



Governing Body

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Institutional Section

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Action to be taken on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of Convention No. 87 in relation to the right to strike to the International Court of Justice for decision in accordance with article 37(1) of the ILO Constitution

Summary of the comments received from constituents

► Introduction

1. In circulating the Office Background report (GB.349bis/INS/1/1, [Appendix](#)) to inform the special session of the Governing Body on the request of the Workers' group and of 36 governments to urgently refer the dispute on the interpretation of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), in relation to the right to strike to the International Court of Justice (ICJ), the Director-General invited Member States and, through them, the national employers' and workers' organizations concerned, to transmit any comments they might wish to make on the issue. The intention was to facilitate inclusive deliberations on a matter of particular institutional significance, including by offering the opportunity to Members not currently represented in the Governing Body to express their views.

2. As of 11 October 2023, the Office had received communications from 10 governments, the secretariats of 2 non-governmental groups, 14 national employers' organizations and 101 national workers' organizations. The names of the constituents that sent comments appear in the appendix. The full text of all the comments received is posted on the web page of the 349th *bis* (special) Session of the Governing Body.

► Summary of the constituents' comments

3. On the principal question of whether or not the Organization should refer the interpretation dispute to the ICJ for decision under article 37(1) of the ILO Constitution, three governments (*Eritrea, Niger and Somalia*)¹ expressed support for the proposal of the Workers' group. The main reason cited was the need for governments to have legal certainty about the obligations arising from their ratification of ILO Conventions. They also noted that the ongoing controversy impacted negatively on the ILO's standard-setting system.
4. Three Governments (*Indonesia, Kenya and Türkiye*) did not support a referral to the ICJ and expressed their preference for continuing dialogue. *Indonesia*, while recognizing the right to strike as a fundamental human right and recognizing the authority vested in the Committee of Experts on the Application of Conventions and Recommendations ("Committee of Experts") to interpret Conventions, took the view that the most prudent course of action was to seek tripartite consensus and urged the Governing Body to consider including an item to this effect on the agenda of the 112th Session (June 2024) of the International Labour Conference. The aim would be to examine the issue comprehensively and the potential development of a framework or standard that would delineate the boundaries and provisions of the right to strike within the context of Convention No. 87. Should achieving tripartite consensus prove unattainable, the route to the ICJ remained available in accordance with article 37(1) of the ILO Constitution. Similarly, *Türkiye*, while noting that the right to strike was an integral part of fundamental principles and rights at work but not an absolute right, expressed support for the pursuit of a resolution within the existing structures of the ILO, promoting active engagement and open dialogue. This approach would be conducive to yielding a balanced, globally acceptable outcome. Kenya expressed the wish that the dispute be brought to an amicable resolution, recalling that it recognized and promoted freedom of association and the right to strike although it had not yet ratified Convention No. 87.
5. *Costa Rica* stated that it was in favour of the proposal of the Workers' group that the matter be referred to the ICJ, without prejudice to other possible solutions, such as holding a discussion at the next session of the International Labour Conference on the possible adoption of a protocol, or any other alternative which might arise out of the forthcoming 349th *bis* and 349th *ter* special Sessions of the Governing Body.
6. *Switzerland* reiterated its continuous preference for the establishment of an in-house tribunal under article 37(2) of the ILO Constitution to resolve interpretation disputes. As far as the possible referral to the ICJ was concerned, *Switzerland* expressed doubts as to whether the two questions proposed by the Workers' group were indeed questions of interpretation. In any event, States parties to Convention No. 87 should be thoroughly involved in the discussions concerning the content of the question to be put to the Court. As for the referral decision,

¹ The names of Members that have ratified Convention No. 87 appear in italics.

Switzerland considered that, notwithstanding the Governing Body's delegated authority, and for reasons of inclusivity and representativeness, it would be for the International Labour Conference to take the decision. The composition of the Governing Body no longer reflects the current composition of the ILO as was the case in 1949 when the resolution under which the Governing Body was authorized by the Conference to request an advisory opinion from the Court was adopted.

