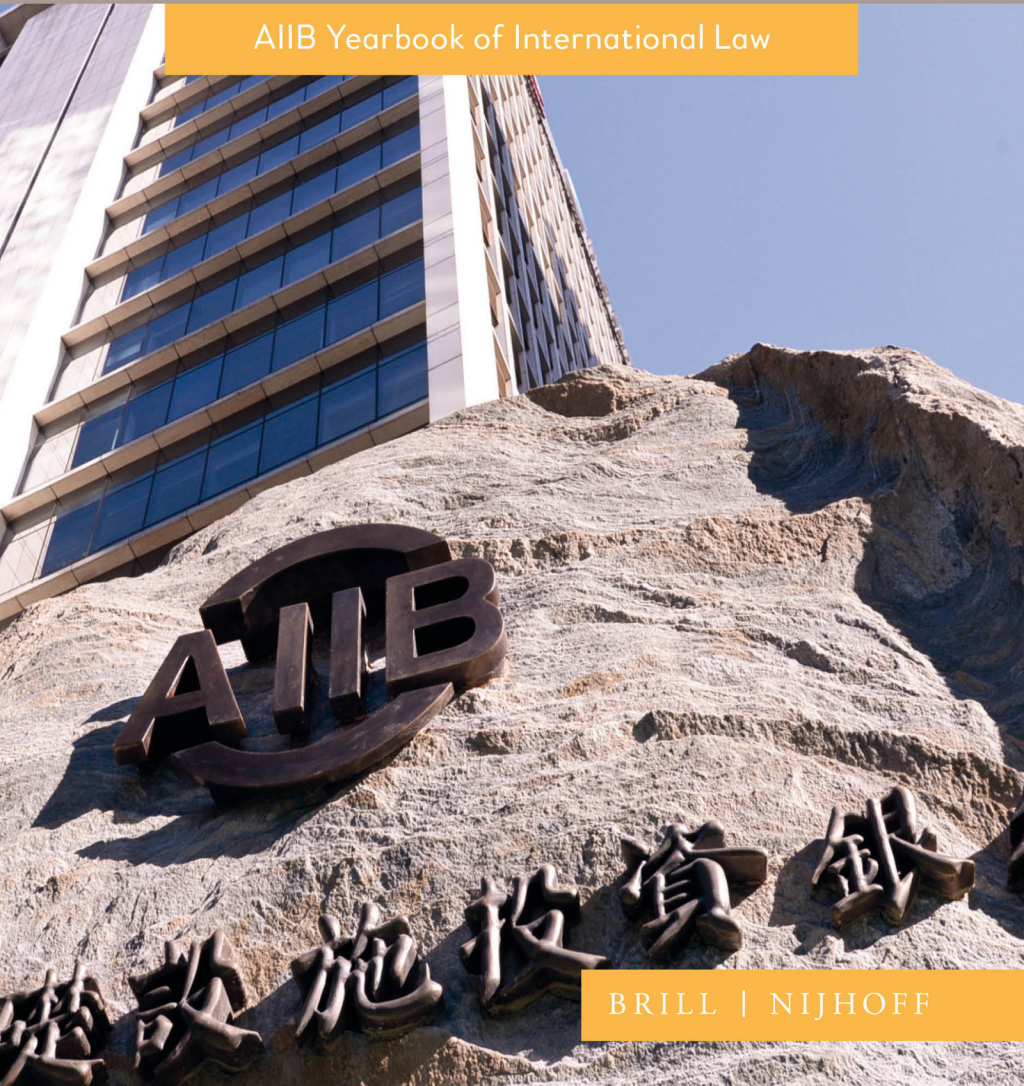


Edited by Peter Quayle

THE ROLE OF INTERNATIONAL ADMINISTRATIVE LAW AT INTERNATIONAL ORGANIZATIONS

AIIB Yearbook of International Law



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The Role of International Administrative Law at International Organizations

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The Modern Multilateral Bureaucracy: What is the Role of International Administrative Law at International Organizations?

*Peter Quayle**

Abstract

What is the role of ‘international administrative law’—the law of employment relations—at international organizations? This chapter begins by contrasting the international legal status of States on the one hand, and international organizations on the other, before noting that the bureaucracies of the latter are heir to the traditions and identity of the former. It is then argued that transposing modern bureaucracy—ideally, meritocratic and impersonal national civil services—to multilateral administration, replaces the ‘patrimonial’ pressures on modern States with the related risks of ‘State sociability’ and co-option of international organizations. We then review the several legal bases of international administrative tribunals to discern whether international administrative law takes into account this strain. This chapter draws the conclusion that international administrative law is inherent to the assumption by multilateral administration of the ideals of modern bureaucracy—impartial, efficient and energetic—and so synonymous with the independent existence of international organizations.

