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FIRST ITEM ON THE AGENDA

Protection of Employers' and Workers' delegates to the International Labour Conference and members of the Governing Body in relation to the authorities of a State of which they are a national or a representative

Purpose of the document

This document responds to a request made by the Workers' group at the 319th Session (October 2013) of the Governing Body. It contains a detailed analysis of the question concerning the protection of Employers' and Workers' delegates to the International Labour Conference and members of the Governing Body in relation to the authorities of a State of which they are a national or a representative. The Governing Body is invited to request the Office to prepare concrete proposals for measures aimed at enhancing that protection, for its consideration at its 326th Session (March 2016), taking into account the views expressed by its members (see the draft decision in paragraph 24).

Relevant strategic objective: Cross-cutting.

Policy implications: None.

Legal implications: None.

Financial implications: None.

Follow-up action required: Document to be submitted to the 326th Session (March 2016) of the Governing Body.

Author unit: Office of the Legal Adviser (JUR).

Related documents: GB.319/LILS/2/2; other documents quoted.

I. Background

1. At its 319th Session (October 2013), the Governing Body discussed a proposal to introduce an identification document for Employer and Worker members of the Governing Body, which was approved with modifications a year later. While the Office document explained that the purpose of the identification document was to ensure better recognition of the privileges and immunities enjoyed by the members of the Governing Body under the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (“the 1947 Convention”) and its Annex I concerning the ILO, it also pointed out that, according to the Convention, those privileges and immunities were not applicable in relation to the authorities of a State of which the person concerned was a national or a representative.¹ The Workers’ group considered this lack of protection of Worker representatives in their own country to be unsatisfactory and requested the Office to prepare a document containing a detailed analysis of the issue and proposing, if necessary, an amendment to Annex I of the 1947 Convention.² The present document is submitted in response to that request.

II. The current situation

A. Privileges and immunities of delegates to the Conference and members of the Governing Body

2. The primary legal basis for the privileges and immunities of delegates to the International Labour Conference and members of the Governing Body is found in article 40 of the Constitution of the ILO, which reads as follows:

Privileges and immunities

1. The International Labour Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
 2. Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.
 3. Such privileges and immunities shall be defined in a separate agreement to be prepared by the Organization with a view to its acceptance by the States Members.
3. The “separate agreement” referred to in article 40(3) which defines specific privileges and immunities is the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the United Nations General Assembly on 21 November 1947. It was developed following the adoption by the General Assembly of the Convention on the Privileges and Immunities of the United Nations in February 1946, whose text it closely follows. While the ILO had initially started to develop its own convention on privileges and immunities of the ILO, it abandoned it in favour of the common UN approach seeking to harmonize the privileges and immunities of the specialized agencies, which resulted in the adoption of the 1947 Convention.

¹ GB.319/LILS/2/2, para. 8.

² GB.319/PV, para. 534.

4. The 1947 Convention consists of standard clauses and one annex for each specialized agency (currently 17). The standard clauses are in principle applicable to all the specialized agencies, while the annexes contain provisions specific to each agency, which complement or modify the standard clauses to accommodate the specific needs of the agencies resulting from their different mandates. Annex I to the 1947 Convention relates to the ILO.
5. Sections 13–15 of Article V of the 1947 Convention set out the privileges and immunities to be enjoyed by “[r]epresentatives of members at meetings convened by a specialized agency”. They include: immunity from arrest or detention; immunity from legal process in respect of words spoken or written and all acts done in their official capacity (even after the official duties end); inviolability for all papers and documents; exemption from immigration restrictions; and facilities in respect of currency exchange restrictions and personal baggage (see Appendix I). The scope of these provisions is slightly wider than article 40(2) of the Constitution, as they cover not only delegates to the International Labour Conference, but also delegates to other meetings composed of national delegations, in particular Regional Meetings.
6. Employers’ and Workers’ delegates to the International Labour Conference (including their advisers and other members of the delegations) are directly covered by Article V of the 1947 Convention, since, in accordance with article 3(1) of the ILO Constitution, they are representatives of the Members at the Conference. The same is not true, however, for Employer and Worker members of the Governing Body, who are elected by the Employers’ and Workers’ electoral colleges of the Conference, respectively, and cannot therefore be regarded as representatives of any member State. It is only by virtue of paragraph 1 of Annex I to the 1947 Convention that the privileges and immunities enjoyed by the Government members of the Governing Body under Article V of that Convention are extended to the Employer and Worker members, with the sole exception of section 13(c) on the use of codes and receipt of papers by courier or in sealed bags (see Appendix I).

