

CONSULTATION NOTE

Modalities, scope and costs of action under article 37 (paragraphs 1 and 2) of the ILO Constitution

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Introduction

1. In March 2014, following a broad consultative process with all groups, the Governing Body was invited to give its direction on concrete proposals that address the main outstanding issues in relation to the standards supervisory system. In view of the urgency and gravity of the situation, the Governing Body felt it was necessary to give further consideration to the options under article 37 (paragraphs 1 and 2) of the ILO Constitution and requested the Director-General to prepare a document for its 322nd Session in November 2014 setting out the possible modalities, scope and costs of action under article 37 of the ILO Constitution to address a dispute or question that may arise in relation to the interpretation of an ILO Convention.¹
2. This document focuses on the practical modalities of the two courses of action envisaged in article 37 of the Constitution, namely a request for an advisory opinion of the International Court of Justice and the establishment of an in-house tribunal for the expeditious settlement of interpretation disputes. It is accordingly divided into two parts.
3. Part A reviews the main characteristics and procedural aspects of the advisory function of the Court, emphasizing issues of particular importance to the ILO, such as the possibility of international employers' and workers' organizations being granted direct access to Court proceedings. To facilitate discussion, it also includes proposed wording of possible questions that might be brought before the International Court of Justice on the right to strike and the Committee of Experts' mandate, a draft Governing Body resolution containing the question to be put to the Court (Appendix I), a draft transmission letter to be addressed to the Registrar of the Court by the Director-General (Appendix II) and a draft letter to be addressed to the United Nations Secretary-General (Appendix III).
4. Part B provides proposals for the establishment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of ILO Conventions. These proposals take into account the specificities of ILO Conventions and the tripartite nature of the Organization, and aim at devising a cost-efficient mechanism for the rapid settlement of interpretation issues. A draft Statute (Appendix IV) has been prepared building on prior discussions and extensive research on the functioning of existing international courts and tribunals. Practical indications of cost estimates and the possible duration of the proceedings are also presented.

¹ GB.320/LILS/4, para. 41(a). The question of interpretation of international labour Conventions and the role of the Committee of Experts in connection with the possible implementation of article 37 has been the subject of recurrent discussions in the past four years; see *Non-paper on interpretation of international labour Conventions* (February 2010); *Informal exploratory paper on interpretation of international labour Conventions* (October 2010); *The ILO supervisory system: A factual and historical information note* (September 2012); *Information paper on the history and development of the mandate of the Committee of Experts on the Application of Conventions and Recommendations* (February 2013). Copies of these documents are found at <https://www.ilo.org/public/english/bureau/leg/art37.htm>.

5. It needs to be clarified at the outset that the possibilities provided for in article 37 (paragraphs 1 and 2) of the ILO Constitution are complementary and not mutually exclusive. Article 37(1), which refers to the advisory function of the International Court of Justice, is part of the Constitution as originally drafted in 1919, whereas article 37(2), which provides for the establishment of an internal judicial body, was introduced at the time of the constitutional amendment of 1946. As it currently reads, article 37 is based on the postulate that the most critical questions relating to the interpretation of ILO Conventions and any question relating to the interpretation of the Constitution itself should be brought before the International Court of Justice, while requests for the interpretation of ILO Conventions that might be less complex or more amenable to expeditious determination could be submitted to an internal tribunal.
6. Even though this document addresses, in line with the Governing Body decision, the two options under article 37 of the ILO Constitution, it should be recalled that the Governing Body could also consider other options, including the possibility of holding a tripartite discussion on the issues that have arisen in relation to the right to strike, the application of that right and limitations to its exercise. Such a tripartite discussion could take the form, for example, of a debate during the Governing Body, a meeting convened by the Governing Body for this purpose, a specific item placed on the agenda of the International Labour Conference, or a dedicated session of the Conference Committee on the Application of Standards.

A. Article 37, paragraph 1: Taking the matter to the International Court of Justice

7. Article 37(1) of the ILO Constitution provides for the referral of “any question or dispute” (*questions ou difficultés* in French) relating to the interpretation of the Constitution or of any international labour Convention adopted by member States pursuant to the provisions of the Constitution to the International Court of Justice “for decision” (*appréciation* in French). Despite the inconsistency between the English and French texts, article 37(1) gives expression to the clear intention of the drafters to entrust the settlement of any dispute or question relating to the interpretation of the Constitution or of an international labour Convention, as a last resort, to the highest judicial authority of the United Nations system and to recognize its pronouncements as decisive.

8. In its early years, the ILO had recourse to the advisory function of the Permanent Court of International Justice on six occasions between 1922 and 1932 (one specifically requesting the interpretation of an international labour Convention) but has not so far sought any advisory opinion from the International Court of Justice.² However, none of these six requests was made on the basis of article 37(1) of the ILO Constitution, as they were all submitted to the Court through the Council of the League of Nations pursuant to Article 14 of the Covenant.
9. In fact, Article 14 of the Covenant of the League of Nations, which called for the establishment of a Permanent Court of International Justice, also provided that the Court “may give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly”. As interpreted in practice, and eventually also reflected in Article 82 of the Rules of Court of 1936, two types of advisory opinion were envisaged; one was an opinion related to a “dispute” (*différend*), which was largely related to a contentious case, while the other was an opinion related to a non-contentious “question” (*point*).³
10. In the event, Article 14 of the Covenant was replaced by Article 96 of the United Nations Charter, which follows the same pattern as it grants the right to initiate advisory proceedings on “any legal question” to two principal organs of the United Nations, namely the General Assembly and the Security Council, and to specialized agencies that the General Assembly would so authorize. Basically the same provision is reproduced in Article 65 of the Statute of the International Court of Justice, which succeeded the Permanent Court of International Justice. There is a significant element of continuity in the manner the two Courts have exercised their advisory function, and this may impact positively on any request for an advisory opinion that might be initiated by the ILO.

² The Permanent Court of International Justice (PCIJ) – the predecessor to the International Court of Justice – held its inaugural sitting in 1922 and was dissolved in 1946. During this period, the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions. The six requests for advisory opinions that concerned the ILO were: *Designation of the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference* (1922); *Competence of the ILO in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture* (1922); *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production* (1922); *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* (1926); *Free City of Danzig and the ILO* (1930); *Interpretation of the Convention of 1919 concerning Employment of Women during the Night* (1932). For a brief account on these cases, see S.M. Schwebel, “Was the capacity to request an advisory opinion wider in the Permanent Court of International Justice than it is in the International Court of Justice?”, in *British Yearbook of International Law* (1991, Vol. 62), pp. 87–90.

³ It has been accordingly suggested that the drafters of article 37 intended, while borrowing language from Article 14 of the Covenant, to recognize the compulsory jurisdiction of the Court for contentious cases that might arise between ILO member States and also to allow for requests for advisory opinions to be brought directly before the Court without the need for prior approval of the League’s Council; see G. Fischer, *Les rapports entre l’Organisation Internationale du Travail et la Cour Permanente de Justice Internationale* (1947), pp. 30–46.

A.1 Advisory function of the International Court of Justice: Procedural aspects

A.1.1 General remarks

11. Contrary to the contentious jurisdiction of the International Court of Justice, the purpose of its advisory function is not to settle inter-State disputes but to provide legal advice to the organs and institutions requesting the opinion.⁴ The provisions governing advisory proceedings are set out in Articles 65 and 66 of the Statute of the Court and Articles 102 to 109 of its Rules.⁵
12. The main distinction is, however, that in an advisory procedure there is no “case” to be adjudicated and consequently there are no “parties”; what is submitted to the Court is a request for legal guidance, and the Court must ensure that it obtains all necessary information through written statements and oral hearings before it delivers its opinion. Another important difference is that the consent of the parties to a dispute, which is the basis of the Court’s jurisdiction in contentious cases, is not required in advisory proceedings.
13. According to the Statute of the Court, the formal request for an advisory opinion has to emanate from a body that is authorized by the United Nations Charter to make such a request, as noted above.⁶ Given the fact that, in accordance with Article 96(2) of the United Nations Charter, the General Assembly has duly authorized the ILO to request advisory opinions, it is probable that in the event of a request for an advisory opinion submitted by the Organization, the Court will base its jurisdiction primarily on Article IX(2) of the 1946 Agreement between the United Nations and the ILO, which explicitly authorizes the ILO to request an advisory opinion, and it will refer to article 37(1) of the ILO Constitution only for the purpose of determining the scope *ratione materiae* of its jurisdiction.⁷

⁴ On the procedural aspects of the advisory function of the International Court of Justice, see S. Rosenne, *The law and practice of the International Court 1920–2005*, 4th edition (2006, Vol. III), pp. 1653–1703; C.F. Amerasinghe, *Jurisdiction of specific international tribunals* (2009), pp. 199–254; R. Kolb, *The International Court of Justice* (2013), pp. 1102–1111; M. Pomerance, *The advisory function of the International Court in the League and U.N. Eras* (1973), pp. 277–329.

⁵ The full text of the Court’s Statute and Rules of Court and the text of all advisory opinions and background documents can be accessed at www.icj-cij.org. Additional information on the advisory function of the Court may be found at <https://www.ilo.org/public/english/bureau/leg/art37.htm>.

⁶ According to the *International Court of Justice Yearbook* (2010–2011), pp. 107–108, three United Nations organs besides the Security Council and the General Assembly, as well as 16 specialized agencies, are at present authorized to request advisory opinions. To date, only four specialized agencies have sought advisory opinions of the Court: the United Nations Educational, Scientific and Cultural Organization, the International Maritime Organization, the World Health Organization and the International Fund for Agricultural Development.

⁷ Article IX(3) of the United Nations-ILO Agreement provides that a request may be addressed to the Court by the Conference or by the Governing Body acting in pursuance of an authorization by the Conference. Such an authorization was given in 1949; see ILC, “Resolution concerning the procedure for requests to the International Court of Justice for advisory opinions”, *Official Bulletin* (1949, XXXII), pp. 388–339. In addition, under Article

A.1.2 Initiation of proceedings

14. The advisory procedure starts with the request for an advisory opinion, which has to be made in writing and transmitted to the Court. It is for the requesting organization to determine how the question is to be formulated and how the decision to request an advisory opinion may be made. According to Article 65(2) of the Statute, “questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question”.⁸ This documentation should contain all background information on the underlying dispute and may also relate to the debate that led to the adoption of the decision requesting the opinion.⁹
15. To date, all requests submitted to the Court have taken the form of a formal resolution adopted in the normal manner by the requesting organ. Following a common pattern, these resolutions contain a few preambular paragraphs contextualizing the problem on which advice is sought, followed by the question or questions to be answered by the Court. Sometimes the resolutions include instructions to the executive head of the organization that files the request regarding the documentation to be transmitted to the Court, measures to be taken pending the opinion and follow-up action once the opinion is received.¹⁰

IX(3) of the Agreement, in the event of a request to the International Court of Justice for an advisory opinion, the ILO has to inform the United Nations Economic and Social Council.