7. Similarly, *Malaysia* took the view that while article 37(1) of the ILO Constitution provides an avenue to resolve interpretation disputes, the referral to the ICJ should be undertaken only when all other efforts to resolve the dispute have failed. It was preferable to seek solutions within the ILO, notably through the establishment of an internal, independent tribunal to provide for the expeditious determination of interpretation disputes.
8. *Japan* considered that it was essential to first have a discussion among tripartite constituents and that referral to the ICJ should be considered only as a last resort. As regards the question to be put to the Court, it should reflect the fact that the right to strike was not an absolute right. No question should be submitted to the Court as regards the competence of the Committee of Experts as it should be discussed further by ILO constituents. Accordingly, the Government proposed some modifications to the draft resolution included in Annex I of the Background report.
9. The employers' organizations indicated that they did not support a referral of the dispute to the ICJ even though the Constitution did provide an avenue for a referral to the Court to resolve interpretation disputes. In essence, three reasons were put forward: firstly, the possibilities for resolving the dispute internally had not been exhausted, such as, for instance, holding a debate at the Conference with a view to adopting an international labour standard; secondly, an advisory opinion would tend to create additional legal uncertainty as regards the scope of the right to strike, and would be detrimental to "social peace" in general within the ILO; and thirdly, an advisory opinion would adversely affect the reputation and the credibility of the ILO. The right to strike is a multifaceted issue that requires thorough discussion by the tripartite actors in the world of work. Consensus-based solutions would enable all constituents to actively engage in the process and would lead to an outcome that would be acceptable to all.
10. While generally recognizing the existence of the right to strike, the employers' organizations reiterated their position that Convention No. 87 does not include the right to strike within its scope neither explicitly nor implicitly. The legislative history documents that the right to strike was intentionally excluded from the scope of the Convention. The Committee of Experts has no mandate to change the Convention in relation to the right to strike or to interpret the Convention as if it contained such a provision and create a body of interpretations outside the tripartite decision-making structure. The Committee on Freedom of Association does not have a mandate to interpret the scope or supervise Convention No. 87.
11. For their part, the workers' organizations expressed support for a referral of the dispute to the ICJ, emphasizing the paramount importance of the right to strike for workers and their organizations as well as for labour rights in general, arguing that legal certainty through a binding advisory opinion of the Court is urgently required. The inability of the ILO to supervise the application of the right to strike under Convention No. 87 due to the ongoing dispute, has had an adverse impact on labour relations at the national level. The proposed protocol to Convention No. 87 would not have any added value given that, as elaborated by the ILO supervisory bodies, Convention No. 87 already guarantees the right to strike as a fundamental principle and right at work. The adoption of a protocol would not bring legal certainty and would, on the contrary, exacerbate the dispute.

12. For the workers' organizations, the protection of the right to strike is inherent in the ILO's constitutional mandate and, as such, it was included within the scope of Convention No. 87. More broadly, the right to strike is an integral part of international law and its protection at the international level is critical. Convention No. 87 and the views expressed by the Committee of Experts and the Committee on Freedom of Association had gained resonance, notably through national and international court decisions, multinational enterprises' codes of conduct and free trade instruments, and this could explain the change in the position of the Employers' group after more than 60 years of those views remaining unchallenged.

► Comments submitted by the International Organisation of Employers

13. The International Organisation of Employers (IOE) considers that the source of the dispute lies in the broad interpretation of the right to strike made by the Committee of Experts, and noted the role the Office has played in that respect. The Employers acknowledge that the right to strike exists at the national level but are firmly of the view that neither Convention No. 87 nor any other Convention for that matter, provide for the right to strike or regulated its exercise. While the referral to the ICJ of any question or dispute on interpretation was set forth in article 37(1) of the Constitution, ILO constituents had repeatedly favoured tripartite solutions with the single exception concerning the interpretation of the Night Work (Women) Convention, 1919 (No. 4). An important point is that the ICJ is not the only competent body and in fact, it can only provide limited legal certainty as regards interpretation disputes as its advisory opinions are inherently not legally binding. On the other hand, standard-setting action would provide more legal certainty as regards the right to strike and would ensure inclusivity and democracy by allowing all constituents to actively participate in the process. This option was consistent with the mandate of the ILO and upheld the principles of tripartism and social dialogue.
14. With regard to Convention No. 87 and the right to strike, the IOE stated that the legislative history of Convention No. 87 was indisputably clear; when developing the Convention, the tripartite constituents intentionally did not include that right, either explicitly or implicitly. Many official documents of governments, employers, workers, and also the ILO supervisory bodies, acknowledge that neither Convention No. 87 nor any other Convention addressed the right to strike. The rules of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969, should be fully respected. In particular, the ordinary meaning of the relevant provisions was clear and left no room for vague concepts such as "dynamic" interpretation. Convention No. 87 does not contain the term "right to strike" or similar terms. Neither could it be argued that there had been agreement between the parties to Convention No. 87 on the interpretation of the right to strike established through subsequent agreement or practice, as demonstrated by the fact that several ratifying States had at different points in time stated that neither Convention No. 87 nor any other ILO instrument provided for the right to strike. On the other hand, recourse to supplementary means of interpretation, such as the preparatory work, could be made to confirm the meaning resulting from the application of Article 31.
15. With respect to the mandate of the Committee of Experts, it was clear that it was limited to an impartial and technical analysis and that its opinions and recommendations were non-binding. Further, when it was established in 1926, the Conference had clarified that the Committee