B. The situation of Employer and Worker representatives in their own countries

7. Article V contains an important exception to the application of the privileges and immunities of the representatives of Members. According to section 17, “[t]he provisions of sections 13, 14 and 15 are not applicable in relation to the authorities of a State of which the person is a national or of which he is or has been a representative”. This exclusion applies directly to the Employers’ and Workers’ delegates to the Conference, who are considered to be representatives of the Members. The exclusion also applies to the Employer and Worker members of the Governing Body through Annex I, which extends the application of Article V – including section 17 – to them. Accordingly, Employers’ and Workers’ delegates to the International Labour Conference or Regional Meetings and Employer and Worker members of the Governing Body enjoy no privileges and immunities under the 1947 Convention in relation to the State that they represent or whose nationality they hold.
8. This limitation to the scope of the Convention finds its origins in well-established practice regarding the diplomatic and consular privileges and immunities afforded to representatives of States. It has indeed long been accepted that government representatives do not enjoy privileges and immunities vis-à-vis the State that they represent, since they are in fact regarded as agents of their government and would otherwise be immune from any jurisdiction. However, with respect to Employers’ and Workers’ delegates at the Conference, the question arises whether this limitation is in line with the letter and the spirit of article 40(2) of the Constitution, which requires that they be accorded the

privileges and immunities “necessary for the independent exercise of their functions in connection with the Organization”. Unlike Government representatives, who naturally receive their instructions from their government, Employers’ and Workers’ delegates at the Conference are expected to act independently from any government, including their own, which is an essential precondition for the tripartite operation of the Conference. The same is even truer for Employer and Worker members of the Governing Body, who receive their mandate from the Employers’ and Workers’ delegates of the International Labour Conference, respectively, and not from any government.

9. Wilfred Jenks, ILO Legal Adviser from 1943 to 1952 and Director-General from 1970 to 1973, expressed the personal view that this situation represented “a weakness of these arrangements as a means of ensuring the independent exercise of their duties by Employers’ and Workers’ representatives” and, in fact, considered it “regrettable that the [Convention on the Privileges and Immunities of the United Nations] and instruments modelled upon it should have made this particular immunity inapplicable against the State of which the representative is a national; in view of its purpose such restriction appears to be inappropriate ...”.³
10. Since its early days, the Organization has had to deal with situations involving the status of Employers’ and Workers’ delegates or Governing Body members in their own country. One case in 1925 concerning a Worker representative who was prevented from attending an ILO meeting due to the non-delivery of his passport, and another case in 1933 concerning a Worker member of the Governing Body who could not attend a session as he had been imprisoned in his country, led the Governing Body to adopt a resolution stating that “[n]o member of the Governing Body, elected by the employers’ or workers’ delegates to the Conference, should be interfered with in any way by reason of action taken in his capacity as a member of the Governing Body.”⁴
11. Following the establishment of the Committee on Freedom of Association (CFA) in 1951, a number of cases relevant to this issue were brought before that Committee. In cases filed in 1955 and 1956 (Chile) and 1961 (Libya), substitute Worker members were unable to attend a Governing Body session as they had been imprisoned. The CFA held that, while the Government was entitled to benefit from the application of Article V, section 17 of the 1947 Convention, any action preventing members of the Governing Body from discharging their duties as such would nevertheless be inconsistent with article 40, paragraph 2 of the Constitution, which applied to all member States, whether they were party to the 1947 Convention or not.⁵ Moreover, the complaint concerning Libya led to the adoption by the International Labour Conference in 1962 of the *Resolution concerning the rights and freedom of members of the Governing Body of the International Labour Office to carry out their functions*, which recalls member States’ obligations under article 40 of the Constitution.⁶
12. In 1968, another case was filed with the CFA concerning a Workers’ delegate who had been arrested and sentenced to imprisonment for the publication in a newspaper of a speech he had made at the International Labour Conference. The CFA, while

³ C.W. Jenks: *International Immunities* (New York, Oceana, 1961), pp. 90–91.

⁴ ILO: *Minutes*, Governing Body, 64th Session (October 1933), p. 364.