⁸ In addition, according to Rule 104, “the documents ... shall be transmitted to the Court at the same time as the request or as soon as possible thereafter, in the number of copies required by the Registry”. As a matter of practice, however, the Court often fixes time limits for the submission of written statements before it has received the relevant documentation from the chief administrative officer of the requesting organization.

⁹ The adoption of the request by the requesting organ is the first step, but the Court is not officially seized of the case until the transmission letter is received in the Registry; the date of the receipt is the date of the institution of the proceedings. Although infrequent, the request may not be notified immediately after adoption; in the *IMCO* case the request was adopted on 19 January 1959 but was sent to the Court on 23 March, while in the *Nuclear Weapons/WHO* case, the request was adopted on 14 May 1993 and was transmitted to the Court on 3 September.

¹⁰ As reflected in the Court’s case law, the Court often draws on the indications included in the preamble of the resolution in order to determine the object of the request and the character of the question; see Rosenne, *op. cit.*, Vol. II, p. 965; and Amerasinghe, *op. cit.*, p. 204.

A.1.3 Notification, invitation to participate in proceedings

16. The request for an advisory opinion must be notified to all those entities that are entitled to appear before the Court and that are likely to provide useful information on the question. The purpose is, of course, to enable the Court to receive information that is as ample and complete as possible. Article 66(1) of the Statute provides that “the Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court”, and Article 66(2) adds that “the Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question”.
17. Whereas all States entitled to appear before the Court automatically receive the general notification of requests for advisory opinions set out in Article 66(1), only those States and international organizations that in the Court’s view may be in a position to provide specific information receive the special notification provided for in Article 66(2). It should be noted that States or organizations specially notified under Article 66(2) are entitled to participate in the written and oral phase of the proceedings if they so wish, but they have no obligation to do so. It should also be noted that, as explained in greater detail below, every time the ILO has requested an advisory opinion international employers’ and workers’ organizations have been allowed to participate in the proceedings.
18. The Court has always placed particular importance on ensuring that the information available to it is sufficiently comprehensive and adequate for it to fulfil its judicial function. The Court’s constant concern, in fact, is whether it “has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed question or fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (*Wall*, 2004, para. 56). Bearing in mind that an advisory opinion states the law on the basis of the facts as made available to the Court at the time of the decision (*Nuclear Weapons/UN*, 1996, para. 97), it would be very important to ensure that in the event of an ILO request for an advisory opinion, as many member States as possible – from all regions and representing all legal systems – actively participate in the proceedings and communicate relevant information to the Court.

A.1.4 Written observations and oral arguments

19. The Court fixes by order the time limit for submission of written observations by those States and international organizations that have been invited to participate. This time limit varies in practice between two and six months. The Court may decide to extend the time limit, may accept written presentations after the time limit has expired, and may also decide to hold a second round of written statements.¹¹
20. The Court's Statute provides for the possibility of entities participating in the advisory proceedings to be granted the right to reply to the statements presented by other entities. According to Article 66(4), "states and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time-limits which the Court ... shall decide in each particular case". In addition, Article 105 of the Rules of Court provides as follows: "Written statements submitted to the Court shall be communicated by the Registrar to any States and organizations which have submitted such statements. The Court, or the President if the Court is not sitting, shall: (a) determine the form in which, and the extent to which, comments permitted under Article 66, paragraph 4, of the Statute shall be received, and fix the time-limit for the submission of any such comments in writing; (b) decide whether oral proceedings shall take place at which statements and comments may be submitted to the Court under the provisions of Article 66 of the Statute, and fix the date for the opening of such oral proceedings".
21. The Court may at its discretion decide to hold public hearings for oral arguments.¹² It may also decide to hear two rounds of oral arguments. In contrast, when the proceedings are urgent or time constraints so require, the Court may dispense with public hearings completely. There is no obligation for participants who have communicated written observations to take part in the oral hearings. Advisory proceedings may therefore follow an adversarial procedure in all but name. It is true that there are technically no "parties" to a case, States do not appoint "agents" to present their views, and oral arguments are not "pleadings" (all these terms are used only in contentious cases), yet, in practice, advisory proceedings may be conducted in a manner that resembles very closely the modalities followed in contentious cases.¹³

¹¹ There seems to be no theoretical obstacle to a State submitting written observations on behalf of a regional group. In the *Wall* case (2004), Ireland, ensuring the rotating European Union Presidency at the time, filed a written statement on behalf of the European Union.

¹² The length of oral hearings depends on the number of entities that indicated their intention to make statements. Participants normally have between 45 minutes and one hour to make oral statements. The judges may ask participants to provide written answers to questions they pose during the oral hearings. To date, there has been only one case in which no hearings were held because no State had requested to be heard by the date fixed for the hearings.

¹³ There is no uniform pattern regarding the order of speaking in the public hearings but the representative of the chief administrative officer of the requesting organization has always addressed the Court first. Representatives

22. Under Article 106 of its Rules, the Court may, in the course of the proceedings, make accessible to the public the written statements and any annexed documents. As a matter of practice, as soon as the oral proceedings begin, the Court makes public these documents by posting them on the Court’s website.¹⁴

A.1.5 Urgent requests

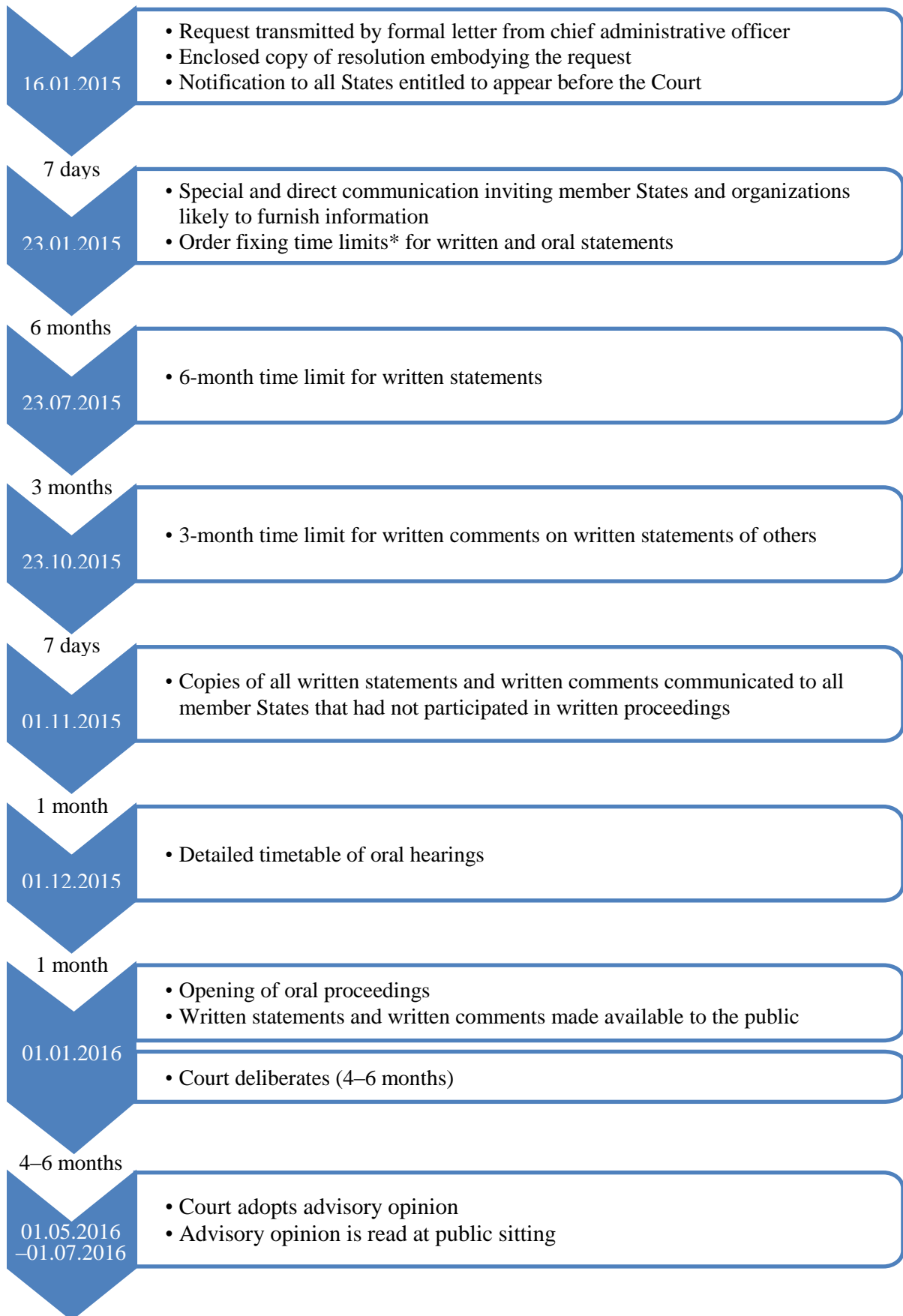
23. Article 103 of the Rules provides that “when the body authorized by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer ... the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request”.¹⁵ The need for expeditious advice is examined by the Court on a case-by-case basis and there are no specific provisions in the Court’s Rules on how it may accelerate the proceedings. When the Court recognizes the urgency of a particular request, it normally fixes short time limits for both the written and the oral phase of the procedure, which permits the Court to give its opinion within an average period of seven months. However, the Court has not so far dispensed with written or oral proceedings in urgent advisory cases.

of requesting organizations normally limit their interventions to providing background information or general explanations on the secretariat’s point of view.

¹⁴ The practice as to the number of written observations and oral interventions that the Court has to consider varies considerably. In the *Wall* case (2004), the Court received written observations from 48 entities and heard oral arguments from 15 of them; In the *Nuclear weapons/UN* case, it received 28 written statements and heard 21 oral arguments; while the corresponding figures in the *Kosovo* case were 35 and 29 respectively.

¹⁵ For instance, requests for urgent answers were made in the *Wall* case (2004), the *Nuclear Weapons/UN* case (1996) and the *WHO/Egypt* case (1980). At times, no specific reference is made to Article 103, but the opinion is asked to be delivered “urgently”, “on a priority basis”, “at an early date”, or “taking into account the time constraint”.

Possible timetable of International Court of Justice advisory proceedings



* Time limits could be shortened by half in the case of urgent proceedings.

A.1.6 Public reading of the advisory opinion

24. The Court delivers its opinion in a public sitting. Currently, the reading of the opinion is retransmitted live on the Court's website. In a more or less standardized format used in contentious and advisory cases alike, the text of an advisory opinion contains the composition of the Court, a summary account of the proceedings, the various positions and arguments, and in the final paragraph, known as *dispositif*, the Court's response to the question(s) asked. The opinion further indicates the judges who voted for and against the Court's main findings and also names the judges who appended separate or dissenting opinions. After the announcement of the opinion, one copy duly signed and sealed is placed in the archives of the Court, another is sent to the United Nations Secretary-General and a third is transmitted to the chief administrative officer of the organization that requested the opinion.

