



# Governing Body

341st Session, Geneva, March 2021

Programme, Financial and Administrative Section

PFA

Personnel Questions Segment

**Date:** 19 February 2021

**Original:** English

Fifteenth 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 with respect to: (i) the procedure according to which an international organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance; (ii) the term of office of judges and the geographical distribution and gender balance in the composition of the Tribunal; and (iii) the extension of the appointment of judges in the event the Conference does not meet prior to the expiry of their term of office. The Governing Body is invited to approve the proposed amendments and transmit those to the 109th Session (June 2021) of the Conference for possible adoption (see the draft decision in paragraph 53)

**Relevant strategic objective:** None.

**Main relevant outcome:** Enabling outcome C: Efficient support services and effective use of ILO resources.

**Policy implications:** None.

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

**Financial implications:** None.

**Follow-up action required:** Depending on the Governing Body's decision, transmission of the proposed amendments to the Tribunal's Statute to the 109th Session (June 2021) of the Conference for possible adoption.

**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\(Rev.\)](#); [GB.335/PFA/12/1](#); [GB.337/PFA/13/2](#).

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## ▶ Introduction

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1. At its 337th Session (October–November 2019), the Governing Body had before it a paper concerning proposed amendments to the Statute of the Administrative Tribunal relating to the procedure according to which an organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance.<sup>1</sup> The Governing Body discussed the importance of introducing a clear and transparent withdrawal procedure which would codify the current practice without creating any new legal obligations for withdrawing organizations. The Governing Body also considered the possibility to introduce a limit to the number of years judges may serve and also include provisions aiming at ensuring a geographical and gender balance in the composition of the Tribunal. There has also been an exchange of views on the advisability of commissioning an independent review of the functioning of the Tribunal. The Governing Body requested the Office to submit draft amendments to the Statute of the Tribunal at its 338th Session (March 2020), taking into account the guidance provided during the discussion.<sup>2</sup>
2. The Office paper with the draft amendments was submitted at the 338th Session (March 2020) of the Governing Body, but was not considered as the Governing Body session was eventually cancelled due to the COVID-19 pandemic. It was subsequently revised to include a new proposed amendment on the extension of the appointment of judges in exceptional circumstances. Following the decision of the Governing Body that the 340th Session (October–November 2020) of the Governing Body be principally virtual, and the consequent decision of the tripartite Screening Group to significantly reduce the agenda of the 340th Session, the consideration of this paper was deferred to the 341st Session (March 2021).
3. This paper contains three sets of proposed amendments to the Statute of the Tribunal and its Annex with respect to (i) the procedure according to which an international organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance, (ii) the term of office of judges and the geographical distribution and gender balance in the composition of the Tribunal, and (iii) the extension of the appointment of judges in the event the Conference does not meet prior to the expiry of their term of office.
4. In compliance with the need to consult the Tribunal on proposals to amend its Statute, the Office has invited the Tribunal to comment on the draft paper. The Tribunal's latest comments dated 27 January 2021 are reproduced in Appendix IV. The Office has also consulted the organizations having recognized the jurisdiction of the Tribunal and their staff associations. All the responses received by October 2020 are reflected in this paper.

## ▶ Withdrawal from the jurisdiction of the Tribunal

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5. Amendments to article II and the Annex to the Tribunal's Statute were initially called for by the Governing Body at its 332nd Session (March 2018) as a consequence of the discontinuation by certain organizations of their declaration of acceptance of the

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<sup>1</sup> GB.337/PFA/13/2.

<sup>2</sup> GB.337/PV, para. 1158.

Tribunal's jurisdiction since 2016 and the reaction of the judges of the Tribunal, who considered that such unilateral decisions might be perceived as "forum shopping" and emphasized the need for clear procedural rules for the termination of membership.<sup>3</sup> The matter was put before the Governing Body at its 334th Session (October–November 2018), but the discussion was deferred in order to allow time for further consultations with organizations that had expressed reservations with respect to some aspects of the proposed amendments.<sup>4</sup> At its 335th Session (March 2019), the Governing Body was unable to conclude its discussion on this matter for lack of time. At its 337th Session (October–November 2019), the Governing Body noted the initiative of the President of the Tribunal to give an opportunity to representatives of the organizations and staff that are subject to its jurisdiction to express their concerns on various aspects of its functioning and case law, and requested the Office to keep it informed of the outcome of those consultations and to prepare proposed amendments for its consideration at its next session.

