



## Governing Body

328th Session, Geneva, 27 October–10 November 2016

GB.328/LILS/1

Legal Issues and International Labour Standards Section  
*Legal Issues Segment*

LILS

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### 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

Following discussion of this agenda item at the 325th (November 2015) and 326th (March 2016) Sessions of the Governing Body, this document proposes a revised draft Conference resolution amending Annex I to the 1947 Convention on the Privileges and Immunities of the Specialized Agencies to accord limited immunity from jurisdiction to Employers' and Workers' delegates to the International Labour Conference and to Regional Meetings, and to Employer and Worker members of the Governing Body, to protect the exercise of their official functions in the ILO in relation to the authorities of their own State.

The Governing Body is invited to approve the draft resolution in Appendix I for submission to the next session of the International Labour Conference (see the draft decision in paragraph 9).

**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.



1. It will be recalled that the Governing Body discussed this item at its 325th (November 2015) and 326th (March 2016) Sessions. At the last session, it took note of the concrete proposals submitted by the Office <sup>1</sup> – a draft Conference resolution adopting amendments to Annex I of the Convention on the Privileges and Immunities of the Specialized Agencies, 1947 (“1947 Convention”) – and decided to postpone the decision on this item until its 328th Session (November 2016) to allow time for tripartite consultations, including at the national level. <sup>2</sup>
2. For the purpose of such consultations, the Office prepared and distributed the revised draft resolution in Appendix I, which seeks to take into account the views expressed in the Governing Body. The Office has also prepared an Explanatory Note in the form of questions and answers (Appendix II) which addresses the legal and practical implications of the proposed amendment to Annex I of the 1947 Convention.
3. The main differences between the revised draft resolution and the draft resolution proposed at the 326th (March 2016) Session of the Governing Body <sup>3</sup> are the following:
  - the Preamble has been slightly reworded and reorganized to stick more closely to the wording of the 1970 resolution concerning freedom of speech of non-governmental delegates to ILO meetings;
  - the privileges and immunities granted to Employers’ and Workers’ Conference delegates and Governing Body members in relation to the authorities of their own State are now limited to immunity from legal process in respect of words spoken or written and acts performed in their official capacity;
  - the personal scope of the immunity has been extended to cover Employers’ and Workers’ delegates and advisers to ILO Regional Meetings;
  - the material scope of this immunity has been clearly limited to words spoken or written and acts performed at the International Labour Conference (ILC), Governing Body or Regional Meetings, or any committees, subcommittees or other bodies of those organs (the latter covering in particular meetings of the groups).
4. The revised proposals are based on the following considerations. As appears from the discussion at the Governing Body and public discussion in member States, privileges and immunities are increasingly criticized as unjustified privileges that are too often abused. It may therefore be more realistic to limit the proposed new privileges and immunities to what is considered strictly necessary to the functioning of the Organization. The complete safeguard of the freedom of speech has generally been the main focus of discussions regarding privileges and immunities of Conference delegates and Governing Body members, in the 1940s when the ILO’s current privileges and immunities were conceived as in the discussions today. It is also the type of immunity that is most widely granted to national and international parliamentarians and that appears to be the least contested. It is therefore proposed to limit the new immunities to immunity from legal process in respect of words spoken or written and acts performed in their official capacity. Not only does this arrangement describe those aspects of Employers’ and Workers’ immunity which are

<sup>1</sup> GB/326/LILS/1.

<sup>2</sup> GB.326/PV, para. 458.

<sup>3</sup> GB.326/LILS/1, Appendix.

indispensable for the functioning of the ILO but it exactly corresponds to the scope of protection called for in the 1970 Conference resolution, which was adopted unanimously and whose relevance has never been challenged.

5. Taking into account the doubts expressed in the course of the discussion at the 326th Session of the Governing Body as to when delegates and members may be deemed to be speaking and acting in their official capacity and not in their private capacity, it is proposed to circumscribe the scope of the immunity to words spoken or written and acts performed “at meetings” of the respective bodies. This would cover, for instance, conversations in informal groups or otherwise on the margins of the meeting, but normally not statements outside of the meeting premises or to the media. The latter would be treated as purely national activities protected by freedom of association principles and applicable instruments and supervisory procedures. In addition, the 1970 resolution remains applicable and the principles contained in it are reaffirmed in the preamble of the proposed resolution.
6. As requested by the Employers’ and Workers’ groups, the scope of the proposed immunity from legal process has been extended to cover delegates and advisers to ILO Regional Meetings. Based on the last cycle of Regional Meetings, this would add, on average, only three to four persons by a member State who would be entitled to immunity from legal process in respect of words spoken or written and acts performed at each four-day Regional Meeting.
7. As regards the amendments to the resolution proposed by the industrialized market economy countries (IMEC) group, most of them were related to the proposed immunity from personal arrest and detention, which is no longer contained in the proposed resolution, and have thus lost their object. The proposals regarding the renumbering of the proposed new paragraph of Annex I to the Convention and regarding the provisional application of the Convention and the revised Annex have been implemented, but the latter has been slightly reworded.
8. It is, however, suggested not to delete the words “in its opinion” from paragraph 1bis(ii) of the proposed revised annex. The principle according to which it is for the international organization itself, through its organ that lifts the immunity to assess whether the conditions for doing so are fulfilled, is well established and considered essential for the protection of the independence of international organizations. It has been codified in numerous instruments on privileges and immunities,<sup>4</sup> including in the 1947 Convention itself, namely in section 22, in paragraph 3(d)(iii) of Annex I and in the analogous provisions concerning experts on mission in nine other annexes of the Convention.<sup>5</sup> If a member State disagrees with the opinion of the Organization that it cannot waive immunity in a particular case, it may consider that this constitutes an abuse of privilege and address the situation with the Organization through the procedure provided under Article VII, section 24, of the Convention.