A.1.7 Legal effect of an advisory opinion

25. Advisory opinions are neither final nor binding, as those terms are used in Articles 59 and 60 of the Court's Statute with respect to contentious cases.¹⁶ However, advisory opinions may be accepted as binding through specific Conventions or acts of international organizations. For instance, advisory opinions relating to the review of judgments of the ILO Administrative Tribunal are binding under Article XII of the Tribunal's Statute. Similarly, Article IX (section 32) of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies provides that should a difference arise between a specialized agency and a member concerning the interpretation or application of the Convention, a request shall be made for an advisory opinion on any legal question and "the opinion given by the Court shall be accepted as decisive by the parties". Be that as it may, the Court has consistently pointed out that such clauses do not affect the nature of the Court's advisory function, nor do they affect the reasoning by which the Court forms its opinion or the content of the opinion itself. The Court has always drawn a distinction between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute to an advisory opinion (*Immunity from Legal Process*, 1999, para. 25).

¹⁶ As the Court has stated in several cases, "these opinions are advisory, not binding [and] are intended for the guidance of the United Nations" (*Privileges and Immunities*, 1989, para. 31).

Advisory proceedings: What and how

- The advisory jurisdiction of the Court is open to the United Nations General Assembly, the Security Council and the specialized agencies so authorized by the General Assembly.
- The request for an advisory opinion must be based on a decision of the executive organs of the organization concerned containing the question to be asked to the Court.
- The request must be accompanied by a dossier containing all the background documents that, in the view of the organization concerned, should be brought to the knowledge of the Court.
- Advisory opinions do not intend to settle inter-State disputes but to give legal advice to the organization that initiated the request.
- In advisory proceedings, the Court's main focus is to collect all relevant information.
- The Court has shown that it is prepared to solicit the participation of non-governmental organizations, or other non-State actors, if (a) this is in the interest of obtaining the most accurate and factual information possible, or (b) the special circumstances of the case at hand so necessitate.
- Advisory proceedings consist of written submissions – including comments on the submissions of other participants – and oral hearings, which represents some form of an adversarial process.
- The Court is prepared to expedite the advisory proceedings, if expressly requested to do so.

26. Even though advisory opinions have no binding force, nor do they produce the effects of *res judicata*, they reflect the moral authority and eminence of the International Court of Justice and as such they carry important legal weight. It should be recalled that certain advisory opinions contain judicial pronouncements of major significance and are viewed today as milestones in the development of international law, such as the 1951 *Genocide* opinion in relation to the concept of peremptory norms of international law imposing obligations *erga omnes*; the 1949 *Reparation for Injuries* opinion with regard to the capacity of intergovernmental organizations to bring international claims; the 1962 *Certain Expenses* opinion for the broad interpretation of the functions and powers of the General Assembly, including in matters relating to the maintenance of peace and security; and the 1971 *Namibia* opinion in connection with the obligation of States not to recognize an illegal situation resulting from a serious breach of international law.
27. As regards the ILO, it would be difficult to overestimate the importance of the 1922 advisory opinion of the Permanent Court of International Justice concerning the nomination of the Workers' delegate at the third session of the International Labour Conference, which still today stands as the only authoritative guidance on matters relating to representativeness of workers' organizations and on which the Conference Credentials Committee systematically builds its case law. It should also be noted that the rationale underlying article 37 of the ILO Constitution is to recognize the referral to the International Court of Justice as the ultimate recourse in matters of

interpretation disputes and to accept the Court's "decision" as final settlement of any such dispute. It is clear, therefore, that according to the letter and the spirit of the ILO Constitution, advisory opinions obtained from the International Court of Justice are meant to enjoy extra legitimacy and authority for all members of the Organization.

A.1.8 Costs

28. Requests for advisory opinions carry no costs. No provision is made for any administration or Court fees for filing a request with the International Court of Justice. According to Article 33 of the Statute, the expenses of the Court are borne by the United Nations. The budget of the Court is in fact part of the budget of the United Nations. The only expenses relate to the reproduction of all supporting documents in the number of copies required by the Registry, and, indirectly, the travel and subsistence expenses of the representative(s) of the organization that initiated the request who may participate in the oral hearings.

A.1.9 Institutional follow-up

29. The Court has consistently taken the view that the practical utility of the advisory opinion is a matter exclusively for the requesting organ to consider, and that once it has spelled out the law, it is for the body that initiated the request to draw the conclusions from the Court's findings. As stated in a recent case, "the Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion" (*Wall*, 2004, para. 62). In some cases, especially when the decision to request an advisory opinion is made in a highly polarized political context or is a result of a divisive vote, implementing the Court's advice may prove particularly challenging. According to standard United Nations practice, the Secretary-General distributes the advisory opinion to all member States, publishes it in the Official Records and ensures that an appropriate item is included in the agenda of the requesting organ. The Secretary-General may also have to comply with any special instructions included in the resolution embodying the request. In most cases, on receipt of an advisory opinion, the General Assembly adopts one or more resolutions expressing its appreciation to the Court, taking note of the Court's advice and extending recommendations to member States for the implementation of the Court's findings.¹⁷
30. As regards the ILO, in the case of the six advisory opinions delivered at its request, all of them were published in the ILO Official Bulletin and referred to in the Director-General's report to the Conference. They were also given effect, according to the issue concerned, in the subsequent practice of the Organization. For instance, following the Court's advisory opinion relating to the interpretation of the ILO Night

¹⁷ In general, these resolutions reflect full acceptance and utmost respect for the Court's opinion. It is not infrequent, however, that a certain number of States vote against these resolutions and do not accept to comply with the judicial pronouncements of the Court, in which case the advisory opinion is seriously weakened and basically leaves the divisive issue at the origin of the request unresolved.

Work (Women) Convention, 1919 (no. 4), the Governing Body decided in 1933 to propose the revision of the Convention that was eventually adopted by the Conference in 1934.¹⁸

A.2 Object of the request for an advisory opinion: Jurisdiction and admissibility

31. When seized of a request for an advisory opinion, the Court first considers whether it has *jurisdiction* and also whether there is any reason why in its *discretion* it should decline to exercise such jurisdiction. As the Court has said: “The Court cannot exercise its discretionary power if it has not first established that it has jurisdiction in the case in question: if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise” (*Nuclear Weapons/WHO*, 1996, para. 14).

A.2.1 The Court’s jurisdiction to examine a request for an advisory opinion

32. The Court has consistently pointed out that it is a precondition of its competence that the advisory opinion be requested by an organ duly authorized to seek, that it be requested on a legal question, and that the question should be one arising within the scope of the activities of the requesting organ (*Wall*, 2004, para. 14; *Kosovo*, 2010, para. 19).
33. With respect to the legal nature of the question, the Court has remarked that questions framed in terms of law and raising problems of international law are by their very nature susceptible to a reply based on law and appear to be questions of a legal character (*Nuclear Weapons/UN*, para. 13). The jurisprudence of the Court confirms that the term “legal question” is not to be interpreted narrowly and that the Court may give an advisory opinion on any legal question, whether abstract (*Conditions for Admission*, 1948, p. 61) or even purely academic or historical (*Western Sahara*, 1975, paras. 18–19).
34. The Court has observed on several occasions that the fact that a question has political aspects (as, in the nature of things, is the case with so many questions that arise in international life) does not suffice to deprive it of its character as a legal question (*Kosovo*, 2010, para. 27; *Wall*, 2004, para. 41). It has further considered that the political nature of the motives that may be said to have inspired the request, and the political implications that the opinion given might have, are of no relevance in the establishment of its jurisdiction (*Nuclear Weapons/UN*, para. 13). The Court has even taken the view that in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate (*WHO/Egypt*, 1980, para. 33).

¹⁸ See *Minutes of Governing Body*, 64th Session (1933), p. 20; and ILC, 18th Session, *Record of Proceedings* (1934), pp. 196, 202.

35. The Court has also taken the view that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction and recalled, in this respect, that the Court has often been required to broaden, interpret and even reformulate the questions put (*Wall*, 2004, para. 38; *Kosovo*, 2010, para. 50).
36. In establishing its jurisdiction, the Court must ascertain not only that the request for an advisory opinion relates to a legal question but also that the question arises within the scope of the activities of the organization requesting the advisory opinion. To date, there has been only one case in which the Court has declined to give the requested opinion, estimating that the question asked fell outside the competence of the organization concerned and that therefore “an essential condition of founding its jurisdiction was absent” (*Nuclear Weapons/WHO*, 1996, para. 31).¹⁹

A.2.2 The Court’s discretionary power to refuse to give an advisory opinion

37. As to the Court’s discretion to decline to reply to a question put to it based on considerations of judicial propriety, the Court’s consistent position is that while enjoying a wide margin of appreciation in this respect, it is mindful that it should not, in principle, refuse to give an advisory opinion, and that only compelling reasons could lead it to such a refusal (*Nuclear Weapons/UN*, para. 14; *Wall*, 2004, para. 43). In fact, there has never been a refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the International Court of Justice.
38. In recent cases, the Court has not accepted as compelling reason any of the arguments raised in support of the view that the Court should decline to give an advisory opinion. The Court dismissed, for instance, arguments concerning the motives behind the request; the vague or abstract nature of the question asked; and the fact that the opinion might adversely affect ongoing negotiations, could impede a negotiated solution, or would lack any useful purpose. In this respect, the Court has made clear that it is for the organ that requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions (*Wall*, 2004, para. 62; *Kosovo*, 2010, para. 34).

¹⁹ While reaffirming that international organizations enjoy “implied powers” (that is, powers conferred by necessary implication as being essential to the performance of their duties), the Court recalled that specialized agencies were autonomous organizations invested with sectoral powers and responsibilities. Those responsibilities, however, were necessarily restricted to the sphere of specialty of the organization concerned (for instance, public health in the case of WHO) and could not encroach on the responsibilities of other parts of the United Nations system.

Object of the request: Key points

- The question put to the Court must be legal in nature.
- The question must be directly related to the activities of the requesting organization and must refer to issues falling within its sphere of competence or speciality.
- The fact that the question may have political dimensions, or is abstract or unclear, does not, in principle, suffice for the Court to decline to give an opinion.
- The Court may reformulate or interpret the question, as it may deem appropriate, for the purposes of rendering its opinion.

A.3 Participation of international employers’ and workers’ organizations in advisory proceedings

39. The question whether the social partners could participate in the advisory proceedings has been central to the debate about the possible referral of a dispute regarding the interpretation of a Convention to the International Court of Justice.²⁰
40. The uncertainty stems from Article 66(2) of the Statute of the Court, which provides that “the Registrar shall ... notify any state entitled to appear before the Court or international organization considered by the Court ... as likely to be able to furnish information on the question, that the Court will be prepared to receive ... written statements, or to hear ... oral statements relating to the question”. Indeed, the term “international organization” under this article of the Statute has been applied by the Court narrowly with the principal aim of excluding the participation of non-governmental organizations. In 1996, in the context of the *Nuclear Weapons* advisory proceedings, the Court received a high number of unsolicited submissions from non-governmental organizations, and as a result it adopted in 2004 Practice Direction XII, which suggests that the terms “international organization” and “intergovernmental organization” are co-extensive.²¹

²⁰ In 1993, an Office paper on the interpretation of international labour Conventions noted that “there is probably good reason to consider that it is even more important, in order to ensure that the specificity of the Organisation and of international labour Conventions is taken adequately into account at the Court, to ensure appropriate access for the social partners to enable them to assert their interests and intentions, than to be concerned with the methods and principles of interpretation that may be applied at the Court”; see GB.256/SC/2/2, para. 48. The same document indicated, however, that “it is unclear whether, in the current context of the Statute of the International Court of Justice the term ‘international organization’ could continue to be given such a wide interpretation as to enable international employers’ and workers’ organizations to be consulted and heard directly” (ibid., para. 42).