6. During its earlier discussions on the proposed amendments to the Statute, the Governing Body has considered that as there is a formal process for the approval of the recognition of the jurisdiction of the Tribunal by an international organization, there should also be a formal and transparent process for orderly withdrawal from the Tribunal membership. It has also accepted that any decision to withdraw from the Tribunal should be promptly brought before the Governing Body so that it could take note of the decision, and confirm that this date, or any later date as may be agreed upon with the organization concerned, would be the effective date of withdrawal to be communicated to the Tribunal's Registry. Moreover, it has been generally accepted that the withdrawing organization was expected – in deference to the Tribunal – to provide information on the reasons of its termination of membership and on whether its staff representatives were duly consulted in this respect.
7. Further, there has been support among Governing Body members that just as it is important to note that withdrawals based solely on disagreement with the Tribunal's case law undermine the independence and impartiality of the Tribunal, it is equally important to respect the prerogative of the governing bodies of organizations recognizing the Tribunal's jurisdiction to decide when and under what circumstances they would deem it appropriate to withdraw. The Governing Body took accordingly the view that any information communicated to the Governing Body by a withdrawing organization should be provided on a voluntary basis, and not as a matter of legal obligation, and that the notification of withdrawal would be submitted to the Governing Body at the session immediately following the date of receipt of that notification.
8. Based on the views expressed during the Governing Body discussions, and also taking into account the comments of the Tribunal and the views expressed by some of the organizations having recognized the Tribunal's jurisdiction, further modifications to the draft amendments are proposed. In article II, paragraph 5, the word "conditions" is replaced by "procedure" to clarify that withdrawal is not subject to legally binding requirements. In paragraph 3 of the Annex, the words "and under conditions that safeguard the independence and the appearance of independence of the Tribunal" have been removed. Also in paragraph 3, the words "This communication should contain" and subparagraphs (a), (b) and (c) are replaced by the following: "The organization shall address to the Director-General an official communication notifying the relevant

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<sup>3</sup> See [GB.332/PV](#), paras 780–784.

<sup>4</sup> [GB.334/PFA/12/1](#).

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, reaffirming its commitment to faithfully execute judgments on any pending cases and indicating, as appropriate, the reasons for discontinuing the recognition of the Tribunal, the alternative means of employment dispute settlement envisaged, and any consultations with the staff representative bodies prior to the withdrawal decision." This seeks to remove any doubt that the information provided to the Governing Body, while highly desirable, ultimately falls under the organization's responsibility. Finally, in paragraph 4, the words "At its next session following the notification of withdrawal," are inserted before the words "The Governing Body" to ensure that the withdrawal process may not be delayed. The last sentence of paragraph 4 referring to complaints filed after the effective date of the withdrawal, should obviously not be interpreted as excluding the Tribunal's competence to consider applications for interpretation, execution or review relating to a judgment delivered by the Tribunal, in accordance with article VI, paragraph 1, of its Statute.

9. By letter dated 13 January 2020, the Tribunal had initially expressed reservations as to the need for an express clause in the Statute while indicating that it might be useful to assert the authority of the Governing Body in the withdrawal process. The Tribunal remained concerned about the possibility of forum shopping and its impact on the independence of the international administrative tribunals. It considered that this concern might be addressed through non-normative initiatives, such as a discussion between the Director-General and other executive heads of organizations having administrative tribunals open to recognition by other organizations, or a code of conduct to be proposed by the Tribunal to other administrative tribunals.
10. By letters of 15 January and 27 August 2020, UNESCO reiterated that the ILO may not unilaterally impose on other organizations conditions on the withdrawal of their acceptance of the Tribunal's jurisdiction through an amendment to the Statute and stressed that any agreement on this matter would require the approval of UNESCO's General Conference. By letter of 7 February 2020, 13 other organizations expressed the view that the withdrawal procedure should be contained in a separate document and indicated that they would have to consider carefully whether any eventual amendments to the Statute would meet with their express agreement. As for the European Organization for Nuclear Research (CERN), it wrote on 29 January 2020 to recall its earlier comment that the formulation of the revised article II, paragraph 5, was acceptable.
11. As for staff representative organizations, the Coordinating Committee of International Staff Unions and Associations (CCISUA) reiterated its previous position that a withdrawal notice period was essential, that withdrawing organizations should provide proof of an alternative mechanism already in place starting on the day following the effective date of withdrawal, that an exhaustive list of documents should be provided as a mandatory requirement to prevent a "race to the bottom" and that the use of the word "may" instead of "shall" was excessively soft. The CCISUA therefore concluded that the draft amendments do not sufficiently protect staff members and considers that the consideration of the amendments should be postponed until at least such a time as other safeguards could be put in place to ensure that organizations do not change forum without good and valid cause.
12. The CERN Staff Association reiterated the importance it attaches to the provision of the reasons motivating an organization to withdraw from the jurisdiction of the Tribunal, and reaffirmed its view that the Tribunal must remain competent in respect of any administrative decision which forms the subject of an internal redress procedure

initiated prior to the effective date of withdrawal. As for the WIPO Staff Council, it concurred with the proposed amendments while stressing the importance for an organization of holding consultations with staff representatives prior to submitting any withdrawal.

13. The ILO's Staff Union Committee (SUC) noted with concern that the proposed amendments differ significantly from previous versions further diluting any initial proposed requirements, for instance by no longer requiring that the staff representatives' views be brought to the attention of the ILO Governing Body. The Staff Union Committee is concerned that the amendments and lack of legal obligations therein, if adopted, would increase the risk of withdrawal of recognition of jurisdiction by organizations, which could ultimately threaten the Tribunal's existence. This concern is particularly exacerbated in light of the most recent UN General Assembly resolution 74/255B. The Staff Union Committee considered that the discussion must be deferred to allow a full consultative process with all stakeholders to take place.
14. By letter of 27 January 2021 (see Appendix IV), the Tribunal indicated that it had no objection, in principle, to the proposed amendment to article II, paragraph 5, of the Statute, coupled with the two new paragraphs in the Annex to the Statute, particularly since the new paragraph 3 of the Annex specifically indicates that an organization's withdrawal from the Tribunal's jurisdiction must comply with the principles of good faith and transparency and provides sufficient guarantees that these principles will be respected.