<sup>4</sup> For example, the Convention on the Privileges and Immunities of the United Nations (1946), sections 20 and 23; General Convention on the Privileges and Immunities of the Organization of African Unity (1965), Articles VI(4) and VII(2); Agreement on the Privileges and Immunities of the Organization of American States (1949), Article 14; Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations (2009), Articles 4(6) and 5(2); General Agreement on Privileges and Immunities of the Council of Europe (1949), Article 19 and Second Protocol (1965) thereto, Article 4; Protocol on the Privileges and Immunities of the European Communities, Article 17.

<sup>5</sup> Annexes II (FAO), III (ICAO), IV (UNESCO), VII (WHO), XII (IMO), XV (WIPO), XVI (IFAD), XVII (UNIDO) and XVIII (UNWTO).

***Draft decision***

- 9. The Governing Body approves the draft resolution in Appendix I for submission to the next session of the International Labour Conference.***



## Appendix I

### **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 ...th Session, June 20...

Noting that, in accordance with article 40 of the Constitution of the Organisation, delegates to the Conference and members of the Governing Body shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization;

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 fundamental importance to the ILO 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 organizations, on questions within the competence of the International Labour Organization, and may freely keep members of their organizations in their countries informed of the views so expressed,

Reaffirming 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 Organization is completely safeguarded;

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 1bis the following provisions:

“1bis. (i) Notwithstanding section 17 of Article V, Employers' and Workers' delegates and advisers to the International Labour Conference or to regional conferences convened under article 38 of the Constitution of the International Labour Organisation, and Employer and Worker 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, immunity from legal process both during and subsequent to the discharge of their duties in respect of words spoken or written and acts performed in their official capacity at meetings of the International Labour Conference, regional conferences or the Governing Body or of any of their committees, subcommittees or other bodies.

(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 in accordance with Article XI, section 47(1), and pending such notification to apply, to the extent possible, its provisions as modified;

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



## Appendix II

### **Proposed protection of Employers' and Workers' delegates to the Conference and to Regional Meetings and Employer and Worker members of the Governing Body in relation to the authorities of a State of which they are a national or a representative**

#### **Questions and answers**

What does it cover? (material scope)

The proposed immunity from legal process will offer protection against judicial proceedings or any other legal action in respect of opinions expressed (orally or in writing), acts performed and votes cast by non-governmental Conference delegates and Governing Body members in the exercise of their functions. The immunity would apply, for instance, to statements and speeches, written reports, initiatives such as filing of complaints and votes cast. It should not extend, however, to private statements and behaviour not directly related to their functions as Employer and Worker representatives. By means of example, a Workers' or Employers' delegate to the Conference who might be charged by the authorities of his/her own country for having signed an article 26 complaint against that country would be immune from legal process.

Whom does it cover? (personal scope)

The new provisions would firstly benefit the Employers' and Workers' delegates and advisers at the ILC as referred to in article 3 of the Constitution. Based on the figures of delegates and advisers registered at the last five sessions of the Conference, and bearing in mind that member States would only have to apply the new provisions to their own Conference delegations, this would concern on average about six persons per member State (taking into account, however, that the actual size of delegations varies widely). Secondly, the new immunity would apply to the Employer and Worker regular members (28 persons) and deputy members (38 persons) of the Governing Body, as well as to their substitutes. This represents normally not more than two persons per member State, in most cases less. Thirdly, as regards Regional Meetings, which are also composed of tripartite national delegations as is the ILC, the new provisions would concern on average between three and four persons.

Where do the words need to be spoken and the acts to be performed in order to be covered by the immunity?  
(spatial scope)

The proposed immunity is limited to statements made and acts performed within the premises hosting the session of the Conference, the Governing Body or a Regional Meeting (for instance, the UN *Palais des Nations*, the ILO headquarters building, or a conference centre hosting a Regional Meeting). This includes words or votes recorded at plenary sittings, group meetings, meetings of committees and subsidiary bodies such as working groups, and other official places of work used for the purposes of the Conference, the Governing Body or a Regional Meeting. It does not include, however, statements made on the occasion of the meeting or session, to the press or social media, televised or radio debates, interviews, political gatherings or in writing, even if such statements merely repeat words they have spoken at ILO meetings. By way of example, a Worker or Employer member of the Governing Body could not invoke immunity from legal process if legal action were to be taken in his/her own country for having given an interview on Swiss television while in Geneva for the March session of the Governing Body in which he/she denounced the

legislative reforms in that country and called for an international embargo against the Government.