²¹ Practice Direction XII further provides that “where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file [and] will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.” It has been suggested, however, that a recourse to the *travaux préparatoires* of Articles 66 and 67 of the Statute leads to the conclusion that the

41. However, it is highly unlikely that the Court applies the same narrow interpretation of the term “international organization” in relation to the possible participation of international employers’ and workers’ organizations in advisory proceedings initiated by the ILO. In fact, there are good reasons to believe that the Court may decide to invite a limited number of international employers’ and workers’ organizations to participate autonomously in such proceedings.
42. First, as a matter of established practice, numerous international employers’ and workers’ organizations were permitted to submit information in relation to advisory proceedings initiated by the ILO at the time of the League of Nations. In fact, Article 66(2) of the Statute reproduces Article 73 of the Revised Rules of the Permanent Court of International Justice – the precursor to the International Court of Justice – pursuant to which employers’ and workers’ organizations were allowed to participate in advisory proceedings initiated by the ILO in the period 1922–1932.²² As the Court’s President Loder put it at the time, practice had created a precedent of admitting great industrial organizations, whether of workers or of employers, which would be difficult to exclude owing to their very great importance, although admittedly these great organizations were at any rate indirectly recognized as constituting elements of the ILO.²³

omission of the word “public” in these provisions was deliberate, and was designed to include also non-governmental international organizations among the entities that could have access to the Court in advisory proceedings and furnish information if the Court so wishes. See E. Jiménez de Aréchaga, “The participation of international organizations in advisory proceedings before the International Court of Justice”, in *Comunicazioni e Studi* (1975, Vol. 14), p. 419.

²² In 1922, in the advisory opinion concerning the *Designation of the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference*, the Court invited the International Association for the Legal Protection of Workers, the International Federation of Christian Trade Unions, and the International Federation of Trade Unions. In the advisory proceedings relating to the *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, the Court invited the following six organizations to participate: the International Federation of Agricultural Trade Unions, the International League of Agricultural Associations, the International Federation of Christian Trade Unions of Landworkers, the International Federation of Landworkers, the International Federation of Trade Unions, and the International Association for the Legal Protection of Workers. In the 1926 advisory opinion on the *Competence of the International Labour Organization to Regulate Incidentally the Personal Work of the Employer*, three organizations were permitted to participate: the International Organization of Industrial Employers, the International Federation of Trade Unions and the International Confederation of Christian Trade Unions. It is indicative that the third annual report of the PCIJ, published in 1927, contains a list of the international organizations permitted to submit information to the Court under Article 73 that consists almost entirely of international trade unions; cited in D. Shilton, “The participation of nongovernmental organizations in international judicial proceedings”, in *American Journal of international Law* (1994, Vol. 88), p. 623.

²³ Cited in Y. Ronen, “Participation of non-State actors in ICJ proceedings”, in *The Law and Practice of International Courts and Tribunals* (2012), p. 88. It has been suggested that the reason for this “preferential” treatment of the ILO may have been the specific provision in the ILO Constitution designating the Court as a dispute settlement forum with respect to complaints of non-observance of ILO Conventions and their interpretation – “a special invitation to the Court to take up requests for advisory opinions. If the Court wished to respond to this invitation affirmatively and fulfil the role assigned to it in a persuasive manner, it could not disregard the *modus operandi* of the ILO” (ibid., p. 93).

43. Second, recent case law supports the view that the Court is prepared to open up its advisory proceedings to actors – other than States and international intergovernmental organizations – every time the participation of such actors is substantively and procedurally essential considering the concrete context of the case, in light of considerations of fairness and justice, but also bearing in mind the need to obtain the fullest information possible.
44. In 2003, for instance, the United Nations General Assembly asked the International Court of Justice to give an advisory opinion on the consequences of the construction by Israel of a wall in the Occupied Palestinian Territory. In authorizing Palestine to submit a written statement and to take part in the hearings, the Court took into account, among other considerations, “the fact that [Palestine] is co-sponsor of the draft resolution requesting the advisory opinion” (*Wall*, 2004, para. 4). Similarly, in 2007, when the General Assembly requested the Court to give an advisory opinion on whether the unilateral declaration of independence by the provisional institutions of self-government of Kosovo was in accordance with international law, the Court decided to invite the authors of the declaration to participate in the written and oral proceedings “taking into account the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion [and therefore] the authors of the above declaration are considered likely to be able to furnish information on the question” (*Kosovo*, 2010, para. 3).
45. The same case law seems to confirm that the Court is open to the participation of entities that are directly interested in a dispute and likely to be affected by the outcome of the proceedings; they are also likely to provide information that may not be available to the Court otherwise.²⁴
46. In any event, it is now widely recognized that the Court adopts a pragmatic approach so as to ensure that all interests at stake can be expressed, and shows a certain flexibility to hear actors other than States.²⁵ It is also commonly admitted that in the case of the ILO, the potential for participation of non-State actors in advisory opinions on the basis of prior practice is particularly pronounced, as industrial organizations

²⁴ It is important to note, in this respect, that in the oral hearings of the *Wall* and *Kosovo* proceedings, the representatives of Palestine and the authors of the declaration of independence of Kosovo were listed first and second respectively in the list of speakers and were allocated three hours for their oral statements, four times longer than other participants.

²⁵ See, for instance, Pierre-Olivier Savoie, “La CIJ, l’avis consultatif et la fonction judiciaire: entre décision et consultation”, in *Canadian Yearbook of International Law* (2004), p. 71. In the words of another commentator, “at least in cases in which non-governmental organizations enjoy international legal rights and duties – from employers’ and employees’ organizations in the ILO Statute to the ICRC in international humanitarian law – the Court may consider allowing those organizations to furnish information”; see Andreas Paulus, “Article 66”, in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A commentary* (2006), pp. 1435, 1440.

are represented within the ILO's tripartite structure and may therefore be regarded as constituting elements of the Organization.²⁶

47. Finally, it should be noted that irrespective of whether the Court would grant permission to any international employers' and workers' organizations to participate autonomously in the proceedings, the Office could include in the dossier to be submitted together with the request any briefs, position papers or other documents that the Employers' and Workers' groups might wish to bring to the knowledge of the Court. In any event, failing direct invitation by the Court, nothing prevents employers' and workers' organizations from submitting their views as uninvited briefs. Moreover, it cannot be excluded that in preparing their written statements some member States may consult national employers' and workers' organizations and properly reflect their views as part of the information communicated to the Court.

A.4 Current situation: Drafting the question

48. In formulating the question that the Governing Body might decide to ask the Court in connection with the current dispute on the right to strike and the mandate of the Committee of Experts, it would be important to take into account the following parameters: (a) the question needs to capture all the different aspects of the ongoing controversy for which legal advice is sought; (b) it must give expression in a direct and concise manner to the differing views expressed; (c) it must be clearly worded so as to limit the need for the Court to engage in its own interpretation of the question; and (d) it should be susceptible of an unequivocal answer that gives immediate, practical guidance to ILO organs as to the limits of their action in matters covered by the request.
49. There are clearly two questions that dominate the relevant discussions: (1) the substantive question as to whether the Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), can be interpreted as protecting the right to strike; and (2) whether the Committee of Experts' mandate gives it the authority to make such interpretations and, if so, whether such interpretations can go beyond general principles by specifying certain details regarding the application of the principle. It would appear that both of those questions need to be answered to settle the current dispute and create the legal certainty necessary for the supervisory system to fully function again. It also appears appropriate to formulate the two following questions separately:
- (1) Is the right to strike of workers and their organizations protected under the ILO Constitution and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?

²⁶ See Ronen, *op. cit.*, pp. 88–89.

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

B. Article 37(2): Setting up a permanent in-house tribunal

50. This section aims to outline a concrete structure set up within the Organization for the expeditious determination of disputes or questions relating to the interpretation of ILO Conventions. To this effect, the Office drew upon earlier discussions and consultations on the subject,²⁷ and undertook a comprehensive review of the structure of major international courts and tribunals in operation.²⁸
51. The following paragraphs provide a commentary to the draft Statute of a tribunal established in accordance with article 37(2) of the Constitution and describe the elements necessary for the operation of an independent tribunal that enjoys the support of the tripartite ILO constituency and adequately reflects the specificities of ILO Conventions. Combining expeditiousness and cost-efficiency, the tribunal is designed as a readily available on-call body that may be activated only when a question or dispute is referred to it.
52. The Statute would first need to be examined and agreed upon by the Governing Body before being submitted to the Conference for approval. The same procedure would apply to any amendment to the Statute. Given that this procedure derives from the text of article 37(2), it is not deemed necessary to include specific provisions in the Statute regarding amendments.

²⁷ See, in particular, GB.256/SC/2/2, GB.256/PV(Rev.); Non-paper on interpretation of international labour Conventions (February 2010); Informal exploratory paper on interpretation of international labour Conventions (October 2010); Summary note concerning the Informal Tripartite Consultations Process launched by the Governing Body (November 2011). Copies of these documents are found at <https://www.ilo.org/public/english/bureau/leg/art37.htm>.

²⁸ The statutes and rules of procedure of the following courts and tribunals were consulted: International Court of Justice; International Tribunal for the Law of the Sea; International Criminal Court; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; Inter-American Court of Human Rights; European Court of Human Rights; African Court on Human and People's Rights; ILO Administrative Tribunal. Other relevant documents included the World Intellectual Property Organization Arbitration and Expedited Arbitration Rules, the Agreement establishing the World Trade Organization (WTO), the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, and the UNCITRAL Arbitration Rules.

B.1 The tribunal

B.1.1 Establishment

53. The tribunal would be established under the authority provided by article 37(2) of the ILO Constitution. It is proposed that its seat be the International Labour Office in Geneva. This would both minimize operation costs and facilitate the protection of the tribunal's status and necessary immunities, including the inviolability of its archives.

B.1.2 Competence

54. As set out in article 37(2), the tribunal would be competent to determine any question or dispute relating to the interpretation of an ILO Convention referred to it by the Governing Body or in accordance with the terms of the Convention.²⁹ To date, no international labour Convention provides for such referral but consideration could be given to drafting an appropriate standard clause to be included in future instruments in case an article 37(2) tribunal is established.
55. Referral of an interpretation dispute or question to the tribunal should not be viewed as a precondition to the submission of a request for an advisory opinion to the International Court of Justice. Both mechanisms would be available to address questions and disputes, the choice depending on the nature and importance of the subject matter. While the Organization should opt for the International Court of Justice to address a broader variety of legal matters, including matters of a constitutional nature, the in-house tribunal, once established, would afford a more technically specialized mechanism tailored to the expeditious determination of specific, and possibly less sensitive, interpretation requests.
56. It has been long argued that ILO Conventions have specificities that should be borne in mind in an interpretation exercise. The question has also been raised whether the general rules of treaty interpretation, as embodied in the Vienna Convention on the Law of Treaties, 1969, meet entirely the special features of international labour Conventions, and in particular the unique role of employers' and workers' organizations in the adoption process. In this regard, it should be recalled that Article 5 of the Vienna Convention recognizes that the rules of the Convention apply "to any treaty adopted within an international organization without prejudice to any relevant rules of the organization". The proposed Statute thus requires the tribunal to bear in mind the specificities of ILO Conventions as international treaties. This acknowledges the importance of giving full consideration to the tripartite process followed for the adoption of international labour Conventions.