## ► Geographical distribution and gender balance in the composition of the Tribunal and limits to the term of office of judges

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15. The proposed amendments to article III of the Statute have been prepared in response to the discussions at the 335th and 337th Sessions of the Governing Body (March and November 2019 respectively) <sup>5</sup> concerning the need to ensure geographical distribution and gender balance in the Tribunal's composition and to establish an overall limit on the number of years judges may serve on the Tribunal.
16. It is recalled that the current text of the Statute does not contain express provisions in this regard. The only statutory requirement set out in article III, paragraph 1, of the Statute is that all the judges must be of different nationalities. In practice, however, factors such as ensuring a balance between various legal systems, regional distribution, linguistic abilities based on the Tribunal's caseload and working languages have always been taken into consideration when prospecting for and selecting eligible judges. To date, judges of 20 different nationalities have served on the Tribunal. <sup>6</sup>
17. Under the current selection process, judges are selected among persons who hold or have held high judicial office (for instance, Supreme Court, Federal Court, Conseil d'Etat etc.) representing different legal traditions. Apart from outstanding professional credentials and long years of experience in labour and administrative law, judges are required to have special linguistic skills necessary for drafting judgments in one of the

<sup>5</sup> GB.335/PV, paras 1072, 1082, 1096, 1099, 1101 and 1116–1119.

<sup>6</sup> See GB.337/PFA/13/2, appendix.



working languages of the Tribunal (English and French) and are expected to have at least passive understanding of the other language to be able to deliberate over complex legal matters in plenary sessions. Every effort is also made so that the Tribunal's composition reflects a geographical distribution (currently the Tribunal is composed of judges from all four regions) and gender balance (at present, two of the seven judges are women – see Appendix I). In view of the highly specialized profile and demanding eligibility criteria, prospection for appointable judges is often challenging and time-consuming.

18. It is proposed to codify established practice by amending article III. The proposed amendments set out the eligibility criteria for judges placing emphasis on the judges' professional competence and skills, which are the paramount criteria for their appointment, and refer to the need of having due regard to geographical distribution and gender balance in the Tribunal's composition.
19. It is also proposed to codify the existing guiding principle according to which the Tribunal's composition should be such that enables the Tribunal to hear complaints filed in either English or French and render judgments in both those working languages. In practice, this means that the Tribunal must be composed at all times of the necessary number of French-speaking and English-speaking judges to operate the "French" and "English" panels accordingly.
20. It is further proposed to add language similar to that found in most statutes of international administrative tribunals providing that the judges shall exercise their functions in conditions of complete independence.
21. It is noted that, while the statutes of most international administrative tribunals provide that no two judges shall be of the same nationality, only the statute of the United Nations Dispute Tribunal (article 4(2)) and the UN Appeals Tribunal (article 3(2)) provide that "due regard shall be given to geographical distribution and gender balance" when appointing judges. No express provision for either gender balance or geographical distribution is made in the statute of the other 12 administrative tribunals reviewed in preparing this paper (see Appendix II).
22. As to the overall number of years that judges may serve, article III, paragraph 2, of the Statute provides that judges are appointed for a period of three years, but does not establish a limit on the number of times their term of office may be renewed. There is an understanding, however, among judges that they should not seek to renew their term of office beyond the age of 75. Many judges have agreed to remain on the Tribunal for several terms to ensure the continuity and stability of its case law. A list of the current judges, together with their nationality and years of service, appears in Appendix I.
23. The statutes of several international administrative tribunals establish a limit to the number of years judges may serve or to the number of times their term of office may be renewed. On one side, there are tribunals that provide for a non-renewable term of office, for instance, the Inter-American Development Bank Administrative Tribunal or the UN Dispute and Appeals Tribunals whose judges are appointed for a non-renewable term of six and seven years respectively. On the other side, there are tribunals that permit the reappointment of judges but only for a fixed number of terms. For example, the judges of the Administrative Tribunal of the Asian Development Bank are appointed for a period of three years and may be reappointed for a maximum of two additional three-year terms, or nine years in total. Similarly, the judges of the World Bank Administrative Tribunal and of the North Atlantic Treaty Organization Administrative Tribunal are appointed for five years and may be reappointed for one additional five-year term (10 years in total) while those of the International Monetary Fund

Administrative Tribunal are appointed for four years and may be reappointed for a maximum of two additional terms (12 years in total).