1 Introduction

The functionalist paradigm that underpins the law of international organizations¹—namely, that intergovernmental institutions are attributed

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1 See, for example, ILC, ‘Draft Articles on Responsibility of International Organizations’ 2011, art 2(a), “‘international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal

functions by their member States together with all necessary powers to fulfil such functions—lends itself to a dynamism (or malleability, if you prefer) concerning the competences and controls of these powerful and pervasive international actors.² Tellingly, the limits of the powers of an international organization were most emphatically encountered by the International Court of Justice (ICJ) when ruling what an intergovernmental institution was not: it was not a State, “still less [...] a ‘super-State’, whatever that expression may mean”.³

Whilst in *Reparation for Injuries* (1949), the ICJ determined that an international organization is possessed of an international legal personality, governed by international law, “That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State”.⁴ The limitation this imposes is underlined by the ICJ in a later advisory opinion, *Legality of Nuclear Weapons* (1996):

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the ‘principle of speciality’, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.⁵

Yet, although international law distinguishes between the competences of States and the international organizations they create, they share an institutional identity. The official bureaucracies of States—their national civil service—are the antecedents of the multilateral secretariats of intergovernmental institutions—the international civil service. Therefore, following this introduction, in attempting to answer the question, ‘What is the role of international administrative law at international organizations?’, this chapter will begin by considering the ideals of modern bureaucracy—of a national civil service (Section 2); before contemplating how transposition of these ideals to

personality”; this chapter uses the terms ‘international organization’ and ‘intergovernmental institution’ interchangeably.

2 See, generally, Klabbers 2015, 9 (“Few people would dispute the relevance of international organizations as part of our [normative universe], and yet our understanding of these creatures is very limited”).

3 ICJ, *Reparations for Injuries*, 9.

4 *Ibid.*

5 ICJ, *Legality of Nuclear Weapons*, para 25.

multilateral administration is accompanied by the sustained strain of State interference upon the neutrality of the international civil service (Section 3). It is then argued that the several legal bases of international administrative tribunals (IATs) reveals the role of international administrative law, and that this correlates to maintaining multilateral administration against co-option by States (Section 4); and by way of conclusion, that as international administrative law ensures the impartiality of international civil servants it secures the independence of international organizations (Section 5).

2 Modern Bureaucracy

As Francis Fukuyama discerns, “Human beings [...] are social animals by nature”.⁶ This, “natural sociability takes the specific form of altruism toward family (genetic relatives) and friends (individuals with whom one has exchanged favours)”.⁷ This is the default pattern of interrelationships—“universal to all cultures and historical period”⁸—to which humanity reverts if strategies to incentivize impersonal behaviors fail. A State based upon inherent human sociability is described by Max Weber as ‘patrimonial’; in other words, “the polity is considered a type of personal property of the ruler, and State administration is essentially an extension of the ruler’s household”.⁹ Weber contrasts this with a modern State, which is impersonal:

[A] citizen’s relationship to the ruler does not depend on personal ties but simply on one’s status as citizen. State administration does not consist of the ruler’s family and friends; rather, recruitment to administrative positions is based on impersonal criteria such as merit, education or technical knowledge.¹⁰

This impersonal administration—modern bureaucracy—whilst attained in ancient China, was not there merged with an accountable, rule of law based,

6 Fukuyama 2014, 8.

7 Ibid.

8 Ibid.

9 Ibid, 10.

10 Ibid.

modern State.¹¹ Instead, contemporary modern bureaucracy was achieved in nineteenth century Britain as a consequence of the Northcote-Trevelyan Report of 1854—a parliamentary report calling for an end to patronage appointments and for examination to be the exclusive basis for entrance into the British civil service. A Civil Service Commission was established in 1855 to oversee this process of competitive recruitment.¹² A similar effect was achieved in the United States (US) later in the century with the passing of the Pendleton Act in 1883.¹³ In both the United Kingdom and the US, a steadily professionalizing civil service “and the selection of bureaucrats based on merit and technical competence rather than patronage”¹⁴ was synonymous with the potency of the modern State.

Weber’s criteria for a modern bureaucracy is instructive, including: that bureaucrats “are organized into a clearly defined hierarchy of offices”; “candidates are selected on the basis of technical qualifications”; “the office is treated as the sole occupation of the incumbent”; “the office constitutes a career”; and “officials are subject to strict discipline and control”.¹⁵ Of course, in practice, the ideal national civil service is far from ubiquitous. Nevertheless, it is these ideals of modern bureaucracy that are transposed to multilateral administration. In the process, the tendency to revert to a patrimonial polity is matched by the risks of State co-option of an international organization. This is not to say that the member States of international organizations do not possess a legitimate role in the governance of intergovernmental institutions. But that this role is to be confined to the constitutional exercise of influence through formal decision-making organs.

3 Multilateral Administration

Dag Hammarskjöld was the lauded, second Secretary-General of the United Nations.¹⁶ As Guy Fiti Sinclair notes, “For many in the UN and outside it, Hammarskjöld was the epitome of the impartial, non-partisan international civil

¹¹ Ibid, 370–371.

¹² Ibid, 126–134.

¹³ Ibid, 149–164.

¹⁴ Ibid, 59.

¹⁵ Ibid, 562, endnote 4, lower-case added.

¹⁶ Sinclair 2015, 748 (“While serving in that capacity during the crucial years of 1953–1961, at the height of the Cold War and decolonization and perhaps the most formative period of UN history, Hammarskjöld was intimately involved in the formulation of several legal innovations that have since become staples of UN activity, including preventive diplomacy and peacekeeping”).

servant”.¹⁷ In publicly defending the embattled international civil service, Hammarskjöld draws attention to the traditions of the great national civil services:

In the United Kingdom, as in certain other European countries, a system of patronage, political or personal, had been gradually replaced in the course of the nineteenth century by the principle of a permanent civil service based on efficiency and competence and owing allegiance only to the State which it served.¹⁸

It was not a foregone conclusion that these attributes would be conveyed from the national to the international civil service. In the same way that an impersonal national civil service was once a novelty, Stephen Schwebel notes, “The concept of a secretariat which, as the [UN] Charter prescribes, shall be of ‘exclusively international character’ is relatively new”.¹⁹ Indeed, this defining characteristic is unmentioned in the Covenant of the League of Nations. A permanent Secretariat is established with its seat in Geneva²⁰ and, “The secretaries and staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council”.²¹ But, the profile of the League’s Secretariat is otherwise only governed by Article 7 of the Covenant which—commendably—requires appointments “open equally to men and women”. As Hammarskjöld recounts:

In the earliest proposals for the Secretariat of the League, it was apparently taken for granted that there could not be a truly international secretariat but that there would have to be nine national secretaries, each assisted by a national staff and performing, in turn, the duties of Secretary to the Council, under the supervision of the Secretary-General. This plan [...] was in keeping with the precedents set by the various international bureau established before the war which were staffed by officials seconded by [m]ember countries on a temporary basis.²²

This recognizes that the most natural organizational tendency on the level of international cooperation resembles the same persistent pattern at the

17 Ibid, 755; importantly, Sinclair essays a critique of this reputation.

18 Hammarskjöld 1961, 331.

19 Schwebel 1953, 71, citing art 100(2) of the UN Charter.

20 League of Nations Covenant, arts 2 and 6.

21 Ibid, art 6.

22 Hammarskjöld 1961, 330; and League of Nations Covenant, art 4; the Leagues’ Council was to comprise nine member States.

national level—namely, patronage-based, not impersonal, bureaucracy; albeit, that the preferment of family and friends is replaced with State co-option of international organizations and the sponsorship of same-State-national staff accordingly. Henceforth, this chapter terms this irrepressible tendency, ‘State sociability’. At best, “The Secretariat would be nothing more and nothing less than a permanent conference of representatives of the members of the League”, as the League’s first Secretary-General, former British civil servant, Sir Eric Drummond feared. At worst, the League and subsequent international organizations would resemble the four-way zonal administration of post-war Berlin. In this scenario, intergovernmental institutions would be indistinguishable from their member States.

But, summoning the example of disinterested modern bureaucracy, Drummond was instead a proponent “of a truly international civil service—officials who would be solely the servants of the League and in no way representative of or responsible to the [g]overnments of the countries of which they were nationals”.²³ The League’s Council endorsed this approach in 1920 by adopting the British delegation’s ‘Balfour Report’.²⁴ This states, “the members of the Secretariat once appointed are no longer the servants of the country of which they are citizens, but become for the time being the servants only of the League of Nations [...] The members of the staff carry out [...] not national but international duties”.²⁵ This assumed the force of international administrative law with the League’s adoption of Staff Regulations, founding “two of the essential principles of an international civil service: (i) its international composition and (ii) its international responsibilities”.²⁶ With the demise of the League, this became the basis for Article 100 of the UN Charter, which states:

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the [UN]. They shall refrain from any action which might reflect on their position as international officials responsible only to the [UN].
2. Each [member State] of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

23 Ibid, 229.

24 Drummond 1931, 228 (indeed, “the principles underlying the organization of the Secretariat of the League are largely those on which the British Civil Service has been developed”).

25 Schwebel 1953, 72, citing the Balfour Report (with original elisions).

26 Hammarskjöld 1961, 76.

In this way, Article 100 secures the undivided duty of loyalty of the international civil service.²⁷ So much so that it preempts the inevitable tension between national and multilateral allegiances—“in such an eventuality, the international obligations of the staff member would prevail”.²⁸ Article 101(3) of the UN Charter likewise endeavours to establish the international civil service on the basis of impersonal appointment criteria:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

The ‘necessity of securing’ these highest standards highlights how efficiency, competence and integrity must be institutionalized, in counterbalance to State sociability. In light of this ‘paramount condition’, the ‘due regard’ paid to the multinational composition of the bureaucracy may be understood to weigh against the co-option of international organizations through the overrepresentation of any one State’s nationals.

Lastly, three other clauses of the UN Charter combine to constitute the ideals of modern bureaucracy: Firstly, the Secretary-General “shall be the chief administrative officer of the [UN]”; second, “[t]he staff shall be appointed by the Secretary-General under regulations established by the General Assembly”; and third “...officials of the [United Nations] shall [...] enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the [UN]”.²⁹ This results, Schwebel notes, in the “exclusively international responsibilities of the Secretariat” being “rooted in the exclusively international process of appointment of its members”.³⁰ They are also the foundation of the organizational hierarchy and “strict discipline and control” that Weber’s modern bureaucracy contemplates.

It may be thought that co-option of an international organization by a State through its same-nationality staff is fanciful. Yet, Hammarskjöld catalogues, “the interest of [...] governments in placing certain nationals and in barring the employment of others” at the UN.³¹ Moreover, “various authorities of the United States Government, host to the United Nation’s Headquarters”, in the

27 See Quayle, *Legal Advisors* 2017, 259–261.

28 Schwebel 1953, 99.

29 UN Charter, arts 97, 101 and 105(2), respectively.

30 Schwebel 1953, 79.

31 Hammarskjöld 1961, 339.

early 1950s, “conducted a series of highly publicized investigations of the loyalty of its nationals in the Secretariat”.³² There is also, “[a] risk of national pressure on the international official [...] introduced, in a somewhat more subtle way, by the terms and duration of [their] appointment”.³³ The Secretary-General has in mind the practice of secondment to international organizations from national civil services, in which the now international official struggles to disregard their State allegiance and assume an impartial identity; and short-term employment contracts which impinge upon the independence of international civil servants as they bow to political influences for fear of imminent non-renewal of their appointment.³⁴ (So offending Weber’s principle, that the office constitutes a career.)