would not be competent to interpret Conventions. Yet, the Committee of Experts gradually built a comprehensive body of broad, extensive and detailed interpretations that provided for far-reaching, almost unrestricted freedom to strike.

16. With respect to the questions to be put to the Court, the IOE considered that reference should have been made to Articles 31 and 32 of the Vienna Convention as both the interpretation of Convention No. 87 in relation to the right to strike and the competence of the Committee of Experts should be decided having regard to the requirements of these provisions. In any event, the two questions proposed by the Workers were insufficient as, among other things, the ICJ should be asked to clarify the role of the Conference both as regards the Committee of Experts and on the competence of the Conference to settle authoritatively interpretation disputes through standard-setting.
17. With regard to the possible next steps, the IOE considers that no decision to refer an interpretation dispute to the ICJ should be made without the support of the State parties to the Convention and that this support should be expressed within the framework of the International Labour Conference. Referral to the Court should not be considered until all possibilities for dialogue between the main ILO actors competent in the area of ILO and international labour standards have been exhausted.
18. The full text of the comments submitted by the IOE is posted on the web page of the 349th *bis* (special) Session of the Governing Body.

► Comments submitted by the International Trade Union Confederation

19. The International Trade Union Confederation (ITUC) recalled that since the institutional crisis broke out in 2012, the governments and social partners have engaged unsuccessfully in several efforts to resolve the interpretation dispute through social dialogue. It is of the view that further dialogue will not break this impasse. The dispute and the lack of legal certainty has undermined the functioning of the supervisory system. Settling the legal question of the scope of Convention No. 87 regarding the right to strike and affirming the authoritative guidance of the Organization's supervisory organs should be prioritized as the most reasonable, efficient and effective way to proceed. The Constitution provides for an efficient and available mechanism to resolve this legal dispute through article 37(1).
20. The Employers' group is the only group which disputes the legal validity of the guidance of the supervisory organs regarding the right to strike and the scope of Convention No. 87. Yet this guidance was based on the long-standing view that the right to strike for workers and their organizations is a fundamental and intrinsic corollary of freedom of association and the right to organize. This legal interpretation had been consistently applied and had informed national legislation and practice but also international courts, multilateral organizations as well as national, international and regional human rights bodies.
21. The rationale for invoking article 37(1) was that as the interpretation question would impact the exercise of a fundamental right and the smooth functioning of the supervisory system of the ILO and beyond, it would be most prudent and appropriate to have recourse to the constitutional procedure set out in article 37(1). Unless the Employers' group recognized the widely held legal interpretation and principle regarding the fundamental link between the right to strike and freedom of association and right to organize and their protection under

Convention No. 87 as well as the authoritativeness of the body of legal guidance of the supervisory bodies including the Committee of Experts, it was necessary to seek legal certainty through recourse to article 37(1).

22. There is no constitutional basis for the suggestion of the Employers' group that the dispute should be discussed at the Conference. With respect to the proposed adoption of a protocol, any effort to address this interpretation dispute through a standard-setting activity, while the uncertainty remained, would not effectively address the scope of Convention No. 87 in relation to the right to strike.
23. With respect to the two proposed questions to be put to the Court, the intention was to cover all aspects of the interpretation dispute. Obtaining an affirmative answer to the first question but also legal certainty on the mandate of the Committee of Experts would be critical to resolving the dispute.
24. With regard to the role of the preparatory work that led to the adoption of Convention No. 87, the ITUC recalled the position of the Committee of Experts that the absence of a concrete provision is not dispositive, as the terms of the Convention must be interpreted in the light of its object and purpose.
25. The ITUC supported the draft resolution appended to the Background report contending that the ICJ is the only mechanism that could provide the necessary legal certainty and clarity to an issue with such broad implications.
26. The full text of the comments submitted by the ITUC is posted on the web page of the 349th *bis* (special) Session.