⁵ Cases Nos 134 and 141 (Chile), Report No. 26, paras 20–103; Case No. 274 (Libya), Report No. 60, paras 212–281.

⁶ ILO: *Record of Proceedings*, International Labour Conference, 46th Session, Geneva, 1962, p. 832.

acknowledging that Article V, section 17 of the Convention “does not appear to make sufficient allowance for the special situation of employers’ and workers’ representatives to meetings of the International Labour Organisation”, reaffirmed that “the question arises as to whether, in the light of the general principle laid down in article 40 of the Constitution, steps should be envisaged to ensure that such persons are fully protected”. The Committee went on to point out that “delegates of employers’ and workers’ organisations to the Conference constantly refer in their speeches to matters which are of direct or indirect concern to the Organisation”, and expressed the view that “there would be a risk of the functioning of the Conference being considerably hampered and the freedom of speech of the delegates of workers’ and employers’ organisations being paralysed if these delegates were under the threat of criminal prosecutions based, directly or indirectly, on the contents of their speeches at the Conference”.⁷

13. In examining the CFA’s report, the Governing Body considered that the question could best be dealt with by a Conference resolution reaffirming the Conference’s understanding as to the scope of the obligation arising from article 40 of the Constitution. The *Resolution concerning freedom of speech of non-governmental delegates to ILO meetings*, consequently adopted by the Conference at its 54th Session (1970) (see Appendix II), underscores the fundamental importance to the ILO of freedom of speech for Employer and Worker representatives and considers that “the free and independent exercise of these functions requires immunity from legal process in respect of words spoken or written and acts performed in [their] official capacity ..., both during and subsequent to the discharge of their duties”, which “may be necessary even in relation to the authorities of a State of which they are nationals or of which they are or have been representatives”. The resolution further affirms the importance that the Conference attaches to “the application of article 40 of the Constitution of the International Labour Organisation in such manner that [their] right ... to express themselves freely on questions within the competence of the [ILO] is completely safeguarded”.⁸
14. The impact of this resolution and previous pronouncements seems to have been rather limited. The CFA has indeed continued to receive complaints related to the uneasy relationship between article 40 of the Constitution and section 17 of the 1947 Convention. It is noted that the CFA has never explicitly relied on the 1970 resolution. For instance, in a case concerning the confiscation of the passport of a Worker deputy member of the Governing Body, the Committee based its recommendations on the consideration that the participation in meetings organized by the ILO was a fundamental trade union right, but made no reference to the ILO Constitution or the resolution of 1970.⁹
15. Finally, the issue concerning the coverage of privileges and immunities of non-governmental representatives at the ILO has been addressed in one further context. Cases in which governments have prevented the attendance of Employers’ and Workers’ delegates at the Conference, for instance by withholding their passport or otherwise restricting their freedom of movement, have been considered instances of non-compliance with the provisions of article 3 of the Constitution, which requires Members to send full tripartite delegations to the Conference. In 2010, the Standing Orders of the Conference were amended to allow such cases to be brought before the Credentials Committee of the

⁷ Case No. 560 (Morocco), Report No. 112, paras 125–126.

⁸ ILO: *Record of Proceedings*, International Labour Conference, 54th Session, 1970, p. 733.

⁹ Case No. 1406 (Zambia), Report No. 254, para. 473.

Conference.¹⁰ Thus, under the current article 26ter(2), the Credentials Committee may consider complaints “alleging that an accredited delegate or adviser has been prevented from attending the session of the Conference due to an act or omission of a government”.

III. Possible ways forward

16. Should the Governing Body decide to pursue the consideration of this question, there would be at least two possible approaches to address the underlying issue, one involving the amendment of Annex I to the 1947 Convention and the other consisting in the adoption of a new resolution.