These State pressures are neither new, nor confined, to the UN, and all international organizations attempt to absorb them. In this way, at the outset of the League of Nations it was found politic to establish sufficient Deputy- and Under-Secretary-General roles, so that together with the Secretary-General appointment itself, the nationals of all five Allied Great Powers were ensured representation.³⁵ Although, “[t]he Under-Secretaries-General created with some the impression of national representatives rather than international officials”,³⁶ this compromise safeguarded the underlying impartiality of the rank-and-file international civil service. In other words, as Schwebel urges, the “official policy and dominant practice conformed to the concept of the Secretariat as being exclusively international in its responsibilities”.³⁷ Set against this principle, “exceptions which derogated from the rule”³⁸ are isolated and pragmatic concessions to State sociability.

Deflecting the intrusions of State sociability through the appointment of quasi-representative officials in this way is intrinsic to all international organizations. As Jacob Katz Cogan demonstrates, “informal agreements allocating positions of authority and decision making pervade international

32 Ibid, 340; this is a passing reference to McCarthyite allegations of subversive activities by US national staff of the UN, leading to their dismissal by the Secretary-General and fraught examination of the extent of obligations owed a headquarters State, see generally, Schwebel 1953, 83–115 and 115, (“The question arises whether the members of a totalitarian party, subject to party discipline, can be reasonably deemed to lack the requisite integrity for honouring the injunction of Article 100 ‘not to seek or receive instructions [...] from any other authority external to the Organization’”).

33 Ibid, 341.

34 Ibid.

35 Drummond 1931, 229; namely France, Great Britain, Italy, Japan and United States.

36 Schwebel 1953, 73.

37 Ibid.

38 Ibid.

organizations”.³⁹ But, notably, as with the five senior members of the League’s Secretariat,

These informal agreements largely take account of, and reallocate authority to match, the differences in power and interests that pervade the international system when those differences cannot be acknowledged formally.⁴⁰

The most widely-known examples of such informal agreement are that the World Bank is always led by a US national and the International Monetary Fund by a European.⁴¹ Taken together, this also exemplifies how “the designation of top posts cannot be seen in isolation—they are often part of a package deal”.⁴² Whilst, a functional justification is sometimes offered—“appointing governmentally approved staff will be likely to promote the international confidence which the Secretariat must enjoy”—this seems self-defeating, if “the greater the confidence shown by a [g]overnment in its nationals appointed to the Secretariat, the more will the objectivity of such nationals be distrusted by other [m]ember States”.⁴³

A more effective constraint is afforded by, on the one hand, these ‘quasi-representational’ positions being appointed, seldom on the basis of the distortion of impersonal criteria, but as an uninhibited governance decision—if necessary, by formal voting—by a membership organ of an international organization.⁴⁴ On the other hand, these appointees are then—somewhat surprisingly—subsumed into the international civil service. For example, the Administrative Tribunal of the International Labour Organization (ILOAT) determined that the Director-General of the Organization for the Prohibition of Chemical Weapons (OPWC), appointed by the Conference of the States Parties

39 Cogan 2009, 211.

40 Ibid.

41 Cogan 2009, 247; IBRD Country Voting Table (The United States subscribes for 16.76% of the World Bank’s capitalization); and IMF Executive Directors and Voting Power (The voting power of the United States is 16.51%, however, the total voting power of Directors with European States in their constituencies is 32.22%).

42 Cogan 2009, 228.

43 Schwebel 1953, 102, summarizing the equivalent considerations of State vetting of international organization staff.

44 For example, UN Charter, art 97, second sentence, “The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council”.

of the OPCW, is “the foremost ‘official’ of the Organization”,⁴⁵ and thereby possesses “the status of an international civil servant”.⁴⁶

The transposition of the ideals of modern bureaucracy to multilateral administration is clearly subject to the sustained strain of potential State co-optation. State sociability is partially absorbed by the extensive appointment of quasi-representational national officials. Considering the governance basis of these appointments and sublimation to the standards of the international civil service, this is presented as a tolerable derogation from the ideals of modern bureaucracy that ought to otherwise rule multilateral administration. In studying the several legal bases of IATs, which function to adjudicate the employment-related disputes of international civil servants, may we discern a role for international administrative law in managing the stresses of State sociability upon international organizations?

4 International Administrative Tribunals

Since the advent of the League of Nations, IATs have been inherent to an international civil service governed by international administrative law.⁴⁷ As Santiago Villapando observes, “The law of the international civil service is therefore an essential feature of the contemporary phenomenon of international organizations”.⁴⁸ Consequently, a study of the legal bases of IATs should afford an assessment of the role of international administrative law—and allow us to discern the extent to which this role involves managing the tendencies of State sociability to which the international civil service is inevitably subject. IATs have four prominent legal bases. Firstly, and most immediately, the basis afforded by the statement of jurisdiction in the statutes of IATs; second, is the basis of limited review of discretionary decisions established by the case law of IATs; third, the influential contingency identified by the European Court of Human Rights (ECtHR) in considering the extent to which IATs should satisfy the right to a hearing afforded by the European Convention on Human Rights (ECHR); and fourth, the basis articulated by the ICJ, when called upon to sustain the competence of international organizations to establish IATs at all. We

45 ILOAT, Judgment No 2232, para 7.

46 Ibid, para 8.

47 See generally, Villapando, *International Administrative Tribunals* 2016, 1085 (“These tribunals are part of the internal systems of administration of justice that international organizations have put into place to settle employment disputes, which would otherwise fall under no jurisdiction”).