²⁹ The terms "question" and "dispute" are used interchangeably to cover any interpretation issue that might be the subject of a request referred to the tribunal.

B.1.3 Composition

57. In order to ensure a suitable composition for the tribunal, the draft Statute sets out a number of requisites for judges based on common requirements found in the statutes of other international courts and tribunals. First, the elementary qualities required of any adjudicator: high moral character and independence. Second, sufficient professional qualifications such as those required for appointment to [high] judicial offices or necessary to be considered a jurist of recognized competence. Third, adequate competence on the subject matter, in particular, demonstrated expertise in labour law and international law. Fourth, fluency [proficiency] in one of the official languages of the tribunal (English, French and Spanish) and passive [working] knowledge of another official language.
58. As is the case in most tribunals and with a view to facilitating decision-making, questions or disputes referred to the tribunal would need to be examined by an odd number of judges. While three judges would be the minimum necessary, a larger odd number, such as five, would seem advisable given the authority required to determine the interpretation of an ILO Convention, which may have been the subject of long-standing comments by supervisory bodies or of widely differing views by constituents. Furthermore, as it may happen that the tribunal remains inactive for a certain period of time, it cannot be expected that all judges will be immediately available at any given time to participate in full-time proceedings at short notice. Consequently, it would be advisable to appoint a larger number of judges to be able to draw from whenever a referral is made by the Governing Body.
59. It is therefore proposed that [twelve] judges be appointed to the tribunal and that each request for interpretation be handled through a smaller panel of five judges. This structure would provide several advantages. First, a five-member panel and the diversity it encompasses would endow the tribunal with adequate authority, greater than that of three adjudicators. Second, a group of five judges would still be small enough so that it would not entail large costs nor undue complexities, in particular given that the tribunal would only be in session if a referral were made to it and its members would need to be rapidly engaged and deliberate efficiently. Third, bearing in mind the [on-call] nature of the tribunal, the availability of [seven] additional judges would facilitate the swift constitution of a panel, and any replacements needed during the process. Having a larger number of judges appointed would not entail any additional cost to the Organization. Moreover, it would ensure the expeditious and continued operation of the tribunal, which would not be compromised nor delayed should vacancies occur. Fourth, a panel of five judges would allow for a quorum and minimum majority for awards that combines both practicability for the expeditious conduct of proceedings and adequate support for final decisions (see section B. 2.8).
60. Finally, it is proposed that its composition demonstrate to the greatest extent possible gender balance, representation of the principal legal systems and geographical distribution. It is also suggested that judges should be of different nationalities. These

are standard criteria found in many constitutive texts of existing international courts and tribunals.

B.1.4 Selection and appointment

61. It is foreseen that members of the tribunal be appointed by the International Labour Conference for a period of [six] years. This would be consistent with the general principle that an adequate length of appointment safeguards the independence of adjudicators. Moreover, it seems both efficient and fully consistent with the nature of an article 37(2) tribunal. Given its uncertain workload and possible inactivity for prolonged periods, it would be advisable not to overburden the Conference and the Governing Body with carrying out the selection and appointment procedure at short intervals.
62. The Director-General would be responsible for submitting to the Officers of the Governing Body a proposed list of nominations that would ensure (a) that candidates conform to the qualifications and expertise requirements; and (b) that the composition of the tribunal reflects to the largest extent possible the above-mentioned criteria of gender balance, representation of legal systems and geographical distribution. In this connection, the Director-General may receive suggestions or proposals from any member of the Governing Body and shall consider those suggestions or proposals before communicating the proposed nominations to the Officers.
63. The Officers of the Governing Body would subsequently assess the proposed nominations and prepare a proposal for the composition of the tribunal to be submitted to the Governing Body. Where necessary, the Officers could seek the assistance of the Director-General in order to identify additional candidates.
64. The composition proposals of the Officers would need to be approved by the Governing Body for submission to the Conference. All members of the tribunal would thus enjoy, as independent judges, the confidence of the three groups.

B.1.5 Panel constitution

65. Promptly after an interpretation dispute or question is referred by the Governing Body to the tribunal, a five-member panel would be constituted to examine it. In order to determine the composition of the panel, it is proposed to have a default designation mechanism while allowing for ad hoc designations in the case of full tripartite consensus.
66. By default, the five judges would be drawn randomly by the Officers of the Governing Body. To foster rotation, the panel so constituted would not include more than two judges having served in the previous case, unless this were necessary to constitute a full five-judge panel (for example, due to the limited availability of judges). This default mechanism would provide an expeditious and reliable procedure for the constitution of the panel, and avoid a potentially time-consuming decision as to who might be best placed to sit in a particular panel. Moreover, the rule preventing

more than two repeat judges would foster rotation while not rendering predictable the composition of the following panel.

67. Nevertheless, the proposed Statute should also allow for flexibility in the designation mechanism to adapt panel composition where the circumstances would so warrant, subject to tripartite consensus. It is thus proposed to allow the Officers of the Governing Body – based on a unanimous decision – to depart from the default mechanism and designate one or more judges to the panel. It is also provided that this possibility should not unreasonably delay the expeditious constitution of the panel, so that in the absence of a swift and unanimous decision from the Officers, the panel would be constituted in accordance with the default mechanism.
68. Once constituted, the panel would elect its President. The President would have a casting vote (see section B.2.8) and could be entrusted with any function necessary for the expeditious conduct of the proceedings. This could expedite the adoption of procedural decisions, such as on special requests for participation.

B.1.6 Incompatibility

69. In order to safeguard the judges' independence and impartiality, exercising the duties of a judge would not be compatible with being appointed as an ILO official or sitting in any capacity in another ILO body.

B.1.7 Resignation, withdrawal and removal

70. The proposed Statute acknowledges the different circumstances under which the composition of the tribunal may need to be altered, drawing on common rules found in other statutes of international courts and tribunals. Judges may resign at any time by notifying their decision to the Director-General, who would inform the Governing Body in order to launch the procedure to fill the vacancy. Judges should withdraw from any case in which their impartiality might reasonably be doubted for any reason. They should be removed, temporarily or permanently, as the case may be, if they are unable or unfit to exercise their functions. Any question relating to the withdrawal or removal of a judge would be brought forth by the judge concerned or, where necessary, decided by the tribunal.

B.1.8 Replacements and vacancies

71. If a judge needs to be replaced after the panel has already been constituted, for example due to unforeseen circumstances rendering the judge unfit to perform their duties, the replacement method would be the same with that used to constitute the panel. Similarly, the procedure to fill vacancies would be the same one used for the appointment of judges, the duration of appointment being limited to the remainder of the term.

B.1.9 Status

72. Just like members of other special ILO bodies, such as commissions of inquiry, the members of the tribunal would be deemed experts entrusted with a special mission by the Organization, that is the settlement of disputes relating to the interpretation of ILO Conventions. This entails the enjoyment of certain privileges and immunities necessary for the effective exercise of their functions, provided for in Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies. These include, most importantly, the immunity from legal process in respect of words spoken or written, or acts committed, in the performance of their official functions.

B.1.10 Honoraria

73. As is customary in other international courts, provision is made for the payment of compensation for the performance of duties by judges, as well as travel and subsistence expenses for their official meetings. The Governing Body would be granted the authority to approve the rate of such compensation and to update that rate as necessary. The applicable amounts would be reproduced as an annex to the Statute (see section B.3). Bearing in mind the stand-by nature of the proposed tribunal, the underlying principle is that honoraria would be provided only for the eventual participation of judges in a panel. There would be no honoraria linked to the mere appointment of judges, which of course limits the cost implications of the tribunal.

B.1.11 Administrative arrangements

74. The Director-General would be responsible for making administrative arrangements necessary for the operation of the tribunal. Taking into account the fact that the tribunal would only be in session when a dispute or question is referred to it, and in order to avoid fixed costs, it is proposed that no permanent registry should be envisaged. The proposed Statute does not presuppose the existence of any fixed administrative framework, nor the appointment of a registrar, and thus affords the flexibility for the tribunal to operate with minimal cost implications. No provision is made, therefore, for permanent appointments or for new posts related to the functioning of the tribunal.
75. Instead, a number of alternative options can be considered to ensure adequate support for the tribunal's work. For instance, similar to what occurs for commissions of inquiry, ILO staff could be detached as necessary for the provision of any secretarial assistance to the tribunal (for example administrative staff for the support that the tribunal may require). As the tribunal would most likely only hear one case at a time, it may suffice at first to detach, on a part-time basis, one P staff and one G staff member for the duration of the proceedings. Alternatively, the necessary support staff could be appointed ad hoc for the duration of the proceedings. In order to maximize cost-efficiency, it is proposed to provide all support necessary through the part-time detachment of staff members. Considering that tribunal cases could have an estimated maximum duration of [six] months, this would entail no more than [three] work months of a G staff and a P staff member (see section B.3).

76. The proposed Statute also acknowledges that a number of administrative arrangements could be set up to enhance the expeditious and cost-effective operation of the tribunal, in particular through IT means, enabling electronic communications and performance of certain duties remotely by judges. This could include the use of an online electronic platform for efficient transmission of notifications and communications to participants. In this regard, to promote expeditiousness and reduce costs, the tribunal could decide that, unless otherwise requested by the participants, documents be submitted and made available to them in electronic form. Similarly, the use of technological means could allow the members of the tribunal to communicate and perform certain of their tasks remotely, thus limiting the duration and cost implications of their meetings in Geneva.

B.2 Procedure

77. The proposed Statute sets out a procedure that combines the need to ensure tripartite access to the tribunal and the objectives of expeditious settlement and reasonable cost. It also seeks to afford a degree of flexibility to adapt, where necessary, the tribunal's operation to the specific circumstances of the question or dispute referred to it.

B.2.1 Initiation of proceedings

78. While the tribunal is designed to be permanently available to receive and examine an interpretation request, it would only be in session when a question or dispute is referred to it by the Governing Body. Judges would not be expected to carry out any duties, and the tribunal would not be functioning, until a panel is constituted to hear a case.

79. Under article 37(2) of the Constitution, the referral of interpretation-related questions or disputes to the tribunal is a prerogative of the Governing Body. Therefore the Statute does not attempt to define how the Governing Body might assess the appropriateness of referring a particular matter to the tribunal. In assessing whether to make an interpretation request, the Governing Body may consider all practical, legal and political circumstances it deems pertinent, such as whether the matter has already been the subject of comments by an ILO organ or by another body; the nature of the interpretative question or dispute and its implications, including in relation to the ILO supervisory system; whether any requests for clarification have been made and by whom; and the usefulness of obtaining an authoritative interpretation.