A. Amendment of Annex I to the 1947 Convention

17. From a procedural point of view, adopting an amendment to Annex I is rather straightforward, even though its entry into force may be slow. In accordance with section 38 of the 1947 Convention “[i]f, after the transmission of a final annex ... any specialized agency approves any amendments thereto in accordance with its constitutional procedure, a revised annex shall be transmitted by it to the Secretary-General of the United Nations”. Pursuant to section 47, to become applicable to a State, a revised annex must be accepted by that State by a notification addressed to the Secretary-General of the United Nations, which takes effect on the date of its receipt by the Secretary-General. In the case of the ILO, this would require the Governing Body to transmit to the Conference for consideration and adoption a proposed revised annex. If adopted by the Conference, the revised annex would then be transmitted by the Office to the Secretary-General of the United Nations and it would become binding on those member States that address a notification of acceptance to the Secretary-General.
18. To date, three of the specialized agencies covered by the 1947 Convention, namely the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO) and the International Maritime Organization (IMO), have amended their respective annexes several times.¹¹ The amendments all concerned the extension of privileges and immunities to certain categories of persons (representatives of Associate Members, experts, Deputy and Assistant Director-Generals and other Directors).
19. As to the content of a possible amendment to Annex I to the Convention, it is clear that the intention cannot be to grant Employer and Worker representatives diplomatic status in their own country. Any privileges and immunities that could be extended to them would be strictly limited to what is necessary to protect the free and independent exercise of their functions within the ILO. Those functions are in fact more comparable to the functions of members of parliaments than to those of diplomatic envoys. Given that many, if not most, member States grant their parliamentarians certain immunities, those could serve as a model in developing a specific protection for ILO Employer and Worker representatives in their own countries. This is also suggested by preparatory works to the Convention: a document discussed in the Governing Body in 1945 considered that members of the Governing Body and delegates to the Conference should be granted complete freedom of

¹⁰ ILO: *Record of Proceedings*, International Labour Conference, 99th Session, Geneva, 2010, No. 2-1 and No. 17, p. 39.

¹¹ FAO (Annex II) in 1959 and 1965; WHO (Annex VII) in 1950, 1957 and 1958; IMO (Annex XII) in 1968 and 2001.

speech “on the analogy of the practice in respect of national parliaments”.¹² Similarly, when expressing regret over the limitation of the protection of Employer and Worker representatives under the 1947 Convention (see paragraph 9 above), Wilfred Jenks considered it significant that there was “no similar restriction in the case of the similar immunity of members of international interparliamentary assemblies”.¹³

20. Parliamentary immunities comprise the protection of free speech through lifelong immunity from prosecution for opinions expressed and votes cast in the exercise of the parliamentary mandate (principle of non-accountability). In addition, in a considerable number of countries, parliamentarians also benefit from immunity from arrest or prosecution for ordinary crimes for the duration of their mandate, which can be lifted by the parliamentary assembly (principle of inviolability).¹⁴ However, possible immunities granted to Worker and Employer representatives in their own country should in principle not exceed comparable privileges and immunities granted to them in other countries under the 1947 Convention and its current Annex I.

21. Based on the above considerations, an amended Annex I could provide for the following privileges and immunities to be accorded to Employers’ and Workers’ delegates to the Conference and other ILO tripartite meetings and to Employer and Worker members of the Governing Body in relation to the authorities of a State of which they are nationals or of which they are or have been representatives:

- (a) immunity from legal process in respect of words spoken or written and acts performed in their official capacity, both during and subsequent to the discharge of their duties;
- (b) immunity from personal arrest or detention while exercising their functions at meetings convened by the ILO and during their journeys to or from the place of meeting;
- (c) exemption from any administrative or other restrictions on their free movement in connection with their attendance to ILO meetings;
- (d) inviolability for all their papers and documents while exercising their functions at ILO meetings and during their journeys to or from the place of meeting.

B. Adoption of a new resolution

22. Alternatively, the Governing Body or the International Labour Conference could adopt a new resolution, which could reaffirm the 1970 resolution, but could also go further to assert more categorically that under article 40 of the Constitution, member States are expected to accord certain privileges and immunities to Employers’ and Workers’ delegates to the Conference and members of the Governing Body who hold the nationality or who are or have been representatives of that State. Such privileges and immunities would include immunity from legal process in respect of words spoken or written and acts

¹² ILO: *Official Bulletin*, Vol. XXVII, No. 2, 1945, p. 203.

¹³ Jenks, op. cit., p. 90.

¹⁴ See Inter-Parliamentary Union: *Parliament and democracy in the twenty-first century: A guide to good practice*, Chapter 2 (www.ipu.org/dem-e/guide/guide-2.htm); PARLINE database on national parliaments (www.ipu.org/parline-e/parlinesearch.asp).

performed in their official capacity as well as further immunities that could be defined along the lines of the proposal in paragraph 21.

