

Comments from the Government of Japan on the Background Report "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"

The Government of Japan (hereinafter referred to as "GOJ") requests that the comments below be given due consideration regarding the background report "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."

The GOJ heard the opinions from the most representative employers' and workers' organizations (Japanese Trade Union Confederation and Japan Business Federation) before finalizing the comments.

The communications submitted from the employers' and workers' organizations are attached.

1. (1) Given that the 347th session of the Governing Body discussed the procedural framework for the referral to the International Court of Justice (hereinafter referred to as "ICJ") under Article 37, paragraph 1, of the ILO Constitution and the procedures for the establishment of an in-house tribunal under Article 37, paragraph 2, of the Constitution, but reached no conclusion and issued a resolution to defer the discussion, such procedural framework should also be discussed in the special meeting.

(2) In particular, it should be stressed that the document presented by the Office at the 347th session of the Governing Body indicated that it is necessary that at least 20 regular Governing Body members or at least 30 Member States jointly request the Governing Body to refer a dispute to the ICJ under Article 37, paragraph 1, of the Constitution (GB.347/INS/5, Appendix I). Hence, in principle, it is desirable to first fully discuss and determine the requirements for referral, which is an important element of the procedural framework that had once been on the Governing Body's agenda and whose discussion had been deferred, and

then to discuss again and decide whether or not to refer the present dispute to the ICJ.

2. While recognizing the importance of moving forward with discussions in resolving the dispute, it is essential to have a discussion among tripartite constituents, which is a characteristic of the ILO, in an exhausted manner before referring the dispute to the ICJ under Article 37, paragraph 1, of the Constitution. In particular, it should be noted that, as the ILO acknowledges, the right to strike is not absolute, and as mentioned in III.1 of the Background report, the provision of the right to strike was not included in the Convention No.87 when it was adopted, and even today there is no coherent consensus on the scope of the right among Member States. If this dispute is referred to the ICJ, it would become a precedent for future discussions on another referral case. From this perspective, it should be clearly stated in the draft resolution that the principle is to discuss among tripartite constituents in an exhausted manner first, and that the referral to the ICJ is the last resort.

3. Based on the above, the GOJ proposes the following modifications to the draft Governing Body resolution contained in the Appendix II of the Background report. However, these modifications are not final, and the GOJ would like to continue discussing the draft resolution at the upcoming special meeting.

(1). The preamble should be modified as follows in red and bold letter:

Recalling that under article 37, paragraph 1, of the 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”,

Noting that this option can only be sought if both of the following conditions are met:

1. The issue has been discussed among tripartite constituents in an exhausted manner

2. It is agreed that the Court’s legal guidance is the last resort,

*Paying attention to these requirements, convinced that seeking the Court's authoritative legal guidance is the **only** viable option available **and the last resort**, since attempts to reach a generally acceptable understanding through tripartite dialogue have failed,*

(2). Regarding “paragraph 2, of the Agreement” in operative paragraph 1, the language “and paragraph 3” should be inserted after “paragraph 2”.

(3). Apart from whether the right to strike is included in Convention No. 87, it should be noted that, in the first place, the right to strike is not absolute, but is restricted for certain categories of workers and in certain situations. From this perspective, the first question in the bracket in operative paragraph 1 should be modified as, for example, “Is the right to strike of workers and their organizations protected **in principle** under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87)?”

(4). The second question in the bracket in operative paragraph 1 should be removed from the draft resolution because the wording of the question recalls an expansion of the mandate of the Committee of Experts on the Application of Conventions and Recommendations of the ILO. Whether the Committee was actually competent or not needs to be discussed further.