How long does it last? (temporal scope)

The proposed immunity prevents any type of judicial proceedings for views expressed or votes cast by the persons concerned during their appointment as Conference delegates or advisers, members of the Governing Body or delegates or advisers of a Regional Meeting. However, it continues to apply in respect of those acts even after the end of the appointment.

Why is the proposed immunity needed?

The proposed immunity serves to protect the freedom of expression and independence of non-governmental delegates to the Conference and Regional Meetings and of non-governmental members of the Governing Body. Freedom of opinion and speech is key to meaningful social dialogue and tripartism, as affirmed by the Conference in the 1970 resolution and by the Committee on Freedom of Association in several cases.

By protecting the immunity of Employers' and Workers' delegates to the Conference and Employer and Worker members of the Governing Body, the ILO enhances and guarantees the independence, transparency and stability of the Organization's main deliberative and executive organs.

The proposed immunity does not seek to protect individual persons but the body to which they belong by safeguarding the autonomy and integrity of their statutory role and functions vis-à-vis the ILO.

How does the proposed immunity compare to parliamentary immunity?

Protection of members of parliament for acts performed in official capacity is a concept recognized in most democracies around the world. In the great majority of countries, parliamentarians enjoy absolute immunity for opinions expressed and votes cast in the performance of their parliamentary duties and this principle is guaranteed by the Constitution. Such protection applies from the moment of their election, or from the moment they take the parliamentary oath, and does not end at the expiration of the mandate or at the dissolution of parliament but remains in force for their action during the exercise of the mandate.

This form of immunity (also known as "parliamentary privilege", "non-accountability" or "freedom of speech") is to be distinguished from another form of immunity in the strict sense (also known as "inviolability") which confers special legal protection for parliamentarians – typically against arrest, detention and prosecution – for acts undertaken outside the exercise of their parliamentary function. This form of immunity is temporary and applies only as long as the members of parliament are in office. Moreover, it may be waived and does not cover cases in which a parliamentarian is caught in the act of committing a crime (in flagrante delicto). This form of immunity is more controversial and national practices and rules vary considerably.

The proposed immunity for Employers' and Workers' delegates to the Conference and members of the Governing Body mirrors the widely accepted principle of "parliamentary privilege" or parliamentary "non-accountability" in that it offers protection only with respect to words spoken and acts performed in the exercise of official ILO functions. On the contrary, it does not cover the "inviolability" form of parliamentary immunity. If the parliamentary privilege is based on the need to protect the principles of representative democracy and separation of powers, the proposed immunity of non-governmental delegates

to the Conference (often referred to as world parliament of labour) and members of the Governing Body seeks to uphold the integrity and autonomous operation of the tripartite structure of the Organization by protecting the representatives of employers and workers from undue pressure and interference.

How would the proposed immunity be lifted and who would make this decision?

It would be for the International Labour Conference or the Governing Body to make a decision on waiving immunity but in making this decision these organs would apply the same rules that presently member States apply when they have to make similar decisions under section 16 of the 1947 Convention. The proposed revised Annex I reproduces textually the wording of section 16 without adding or taking out anything.

When ratifying the revised Annex I, do Members need to adopt implementing legislation?

Implementing the provisions of the revised Annex I would call for some action, legislative or otherwise, depending on the legal system, procedures and practices of the ratifying Member. It may be assumed that in most countries, some form of legal instrument such as an act, ordinance or regulation would be required before the immunity envisaged could be effectively applied in the domestic legal order.

Why is the amendment of Annex I to the 1947 Convention required?

According to a 1970 Conference resolution, article 40 of the ILO Constitution should be applied in a manner that fully protects the freedom of speech of Conference delegates and Governing Body members on questions concerning the ILO. Yet, the 1947 Convention in its section 17 renders their privileges and immunities under the Convention inapplicable in relation to the authorities of a State of which they are a national or representative. Since a complete protection of Conference delegates' and Governing Body members' freedom of speech does not seem possible if it may be disregarded in their own country, the 1947 Convention needs to be adapted to follow the Conference's understanding of article 40. The way to do this is by amending Annex I of the Convention, which is the instrument that allows the ILO to adapt the 1947 Convention to its particular needs.

What is the procedure for amending Annex I?

If approved by the Governing Body, the proposed amendment to Annex I will be transmitted to the Conference in the form of a draft resolution for consideration and possible adoption. If adopted by the Conference, the revised annex will be transmitted by the Office to the UN Secretary-General and it would become binding on those member States that would address a notification of acceptance to the Secretary-General in accordance with sections 38 and 47(1) of the 1947 Convention.

Have there been other amendments of Annex I of the 1947 Convention?

No, this will be the first time the ILO will propose a revised annex. However, other specialized agencies, such as the WHO, the IMO and the FAO have amended their respective annexes several times in order to extend the coverage of privileges and immunities to certain categories of persons.

Will any Member ratifying the 1947 Convention after the adoption of the revised annex be automatically bound by that annex?

No, according to United Nations practice as depositary of the Convention, a member State may still choose to be bound only by the original 1948 version of Annex I by making a corresponding declaration.