80. The proposed Statute does not regulate either how the consideration of a question or dispute could be brought before the Governing Body. It would be difficult to anticipate all possible scenarios, while the Standing Orders of the Governing Body already provide for an adequate tripartite framework, in particular through the screening group.³⁰ Several courses of action can, nevertheless, be envisaged as to how

³⁰ See section 3.1 of the Standing Orders of the Governing Body and paragraphs 28 to 34 of the Introductory Note to the Compendium of Rules applicable to the Governing Body.

a question or a dispute might be brought before the Governing Body for possible submission to the tribunal. For example, the ILO supervisory bodies, in particular the Committee of Experts on the Application of Conventions and Recommendations or the Conference Committee on the Application of Conventions and Recommendations, may in their respective reports express the view that the Governing Body should refer a specific matter to the tribunal. Consideration of an interpretation issue could also be included in a session of the Governing Body by the screening group, whose mandate to draw up the agenda of the Governing Body would allow the matter to be introduced whenever it was deemed suitable. Moreover, the Governing Body itself could decide to include in its agenda an item on a possible referral to the tribunal. Furthermore, in case of urgency, the existing rules allow the Officers, following consultations with the other members of the screening group, to include in the agenda of the Governing Body matters of urgent importance that may arise either between or during sessions. In short, existing procedures applicable to Governing Body agenda setting provide an adequate and comprehensive framework, which safeguards the discretionary power of the Governing Body and its flexibility in considering requests for interpretation.

81. When referring a request for interpretation, the Governing Body should agree on the question to be communicated to the tribunal. The accompanying documents would be provided to it by the Director-General. Once the tribunal is seized of a request, in the interest of preserving the coherence of the ILO supervisory system, the proposed Statute provides for the suspension of consideration of all cases before ILO supervisory bodies relating to the question or dispute concerned. However, it also allows for the Governing Body to decide otherwise in the light of particular circumstances.

B.2.2 Participation in proceedings

82. In keeping with the ILO's tripartite structure, the tribunal proceedings need to allow for full tripartite participation. It is proposed that participation rights be granted to the governments of all member States of the ILO, to Employers' and Workers' members of the Governing Body and to organizations enjoying general consultative status.³¹ The tribunal or the Governing Body could also invite other organizations or persons to participate in the proceedings. For example, in a case where the request for interpretation concerns a technical or sectoral matter, the Governing Body could provide for the participation of the international employers' and workers' organizations directly concerned. The Governing Body could also transmit invitations to international organizations, such as the United Nations, specialized agencies, or regional organizations, having an interest in the matter referred to the tribunal. Where appropriate, the Governing Body could consider granting standing invitations to certain organizations.³²

³¹ See Compendium of Rules applicable to the Governing Body, Annex V.

³² For example, relevant public international organizations, or non-governmental international organizations enjoying regional consultative status or included in the Special List.

83. In addition, similarly to the statutes of other courts allowing for interested parties to request participation, it is proposed that international intergovernmental or non-governmental organizations, in particular employers' and workers' organizations, having an interest in the question or dispute should be allowed to submit a request to the tribunal to participate in the proceedings. It is also proposed to ensure flexibility by affording the tribunal sufficient discretion to decide on whether to grant such participation, and to fix the relevant conditions. Finally, the proposed Statute also acknowledges that participation may be exercised collectively. This could contribute to the expeditious determination of the interpretation request.

B.2.3 Conduct of proceedings

84. The draft Statute seeks to ensure the expeditiousness of the proceedings by means of two types of provisions: first, provisions on general time limits, which would apply automatically so that judges do not need to take administrative or procedural decisions; and second, provisions calling upon the tribunal to make orders for the expeditious conduct of the proceedings, including with regard to the form and volume of written submissions or the length of oral presentations. Time could also be gained through the extensive use of IT means, for example the posting of all procedural notifications and communications on a dedicated web page.

85. Based on a comparative analysis of the time schedule provided for under the statutes of other courts and tribunals, it could be reasonably expected that proceedings not exceed [six] months from the date the Governing Body submits a formal request for interpretation to the date the tribunal delivers its award.³³ This is the default time frame foreseen in the proposed Statute. If a specific question or dispute required a different time frame, for instance in the light of the complexity of the subject matter, or proceedings were delayed, for instance due to the withdrawal or replacement of one or several judges, it should be possible for the Governing Body or the tribunal to adapt time limits accordingly.

86. It is proposed that the official languages of the tribunal be the official languages of the ILO – English, French and Spanish. Written and oral submissions may be made in any of the official languages. Simultaneous interpretation in the three official languages would be provided during the oral hearings. However, limiting the official languages to the two authentic languages (English and French) of ILO Conventions that will be the object of interpretation requests would significantly reduce the cost and length of proceedings (see section B.3).

87. The proposed Statute is sufficient for the tribunal to be fully operational. However, it is likely that, once in operation, the members of the tribunal may wish to further regulate its functioning and procedure in the form of more detailed rules. It is

³³ For example, under the WTO Dispute Settlement Understanding, Annex II, the panel must issue its reports within 6 months (Article 12.8) and the Appellate Body must circulate its report within 60 days (Article 17.5). The WIPO Expedited Arbitration Rules provide that the final award must be made within 4 months (Article 56), while under the ICC Arbitration Rules the final award must be rendered within 6 months (Article 30).

proposed, therefore, that the Statute should provide for the possible adoption of rules of procedure. These would draw upon suggestions by the judges and practical experience. The adoption of rules of procedure, a common practice in most international courts and tribunals, would allow the Statute to be complemented with respect to the detailed aspects of procedure or organization of the tribunal, without the need to formally amend the Statute and go through the approval of the Conference.

B.2.4 Phases of proceedings

88. Most statutes of international courts and tribunals provide for both written and oral phases. Although an oral phase could increase the length and cost of the proceedings, the views expressed during earlier discussions have emphasized the need to ensure the adversarial character of the proceedings and thus hold oral hearings. However, in some instances, the exchange of written statements may provide sufficient opportunity for a comprehensive debate, as all participants would have access to the submissions of others and would have the opportunity to make comments. It is suggested, therefore, that the procedure should consist of written proceedings followed by oral hearings, unless the tribunal were to decide otherwise (for example, if it deemed that the latter would not provide a useful contribution to the examination of the case).

B.2.5 Notification and written proceedings

89. As a general principle, the draft Statute provides that requests for interpretation should be notified to all participants entitled to take part in the proceedings. Notification would allow to ensure that all participants are aware of the opening of the proceedings and, if the tribunal so decides, of the time limit to submit written statements. In the absence of a specific time limit, the Statute provides for a default time limit of 45 days.
90. In order to ensure an effective exchange of arguments and thus enhance the adversarial character of the procedure before the tribunal, the proposed Statute further provides that upon the expiry of the period to submit written statements, the submissions received shall be made available. In accordance with the suggested rule on publicity (see section B.2.7) submissions will normally be made available to the public, unless the tribunal decides otherwise, for example to limit access to other participants only, if special circumstances so warrant. Participants having presented written statements would thus be permitted to comment on the statements of others within the time limits decided by the tribunal. Again, should the tribunal deem it unnecessary to specify a different time limit, the proposed Statute provides for a default time limit of 30 days.

B.2.6 Oral proceedings

91. As noted above, the draft Statute proposes to offer the possibility of holding oral hearings, unless the tribunal decides otherwise. Should it decide to hold oral hearings, the tribunal would fix the dates and form of such proceedings. The draft Statute

provides for a default time frame of five days. This appears to be sufficient to hear the views of all participants authorized to take part in the proceedings and of such other persons as the tribunal may decide to hear (such as experts or other persons who may provide a valuable contribution to the tribunal's expeditious determination).

B.2.7 Publicity

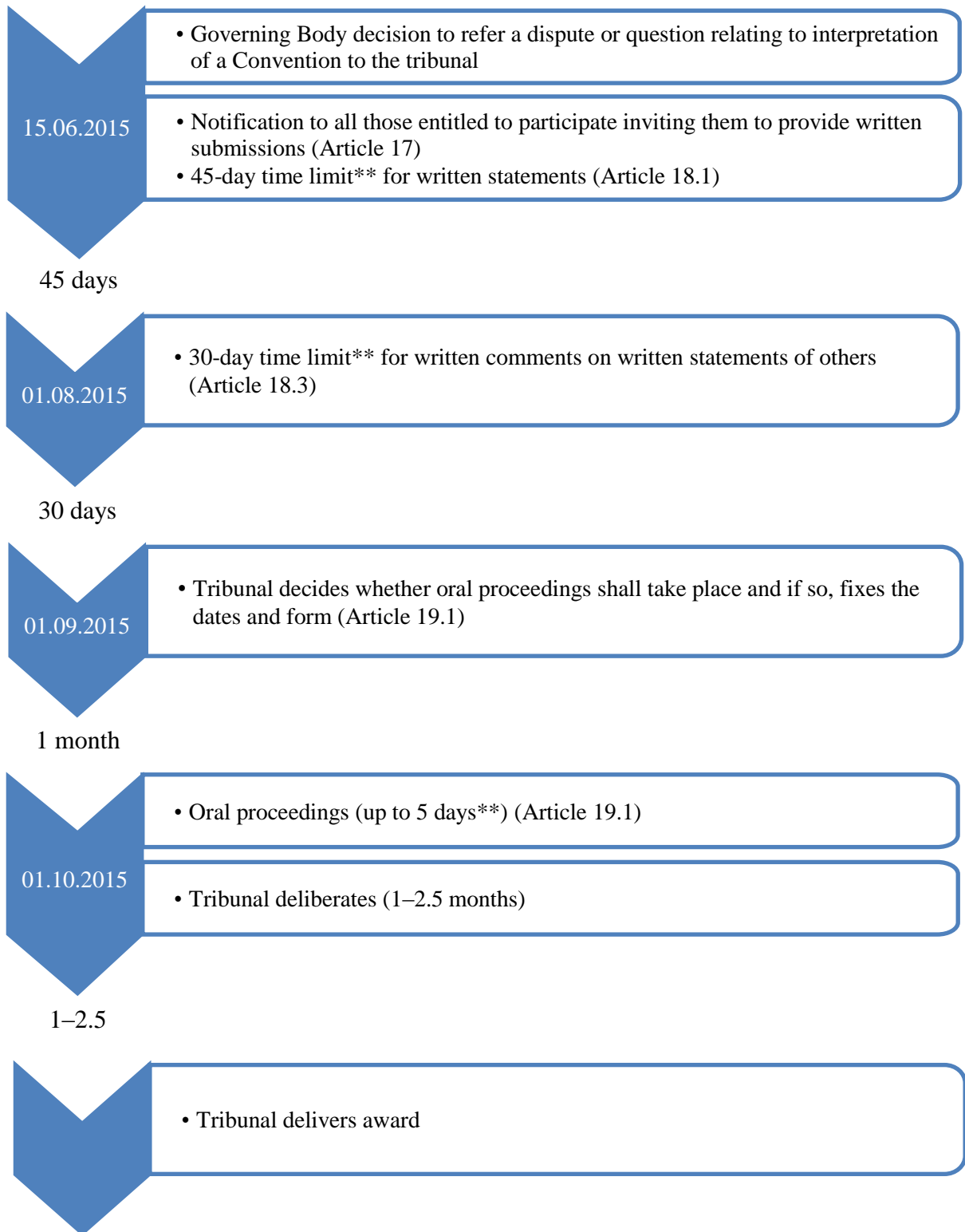
92. The proposed Statute recalls the public nature of the proceedings. Unless the tribunal decided otherwise for specific reasons, documents deposited with the tribunal would be accessible to the public and hearings would be public. This would be consistent with the rules of other courts and tribunals. [Such presumption of publicity is also reflected in the provision on making available the submissions received by the tribunal.]