24. In contrast, the Statutes of the administrative tribunals of the Council of Europe, the European Bank for Reconstruction and Development, the African Development Bank and the Organisation for Economic Co-operation and Development, provide that judges are appointed for renewable terms of three years, without any specific limit. In the same vein, the judges of the First instance and Appeals Tribunals of the Organisation Internationale de la Francophonie and those of the Administrative Tribunal of the European Stability Mechanism are appointed for renewable terms of four and five years respectively. As regards the judges of the Administrative Tribunal of the Bank for International Settlements, they are appointed for a term of four years renewable until the age of 75 whereas the judges of the Administrative Tribunal of the Organization of American States are appointed for a term of six years on the understanding that they may serve for no more than two consecutive terms. A comparative table of the term limitations of the judges of the different administrative tribunals is provided in Appendix II.
25. It is noted that two opposing considerations may guide the Governing Body's deliberations on this matter; on the one hand, providing for a single, non-renewable term of office of a limited number of years appears to offer the best guarantee against any risk, real or perceived, of favouritism which would result from the regular short intervals at which reappointments of judges are examined. On the other hand, allowing judges to be reappointed and thus serve for longer periods contributes to preserving and promoting the consistency, stability and quality of case law.
26. Should the Governing Body decide to amend article III, one possible option would be to align the Statute of the ILO Administrative Tribunal with that of the UN Dispute and Appeals Tribunals and provide for a non-renewable term of seven years. It is recalled, in this connection that when reviewing the status of the judges of the ILO Administrative Tribunal at its 334th Session (October–November 2018), the Governing Body considered it appropriate to align their status with that of the judges of the UN Dispute and Appeals Tribunals<sup>7</sup>, and therefore the proposed alignment would be in the interest of further uniformity between the two justice systems. Another possible option would consist in maintaining the current wording of the Statute and simply introducing a limit on the number of times the term of office of judges may be renewed. In this sense, a term of office of five years renewable once – or a maximum of ten years – would seem to generally reflect the practice of other administrative tribunals.<sup>8</sup>
27. It is recalled that in an analogous development, in 2002, it was decided that the members of the Committee of Experts on the Application of Conventions and Recommendations would not serve for more than 15 years, that is, a maximum of four renewals after the first three-year appointment, notably with a view to furthering the Committee's diversity.
28. Irrespective of which option the Governing Body could possibly retain, the proposed draft Conference resolution includes transitional measures with a view to ensuring the stability of the Tribunal's functioning and the continuity of service of the currently serving judges. Provision could also be made for staggered terms of office of judges so that the composition of the Tribunal be renewed in parts when needed. Staggering

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<sup>7</sup> GB.334/PFA/12/3(Rev.).

<sup>8</sup> For instance, the Statute of the World Bank Administrative Tribunal, which provided for a three-year term renewable without limit, was revised in 2001 to introduce a five-year term renewable once.

arrangements are often provided for the initial appointment of judges at newly-established courts or tribunals (see, for instance, article 36(9) of the Rome Statute of the International Criminal Court and article 3(4) of the United Nations Appeals Tribunal) and seek to avoid the risk of departure of several experienced judges at the same time.

- 29.** In its earlier comments communicated on 13 January 2020, the Tribunal expressed the view that geographical distribution and gender balance in the composition had always been taken into consideration by the International Labour Conference in nominating judges and that including only gender and geographical representation criteria might be seen as contrary to the long-standing practice of the ILO which insists on the experience and quality of judges. As for the term of office of judges, the judges could not see any compelling reason for changing the current situation and that their discretion to decide when to finish their mandate was perceived as a guarantee of their independence. They further considered that comparative information concerning other administrative tribunals was not very helpful as there were many differences in the profile of judges and the caseload of those tribunals.
- 30.** As for the 13 organizations that communicated their comments on 7 February 2020, they did not express any view on the proposed amendments to article III. Similarly, UNESCO and CERN in their respective communications of 15 January and 29 January 2020 did not address at all the issues of gender balance and geographical distribution in the Tribunal's composition or the possible limitations to the term of office of judges. Likewise, the WIPO Staff Council, the CERN Staff Association, the CCISUA and the ILO's Staff Union Committee submitted no observations in this matter.
- 31.** By communication of 9 September 2020, the International Centre for Genetic Engineering and Biotechnology (ICGEB) expressed its preference for limiting the appointment of judges to one term of seven years as this would allow for rotation and would align the Tribunal to the term of the UN tribunals. Likewise, the WHO would support a non-renewable term of office and application of time limits also to the judges appointed prior to 2021. Two staff associations, the WHO Staff Association by letters of 10 March and 9 September 2020 and the UNAIDS Secretariat Staff Association by message of 4 September 2020, expressed their support for a term of office of five years renewable once as this would be in line with general practice of other administrative tribunals. For the WHO Staff Association, allowing current judges to be renewed indefinitely (as is currently the case) would prevent the principles of geographical distribution and gender balance from taking their full effect.
- 32.** In contrast, CERN indicated that it was satisfied with the current system and the evident efforts to ensure diversity in the composition of the Tribunal and also that it was not convinced modification is required with regard to the term of office of judges.
- 33.** In its latest comments dated 27 January 2021 (see Appendix IV), the Tribunal indicated that it had no objection to the eligibility criteria for judges or to the introduction of an explicit reference to geographical distribution and gender balance in its composition. As regards language requirements, the Tribunal suggested that the relevant provision should be drafted in a manner that avoids unduly restricting the possibility of attracting good candidates from countries where knowledge of one or other of the Tribunal's working languages is less common.
- 34.** With respect to the duration of the term of office of judges, the Tribunal expressed the view that the present method of tenure has worked well over the years and has afforded continuity and consistency in the case law of the Tribunal. However, the Tribunal did not oppose the proposed amendment of the judges' term of office to five years renewable

once. Lastly, with respect to the transitional measures, the Tribunal considered that retaining the customary retirement age of 75 would be a more appropriate solution to address the situation of judges currently in office but did not oppose the proposed extension for a further non-renewable term of seven years.

