



Governing Body

326th Session, Geneva, 10–24 March 2016

GB.326/LILS/1

Legal Issues and International Labour Standards Section
Legal Issues Segment

LILS

Date: 9 February 2016

Original: English

FIRST ITEM ON THE AGENDA

Follow-up to the discussion on 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

Purpose of the document

In accordance with the decision taken by the Governing Body at its 325th Session (November 2015), this document proposes 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 a national. The Governing Body is invited to consider the proposals formulated in this document and to request the Office to take the necessary follow-up action (see draft decision in paragraph 16).

Relevant strategic objective: Cross-cutting.

Policy implications: None.

Legal implications: Possible referral to the International Labour Conference of a draft resolution amending Annex I of the Convention on the Privileges and Immunities of the Specialized Agencies.

Financial implications: None.

Follow-up action required: Submit the draft resolution to the Conference for possible adoption.

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

Related documents: GB.325/LILS/1; GB.319/LILS/2/2; other documents quoted.

I. Introduction

1. At its 325th Session (November 2015), the Governing Body considered 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. As a possible way forward, two main courses of action were identified to address the underlying issue: the amendment of Annex I to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, which adapts the Convention to the specific needs of the ILO, and the adoption of a new resolution by the International Labour Conference building upon a resolution adopted in 1970. Following its discussion of the document, the Governing Body requested the Office to prepare concrete proposals for its consideration, taking into account the views expressed by its members.¹

II. Form of the proposals

2. The Governing Body generally agreed to enhance the protection of Employer and Worker representatives at the Conference and the Governing Body in relation to the authorities of their home State. As regards the form that such action might take, there was clearly no support for the option of a stand-alone resolution. It was in particular pointed out that such a resolution would not be binding on member States and that it could not create or assert the existence of privileges and immunities that were expressly excluded under the 1947 Convention.
3. As regards the option of adopting a revised Annex I relating to the ILO, which was favoured by the Employers' and Workers' groups, its possible impact was questioned by some given that it would have to be accepted by Members to become binding. However, the legal value and political weight of the adoption by the Conference of a revised Annex I vis-à-vis Members which would not accept it would be at least equal to that of a new Conference resolution. In fact, the revised Annex would also be adopted by way of a resolution, in the same manner as the original Annex I was adopted by the Conference in 1948. In addition to the operative paragraph revising Annex I, the resolution could contain other operative paragraphs, for instance calling upon member States to accept the revised Annex, as was suggested by the Employers' group, and a recommendation to Members to provisionally apply the Annex pending its formal acceptance, as was done for the Convention (including its original Annex I) when it was accepted by the Conference.² A draft Conference resolution containing some of those elements appears in Appendix I.
4. The group of industrialized market economy countries (IMEC) requested the Office to explore further options beyond a possible amendment to the Annex I or a new Conference resolution, such as the adoption of guidelines.³ Having examined such possible alternatives, the Office is not in a position to submit proposals in this regard for the following reasons.

¹ GB.325/LILS/1, para. 24.

² See *Resolution concerning interim arrangements in regard to the privileges and immunities of the International Labour Organisation*, adopted by the International Labour Conference at its 31st Session (1948).

³ GB.325/LILS/PV, para. 3.

5. The usual form for formal Conference decisions on substantive questions is a resolution. Resolutions are used as a way of formally expressing the will or opinion of the Conference on a given subject, as in the case of the 1970 *Resolution concerning freedom of speech of non-governmental delegates to ILO meetings*⁴ relevant to the issue at hand. Resolutions are also the instrument used by the Conference to adopt different kinds of formal texts, such as the programme and budget, the conclusions of a general discussion item on the agenda of the Conference, or amendments to the Conference Standing Orders. There are only two types of exceptions to the use of resolutions for formal decision-making by the Conference: firstly, procedural Conference decisions do not normally take any particular form, such as the appointment of committees, rulings on motions or amendments or the approval of committee reports; and secondly, certain decisions provided for in the Constitution, such as the adoption of Conventions or Recommendations or amendments to the Constitution, are adopted as such, without a resolution.
6. Therefore, any new text that might be adopted by the Conference on the legal protection of Employer and Worker representatives at the Conference or the Governing Body in their home countries, be it in the form of guidelines or otherwise, would be appended to a resolution and thus share its legal nature. As such, it would be subject to the same concerns as those directed at a new resolution referred to above, namely that as a non-binding instrument it could not revise the legally binding provisions of the 1947 Convention. Any sort of agreement on the subject at the Conference, which would be put on record but would not lead to a formal decision, always remains possible, but would of course bear less weight than a resolution. Similarly, the adoption of any guidelines or similar texts by the Governing Body, for example upon consideration of a meeting of experts, is not proposed, since besides having less authoritative value than a Conference resolution, such options would incur similar criticisms as a resolution.
7. It finally appears that the possibilities of addressing the legal protection of Employers' and Workers' delegates at the Conference through the Conference Standing Orders have been exhausted by the introduction of the possibility to file a complaint with the Credentials Committee for cases where an accredited Workers' or Employers' delegate is prevented by the Government from attending the Conference.⁵ The Standing Orders create obligations for constituents only with respect to and during a session of the Conference, whereas in particular the protection of the freedom of speech of Employers' and Workers' delegates must go beyond the duration of the Conference.
8. In light of the foregoing, it is proposed to pursue only the option involving an amendment of Annex I to the 1947 Convention as the logical solution to what is perceived as a gap in the legal protection accorded to Employers' and Workers' delegates to the Conference and members of the Governing Body under the 1947 Convention. Annex I is the instrument put at the disposal of the ILO to adapt the 1947 Convention to its specific needs and the Convention provides for the possibility of amending the Annex. The reasons why the protection gap remained when the Conference adopted the initial Annex in 1948 do not appear from the preparatory work. It can be assumed either that the practical importance of the gap was underestimated or that addressing it might have overburdened the Conference in those busy post-World War II years. In 1970, the option of amending Annex I was not pursued as it was thought that the adoption of a resolution concerning the application of article 40 of the Constitution would be simpler and more effective, an assumption that was not confirmed by events in subsequent years.