48 Villapando, *International Civil Service Law* 2016, 1070.

shall consider each of these legal bases in turn, in light of what they may convey about the role of international administrative law, in the context of modern multilateral administration.

4.1 *Statutes of International Administrative Tribunals*

The statutes of IATs—adopted by the governance organs of international organizations⁴⁹—establish their legal basis by reference to a jurisdiction entirely bounded by the terms of appointment (also referred to as the contract of employment) to the staff of an intergovernmental institution. In this way, the jurisdiction of the ILOAT is innocuous:

The Tribunal shall be competent to hear complaints alleging nonobservance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.⁵⁰

The jurisdiction of the World Bank Administrative Tribunal (WBAT) is similar:

The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words ‘contract of employment’ and ‘terms of appointment’ include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan.⁵¹

The comparable provision of the statute of the UN Dispute Tribunal (UNDT) establishes that the UNDT is competent to,

[H]ear and pass judgment on an [...] appeal [of] an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms ‘contract’ and ‘terms of appointment’ include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.⁵²

49 See, Preambles, ILOAT, WBAT and UNDT Statutes: the ILOAT is established by the International Labour Conference of the International Labour Organization; the WBAT by the Board of Governors of the World Bank; the UNDT by the UN General Assembly.

50 ILOAT Statute, art II (1).

51 WBAT Statute, art II (1).

52 UNDT Statute, arts 1 and 2(1).

Noticeably, none of the statutes of the three major IATs attribute a legal basis to international administrative law, other than the contracts of employment or terms of appointment of international organizations. Nor is the law governing this relationship identified by these statutes. The functional rationale of IATs is not obvious. Nothing suggests that the approach by IATs to hearing complaints and passing judgment should be anything other than wholly self-contained, without reference to any exterior legal principles. In this way, the role of international administrative law is left unstated and uncertain.

4.2 *Deference to Discretionary Decision-Making*

Instead, the application of international administrative law by IATs is dominated by a doctrine that is unarticulated by the statutes of IATs. Namely, the limited review of discretionary power. The extent to which the “relevant administrative issuances” of international organizations are compendious—regulating almost every imaginable aspect of employment—engages a broad range of alternative outcomes. From the decision to appoint an international official through to the decision to terminate their employment, the exercise of discretion by the employing international organization causes IATs to limit the scope of their judicial review. IATs reiterate this approach ad infinitum—for example:

The [ILOAT’s] case law has it that a staff appointment by an international organization is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence.⁵³

This approach is emulated by every other IAT.⁵⁴ In other words, in order not to be set aside, a discretionary decision must be undertaken by: (i) a competent

53 ILOAT, Judgment No 3652, para 7.

54 For example, WBAT, *Jassal*, para 37, “[T]he Tribunal is charged with determining whether the Bank’s decision was the product of bias, prejudice, arbitrariness, manifest unreasonableness, or unfair or improper procedure. Thus, if the Bank’s conclusion regarding the [a]pplicant’s qualifications for selection [...] altogether lacks support in factual evidence or reasonable inference, that conclusion must be found to be an abuse of discretion”; and UNAT, *Abassi*, para 24, “The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process”.

authority; (ii) in accordance with the accompanying procedure established by the international organization; and (iii) demonstrate sufficient rigour and reasonableness so as not to be susceptible to mistaken understandings, oversights, prejudices and erroneous conclusions. However, in the sense of the resultant role of international administrative law at international organizations, this results in three discernable institutional features.

Firstly, international administrative law acts to constrain a decision-maker, rather than to adjudicate a contractual bargain. Albeit, as the WBAT states, “Discretionary power is not absolute power”,⁵⁵ it is apparent that international administrative law is predicated upon a power imbalance and the “strict discipline and control” and “clearly defined hierarchy” contemplated by Weber. This is a legacy of the Commission of Jurists appointed by the Council of the League of Nations to address the first appeal by an official of the Secretariat against termination of their employment. The Commission concluded that “[r]elations connected with public employment are always governed by the exigencies of the public interest, to which the private and personal interests of the officials must necessarily give way”.⁵⁶ This approach privileges the discretionary power of public administration and consequently international organizations. (Although the domestic analogy is imperfect “since municipal systems have different conceptions of how their own national civil service relationship is to be construed”).⁵⁷ This is not then a law intended to maximize human resources or ensure managerial excellence—it is the law of restraint of egregious intergovernmental arbitrariness.

Second, inherent in even this standard of limited review is longstanding uncertainties. Neither the test of reasonableness, the implications of non-adherence to procedure, nor the consequences of a decision being set aside have been pronounced upon with the same uniformity as the limited scope of review itself. Instead, the combination of specific facts and contextualizing review lends itself to persistent unforeseeability: every issue being triable and the continual retrying of issues.⁵⁸

55 WBAT, *de Merode*, para 45.

56 Schwebel 1953, 74, citing the Commission’s report.

57 Villapando, *International Civil Service Law* 2016, 1073.

58 The one-line summaries from the ILOAT’s Case-law Database afford a flavour. The following are the most recent five, from the 129th Session, 2020, with the respondent international organizations in parenthesis: “The complainant impugns the decision whereby the Director-General of the ITER Organization dismissed [them]” (ITER Organization); “After the delivery of Judgment 4006, the complainant re-submitted to the new Registrar of the

