



Governing Body

334th Session, Geneva, 25 October–8 November 2018

GB.334/PFA/12/1

Programme, Financial and Administrative Section
Personnel Segment

PFA

Date: 9 October 2018

Original: English

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 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 22).

Relevant strategic objective: None.

Policy implications: None.

Legal implications: Possible 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.).

Introduction

1. Over the past five years, concerns have regularly been expressed about the workload and effectiveness of the ILO Administrative Tribunal (“the Tribunal”), especially in view of the constant flow of complaints filed against the European Patent Organisation (EPO). Furthermore, since July 2016, three international organizations have discontinued their recognition of the jurisdiction of the Tribunal and either 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)), or decided to have recourse to arbitration (in the case of the Permanent Court of Arbitration).
2. At the present session, the Governing Body is to consider a further request for withdrawal, submitted by the Technical Centre for Agricultural and Rural Cooperation (CTA),¹ which, although it has only a limited number of staff members, decided to establish its own administrative tribunal.
3. Unofficial accounts suggest that yet other organizations may currently be considering withdrawing from the Tribunal’s membership, principally due to their dissatisfaction about recent unfavourable judgments rendered by the Tribunal.
4. In reaction to these developments, the judges of the Tribunal 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”. 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.² In preparing the draft amendments, the Office has consulted the Tribunal and also the international organizations which have recognized its jurisdiction and their staff associations.
5. In accordance with article XI of the Statute of the Tribunal, the Statute may be amended by the International Labour Conference. Accordingly, a draft Conference resolution is proposed in the appendix.

Withdrawal from membership 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 membership.
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

¹ See [GB.334/PFA/12/2\(Rev.\)](#).

² See [GB332/PV](#), paras 780–784.

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 unilateral 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, such withdrawal must be communicated to the Governing Body, which must confirm 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. As governments are represented in most of the governing bodies of the organizations under the Tribunal's jurisdiction, the Office does not expect concerns to arise about the prerogative of the Governing Body of the ILO to approve a withdrawal and ensure the consistency of policies of the same member States.
10. The judges of the Tribunal have raised some serious concerns about the reasons for the withdrawals by the governing bodies of the relevant organizations. Given that one cannot avoid the impression that organizations withdrawing from the Tribunal's jurisdiction have some degree of dissatisfaction about its functioning, it is important for both the Tribunal and the Governing Body to understand their reasons.
11. As may be seen from information publicly available in the Tribunal's case-law database, Triblex,³ 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. Although the reasons for the withdrawal of those organizations were not communicated to the ILO, it is difficult to avoid the impression that the administrations concerned were dissatisfied with the Tribunal's judgments. 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,

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

and that compensation shall normally not exceed the equivalent of two years' net base salary of the applicant.

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. If the judges know that as a result of a judgment, one party who is not satisfied with the judgment, in particular with an order to reinstate an unlawfully dismissed complainant, can simply look for another tribunal, this may exercise extraneous influence on the judges' decision and ultimately have an impact on the measures that they may deem necessary to order to redress the wrong. The appearance of neutrality and independence of the Tribunal is 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 appears even worse 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 the officials' right to a tribunal which must be, and must appear to be, neutral, independent and impartial. This possibility to "choose one's judge" affects all systems of existing international administrative tribunals and the entire idea of justice within the international community.
14. It is also important that the recognition of the jurisdiction of the Tribunal by an organization should be done in good faith, which implies that in no way could a withdrawal from the Tribunal's jurisdiction call into question the Tribunal's appearance of independence and neutrality. In other words, the good faith recognition of the Tribunal's jurisdiction also implies an acceptance of the Tribunal's independent authority, and of its judgments. 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.
15. Moreover, as there is some indication that the withdrawals may have been for financial reasons, a thorough comparative analysis of the costs reported by the various tribunals may need to be conducted, as the structure of costs charged to the organizations may vary considerably. Furthermore, although cost savings are always necessary, financial aspects should not be a decisive factor for organizations considering recognizing the jurisdiction of another administrative tribunal.
16. Finally, as recent efforts deployed by the Tribunal have now practically eliminated the backlog for all organizations except the EPO,⁴ the concerns that some organizations had expressed about the length of time that it takes to issue a judgment in some cases have now been addressed.

Proposed amendments to the Statute

17. For all the above reasons, it is proposed that the Statute be amended such that organizations would be required to provide explanations regarding their reasons for withdrawing from the Tribunal's jurisdiction. The proposed amendments also introduce an obligation to consult the staff representative organizations regarding any possible withdrawal from the Tribunal's jurisdiction and to ensure that the staff representatives' views are brought to the attention of the Governing Body. 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 in important decisions concerning the type, nature and quality of the dispute resolution mechanism or mechanisms to which they have access in employment matters. Furthermore,

⁴ See [GB.332/PFA/INF/9](#).

as there are two parties in cases before the Tribunal, it seems unjust that only the administration should be in a position to influence a governing body, while the staff members have no possibility to express their views. Elementary considerations of good faith would require that organizations consult their staff in such cases.

18. 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.
19. The issue of applications for review, execution or interpretation may also need to be addressed. 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.
20. It is further proposed to require 12 months' advance notice for any withdrawal from the Tribunal's jurisdiction. This proposal is founded on the general principle of good faith, pursuant to which unilateral commitments give rise to a number of obligations, including the obligation to give reasonable notice before ending those commitments. This principle is reflected, for instance, in article 56 of the Vienna Convention on the Law of Treaties, which provides that where a treaty does not contain any provision regarding its termination, a party shall give not less than 12 months' notice of its intention to denounce or withdraw from the treaty. The analogy between treaty law and unilateral commitments of indefinite duration has been explained further by the International Court of Justice, which confirmed, in relation to the right to terminate unilateral declarations of recognition of the Court's jurisdiction, that it stemmed from "the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity".⁵
21. 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

22. *The Governing Body approved the draft resolution appended to document GB.334/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).*

⁵ International Court of Justice: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, p. 392–443, para. 63.

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. Any 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 by addressing to the Director-General an official communication emanating from the same organ which decided to recognize the Tribunal's jurisdiction. This communication must contain:

- (a) explanations on the reasons for withdrawing the recognition of the Tribunal's jurisdiction and the means of employment dispute settlement envisaged to replace the Tribunal;
- (b) full details 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, may approve the withdrawal of the recognition of the Tribunal's jurisdiction, which shall take effect at the earliest 12 months after its notification to the Director-General, or any other later date as may be agreed upon with the organization concerned after consultation with the Tribunal. No complaint filed against the organization after the effective date of the withdrawal shall be entertained by the Tribunal.