23. The reasons that were given in 1969 for proposing a resolution rather than an amendment to Annex I of the 1947 Convention were, firstly, that amending the annex would be cumbersome and necessarily slow, since any amended annex would have to be accepted by member States and, secondly, that an amendment would give the impression that new law was being created, whereas the intention was to make express, in relation to this particular problem, the meaning of the general principle laid down in article 40 of the Constitution.¹⁵ Those reasons may still be considered valid today. However, doubts may arise as to whether a new resolution adopted today could be more successful than the resolution adopted in 1970 in ensuring the protection of the independent exercise by Employer and Worker representatives of their functions in connection with the ILO.

Draft decision

24. *The Governing Body requests the Office to prepare concrete proposals for measures aimed at enhancing the protection of Employers' and Workers' delegates to the International Labour Conference and members of the Governing Body in relation to the authorities of a State of which they are nationals or representatives, for its consideration at its 326th Session (March 2016), taking into account the views expressed by its members.*

¹⁵ GB.177/SC/4/3, para. 6.

Appendix I

Convention on the Privileges and Immunities of the Specialized Agencies (1947) (relevant excerpts)

Article V

REPRESENTATIVES OF MEMBERS

Section 13

Representatives of members at meetings convened by a specialized agency shall, while exercising their functions and during their journeys to and from the place of meeting, enjoy the following privileges and immunities:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage, and in respect of words spoken or written and all acts done by them in their official capacity, immunity from legal process of every kind;
- (b) Inviolability for all papers and documents;
- (c) The right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (d) Exemption in respect of themselves and their spouses from immigration restrictions, aliens' registration or national service obligations in the State which they are visiting or through which they are passing in the exercise of their functions;
- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions;
- (f) The same immunities and facilities in respect of their personal baggage as are accorded to members of comparable rank of diplomatic missions.

Section 14

In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.

Section 15

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of members of the specialized agencies at meetings convened by them are present in a member State for the discharge of their duties shall not be considered as periods of residence.

Section 16

Privileges and immunities are accorded to the representatives of members, not for the personal benefit of the individuals themselves, but in order to safeguard the independent

exercise of their functions in connexion with the specialized agencies. Consequently, a member not only has the right but is under a duty to waive the immunity of its representatives in any case where, in the opinion of the member, the immunity would impede the course of justice, and where it can be waived without prejudice to the purpose for which the immunity is accorded.

Section 17

The provisions of sections 13, 14 and 15 are not applicable in relation to the authorities of a State of which the person is a national or of which he is or has been a representative.

Annex I to the Convention, relating to the International Labour Organisation

In their application to the International Labour Organisation the standard clauses shall operate subject to the following provisions:

1. Article V (other than paragraph (c) of section 13) and section 25, paragraphs 1 and 2 (I), of article VII shall extend to the employers' and workers' members and deputy members of the Governing Body of the International Labour Organisation and their substitutes, except that any waiver of the immunity of any such person member under section 16 shall be by the Governing Body.

...

Appendix II

Resolution concerning freedom of speech of non-governmental delegates to ILO meetings (1970)

The General Conference of the International Labour Organisation,

Noting the terms of article 40 of the Constitution of the Organisation, which provides that “delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall ... enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation”,

Considering that it is of fundamental importance to the International Labour Organisation and to the performance of the work of the ILO that Employers’ and Workers’ delegates to the Conference and members of the Governing Body may freely express their views, the views of their groups, and the views of their organisations, on questions within the competence of the International Labour Organisation, and may freely keep members of their organisations in their countries informed of the views so expressed,

Considering further that it is accepted that the free and independent exercise of these functions requires immunity from legal process in respect of words spoken or written and acts performed in the official capacity of delegates to the Conference or members of the Governing Body, both during and subsequent to the discharge of their duties,

Recognising that in the case of Employers’ and Workers’ delegates to the Conference and members of the Governing Body such immunity may be necessary even in relation to the authorities of a State of which they are nationals or of which they are or have been representatives;

Affirms the importance it attaches to the application of article 40 of the Constitution of the International Labour Organisation in such manner that the right of Employers’ and Workers’ delegates to the Conference and members of the Governing Body to express themselves freely on questions within the competence of the International Labour Organisation is completely safeguarded.