

# Governing Body

335th Session, Geneva, 14–28 March 2019

GB.335/PFA/12/1

Programme, Financial and Administrative Section  
*Personnel Segment*

PFA

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## TWELFTH ITEM ON THE AGENDA

### Matters relating to the Administrative Tribunal of the ILO

#### Proposed amendments to the Statute of the Tribunal

##### Purpose of the document

This document contains revised proposals for amendments to the Statute of the ILO Administrative Tribunal and to its Annex relating to the conditions under which an international organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance (see the draft decision in paragraph 27).

**Relevant strategic objective:** None.

**Main relevant outcome/cross-cutting policy driver:** Enabling outcome C: Efficient support services and effective use of ILO resources.

**Policy implications:** None.

**Legal implications:** Amendments to the Tribunal's Statute and its Annex, subject to adoption by the International Labour Conference.

**Financial implications:** None.

**Follow-up action required:** None.

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

**Related documents:** GB.325/PFA/9/1(Rev.); GB.332/PFA/12/1(Rev.); GB.334/PFA/12/2(Rev.).



## Introduction

1. Since July 2016, four international organizations have withdrawn their recognition of the jurisdiction of the ILO Administrative Tribunal. They have joined other international administrative tribunals, such as the United Nations Appeals Tribunal (in the case of the World Meteorological Organization (WMO)) or the Council of Europe Administrative Tribunal (in the case of the Intergovernmental Organization for International Carriage by Rail (OTIF)), decided to have recourse to arbitration (in the case of the Permanent Court of Arbitration) or decided to establish their own administrative tribunal (in the case of the Technical Centre for Agricultural and Rural Cooperation (CTA)). While the Governing Body has taken note of those withdrawals, several members have asked for the reasons, which, in the absence of any indication in the withdrawal letters, the Office was unable to provide.
2. In reaction to these developments, the judges of the Tribunal have expressed the view that any unilateral decision by an international organization to withdraw from a tribunal's jurisdiction raises important legal and policy issues, as such a decision might be perceived as a kind of "forum shopping". In a letter from the President of the Tribunal to the Director-General, which was brought to the attention of the Governing Body, the Tribunal proposed the establishment of a formal procedure of withdrawal and suggested several elements to be considered by the Governing Body.<sup>1</sup> As a result, the Governing Body at its 332nd Session (March 2018) called for the adoption of amendments to the Statute of the Tribunal to lay down clear conditions and procedural rules for the termination of membership of the Tribunal.<sup>2</sup>
3. While proposed amendments were submitted at the 334th Session (November 2018), the Governing Body decided to defer consideration of this matter to its current session to allow time for further consultations with those organizations that had expressed their reservations with respect to some aspects of the proposed amendments. In reaction to the proposed amendments, a number of organizations had questioned the need for the ILO Governing Body to "approve" the withdrawal of another international organization from the Tribunal's jurisdiction, and the requirement to communicate the reasons for withdrawing as well as details on prior consultation with staff representative bodies. They expressed the view that such requirements would be contrary to the voluntary and unilateral nature of declarations of acceptance of the Tribunal's jurisdiction, and therefore could not be accepted. They also objected to the proposal to require a notice period before the withdrawal could take effect. Moreover, they considered that the International Labour Conference could not amend the Tribunal Statute without the prior consent of all member organizations, nor did it have the authority to retroactively impose conditions for withdrawal on existing member organizations.
4. From 20 November 2018 to 18 February 2019, the Office undertook two new rounds of consultations with the Tribunal, the international organizations which have recognized its jurisdiction and their staff associations. In response to those consultations, the Office proposed that, as per current practice and established case law, the Governing Body would not need to "approve" but only to "take note" of the decisions of an organization to revoke its declaration of acceptance. It also proposed that a withdrawing organization would not need to provide information on the reasons of withdrawal or on prior consultations with staff

<sup>1</sup> See the letter of the President of the Tribunal to the Director-General of 25 January 2018, Appendix III to document [GB.332/PFA/12/1\(Rev.\)](#).

<sup>2</sup> See [GB.332/PV](#), paras 780–784.

as a matter of legal obligation, replacing the expression “this communication must contain” by “this communication should contain”. It further proposed to remove the reference to a 12-month notice period for withdrawal providing instead that the effective date of withdrawal would be the date on which the Governing Body takes note of the notification of withdrawal. As a result, the Office considers that it has satisfactorily addressed most, if not all, the points of concern raised by member organizations. However, at the time of preparing this paper, some member organisations continue to oppose the proposed amendments. The Office is seeking to continue consultations and will update the Governing Body accordingly.