► Conclusion

27. Despite the early circulation of the Background report, the response rate, especially on the part of governments, has been low.
28. The comments confirm that the dispute is not so much about the recognition of the right to strike but rather on the interpretation of Convention No. 87 and the authority of the Committee of Experts to develop authoritative guidance with respect to the conditions for the exercise of the right to strike and the limits to that right.
29. As might be expected, the comments from national employers' and workers' organizations reflect the clear division of opinion between the Employers' group and the Workers' group on the advisability of referring the dispute to the International Court of Justice for decision under article 37(1) of the ILO Constitution.

► Appendix

Governments

Costa Rica
Eritrea
Indonesia
Japan
Kenya
Malaysia
Niger
Somalia
Switzerland
Türkiye

Employers' organizations

International Organisation of Employers (IOE)
Confederación de Cámaras Industriales de los Estados Unidos Mexicanos (CONCAMIN)
Confederación Patronal de la República Mexicana (COPARMEX)
Confederation of Danish Employers (DA)
Confederation of Finnish Industries (EK)
Confederation of Norwegian Enterprise (NHO)
Confederation of Portuguese Business (CIP)
Confederation of Swedish Enterprise (SN)
Comité Coordinador de Asociaciones Agrícolas, Comerciales, Industriales y Financieras (CACIF)
(Guatemala)
Fédération des entreprises de Belgique (FEB)
Hellenic Federation of Enterprises (SEV)
Japan Business Federation (Keidanren)
Malaysian Employers Federation (MEF)
Union patronale suisse (UPS)
Union tunisienne de l'industrie, du commerce et de l'artisanat (UTICA)

Workers' organizations

International Trade Union Confederation (ITUC)
 All Indonesian Trade Union Confederation (KSBSI)
 All Nepal Federation of Trade Unions (ANTUF)
 All-Poland Alliance of Trade Unions (OPZZ)
 Australian Council of Trade Unions (ACTU)
 Bangladesh Free Trade Union Congress (BFTUC)
 Bangladesh Jatiyatabadi Sramik Dal DAL-BJSD
 Bangladesh Labour Federation (BLF)
 Botswana Federation of Trade Unions (BFTU)
 Canadian Labour Congress (CLC)
 Central Autónoma de Trabajadores del Perú (CATP)
 Central Autónoma de Trabajadores Salvadoreños (CATS)
 Central de Trabajadores/as de la Argentina Autónoma (CTA-A)
 Central Organisation of Finnish Trade Unions (SAK)
 Central Organization of Trade Unions – Kenya (COTU-K)
 Central Unitaria de Trabajadores/as de Chile (CUT-Chile)
 Central Unitaria de Trabajadores del Perú (CUT-Perú)
 Confederação Geral dos Trabalhadores Portugueses (CGTP)
 Confederación Auténtica de Trabajadores de la República Mexicana (CAT)
 Confederación Autónoma Sindical Clasista (CASC) (Dominican Republic)
 Confederación de Trabajadores de México (CTM)
 Confederación de Unificación Sindical (CUS) (Nicaragua)
 Confederación General del Trabajo de la República Argentina (CGT-RA)
 Confederación Intersindical Galega (CIG) (Spain)
 Confederación Nacional de Unidad Sindical (CNUS) (Dominican Republic)
 Confederación Nacional de Unidad Sindical Independiente (CONUSI) (Panama)
 Confederación Sindical de Comisiones Obreras (CCOO) (Spain)
 Confederația Națională Sindicală (Cartel Alfa) (Romania)
 Confédération des syndicats autonomes du Sénégal (CSA)
 Confédération des Travailleurs des Secteurs Publique et Privé (CTSP) (Mauritius)
 Confédération française démocratique du travail (CFDT)
 Confédération générale autonome des travailleurs en Algérie (CGATA)
 Confédération libre des travailleurs de Mauritanie (CLTM)