Third, the preponderance of IATs and the density of most judgments, results in international administrative law being unrevealed to the average international official. With good reason, international administrative law is said to be, “among the least-known dimensions of the phenomenon of international organizations”.⁵⁹ Taken together, these features are at best unsatisfactory, and at worst, troubling if—as a UN Justice System Redesign Report lately finds—“A large part of the current management culture in the [UN] exists because it is not underpinned by accountability. Accountability can be guaranteed only by an independent, professional and efficient internal justice system”.⁶⁰

4.3 *The Right to a Hearing by a Tribunal*

Since the League of Nations and the advent of multilateral administration, IATs were considered to be mostly pragmatic requirements of international organizations. On the one hand, “The League Administration was not unaware that a mechanism which was either arbitrary or harsh in its personnel policies could not expect to attract the devotion and energies of qualified officials”.⁶¹ On the other hand, “International organizations are generally granted immunity from municipal jurisdiction, which implies that their employees are, in principle, barred from having recourse to national tribunals (both those of the host country and their own state of nationality)”.⁶² It was not until the judgment of the ECtHR in *Waite and Kennedy v Germany* (1999) that an IAT was considered to be a contingency of the jurisdictional immunity of international organizations.

ICC a harassment grievance on the part of the former Registrar. [They] filed [their] complaint directly with the Tribunal, considering that [they] did not receive a final decision on [their] grievance within the prescribed time limit” (International Criminal Court); “The complainants, former officials of the World Food Programme whose employment was terminated as a result of the abolition of their posts, allege that they performed functions of a higher level than those of the posts they occupied, and claim compensation as well as reinstatement”. (Food and Agriculture Organization); “The complainant, a former EPO employee subjected to a ‘house ban’, seeks to impugn the decision to reject [their] requests for review” (European Patent Office); and “The complainant, who was suspended and revoked for having behaved inappropriately, challenges the delay in the appeal proceedings” (INTERPOL).

59 Villapando, *International Civil Service Law* 2016, 1083.

60 UN Justice System Redesign Report 2016, para 13.

61 Schwebel 1953, 75.

62 Villapando, *International Administrative Tribunals* 2016, 1085.

The applicants, former contractors—who allege that they were de facto employees—of the European Space Agency (ESA), contend that the preclusion of jurisdiction of the German labour courts where they worked, over their claims for unfair dismissal, flout their rights under Article 6(1) of the European Convention on Human Rights (ECHR) to a fair hearing before a tribunal. Importantly, the ECtHR is untroubled by jurisdictional immunity itself: “[T]he Court points out that the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments”.⁶³ Thus, under the jurisprudence of the ECtHR, jurisdictional immunity pursues, what is known as, a ‘legitimate objective’—so, the restriction on the Convention is permissible, but it must however be proportionate.⁶⁴

Is barring employees of international organizations from the labour courts of States that are both members of an intergovernmental institution (the ESA, for example), and adherents to the ECHR, proportionate? The Court is clear that despite the long-established practice of jurisdictional immunity, “States were [not] thereby absolved from their responsibility under the Convention”.⁶⁵ However, in testing the proportionality of this jurisdictional immunity, the ECtHR is interested in what arrangements the international organization has in place of national jurisdiction:

For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.⁶⁶

From this judgment arose an apprehension that the jurisdictional immunity of international organizations was contingent upon the availability of alternative judicial forums—in the realm of employment-related disputes this demands an IAT of sufficiently judicial character to act as a reasonable alternative to a national labour court.⁶⁷ As August Reinisch identifies, this aligns with expanded expectations of a right of access to justice:

63 ECtHR, *Waite and Kennedy*, para 63.

64 *Ibid*, para 59.

65 *Ibid*, para 67.

66 *Ibid*, para 68.

67 See, generally, Reinisch 2008.

[A]lthough it did not make the availability of an alternative forum a strict prerequisite for immunity but only regarded it a ‘material factor’, this ‘conditionality’ for granting immunity to an international organization has fallen on fertile ground in the subsequent case law of various national courts in Europe.⁶⁸

But, afforded the opportunity to confirm this contingent legal basis of IATs—in *Mothers of Srebrenica v The Netherlands* (2012)—the ECtHR refuses to endorse this conclusion: “It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court”.⁶⁹ In other words, the contingent legal basis of IATs and the related role of international administrative law suggested by *Waite and Kennedy*, “cannot be interpreted in such absolute terms”.⁷⁰

4.4 *Treaty Basis of International Administrative Tribunals*

If the legal bases attributable to IATs by their statutes, the convention of deference to the discretionary decision-making by international organizations and the right to a hearing before a tribunal, result in an inconclusive role for international administrative law, then the approach of the ICJ in *Effect of Awards of Compensation* (1954) is all the more compelling. The contentious role of the UN’s administrative tribunal in reviewing, and intermittently revoking, the alleged subversive activity related dismissals in the early 1950s, led to a challenge to “[t]he legal power of the [UN] General Assembly to establish a tribunal competent to render judgments binding on the United Nations”.⁷¹ The ICJ begins by identifying the familiar pragmatic predicate of IATs; namely, that “[i]t was inevitable that there would be disputes between the [UN] and staff members as to their rights and duties” and “Article 105 [of the UN Charter] secures for the United Nations jurisdictional immunities in national courts”.⁷²

The next sentence of the ICJ’s Advisory Opinion could be mistaken for the gravamen of the judgment. Although no provision of the UN Charter expressly establishes an IAT,

It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individu-

68 Ibid, 292.

69 ECtHR, *Mothers of Srebrenica*, para 164.

70 Ibid.

71 ICJ, *Effect of Awards*, 13.

72 Ibid, 14.

als and with the constant preoccupation of the United Nations [...] to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.⁷³

But instead, this is in fact an aid to the Court's finding—it identifies the best methodology to settle the UN's employment-related disputes, namely, judicial or arbitral remedy. Rather, the ICJ holds that the legitimate legal basis for IATS is derived from the exceptional status of the international civil service:

In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the [UN] and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.⁷⁴

In other words, the legal basis of IATS is that they are necessary to multilateral administration ensuring the embodiment of the ideals of modern bureaucracy. As Hammarskjöld warns, “The conception of an independent international civil service, although reasonably clear in the Charter provisions, was almost continuously subjected to stress in the history of the [UN]”.⁷⁵ The attendant role of international administrative law, necessarily intended by the UN Charter itself, is thereby to secure the efficiency, competence and integrity of an international civil service continually strained by sustained and inevitable State pressures upon its impartiality.