B.2.8 Adoption of decisions, quorum, effect of tribunal's award

93. A balance is sought between promoting the efficient operation of the tribunal and ensuring that its awards reflect broad agreement among judges to sustain their authority. The Statute thus proposes a quorum of three judges. This applies to any decision relating to the proceedings as well as to the award. All questions would be decided by a majority of the judges present and the President or replacing member would have a casting vote in the event of equality of votes. This approach follows the practice of numerous courts. As to the tribunal's award, it is proposed to require the concurrence of at least three judges.
94. Awards of the tribunal, including any interpretation of specific provisions of an ILO Convention and other judicial pronouncements made in the context of determining the dispute referred to it, would have an authoritative [binding] effect which means that they would be opposable to all, only subject to any relevant judgement or advisory opinion of the International Court of Justice.³⁴ Moreover, as a corollary to the authoritative nature of awards, the proposed Statute requires all ILO organs to give effect to the interpretations provided by the tribunal.
95. As provided for in article 37(2), the tribunal's award would need to be circulated to the Members of the ILO and any observations that they might make thereon would need to be brought before the Conference. This constitutional requirement is closely linked to the binding nature of the award, allowing member States to provide their views and the Conference to consider any follow-up action it deems appropriate (for example, through a discussion as to whether standard-setting action would be necessary as a result of an award).

³⁴ As reflected in the *travaux préparatoires*, the Tripartite Conference Delegation on Constitutional Questions that discussed article 37(2) in 1946 stressed the need for uniformity of interpretation and expressed the view that any award of the tribunal should be binding on all member States. During these discussions, Wilfred Jenks, confirming similar observations made by the constituents, noted that "uniform interpretations were needed, binding on all countries"; see *Official Bulletin* (1946, Vol. XXVII, No. 3, December), p. 768. When the question was raised that the proposed amendment to the Constitution did not specify that the awards would be binding, the chairperson responded that this "would be provided by the rules laid down by the Governing Body"; see *ibid.*, p. 771.

Possible timetable of tribunal proceedings: Estimated duration 4.5 to 6 months *



* The total length cannot exceed 6 months unless specifically requested by the Governing Body or otherwise decided by the tribunal (Article 15.2).

** Default time limits unless the tribunal decides otherwise.

96. Consistent with the spirit of article 37(2), no right of appeal is provided for in the draft Statute, as this would run counter to the expeditious settlement of a question or dispute. However, nothing would prevent the same question or dispute from being submitted to the International Court of Justice.

B.3 Costs

97. Under the proposed configuration of the tribunal, the costs would be kept fairly low. While members of the tribunal would be appointed for a renewable term of six years, they would not receive any honoraria unless selected to sit on a panel. Similarly, support and registry services would be solicited only when needed. Once an interpretation request is referred by the Governing Body to the tribunal, two financial questions would need to be addressed.
98. The first question relates to the payment of appropriate compensation to judges. The Governing Body would need to approve an honorarium amount, which could be calculated either on the basis of time spent or as a lump sum per case. The judges would also need to be provided with a subsistence allowance and travel expenses for their meetings. As to compensation, it is proposed that it be provided on a case basis. While a multiplicity of payment methods abound in international tribunals,³⁵ providing for a fixed amount on a case basis allows for a more standardized calculation of the operational costs of the tribunal. Having assessed the compensation provided by other international tribunals and similar bodies,³⁶ and bearing in mind the likely duration of each case, it is proposed that the amount offered by case, which could be updated as necessary by the Governing Body, be [4,000–7,000] Swiss francs (CHF) per case. This would entail a predictable and reasonable cost and retain the symbolic nature of such compensation.³⁷ As to allowance and travel expenses for their meetings, it is proposed that judges should receive the same treatment and should be subject to the same rules applicable to Governing Body members. An estimate of the

³⁵ For example, the judges of the ILO Administrative Tribunal receive US\$3,000 per decision drafted and US\$750 per decision signed. In the WTO, the Dispute Settlement Body panellists receive 600 CHF per day worked in Geneva and 600 CHF per eight hours of preparation work, while the Appellate Body members receive a monthly retainer fee of 9,031 CHF and a monthly administrative fee of 330 CHF. The judges of the International Court of Justice, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the former Yugoslavia receive a base salary of approximately US\$166,000 and a post adjustment.

³⁶ For example, the compensation of 4,000 CHF that the members of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) receive per session serves as a useful comparison.

³⁷ The compensation of 4,000–7,000 CHF is comparable to the amount received by the ILO Administrative Tribunal judges per decision drafted, the remuneration of the WTO Dispute Settlement Body panellists for two weeks of work, and the honorarium for the CEACR members. The compensation is considerably less than the salary of the International Court of Justice judges and the retainer fee for the WTO Appellate Body members, reflecting the symbolic nature of the compensation.

minimum cost, based on the working hypothesis of two trips from different regions for five judges and a total stay of two weeks in Geneva, is given in table 1.

99. The second financial question concerns administrative costs. As noted above, the aim would be to minimize and, to the extent possible, absorb them within existing Office budgetary allocations. It is proposed that the Office support be provided through part-time detachment of two ILO officials. Assuming that a case would have an average duration of six months, that one staff member at the P4 level and another at G6 level would be sufficient to cover the needs, and that the total time spent on a case would not exceed half of their working hours, the cost for these two positions would not be more than three working months of each staff member per case.³⁸ Other operating expenses, such as any necessary document services, IT infrastructure or archival support, would be absorbed by the departmental budgets of the relevant ILO services. Finally, it is recalled that the operation of the tribunal in all three ILO official languages necessarily implies significant translation and interpretation expenses³⁹ that most likely could not be covered by existing budgetary allocations.

Table 1. Estimated minimum cost per case

Expenses	Calculation	Amount (CHF)
Compensation	[4,000–7,000 CHF per judge] x 5 judges	20,000–35,000
Daily subsistence allowance	[437 CHF per day per judge] x 14 days x 5 judges	30,600
<i>Travel expenses</i>		
Africa	[4,000 CHF per trip] x 2 trips	8,000
Americas	[4,000 CHF per trip] x 2 trips	8,000
Asia	[4,000 CHF per trip] x 2 trips	8,000
Europe	[500 CHF per trip] x 2 trips	1,000
Average of the 4 regions	[3,125 CHF per trip] x 2 trips	6,250
Total per case		81,850–96,850

³⁸ For the current biennium, the standard cost per work month is US\$19,020 for a P4 staff member and US\$13,890 for a G6 staff member.

³⁹ For example, simultaneous interpretation in three languages costs US\$7,000 per day; for the five-day duration of oral hearings, this would amount to US\$35,000. Translation and interpretation costs remain, however, very difficult to estimate as they depend on several variables, such as the number of submissions received and the linguistic capacities of panel members.

Appendix I.

Draft resolution of the ILO Governing Body

The Governing Body,

Conscious that the International Labour Organization is facing a serious [unprecedented] institutional crisis that puts at risk the functioning of the Organization's supervisory system and has over the past three years twice prevented the Conference Committee on the Application of Standards from discharging its responsibilities,

Recalling that at the origin of the deepening controversy lies the decision of one part of the ILO constituency to challenge the long-standing position of the Committee of Experts on the Application of Conventions and Recommendations – last expressed in the 2012 General Survey on the fundamental Conventions – that the right to strike is protected under the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and to affirm that in so doing the Committee of Experts has exceeded its mandate and has improperly engaged in interpretive functions,

Noting that other parts of the ILO constituency maintain to the contrary that the right to freedom of association is commonly understood to include the right to strike, that comments to this effect made not only by the Committee of Experts but also by the tripartite Committee on Freedom of Association remained unchallenged for forty years, and that the findings of these supervisory bodies are now largely echoed in judgments of international human rights courts,

Affirming that the ILO supervisory system that has been in operation for the past eighty-eight years is based on the complementarity of the Committee of Experts and the tripartite Conference Committee on the Application of Standards and is often regarded as being among the most effective in the multilateral system,

Mindful of the need for the ILO to continue to have a strong supervisory system enjoying the support of all parties, and aware that the absence of satisfactory responses to unresolved issues and persistent concerns would damage the functioning and strength of the system,

Recognizing the need to receive authoritative legal guidance from the International Court of Justice as the sole organ that may decide any question or dispute relating to the interpretation of an international labour Convention under article 37 of the ILO Constitution,

Expressing the hope that in view of the ILO's unique tripartite structure, not only governments but also international employers' and workers' organizations should be invited to participate directly and on an equal footing in any procedure aimed at clarifying the current situation,

1. *Decides*, in accordance with Article 96, paragraph 2, of the Charter of the United Nations, article 37, paragraph 1, of the ILO Constitution, Article IX, paragraph 2, of the Agreement between the United Nations and the ILO, approved by the General Assembly of the United Nations on 14 December 1946, and the Resolution

concerning the Procedure for Requests to the International Court of Justice for Advisory Opinions, adopted by the International Labour Conference on 27 June 1949, to request the International Court of Justice to urgently render an advisory opinion on the following questions:

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

Did the Committee of Experts on the Application of Conventions and Recommendations of the ILO have the legal authority to:

- a. determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and
 - b. in examining its application, specify certain elements concerning the scope of this right, its limits and conditions for its legitimate exercise?
2. *Requests* ILO supervisory bodies to suspend the examination of all cases concerning the application of Convention No. 87 in relation to the right to strike pending the advisory opinion of the International Court of Justice.
3. *Instructs* the Director-General to:
- a. transmit this resolution to the International Court of Justice, accompanied by all documents likely to throw light upon the question, in accordance with Article 65, paragraph 2, of the Statute of the Court;
 - b. respectfully request the International Court of Justice to allow for the participation in the advisory proceedings of the employers' and workers' organizations enjoying general consultative status with the ILO;
 - c. respectfully request the International Court of Justice to consider possible steps to accelerate the procedure, in accordance with Article 103 of the Rules of the Court, so as to render an urgent answer to this request;
 - d. prepare, after the Court has given its opinion, concrete proposals to give effect to that opinion;
 - e. inform, as required under Article IX, paragraph 4, of the 1946 United Nations-ILO Agreement, the United Nations Economic and Social Council of this request.

Appendix II.