35. In light of the preceding, it is proposed to codify and further detail the eligibility criteria for judges, fix the duration of the term of office of judges to five years renewable once, and provide for staggered terms of office. Further, as a transitional measure, it is proposed that the appointment of currently serving judges would be extended for one further non-renewable term of seven years.

## ▶ Extension of appointment of judges in case the Conference does not meet on expiry of their term of office

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36. It is recalled that following the decision not to hold the 338th spring Session of the Governing Body in March 2020 due to the COVID-19 pandemic, the tripartite Screening Group met in April to discuss matters that required urgent attention, and decided through delegated authority, among other things, to recommend that the International Labour Conference renew the appointment of one of the judges of the Tribunal for another three-year term as from 1 July 2020.<sup>9</sup>
37. However, the 109th Session of the International Labour Conference was subsequently deferred rendering impossible the renewal of the appointment of the judge in accordance with the provisions of article III of the Statute of the Tribunal. Upon thorough consideration of the matter in several meetings, the tripartite Screening Group concluded that the question should be deferred to the next session of the International Labour Conference in June 2021 for decision, as appropriate.<sup>10</sup>
38. During these discussions, the Office drew attention to the fact that an analogy could be drawn with the Governing Body elections and article 7(5) of the Constitution which provides that “if for any reason the Governing Body elections do not take place on the expiry of [period of office], the Governing Body shall remain in office until such elections are held.” This provision was introduced at the time of the 1946 constitutional amendment as a result of the experience during the Second World War whereby the Governing Body – in view of the impossibility of organizing elections due to the deferral of the Conference in 1940 – continued to function as then constituted until the next regular session of the Conference which was held in 1944.
39. The Office further indicated that in the context of the ongoing consideration of draft amendments to the Tribunal’s Statute, a new provision could be inserted in article III replicating in essence the principle of “service continuity” set out in article 7(5) of the Constitution with regard to Governing Body elections.<sup>11</sup> This would address the exceptional situation created by the deferral of the annual Conference and would thus avoid legal controversy in the future.

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<sup>9</sup> See the Minutes of the meetings of the Screening Group held in preparation of decisions made by correspondence by the Governing Body between March and October 2020, para. 45.

<sup>10</sup> See the Minutes of the meetings of the Screening Group, para. 224.

<sup>11</sup> See the Minutes of the meetings of the Screening Group, paras 200, 204.

40. It is proposed, therefore, that a second sentence be added in paragraph 2 of article III of the Tribunal's Statute to provide that if, for any reason, the International Labour Conference does not meet on the expiry of the term of office of a judge, the judge shall remain in office until the Conference holds its next session and has an opportunity to take a decision on the matter.
41. By letters dated 31 July 2020 and 27 January 2021, the Tribunal indicated that it fully supported the insertion in its Statute of a clause specifically providing for the extension of appointment of judges in case the Conference does not meet on expiry of their term of office. By letter dated 10 August 2020, the Food and Agriculture Organization of the United Nations writing on behalf of 14 member organizations, welcomed the proposed amendment since it aims to resolve a twofold question of governance and legal certainty. By communications of 20 August 2020, the United Nations Industrial Development Organization (UNIDO) and the European Patent Organisation also expressed support, considering it a useful and pragmatic amendment. Moreover, by messages dated 9 and 11 September 2020 respectively, the ICGEB and CERN agreed with the proposed amendment which allows for continuity in the work of the Tribunal. Similarly, by messages of 9 September 2020, the Staff Union Committee and the WHO Staff Association indicated that they were in favour of the amendment as the Tribunal must be able to continue to function.
42. 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. Accordingly, a draft Conference resolution is proposed in Appendix III.

## ► Review of the functioning of the Tribunal

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43. During the discussions at the 335th and 337th Sessions of the Governing Body, diverging views were expressed with regard to the advisability of conducting a review of the functioning of the Tribunal. On one hand, it was proposed that an independent review would lead to a better understanding of the reasons why organizations were withdrawing from the Tribunal's jurisdiction, as well as the identification of areas for improvement and possible alignment with best practices. Special reference was made by some, in this regard, to the standard of proof for sexual harassment cases and the requirement for reinstatement instead of financial compensation, as currently applied by the Tribunal. On the other hand, strong doubts were expressed as to the need to review the functioning of the Tribunal which enjoyed high esteem and was working well, and as to the appropriateness for the ILO as one of the Tribunal's "client" organizations to commission a review of its functioning, as this might undermine the Tribunal's independence and integrity. It was also felt by some that the Tribunal's case law and judicial assessments were not issues that had to be addressed by the Governing Body.
44. It was also noted that the need for any such a review could be further assessed in light of the outcome of the consultation meeting recently organized by the Tribunal with the legal advisers and staff representative bodies of its member organizations. With regard to the scope and financial implications of a possible review, it was clarified that it would not, in any event, be as far-reaching and costly as the redesigning of the UN internal justice system. It was further clarified that the estimated cost would depend on the composition of the panel and exact terms of reference that the Governing Body should adopt prior to commissioning any such review.