Confédération luxembourgeoise des syndicats chrétiens (LCGB)
Confédération nationale des travailleurs du Burkina (CNTB)
Confédération nationale des travailleurs du Sénégal (CNTS)
Confederation of Autonomous Trade Unions of Serbia (CATUS)
Confederation of Ethiopian Trade Unions (CETU)
Confederation of Free Trade Unions of Macedonia (KSS)
Confederation of Free Trade Unions of Ukraine (KVPU)
Confederation of Independent Trade Unions in Bulgaria (CITUB)
Confederation of Progressive Trade Unions of Turkey (DISK)
Confederation of Public Employees' Trade Unions (KESK) (Türkiye)
Confederation of Trade Unions of Albania (KSSH)
Confederation of Trade Unions of Montenegro (CTUM)
Confederation of Turkish Trade Unions (TÜRK-İŞ)
Confederation of Unions for Professionals (Unio) (Norway)
Confédération syndicale des travailleurs du Togo (CSTT)
Confédération syndicale du Congo (CSC) (Democratic Republic of the Congo)
Confédération syndicale indépendante du Luxembourg (OGBL)
Consejo Nacional del Trabajadores Organizados (CONATO) (Panama)
Construction and Building Materials Industry Workers' Union of Ukraine (PROFBUD)
Czech Moravian Confederation of Trade Unions (ČMKOS)
Federación Sindical de Trabajadores Independientes (FSTIES) (El Salvador)
Fédération nationale des syndicats des ouvriers et des employés du Liban (FENASOL)
Federation of Independent Trade Unions of Russia (FNPR)
Federation of Iraq Trade Unions (FITU)
Federation of Korean Trade Unions (FKTU)
Federation of Somali Trade Unions (FESTU)
Federation of Trade Unions of Macedonia (SSM)
Federation of Trade Unions of the Republic of Kazakhstan (FPRK)
Federation of Trade Unions of Ukraine (FPU)
General Federation of Bahrain Trade Unions (GFBTU)
General Workers' Union (UGT) (Portugal)
Georgian Trade Union Confederation (GTUC)
German Confederation of Trade Unions (DGB)
Greek General Confederation of Labour (GSEE)

Hind Mazdoor Sabha (HMS) (India)
Independent and Self-Governing Trade Union Solidarność (NSZZ “Solidarność”) (Poland)
Independent Trade Unions of Croatia (NHS)
Italian Confederation of Workers’ Trade Unions (CISL)
Italian General Confederation of Labour (CGIL)
Italian Labour Union (UIL)
Japanese Trade Union Confederation (JTUC-RENGO)
Kilusang Mayo Uno (KMU) (Philippines)
Korean Confederation of Trade Unions (KCTU)
Liberia Labour Congress (LLC)
National Trade Union Confederation (NTUC) (Mauritius)
Netherlands Trade Union Confederation (FNV)
Pakistan Workers’ Federation (PWF)
Pan-Cyprian Federation of labour (PEO) (Cyprus)
Randrana Sendikaly USAM-SVS (Madagascar)
Singapore National Trades Union Congress (SNTUC)
Swedish Confederation of Professional Associations (SACO)
Swedish Confederation of Professional Employees (TCO)
Swedish Trade Union Confederation (LO)
Syndicat des enseignants du supérieur solidaires (SESS) (Algeria)
Swiss Trade Union Confederation (SGB/USS)
Trade Union Congress (TUC) (United Kingdom of Great Britain and Northern Ireland)
Trade Union Congress of Namibia (TUCNA)
Trade Union Congress of Swaziland (TUCOSWA)
Trade Union Confederation “Nezavisnot” (Nezavisnost) (Serbia)
Trade Union Confederation of the Republic of Srpska (Bosnia and Herzegovina)
Unión General de los Trabajadores del Brazil (UGT)
Unión General de Trabajadoras y Trabajadores de España (UGT-E) (Spain)
Unión Nacional de Trabajadores (UNT) (Mexico)
Union nationale des syndicats des travailleurs du Bénin (UNSTB)
Union nationale des travailleurs de Guinée-Bissau (UNTG-CS)
Union of Autonomous Trade Unions of Croatia (UATUC)
Union of Free Trade Unions of Montenegro (UFTUM)
Union of Independent Trade Unions of Albania (BSPSH)
Zimbabwe Congress of Trade Unions (ZCTU)