5. In accordance with article XI of the Statute of the Tribunal, the Statute may be amended by the International Labour Conference after consultation with the Tribunal. The Tribunal has been fully consulted and supports the amendments. Accordingly, a draft Conference resolution is proposed in the appendix.

## **Withdrawal from jurisdiction of the Tribunal**

6. Article II(5) of the Statute confers on the Governing Body binding and exclusive responsibility for verifying that organizations wishing to recognize the jurisdiction of the Tribunal meet certain conditions, and for approving the admission of any such organization to the Tribunal’s jurisdiction.
7. Those conditions include both objective criteria (for example, whether an organization is intergovernmental or whether it enjoys immunity from jurisdiction with respect to employment disputes) and a more discretionary assessment about the organization’s capacity to meet the obligations arising from the recognition of the Tribunal’s jurisdiction, such as the acceptance of the decisions of the Tribunal as final and enforceable and the commitment to pay a share of the Tribunal’s costs. Moreover, the increasing number of international organizations, as well as the evolving nature of internal remedies and their relationship to the ILO Administrative Tribunal as the tribunal of last instance in employment disputes, have led to the emergence of an additional condition for the approval of an application by a new organization, namely the existence in the organization’s regulatory framework of an independent review mechanism for grievances, which must be compatible with the Tribunal’s jurisdiction. Thus, it is now established practice that upon receipt of an application, the Office undertakes a review of the organization’s staff regulations, also seeking the views of the Tribunal when necessary, and at times advises on suggested changes to those regulations before the application is submitted to the Governing Body.
8. If the Governing Body is satisfied that all of the conditions are met, it can then approve the recognition of jurisdiction, thereby authorizing the Tribunal to hear complaints emanating from the organization concerned. The Statute, however, contains no explicit provision for a revocation by an international organization of its earlier declaration recognizing the Tribunal’s jurisdiction.
9. While it is the right of international organizations which have recognized the jurisdiction of the Tribunal to withdraw their recognition, to provide certainty regarding the withdrawal process it is proposed to codify the practice that has been followed in the past. That is, such withdrawal must be communicated to the Governing Body, which must note it and determine the effective date of the withdrawal in the same manner as it determined the recognition of the Tribunal’s jurisdiction by the organizations concerned. The proposed amendment to the Statute provides for this.
10. The judges of the Tribunal have also expressed concern about the reasons for the withdrawals by the relevant organizations. It is assumed that organizations withdrawing from the Tribunal’s jurisdiction have some degree of dissatisfaction about its functioning,

and it is therefore important for both the Tribunal and the Governing Body to understand their reasons. Some questions have been raised about the impact of a heavy workload on the effectiveness of the Administrative Tribunal, particularly in light of the constant flow of complaints against the European Patent Organisation (EPO). Questions have also been raised regarding a possible link between withdrawals and dissatisfaction with Tribunal judgments.

11. With respect to the latter, as may be seen from information publicly available in the Tribunal's case-law database, Triblex,<sup>3</sup> some withdrawals occurred after the Tribunal had ordered the reinstatement of a staff member and the organization concerned was unsuccessful in its application for review of the judgment. In the case of the WMO, Judgment 3348 (July 2014) ordered the reinstatement of the complainant, and Judgment 3723 (November 2016) dealt with the complainant's application for execution of Judgment 3348 in the light of the WMO's hesitation to execute it. In the case of the CTA, the reinstatement of a staff member was ordered by Judgment 3437 (February 2015), and when the CTA sought a review of that judgment, the Tribunal dismissed the application by Judgment 3719 (February 2017). In the case of the OTIF, the Tribunal determined in Judgment 3674 (July 2016) that the complainant, who had been dismissed, had been deprived of internal means of redress, and sent the case back to the OTIF.
12. It may also be worth noting that the remedies that can be ordered by some other international administrative tribunals are less stringent, which may influence the decision of certain administrations. For example, the United Nations Appeals Tribunal cannot simply order the reinstatement of a successful applicant, but must also set an amount of compensation that the respondent may elect to pay as an alternative (article 9, paragraph 1(a) and (b), of the Statute of the UN Appeals Tribunal).
13. In the view of the judges of the Tribunal, the fact that an organization can decide to withdraw its recognition of a tribunal's jurisdiction simply because it disagrees with that tribunal's case law weakens the appearance of independence and impartiality of both the tribunal from which it wishes to withdraw and the one it wishes to join. Such considerations may be perceived to exercise extraneous influence on a judge's decision-making and ultimately have an impact on the measures that they may deem necessary to order to redress a wrong. In such instances the appearance of neutrality and independence of the Tribunal would be seriously put at risk. For the "receiving" tribunal, it may create the impression that it was chosen for being more favourable to the administration. It is all the more grave when the organization concerned declares in its reasoning that it favours the rules of one tribunal over another, as that clearly puts the administration at an advantage over the complainants and adversely affects an official's right to a tribunal which must be, and must appear to be, neutral, independent and impartial. This possibility to "choose one's judge" would affect the integrity of existing international administrative tribunals and the concept of justice within the international community.
14. Withdrawing from the Tribunal's jurisdiction based on dissatisfaction with its judgments would violate good faith, as it calls the Tribunal's independence into question. The Tribunal has considered that withdrawal based on reasons of dissatisfaction with its case law are unacceptable and contrary to basic requirements of the rule of law. In a very recent judgment, the Tribunal expressed in strong terms its dissatisfaction with what it considered a disguised threat that unless the Tribunal accepted to revise one of its judgments, the organization concerned would consider withdrawal (see Judgment No. 4077, consideration 17).