Draft letter of the ILO Director-General to the President [or the Registrar] of the International Court of Justice

[date]

Dear Mr President,

I wish to inform you that, in accordance with Article 96, paragraph 2, of the Charter of the United Nations, Article IX, paragraph 2, of the Agreement between the ILO and the United Nations, and article 37, paragraph 1, of the ILO Constitution, the Governing Body of the International Labour Office, by Resolution adopted on [date], decided to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion urgently on the following questions:

- (1) Is the right to strike of workers and their organizations protected under the ILO Constitution and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?
- (2) Did the Committee of Experts on the Application of Conventions and Recommendations of the ILO have the legal authority to:
 - (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and
 - (b) in examining its application, specify certain elements concerning the scope of this right, its limits and conditions for its legitimate exercise?

Certified copies of the adopted resolution, in English and French, are enclosed.

According to the terms of the resolution, the Governing Body seeks an urgent answer, as the Court's legal advice is needed to restore the strength and authority of the ILO's standards supervisory system and ensure its proper functioning. I would, therefore, kindly request the Court to do all possible under Article 103 of its Rules to accelerate the procedure.

In addition, the resolution refers to the Organization's unique tripartite structure and recalls the importance of offering all ILO constituents, i.e. not only States but also international employers' and workers' organizations, the possibility of expressing their views in the course of the advisory proceedings. The ILO's employer and worker constituency participate fully in all organs and at all levels of decision-making as well as in the elaboration, adoption and monitoring of international labour standards. This specificity due to ILO's unique tripartite membership was recognized by the Permanent Court of International Justice, which on several occasions invited employers' and workers' organizations to participate in advisory proceedings. The Court may wish, therefore, to bear in mind that given their special role and responsibilities in fulfilling the ILO's constitutional mandate and also considering that the question brought before the Court affects them profoundly and most directly, international employers' and workers' organizations may provide particularly important information for the purposes of the proceedings. Further to the consultation

arrangements provided for in article 12 of the ILO Constitution, the following six organizations have been granted general consultative status by the ILO's Governing Body: International Co-operative Alliance; Organization of African Trade Union Unity; International Organisation of Employers; Business Africa; International Trade Union Confederation; World Federation of Trade Unions.

As you will see, under the resolution the Governing Body requested ILO supervisory bodies to suspend the examination of all cases concerning the application of Convention No. 87 in relation to the right to strike pending the Court's guidance on this matter.

Finally, pursuant to Article 65, paragraph 2, of the Statute of the Court, the Office is preparing a dossier containing "all documents likely to throw light upon the question", which will be transmitted to the Court as soon as possible.

Thank you for your consideration of this matter.

(Signature)

Director-General

Appendix III.

Draft letter of the ILO Director-General to the Secretary-General of the United Nations

[date]

Dear Secretary-General,

I am writing to you with respect to the Agreement between the United Nations and the International Labour Organisation of 1946.

Article IX, paragraph 4, of this Agreement stipulates that when requesting the International Court of Justice to give an advisory opinion, the International Labour Organisation shall so inform the Economic and Social Council.

I would, therefore, ask you to inform the Economic and Social Council that further to resolution [...] adopted by the Governing Body of the International Labour Office on [...], a request for an advisory opinion has been filed with the Registry of the Court on [...] on the following questions:

- (1) Is the right to strike of workers and their organizations protected under the ILO Constitution and the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)?
- (2) Did the Committee of Experts on the Application of Conventions and Recommendations of the ILO have the legal authority to:
 - (a) determine that the right to strike derives from the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and
 - (b) in examining its application, specify certain elements concerning the scope of this right, its limits and conditions for its legitimate exercise?

Thank you in advance for your action on this matter.

(Signature)

Director-General

Appendix IV.

Draft Statute

I. THE TRIBUNAL

Article 1

Establishment

1. A Tribunal for the expeditious determination of disputes or questions relating to the interpretation of ILO Conventions is established pursuant to article 37, paragraph 2, of the ILO Constitution.
2. The seat of the Tribunal shall be the International Labour Office in Geneva, Switzerland.

Article 2

Competence

1. The Tribunal shall be competent to determine any question or dispute relating to the interpretation of an ILO Convention referred to it by the Governing Body or in accordance with the terms of the Convention.
2. When determining any dispute or question, the Tribunal shall take into account the specificities of ILO Conventions as international treaties.

Article 3

Composition

1. The Tribunal shall be composed of a body of judges appointed from among independent persons of high moral character. They shall possess the qualifications required for appointment to [high] judicial offices or shall be jurists of recognized competence, and shall have demonstrated expertise in labour law and international law. They shall be fluent in at least one of the official languages of the Tribunal and shall have passive knowledge of at least another.
2. The Tribunal shall consist of [twelve] judges and shall sit in a panel of five judges.
3. The Tribunal's composition shall reflect to the greatest extent possible gender balance, representation of the principal legal systems, and geographical distribution. Judges shall be of different nationalities.

Article 4

Selection and appointment

1. The judges of the Tribunal shall be appointed by the International Labour Conference for a term of [six] years, and may be re-appointed.
2. Candidate nominations meeting the criteria set out in Article 3 shall be submitted by the Director-General to the Officers of the Governing Body. Before transmitting the nominations, the Director-General shall consider any suggestions or proposals made by any member of the Governing Body.
3. The Officers shall assess the nominations and prepare a proposal for the composition of the Tribunal. Where necessary, the Officers may request the Director-General to provide additional candidates.
4. The proposal for composition of the Tribunal shall be approved by the Governing Body for submission to the International Labour Conference.

Article 5

Panel constitution

1. A five-judge panel shall be [promptly] constituted when the Governing Body refers a question or dispute to the Tribunal.
2. The judges in the panel shall be drawn randomly by the Officers of the Governing Body or whomever they delegate to. The panel shall not include more than two judges having served in the previous case, unless necessary to constitute a full five-judge panel.
3. Notwithstanding the foregoing, the Officers may by unanimous decision specifically designate one or more judges to the panel. This decision shall not unreasonably delay the prompt constitution of the panel.
4. Each panel shall elect its President. The panel may delegate to the President any function necessary for the expeditious conduct of the proceedings.

Article 6

Incompatibility

Judges may not be appointed as ILO officials or sit in any capacity in another ILO body.

Article 7

Resignation, withdrawal and removal

1. A judge may resign at any time by notifying the Director-General, who shall inform the Governing Body.
2. Judges shall withdraw from any case in which their impartiality might reasonably be doubted.
3. Judges shall be removed, temporarily or permanently as the case may be, if they are unable or unfit to exercise their functions.
4. Any question relating to the withdrawal or removal of a judge shall be brought forth by the judge concerned or decided by the Tribunal.

Article 8

Replacements

Any necessary replacements of panel judges shall take place in accordance with the panel constitution procedure.

Article 9

Vacancies

Vacancies to the Tribunal shall be filled in accordance with the appointment procedure. The duration of appointment shall be the remainder of the term.

Article 10

Status

When performing their duties for the Tribunal, judges shall have the status of experts on mission enjoying the privileges and immunities provided for in Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies.

Article 11

Honoraria

1. Judges shall receive a compensation for the performance of their duties in the proceedings in which they are engaged, as well as a subsistence allowance and travel expenses for their official meetings in the seat of the Tribunal.
2. Rates for compensation and travel and subsistence expenses shall be approved by the Governing Body and annexed to this Statute.

Article 12

Administrative arrangements

The Director-General shall make any administrative arrangements necessary for the expeditious operation of the Tribunal, including registry services, the use of technological means and the possibility for judges to perform certain of their duties remotely.

II. PROCEDURE

Article 13

Initiation of proceedings

1. The Tribunal shall only be in session when a question or dispute is referred to it.
2. The Governing Body shall refer questions or disputes to the Tribunal by means of a request for interpretation.
3. The Director-General shall submit to the Tribunal any documents and other information relevant to the request for interpretation.
4. Unless the Governing Body decides otherwise, from the time a referral is decided until a determination is made by the Tribunal, the ILO supervisory bodies shall suspend consideration of cases relating to the question or dispute concerned.

Article 14

Participation in proceedings

1. Governments of ILO Members, Employer and Worker members of the Governing Body, and [non-governmental international] organizations enjoying general consultative status, as well as any other organizations or persons invited by the Governing Body or by the Tribunal, shall be entitled to participate in the proceedings. Participation may be exercised collectively.
2. International organizations or non-governmental international organizations, in particular employers' and workers' organizations, having an interest in the question or dispute may submit a request to the Tribunal to be permitted to participate in the proceedings. The Tribunal shall decide on the extent and time limits of this participation.

Article 15

Conduct of proceedings

1. The Tribunal shall make orders for the expeditious conduct of the proceedings, including as to the form and time for written and oral submissions.
2. The proceedings shall not exceed [6] months from the date the Governing Body submits a request for interpretation to the date the Tribunal circulates its award. Different time limits may be established when specifically requested by the Governing Body or otherwise decided by the Tribunal.
3. The Tribunal may, at any stage of the proceedings, call upon the participants to produce documents or provide other contributions.

4. The official languages of the Tribunal shall be English, French and Spanish. Written and oral submissions may be made in any of the official languages. The award shall be given in the three official languages, all three texts being equally authoritative.
5. Subject to the provisions of the present Statute, the Governing Body may adopt rules of procedure for the Tribunal.

Article 16

Phases of proceedings

The procedure before the Tribunal shall consist of written proceedings, followed by oral proceedings unless the Tribunal decides otherwise.

Article 17

Notification

Requests for interpretation shall be promptly notified to those entitled to participate in the proceedings pursuant to Article 14.1.

Article 18

Written proceedings

1. Unless the Tribunal decides otherwise, the initial notification shall include an invitation to submit written statements within a time limit of [45] days.
2. Submissions received shall be made available upon expiry of the period to submit written statements.
3. Participants having presented written statements shall be permitted to comment on the statements of others. Unless the Tribunal decides otherwise, the time limit for comments shall be of [30] days from the end of the period to submit written statements.

Article 19

Oral proceedings

1. The Tribunal shall decide whether oral proceedings shall take place and fix the dates and form. Unless the Tribunal decides otherwise, hearings shall not exceed [five] days.
2. The oral proceedings shall consist of the hearing by the Tribunal of those authorized to take part in the proceedings pursuant to Article 14, and of such others as the Tribunal may decide to hear.

Article 20

Publicity

Unless the Tribunal decides otherwise, hearings shall be public and documents deposited with the Tribunal shall be accessible to the public.

Article 21

Adoption of decisions

1. The quorum for deliberations by the Tribunal shall be [three] judges.
2. All questions shall be decided by majority of the judges present. In the event of equality of votes, the President shall have a casting vote.
3. The adoption of an award shall require the affirmative vote of [three] judges.

Article 22

Award

The Tribunal shall decide a request for interpretation with an award. The award shall be circulated to the member States and any observations which they make thereon shall be brought before the Conference.

Article 23

Effect

1. The awards of the Tribunal shall be authoritative [binding] and shall be given effect by all ILO bodies.
2. The foregoing is without prejudice to the provisions of the ILO Constitution, or to any applicable judgement or advisory opinion of the International Court of Justice, which shall be binding upon the Tribunal.