International Labour Organization

▶ GB.344/INS/5

Governing Body

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Institutional Section **INS**

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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.

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▶ 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