<sup>3</sup> Triblex can be accessed at: <http://www.ilo.org/dyn/triblex/>.

- 15.** With respect to workload and its impact on effectiveness, as recent efforts deployed by the Tribunal have now practically eliminated the backlog for all organizations except the EPO,<sup>4</sup> the concerns that some organizations had expressed about the length of time that it takes to issue a judgment have now been addressed.

## Proposed amendments to the Statute

- 16.** For all the above reasons, it is proposed that the Statute be amended so that the procedure for denouncing ILO Administrative Tribunal membership be aligned with the admission procedure and the Tribunal's own case law. The amendments would require that a formal communication be addressed to the ILO Director-General for submission to the Governing Body. It would be for the Governing Body to take note of the revocation of the declaration of recognition and determine the effective date of the withdrawal of the organization concerned. This would be consistent with established legal principles and reflects the practice followed by the Office in all four cases of withdrawal in the past two years.
- 17.** In taking this view, the Office does not create a new legal situation but codifies in the Statute a situation already reflected in the Tribunal's case law. In fact, in its Judgment No. 1043 of 26 June 1990, the Tribunal dealt with an objection regarding its competence and the question of withdrawal of a member organization (UPU). According to the Tribunal's ruling:

The Union may always denounce its recognition of the Tribunal's jurisdiction, though in keeping with the rule that similar acts require similar procedures the same authority must denounce the recognition, and by the same process, as originally declared it. ... But mere notification is not valid denunciation. ... In any event only if the Governing Body of the International Labour Office has taken note of denunciation and so informed the Tribunal will denunciation be binding, and the Tribunal has had notification of no such decision.

- 18.** In view of the concerns expressed by several organizations during the consultations, the Office proposes that the Governing Body "takes note of" rather than "approves" the decision of an organization to revoke its declaration of acceptance. This is fully in line with the above-cited judgment and recent Governing Body practice.<sup>5</sup>
- 19.** As per current practice, it would be for the Governing Body to determine the effective date of withdrawal of a member organization, as it does for the effective date of recognition and the Tribunal takes this into account. The Tribunal would only take into account a notification from the ILO. The publication of the Governing Body document would inform all those concerned, including the Tribunal, about the effective date of the withdrawal, which would have an impact on the possibility to file a new complaint, the financing of the Tribunal and its internal organization.
- 20.** As regards the length of the notice period, the Office considers that the withdrawal should become effective on the date on which the Governing Body takes note of the official communication of the withdrawing organization – as is the practice followed thus far.
- 21.** As regards the information to be communicated to the ILO Governing Body, the ILO can only reiterate the importance of: (i) showing respect to the Tribunal to which the withdrawing organization had entrusted the judicial review of its employment disputes; (ii) acting in good faith, transparency and in a manner that does not weaken or prejudice the

<sup>4</sup> See [GB.332/PFA/INF/9](#).

<sup>5</sup> See [GB.328/PFA/10](#), para. 7; [GB.329/PFA/11/2](#), para. 17; [GB.331/PFA/15](#), para. 18; [GB.332/PFA/12/1\(Rev.\)](#), para. 8; [GB.334/PFA/12/2\(Rev.\)](#), para. 6.

independence and impartiality of the Tribunal or of the system of justice of the international civil service in general; and (iii) the requirement of the Governing Body to be provided with appropriate information.