5 Conclusion

The “default mode of human sociability” is the preference for family and friends, not strangers and foreigners.⁷⁶ At the State level, this tendency lends itself to patrimonial polities and a State that is the extension of the personal

73 Ibid.

74 Ibid.

75 Hammarskjöld 1961, 338; see also Sinclair 2015, 761 (strikingly, “An aspect of Hammarskjöld's expertise that has received almost no systematic scholarly treatment, for example, is his approach to public administration”).

76 Fukuyama 2014, 208.

property of the ruler. The modern bureaucracy—impersonal, technically qualified, competitively recruited, national civil services—is inherent to a potent, rule of law based and accountable, modern State, resistant to these profound pressures. The ideals of modern bureaucracy are the institutional inspiration of multilateral administration. In the course of this transposition, patrimonial pressures are replaced by the strain of State sociability and co-option. In other words, the exertion of inevitable influence by States on the staff of international organizations. Intergovernmental institutions attempt to absorb this strain by acceding to quasi-representative high-level appointments, as a derogation from the rule of impersonality of the rank-and-file international civil service. International administrative law is intrinsic to securing the exceptional status of international officials, namely their independence. Notably, the ICJ judges this impartiality of the international civil service so fundamental as to be correlated with the independence of an international organization itself.

The full caption of *Reparation for Injuries* reminds us that the ICJ's determination that international organizations possess international legal personality is in the aftermath of injuries (including fatalities), suffered by international civil servants in the service of the UN.⁷⁷ In 1948, the assassination in Jerusalem of Count Folke Bernadotte and other members of the UN Mission to Palestine, raised, "with greater urgency than ever, the question of the arrangements to be made by the United Nations with a view to ensuring to its agents the fullest measure of protection in the future and ensuring that reparation be made for the injuries suffered."⁷⁸ The convention of relying upon the same-nationality-State to represent and protect persons on the international legal plane against the actions of other States is incompatible with the independence of international officials. Consequently, the ICJ concludes that, to enable the independent action of an international organization, the independence of international officials must be ensured—and vice versa.⁷⁹

Fukuyama terms backsliding by modern States, 'repatriomonalisation', and identifies it as a mechanism of political decay—the rotten, re-personalized State becomes incapable of governing effectively.⁸⁰ This "leads either to slowly increasing levels of corruption, with correspondingly lower levels of government effectiveness, or to violent populist reactions to perceived elite manipulation."⁸¹ Given the strength of the related strains of State sociability,

77 See Quayle, *Treaties of a Particular Type* 2016, 871–873.

78 ICJ, *Reparation for Injuries*, 9, citing the UN General Assembly resolution referring the request for an Advisory Opinion to the ICJ.

79 *Ibid.*, 13.

80 Fukuyama 2014, 35.

81 *Ibid.*, 28.

there is no reason to discount the risk of ‘repatrimonialisation’ of international organizations. Whilst, “a spirit of international loyalty among public servants can be maintained in practice”, Drummond’s experience of leading the League of Nations Secretariat was “also that maintenance of such a spirit is an essential factor in the activity of an international service, since this alone can ensure to it that confidence without which it cannot function as it ought”.⁸² If the political decay of an international organization resembled that of a modern State, the compromised international civil service would lead to dwindling governance effectiveness and the de-legitimizing of the intergovernmental institution. In other words, international organizations are only international organizations because of the independence of the international civil service. The resulting role of international administrative law is surely to maintain this exclusively international loyalty, indispensable to modern multilateral administration.

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82 Schwebel 1953, 6, quoting deliberations of a group of League officials, chaired by Sir Eric Drummond.

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PART 1

*The Legal Premise of International
Administrative Law*



The Tension between the Jurisdictional Immunity of International Organizations and the Right of Access to Court

*Edward Chukwuemeke Okeke**

Abstract

The major controversy about immunity from legal process possessed by many international organizations is that without access to court or adequate alternative recourse there may be a denial of justice. Even where a recourse to an alternative dispute resolution mechanism is available, there is still the issue whether that mechanism meets the requisite standards of impartiality and independence for the determination of a legal claim. This chapter addresses the nature, sources and purpose of the immunity from legal process of international organizations, and then discusses how national courts and international courts and tribunals, especially the European Court of Human Rights, have dealt with the interplay between these competing or conflicting principles of jurisdictional immunity and access to court. Most importantly, it addresses whether the jurisdictional immunity of international organizations is conditional on the availability of an alternative dispute resolution mechanism. It also discusses the adequacy of alternative dispute resolution mechanisms; in particular, whether the proceedings of international administrative tribunals meet the standards of such instruments as Article 6(1) of the European Convention on Human Rights. It concludes with an exploration of whether the international law principle of jurisdictional immunity of international organizations could be reconciled with the human rights principle of access to court or tribunal.