45. With regard to the meeting that was held in October 2019 at the initiative of the President of the Tribunal, it is noted that this permitted an exchange of views on various procedural matters and issues related to the Tribunal's case law, such as the advisability of hearing witnesses, ordering penalties for frivolous complaints, the cause for action of staff representatives, and the standard of proof applied by the Tribunal, which continues to raise controversy among the organizations under the Tribunal's jurisdiction. The meeting did not address the question of withdrawal of organizations while the President of the Tribunal announced his intention to hold similar consultation meetings in the future.
46. Another question that was briefly addressed during the 335th and 337th Sessions of the Governing Body was the process for the selection and appointment of judges. It is recalled that this question was last discussed by the Governing Body at its 325th Session (October 2015).<sup>12</sup> At the time, the Governing Body considered that the manner in which the judges are selected and appointed is fully satisfactory and does not call for any change.
47. In addition to commenting on the proposed amendments to its Statute, the Tribunal expressed concern that the nature and the scope of any review of its functioning remains unclear and could potentially affect the independence of the Tribunal. However, the Tribunal indicated that it remains open to dialogue with all the parties concerned.
48. As for the replies received from organizations having recognized the Tribunal's jurisdiction, there have been no views expressed either in favour or against the possibility of undertaking a review of the functioning of the Tribunal.
49. In another related development, the UN General Assembly adopted on 27 December 2019 resolution 74/255B which, *inter alia*, requests the Secretary-General in his capacity as Chairperson of the Chief Executives Board for Coordination to conduct a review of the jurisdictional set-up of the United Nations common system, submit information on findings and proffer recommendations to the General Assembly as soon as practicable. The report, which is expected to be considered by the General Assembly during its first resumed session that begins on 1 March 2021, provides a detailed account of the structure and functioning of the UN and ILO administrative tribunals, an overview of past efforts for the unification of the two tribunals or the harmonization of their Statutes, a discussion of the relevant jurisprudence on common system entitlements, and an initial presentation of options available to promote consistency in the jurisprudence and coherence in the common system.
50. It is recalled that a number of similar reviews have been undertaken in the past 40 years (together with at least three relevant Joint Inspection Unit (JIU) reports) and that the ILO has always cooperated with a view to ensuring the thoroughness and accuracy of those reports.<sup>13</sup>
51. The Secretary-General's report has been prepared in close consultation with the Office as custodian institution of the ILO Administrative Tribunal. It is expected that in the coming months the Office will continue to engage with the UN Secretariat and other UN common system organizations to follow up on the report and any specific guidance of the UN General Assembly. Accordingly, the Governing Body may wish to take these

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<sup>12</sup> GB.325/PFA/9/1(Rev.) and GB.325/PV, paras 696, 702–703.

<sup>13</sup> See, for instance, A/C.5/34/31; A/C.5/37/23; A/C.5/39/7; A/40/471; A/C.5/41/8; A/42/328; A/43/704; A/C.5/44/1; A/61/205. See also JIU/REP/2000/1; JIU/REP/2002/5; JIU/REP/2004/3.

developments into account when discussing whether to resume consideration of a possible independent review of the functioning of the Tribunal.

52. Indeed, by communications of 20 August and 11 September 2020 respectively, UNIDO and CERN took the view that no such review should take place until the review called for in General Assembly resolution 74/255B had been completed.

## ▶ Draft decision

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53. **The Governing Body, taking into account the guidance provided during the Governing Body discussions at the 335th and 337th Sessions on the proposed amendments to the Statute of the ILO Administrative Tribunal, and having duly consulted the Tribunal as well as the organizations having recognized its jurisdiction and their staff associations, decided, by correspondence:**
- (a) **to approve the draft resolution appended to document GB.341/PFA/15/1 concerning amendments to the Tribunal's Statute and to its Annex, for possible adoption by the International Labour Conference at its 109th Session (2021) relating to:**
    - (i) **the procedure according to which an international organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance;**
    - (ii) **the eligibility criteria for judges, the geographical distribution and gender balance in the composition of the Tribunal, and the term of office of judges;**
    - (iii) **the extension of the appointment of judges in the event that the Conference does not meet prior to the expiry of their term; and**
  - (b) **to defer consideration of the advisability of undertaking an independent review of the functioning of the Tribunal in light of the review of the jurisdictional set-up of the United Nations common system undertaken by the UN Secretary-General pursuant to General Assembly resolution 74/255B and welcomed the Office's cooperation in this review.**





## ▶ Appendix I

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### Current composition of the Tribunal

	Initial appointment	Current item
Mr Patrick Frydman (France), President	2007	5th (2019–22)
Ms Dolores Hansen (Canada), Vice-President	2006	5th (2018–21)
Mr Giuseppe Barbagallo (Italy)	2006	5th (2018–21)
Ms Fatoumata Diakité (Côte d'Ivoire)	2015	2nd (2018–21)
Mr Michael F. Moore (Australia)	2012	3rd (2018–21)
Sir Hugh A. Rawlins (Saint Kitts and Nevis)	2012	3rd (2018–21)

There is one vacant position following the non-renewal of the appointment of Mr Yves Kreins (Belgium) due to the deferral of the 109th Session of the International Labour Conference.