22. Given that the Tribunal and the Governing Body considered that more information on the reason for withdrawal of the recognition of the Tribunal's jurisdiction is necessary, it is proposed that the withdrawal letter should provide the necessary clarity.
23. The proposed amendments also introduce an obligation to inform the Governing Body about consultations with the staff representative bodies of the organization who wish to withdraw from the Tribunal's jurisdiction. These requirements stem from the legitimate expectations of the staff of each member organization and seek to ensure that their views are duly taken into account on the dispute resolution mechanism or mechanisms to which they have access in employment matters.
24. The proposed requirement that withdrawing organizations must fully and faithfully execute judgments on complaints filed prior to their withdrawal and pay all corresponding costs reflects the requirement of legal stability and corresponds to current practice.
25. The issue of applications for review, execution or interpretation is also addressed in the proposed amendments. The Tribunal's Statute was recently modified to provide specifically for the possibility of filing such applications. It seems reasonable, therefore, that the Tribunal should continue to be responsible for issuing judgments on such applications, as they constitute the follow-up to judgments delivered by it.
26. It is proposed that a general reference to the possibility of withdrawal at the request of the organization concerned be included in article II(5) of the Statute, and that the specific conditions and procedural steps be detailed in the Annex to the Statute.

## Draft decision

### *27. The Governing Body:*

- (a) *approved the draft resolution appended to document GB.335/PFA/12/1 concerning amendments to the Tribunal's Statute and to its Annex, for possible adoption by the International Labour Conference at its 108th Session (June 2019); and*
- (b) *requested the Director-General to contact the executive heads of all organizations having accepted the jurisdiction of the Tribunal in order to draw their attention to recent developments regarding the termination of membership, the concerns expressed by the Tribunal and the importance of protecting its integrity and independence.*



## Appendix

### Draft Conference resolution

The General Conference of the International Labour Organization,

Conscious of the need to amend articles II and VII of the Tribunal's Statute and its Annex in order to expressly provide for the conditions under which a member organization may unilaterally revoke its declaration of acceptance of the Tribunal's jurisdiction;

Noting that the Governing Body of the International Labour Office has reviewed and endorsed the text of the draft amendments to the Tribunal's Statute and to the Annex;

adopts the following amendments to the Statute and to the Annex to the Statute of the Administrative Tribunal of the International Labour Organization:

#### STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

Adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008, and 7 June 2016 and ... June 2019.

[...]

#### ARTICLE II

[...]

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body. An organization may withdraw its declaration recognizing the jurisdiction of the Tribunal in accordance with the conditions set out in the Annex.

[...]

#### ANNEX TO THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

1. To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its Statute, an international organization must either be intergovernmental in character, or fulfil the following conditions:

- (a) it shall be clearly international in character, having regard to its membership, structure and scope of activity;
- (b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and

- (c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.

2. The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions which, in cases affecting any one of these organizations, are applicable as follows:

*Article VI, paragraph 2*

The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office, to the executive head of the international organization against which the complaint is filed, and to the complainant.

*Article VI, paragraph 3*

Judgments shall be drawn up in two copies, of which one shall be filed in the archives of the International Labour Office and the other in the archives of the international organization against which the complaint is filed, where they shall be available for consultation by any person concerned.

*Article IX, paragraph 2*

Expenses occasioned by the sessions or hearings of the Tribunal shall be borne by the international organization against which the complaint is filed.

*Article IX, paragraph 3*

Any compensation awarded by the Tribunal shall be chargeable to the budget of the international organization against which the complaint is filed.

3. An international organization may withdraw its declaration recognizing the jurisdiction of the Tribunal in accordance with the principles of good faith and transparency and under conditions that safeguard the independence and the appearance of independence of the Tribunal. The organization shall address to the Director-General an official communication notifying the relevant decision which should emanate from the same organ which decided to recognize the Tribunal's jurisdiction or the organ currently competent to take such a decision. This communication should contain:

- (a) the reasons for withdrawing the recognition of the Tribunal's jurisdiction and the means of employment dispute settlement envisaged to replace the Tribunal;
- (b) information on prior consultations with the staff representative bodies of the organization concerned regarding withdrawal; and
- (c) an express commitment to execute fully and faithfully all judgments rendered by the Tribunal in respect of complaints filed against the organization concerned prior to the effective date of its withdrawal, or in respect of applications for review, interpretation or execution of those judgments, and to pay all corresponding costs.

4. The Governing Body, after consultation with the Tribunal, shall take note of the withdrawal of the organization concerned, and shall confirm that as of the date of its decision, or any other later date as may be agreed upon with the organization concerned, the organization shall no longer be subject to the competence of the Tribunal. No complaint filed against the organization after the effective date of the withdrawal shall be entertained by the Tribunal.