.<sup>17</sup> 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).<sup>18</sup>
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.

<sup>17</sup> 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.

<sup>18</sup> 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

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### 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.<sup>19</sup> Further elements on the organization and functioning of the tribunal were provided in the document that was prepared for the 338<sup>th</sup> Session (March 2020) of the Governing Body.<sup>20</sup>
- 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-

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<sup>19</sup> GB.322/INS/5, paras 50–101 and Appendix II.

<sup>20</sup> 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”.<sup>21</sup>
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”.<sup>22</sup> 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.<sup>23</sup>

<sup>21</sup> Minutes of the 57th Session of the Governing Body, April 1932, pp. 344–345.

<sup>22</sup> Emphasis added. First Session of the Committee on Constitutional Questions of the Governing Body, *Official Bulletin*, 10 December 1945, Vol. XXVII, p. 128.

<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>
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.<sup>26</sup>
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).<sup>27</sup> It may be useful to list a few examples of requests for an informal opinion<sup>28</sup> 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?

<sup>24</sup> First Session of the Conference Delegation on Constitutional Questions, *Official Bulletin*, 15 December 1946. Vol. XXVII, No.3, pp. 729 and 767–768.

<sup>25</sup> *Official Bulletin*, Vol. XXVII, No.3, p. 770.

<sup>26</sup> 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.

<sup>27</sup> GB.256/SC/2/2, para 50.

<sup>28</sup> 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)?<sup>29</sup>

## 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.<sup>30</sup>
- 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.

<sup>29</sup> 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.

<sup>30</sup> 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.<sup>31</sup>

## 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.<sup>32</sup>
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.<sup>33</sup> 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.<sup>34</sup>
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.<sup>35</sup>

<sup>31</sup> GB.322/INS/5, para 71.

<sup>32</sup> 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.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.<sup>36</sup> 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

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<sup>36</sup> 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.<sup>37</sup>
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.<sup>38</sup> The drafters envisioned two judicial bodies - the International Court of Justice, on the one hand, and the in-house tribunal, on the other -

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<sup>37</sup> GB.344/PV, paras 146 and 154.

<sup>38</sup> 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.<sup>39</sup> 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).<sup>40</sup>
61. The tribunal could be provisionally established for an initial period, for instance of five or seven years.<sup>41</sup> 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.

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<sup>39</sup> 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.

<sup>40</sup> A similar approach was proposed in 2014 (see GB.322/INS/5, para. 53).

<sup>41</sup> 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

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**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

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### 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,<sup>1</sup> 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

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<sup>1</sup> 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.

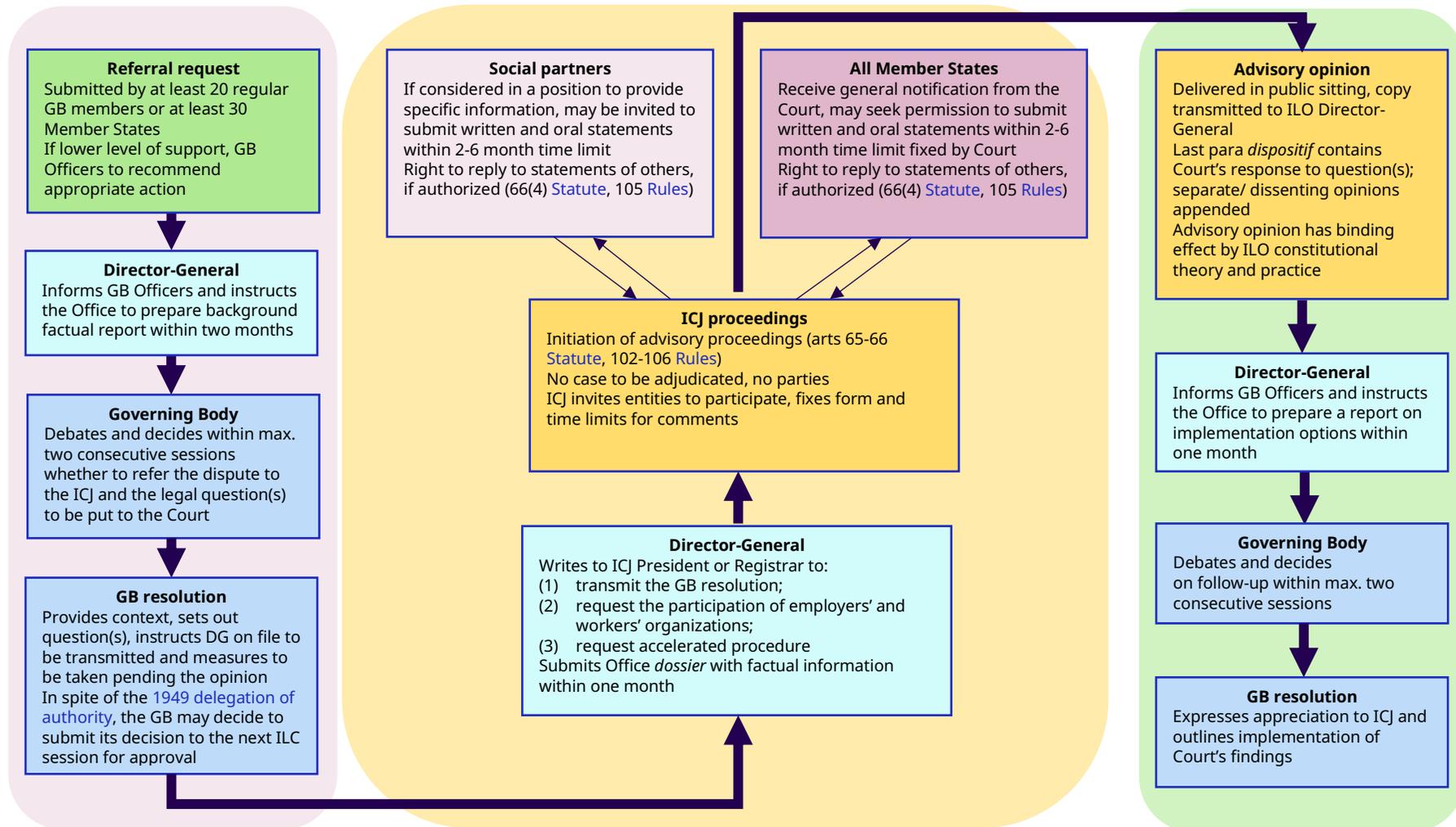
12. The Director-General shall also transmit to the Registrar a dossier as expeditiously as possible and in any case not later than one month from the date of the formal communication of the request for an advisory opinion. The dossier shall provide all relevant background information and shall explain 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.