▶ **Appendix II**

## Geographical distribution and gender balance in the composition of administrative tribunals and limits to the term of office of judges – Comparative Table

Administrative Tribunal	Gender balance	Geographical distribution	Term of office
Inter-American Development Bank	x	x	6 yrs non-renewable
United Nations Dispute Tribunal	✓	✓	7 yrs non-renewable
United Nations Appeals Tribunal	✓	✓	7 yrs non-renewable
Asian Development Bank	x	x	3 yrs renewable twice
World Bank	x	x	5 yrs renewable once
North Atlantic Treaty Organization	x	x	5 yrs renewable once
International Monetary Fund	x	x	4 yrs renewable twice
Council of Europe	x	x	3 yrs renewable
European Bank for Reconstruction and Development	x	x	3 yrs renewable
African Development Bank	x	x	3 yrs renewable
Organisation for Economic Co-operation and Development	x	x	3 yrs renewable
Organisation Internationale de la Francophonie First Instance and Appeals Tribunal	x	x	4 yrs renewable
European Stability Mechanism	x	x	5 yrs renewable
Bank for International Settlements	x	x	4 yrs renewable until age of 75
Organization of American States	x	x	6 yrs renewable no more than 2 consecutive terms

## ▶ Appendix III

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### Draft Conference resolution

The General Conference of the International Labour Organization,

Conscious of the need to amend article II of the Tribunal's Statute and its Annex in order to set out the procedure pursuant to which a member organization may unilaterally revoke its declaration of acceptance of the Tribunal's jurisdiction;

Desirous to align article III of the Tribunal's Statute with best practices regarding geographical distribution and gender balance in the composition of the Tribunal and limitation of the judges' term of office;

Desirous also to ensure service continuity in exceptional circumstances and provide for the extension of appointment of a judge in the event the Conference does not meet on the expiry of their term of office;

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 as well as the transitional measures;

adopts the following amendments to the Statute and to the Annex to the Statute of the Administrative Tribunal of the International Labour Organization, as well as the transitional measures for the implementation of amended article III of the Statute:

#### 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 2021.

[...]

#### 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 such organization may withdraw its declaration recognizing the jurisdiction of the Tribunal under the procedure set out in the Annex.

[...]

## ARTICLE III

1. The Tribunal shall consist of seven judges who shall all be of different nationalities. ~~The judges shall be considered officials of the International Labour Organization other than officials of the International Labour Office under the Convention on the Privileges and Immunities of the Specialized Agencies.~~ The judges shall be persons of high moral character, impartiality and integrity and must have been appointed to, or possess the qualifications required for appointment to the highest judicial office of their countries. They must have an excellent knowledge of at least one of the working languages of the Tribunal and should also have at least a basic written and oral comprehension of the other working language. Due regard shall be given to geographical distribution and gender balance in the composition of the Tribunal. At all times the Tribunal's composition shall permit the Tribunal to render judgments in both working languages.

2. ~~Subject to paragraph 3 below, the judges shall be appointed for a term period of three-five years, renewable once by the International Labour Conference. If for any reason the International Labour Conference does not meet on the expiry of this term, judges shall remain in office until the Conference holds its next session and has an opportunity to take a decision.~~

3. ~~If the period of appointment of four or more judges expires in the same year, the International Labour Conference may exceptionally extend the appointment of two of those judges drawn by lots for a period of three years.~~

4. ~~The judges shall be completely independent in the exercise of their functions and shall not receive any instructions or be subject to any constraint. The judges shall be considered officials of the International Labour Organization other than officials of the International Labour Office under the Convention on the Privileges and Immunities of the Specialized Agencies.~~

35. ~~A meeting of the Tribunal shall be composed of three judges or, in exceptional circumstances, five, to be designated by the President, or all seven.~~

[...]

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 keeping with the principles of good faith and transparency. 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, reaffirming its commitment to faithfully execute judgments on any pending cases and indicating, as appropriate, the reasons for withdrawing the recognition of the Tribunal's jurisdiction, the alternative means of employment dispute settlement envisaged and any consultations with the staff representative bodies prior to the withdrawal decision.

4. At its next session following the notification of withdrawal, the Governing Body, after consultation with the Tribunal, shall take note of the withdrawal of the organization concerned, and shall confirm that as of that date, 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 new complaint filed against the organization after the effective date of the withdrawal shall be entertained by the Tribunal.

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Transitional measures

As a transitional measure, the judges appointed prior to June 2021 may, upon completing their present terms, be reappointed for one further non-renewable term of seven years.

## ▶ Appendix IV

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### Letter from the President of the Tribunal



*The President*

Geneva, 27 January 2021

Dear Mr Politakis,

I refer to your email of 17 January 2021, by which the Tribunal was invited to comment on a revised draft of the proposed amendments to the Statute of the Tribunal that the Office intends to submit to the Governing Body at its forthcoming session in March. Following an extensive discussion of these proposals amongst the judges, I should like to share with you the Tribunal's comments, which are set out below.