⁴ GB.325/LILS/1, Appendix II.

⁵ GB.325/LILS/1, para. 15.

9. As indicated previously, the process for amending an Annex to the 1947 Convention is neither complicated nor lengthy. Three specialized agencies (the World Health Organization, Food and Agriculture Organization and International Maritime Organization) have had recourse to that process for the amendment of their respective annexes. The proposed amendment is adopted by the legislative body of the specialized agency concerned in the form of a resolution and is then transmitted to the Secretary-General of the United Nations for registration. When the Secretary-General of the United Nations, in their capacity as depositary, receives a revised text of an annex to the 1947 Convention, they issue a depositary notification informing all States that the head of the specialized agency in question has transmitted to them, pursuant to section 38 of the 1947 Convention, the revised text of the respective annex. The depositary notification includes the relevant information regarding the adoption of the text by the agency's legislative body. The depositary notification also includes the certified true copy of the revised text in all the authentic languages, in accordance with section 37 of the Convention, and reminds all States that section 47(1) of the Convention provides that in the case of a revised annex, the acceptance of States shall be by a notification addressed to them, which shall take effect on the date of its receipt by the Secretary-General.
10. It should be noted that the adoption of a revised annex will not discourage new adhesions to the Convention in respect of the ILO since, according to United Nations practice as depositary of the Convention, which is in line with Article 40(5) of the Vienna Convention on the Law of Treaties, a member State may still choose to be bound only by the original 1948 version of Annex I by making a corresponding declaration.

III. Substance of the proposals

11. It is proposed to insert a new paragraph in Annex I granting Employers' and Workers' delegates and advisers to the Conference and Employer and Worker members and deputy members of the Governing Body and their substitutes, certain limited immunities in relation to the authorities of a State of which they are nationals or of which they are or have been representatives.
12. In the course of the discussion of the subject at the 325th Session (November 2015) of the Governing Body, doubts were expressed as to whether the proposed immunities for Employer and Worker representatives in their own countries – which should not be confused with diplomatic immunities – could be compared to parliamentary immunities, as had been suggested in the Office document. Both would have in common that they protect the function of supreme governance organs by ensuring the independence of their members, which are expected to act independently from governments, as is the case for members of parliaments as well as for Employers' and Workers' delegates to the Conference and members of the Governing Body. Moreover, certain parliamentary immunities are not only granted in national legal systems but also under international treaties, for example in respect of members of the European Parliament and of the Pan-African Parliament. Those similarities, which probably do not go much further, only suggest that the proposals made in this document would not require Members to break totally new ground. It is not suggested, however, that Members could simply apply their existing system of parliamentary immunities to Employers' and Workers' delegates and Governing Body members.
13. The scope of the proposed new immunities for Employer and Worker representatives would be limited in two respects. As regards the persons protected, it is proposed to include only delegates and advisers to the Conference and Governing Body members (regular, deputy and substitutes), excluding other members of Employers' and Workers' delegations to the Conference who do not have a constitutional function in the Conference

and all Employer and Worker representatives at other ILO meetings, such as regional, sectoral or experts meetings. The rationale for this limitation is that the recognition of immunities for Employer and Worker representatives in their own countries may be easier to accept by analogy to the protection of parliamentarians if it is limited to the delegates and members of the two highest ILO governing organs. As regards the immunities granted, those would be strictly limited to those necessary to protect the free and independent exercise of their functions within the ILO and would have to be waived by the Conference or the Governing Body in justified cases.

14. Accordingly, the immunities proposed to be accorded to Employers' and Workers' delegates and advisers to the Conference 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 would be the following:

(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 in connection with the International Labour Organization;*

- This provision, which follows the drafting of the relevant passage of the 1970 Resolution and Article V(13)(a) of the 1947 Convention, establishes the life-long protection of the freedom of speech and freedom of action (for example, through voting, submitting amendments, among other things) of the protected Employer and Worker representatives in the exercise of their functions. With regard to concerns expressed that the distinction between words spoken or written and acts performed by persons in their official capacity and in their personal capacity may be difficult in practice, it should be noted that the Office has a rich experience in applying a similar distinction when determining whether its officials benefit from their functional jurisdictional immunity under Article VI(19) of the 1947 Convention.