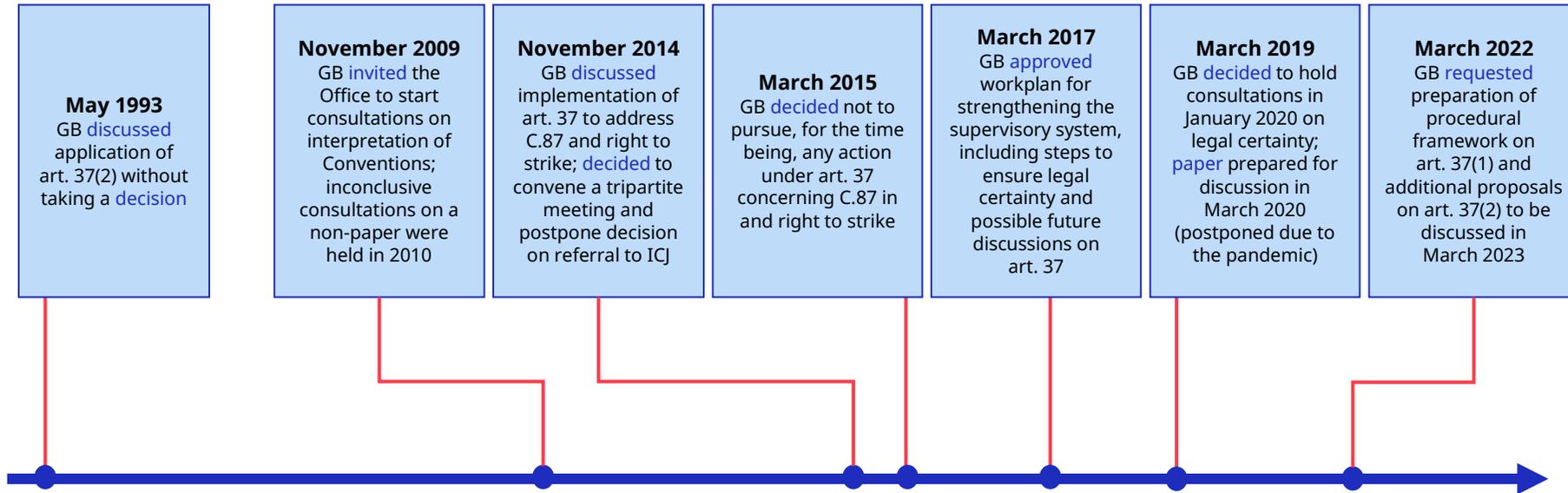
► Appendix II

Graphic representation of the procedural framework



► Appendix III

The debate on article 37 – Overview and key dates



**Art. 37 – Origins and past practice**

<p style="text-align: center;">► <b>1919</b></p> <p>Article 423, Treaty of Versailles: Permanent Court of International Justice (PCIJ) competent body to interpret ILO Conventions</p>	<p style="text-align: center;">► <b>1932</b></p> <p>PCIJ advisory opinion on the Night Work (Women) Convention, 1919 (No. 4)</p>	<p style="text-align: center;">► <b>1946</b></p> <p>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</p>
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## ▶ Appendix IV

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### 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](#).