As indicated in the Office's introductory document, these proposed amendments concern three matters, namely: (i) the procedure according to which an international organization that has recognised the jurisdiction of the Tribunal may revoke its declaration of acceptance; (ii) the term of office of judges and the geographical distribution and gender balance in the composition of the Tribunal; and (iii) the extension of the appointment of judges in the event that the International Labour Conference does not meet prior to the expiry of their term of office.

With respect to the first of these matters, the Tribunal has no objection, in principle, to the proposed amendment to Article II, paragraph 5, of the Statute, coupled with the two new paragraphs in the Annex to the Statute, particularly since the new paragraph 3 of the Annex specifically indicates that an organisation's withdrawal from the Tribunal's jurisdiction must comply with the principles of good faith and transparency and provides sufficient guarantees that these principles will be respected. The Tribunal suggests that this comment, which explains its agreement with the proposed amendment, be included in the Office's introductory document, by inserting it after paragraph 13, for example.

Nevertheless, the Tribunal considers that, without removing anything from the proposed text, the reference in paragraph 3 of the Annex to the organisation's "commitment to faithfully execute judgments on any pending cases" should perhaps be moved so as to give appropriate weight to this important element. To that end, the following or similar wording could be used:

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Legal Adviser  
International Labour Organization  
4, route des Morillons  
1211 Geneva 22

*“3. An international organization may withdraw its declaration recognizing the jurisdiction of the Tribunal in keeping with the principles of good faith and transparency. 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, reaffirming its commitment to faithfully execute judgments on any pending cases and indicating, as appropriate, the reasons for withdrawing the recognition of the Tribunal’s jurisdiction, the alternative means of employment dispute settlement envisaged and any consultations with the staff representative bodies prior to the withdrawal decision.”*

Additionally, in the interests of clarity, the Tribunal considers that it may be useful to specify, in the relevant section of the Office’s introductory document, that the last sentence of the new paragraph 4 of the Annex, referring to complaints filed after the effective date of the withdrawal, should obviously not be interpreted as excluding the Tribunal’s competence to consider applications for interpretation, execution or review relating to a judgment delivered by the Tribunal, in accordance with Article VI, paragraph 1, of its Statute.

Regarding the proposed amendments to Article III of the Statute, the Tribunal has no objection to the references, in paragraph 1, to the personal qualities and qualifications required of the judges. Neither does it object to the introduction of an explicit reference to geographical distribution and gender balance in its composition. However, it suggests that the wording of this paragraph be changed so as to emphasise that judges should ideally have held judicial functions of the highest level in their countries. It also considers that the stated requirements concerning language skills should be expressed differently, in order to avoid unduly restricting the possibility of attracting good candidates from countries where knowledge of one or other of the Tribunal’s working languages is less common. The Tribunal suggests that the following wording would be more appropriate:

*“1. The Tribunal shall consist of seven judges who shall all be of different nationalities. The judges shall be persons of high moral character, impartiality and integrity and must have been appointed to, or possess the qualifications required for appointment to the highest judicial office of their countries. They must have an excellent knowledge of at least one of the working languages of the Tribunal and should also have at least a basic written and oral comprehension of the other working language. Due regard shall be given to geographical distribution and gender balance in the composition of the Tribunal. At all times the Tribunal’s composition shall permit the Tribunal to render judgments in both working languages.”*

Regarding the language requirements, the Tribunal considers that this provision should not be interpreted as precluding the appointment of a judge possessing only a minimal knowledge of the second language, although in such a case it is advisable that the judge should take appropriate steps to improve her or his language skills.

Concerning paragraph 2 of Article III, the Tribunal considers that the present method of tenure has worked well over the years. Critically, it has afforded continuity and consistency in the case law of the Tribunal, which has inured to the efficiency of the Tribunal. However, the Tribunal does not oppose the proposed amendment to this paragraph regarding the conditions for the duration and renewal of the judges’ terms of office.



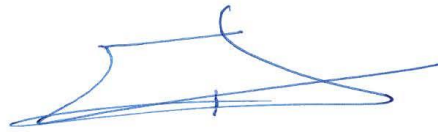
The Tribunal fully supports the insertion, in paragraph 2 of Article III, of the provision according to which the judges shall remain in office on a provisional basis in the event that the Conference does not meet when their term of office expires. It also fully supports the proposed amendments to paragraphs 3 and 4 of Article III.

Lastly, with respect to the transitional measures, the Tribunal considers that retaining the customary retirement age of 75 referred to in paragraph 21 of the Office's introductory document would be a more appropriate and satisfactory solution to address the situation of judges currently in office. However, it does not oppose the proposed provision.

I hope that these comments will be useful to the Governing Body in examining the proposed amendments, and I take this opportunity to thank you for seeking the views of the Tribunal on these important matters.

You will no doubt recall that, by a letter of 13 January 2020, I explained the Tribunal's views on the issues raised by a previous version of these amendments, and I note that some of the observations made in that letter would equally apply to the revised draft now under consideration. I trust, therefore, that you will appreciate that the Tribunal's response to this revised draft reflects a genuine attempt to find a suitable compromise that may be acceptable to all parties.

Yours sincerely,



Patrick Frydman  
President of the Tribunal