(b) *immunity from personal arrest or detention while exercising their functions at a meeting of the International Labour Conference or the Governing Body and during their journeys to or from the place of meeting;*

- The text of this subparagraph is based on Article V(13)(a) of the 1947 Convention. The immunity at meetings of the Conference or Governing Body is of a lesser practical relevance than the immunity during the journey to and from the meeting given that both the Conference and the Governing Body have always taken place in Geneva since 1948. It seems nevertheless useful to include it as it cannot be excluded that in the future the Conference be held again outside of Switzerland or that it will be possible to take part in it remotely through videoconferencing facilities.

(c) *exemption from any administrative or other restrictions on their free movement in connection with their attendance at the meeting concerned;*

- This provision uses terminology borrowed from Article 7 of the Protocol on the Privileges and Immunities of the European Communities, concerning members of the European Parliament.⁶ Its purpose is to address the situation where Employer or Worker representatives are prevented from attending sessions of the Conference or the Governing Body by administrative restrictions, in particular regarding the availability of a valid passport to travel to the place of

⁶ Text available at: <http://data.consilium.europa.eu/doc/document/ST-6655-2008-REV-8/en/pdf>, pp. 348–355.

the meeting or permission to leave the country, situations that have in the past been brought before the Committee on Freedom of Association and the Credentials Committee.

(d) *inviolability for all their papers and documents while exercising their functions at the meetings concerned and during their journeys to or from the place of meeting.*

- This subparagraph, which is based on wording from Article V(13)(b) of the 1947 Convention, provides for the inviolability of papers and documents to avoid that the protected persons can be hindered in the exercise of their functions by confiscation of the documents they need to perform their tasks.

15. Subparagraph (ii) of the proposed new paragraph of Annex I establishes, in terms similar to Article V(16) of the Convention and current paragraph 3(iii) of Annex I, the right and obligation of the Organization to waive the immunities granted under the new paragraph 2 where the immunity would impede the course of justice and can be waived without prejudice to the purpose for which the immunity is accorded. It is specified that the waiver would be decided by the International Labour Conference or the Governing Body “as the case may be”, which means that the Conference would decide on waivers of the immunity of Conference delegates and advisers when it is in session and the Governing Body in all other cases.

Draft decision

16. ***The Governing Body approves the draft resolution in the appendix for submission to the next session of the International Labour Conference.***

Appendix

Draft resolution concerning the revision of Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies (1947)

The General Conference of the International Labour Organization, meeting in its 105th Session, June 2015,

Noting that according to the letter and the spirit of the Constitution of the Organization, delegates to the Conference and members of the Governing Body must enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization,

Reaffirming the fundamental importance to the International Labour Organization and to the performance of the work of the Organization to apply article 40 of the Constitution in such manner that Employers' and Workers' delegates to the Conference and members of the Governing Body enjoy, in relation to the authorities of a State of which they are nationals or of which they are or have been representatives, sufficient protection with respect to the discharge of their official duties,

Recalling the resolution concerning freedom of speech of non-governmental delegates to ILO meetings adopted by the International Labour Conference at its 54th Session (1970) which emphasized the need to ensure that Employers' and Workers' delegates to the Conference and members of the Governing Body can freely express their views, the views of their groups, and the views of their organisations, on questions within the competence of the International Labour Organization, and can freely keep members of their organisations in their countries informed of the views so expressed,

Decides to revise Annex I to the Convention on the Privileges and Immunities of the Specialized Agencies by inserting in the said Annex as new paragraph 2 the following provisions:

“2. (i) Notwithstanding section 17 of Article V, Employers' and Workers' delegates and advisers to the International Labour Conference and Employers' and Workers' members and deputy members of the Governing Body and their substitutes, shall enjoy, 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 in connection with the International Labour Organization;
- (b) immunity from personal arrest or detention while exercising their functions at a meeting of the International Labour Conference or the Governing Body 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 at the meeting concerned; and
- (d) inviolability for all their papers and documents while exercising their functions at the meetings concerned and during their journeys to or from the place of meeting.

(ii) Privileges and immunities under this paragraph are accorded not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the International Labour Organization. Consequently, the Organization shall have the right and the duty to waive, through the International Labour Conference or the Governing Body as the case may be, the immunity of any

Employer or Worker representative in any case where in its opinion the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.”

Requests the Director-General to transmit to the Secretary-General of the United Nations the revised Annex I in accordance with section 38 of the Convention;

Invites Members, parties to the Convention, to notify to the Secretary-General their acceptance of this revised annex under section 47(1), and pending such notification to apply its provisions as modified;

Invites Members not parties to the Convention to accede thereto, and pending such accession to apply the provisions of the Convention and of the Annex, as modified, in their territories.