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1 Introduction

There is no denying that there is tension between the international law principle of jurisdictional immunity¹ of international organizations and the human rights principle of access to court. The tension arises because of the inherent conflict between both principles. The major controversy about jurisdictional immunity is that without access to court or adequate alternative recourse there may be a denial of justice or accountability gap where an international organization does not provide remedy to aggrieved persons. This is so because any time jurisdictional immunity is asserted and granted, the inevitable result is that an aggrieved party will be left without legal recourse or remedy. Even where a recourse to an alternative dispute resolution mechanism is available, there is still the issue whether that mechanism is adequate in the sense that it meets the requisite standards of fairness for the determination of a legal claim.

Following this introduction, this chapter will start with a discussion of the nature of international organizations and the sources and purpose of their jurisdictional immunity (Section 2). This is followed by the identification of the right of access to court or tribunal in international human rights instruments, as well as some national laws together with an examination of how courts have addressed the tension between jurisdictional immunity and access to court—especially the fecund and profound jurisprudence of the European Court of Human Rights (Section 3). In particular, it will examine how courts have considered the availability and adequacy of alternative dispute resolution mechanisms in addressing the tension. In this regard, it will address whether the jurisdictional immunity of international organizations is conditional on the availability or adequacy of alternative dispute resolution mechanisms, such as international administrative tribunals (Section 4). The chapter concludes with an exploration of whether jurisdictional immunity and access to court could be reconciled (Section 5).

2 Sources and Purpose of Jurisdictional Immunity of International Organizations

States opt for international cooperation through the establishment of and participation in international organizations to achieve their common objectives. International organizations, which are different from nongovernmental organizations or multinational corporations, are established by international

¹ Jurisdictional immunity is often referred to as immunity from legal process or immunity from judicial process.

agreements by their member States and governed by international law. They are not rogue entities. As the International Court of Justice has determined, international organizations have their own international personality and are therefore subjects of international law.² However, international organizations are not sovereign States or 'super-States'.

International organizations derive their jurisdictional immunity primarily from their constituent instruments.³ International organizations may also derive jurisdictional immunity from other multilateral treaties on privileges and immunities;⁴ bilateral treaties, such as host nation agreements; or national legislation, such as the United States International Organizations Immunities Act⁵ and the United Kingdom International Organisation Act.⁶

To enable international organizations to fulfill their functions, their member States accord them certain privileges and immunities, including immunity from legal process. These privileges and immunities protect international organizations from the jurisdiction and enforcement measures of their member States. Jurisdictional immunity bars a national court from subjecting these international organizations to judicial process or adjudicating their legal relations.⁷ Staff of these international organizations also enjoy jurisdictional immunity for acts performed in the discharge of their official duties. Under international law, international organizations generally are immune from legal process unless the organization expressly waives the immunity.

2 ICJ, *Reparation for Injuries* 1949, 174.

3 See, for example, IMF Articles of Agreement, art IX, s 3 ("The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract").

4 See, for examples, Convention on the Privileges and Immunities of the United Nations (General Convention), art II, s 2 ("The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity"); Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), art III, s 4 ("The specialized agencies, their property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity").

5 International Organizations Immunities Act (USA), s 2(b) ("International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract").

6 International Organizations Act 1968 (UK), sch 1, pt 1 ('Immunity from suit and legal process').

7 Okeke 2018, 4.

Jurisdictional immunity prevents interference by member States, through their national courts, in the administration, management and operation of international organizations. It ultimately serves to protect international organizations from becoming subject to national laws and regulations. Jurisdictional immunity protects both the international organizations and their member States by preventing their various national courts from unilaterally determining the legal validity of the acts of the international organizations in the exercise of their functions. Immunity allows international organizations to fulfil their functions effectively, efficiently and economically. These functions or activities of international organizations are determined and defined by the member States.

The main justification for the jurisdictional immunity of international organizations has been summed up as follows:

Intergovernmental organizations, which carry out their functions not only in their headquarters State but in the territories of all their members, must, in order to deal equitably with all their members, be able to operate on the basis of uniform, i.e., international, law, rather than on the basis of the diverse laws of particular member States. If any State could, through its courts, bend the operations of an organization to the laws of that State, all other States could do likewise with respect to their laws, thus possibly paralyzing or fragmenting the organization.⁸

3 Right of Access to Court and Availability of Alternative Dispute Resolution Mechanism

International human rights instruments, such as the Universal Declaration of Human Rights (UDHR),⁹ the International Covenant on Civil and Political Rights (ICCPR),¹⁰ the European Convention on Human Rights (ECHR),¹¹ Amer-

8 UN Juridical Yearbook 1980, 228. See also Court of Appeals for the DC Circuit, *Broadbent v Organization of American States*.

9 Universal Declaration of Human Rights, art 10 (“In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

10 International Covenant on Civil and Political Rights, art 14 (“In the determination of his [...] rights and obligations in a suit at law, everyone shall be entitled to fair and public hearing by a competent, independent, and impartial tribunal established by law”).

11 European Convention for the Protection of Human Rights and Fundamental Freedoms, art 6(1) (“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”).

ican Convention on Human Rights,¹² and African Charter on Human and Peoples' Rights,¹³ all recognize the right to a fair proceeding before an independent and impartial court or tribunal.¹⁴ These human rights instruments impose the obligation of access to court on their respective State parties.¹⁵ Where these State parties are also members of international organizations and have granted them jurisdictional immunity under applicable treaties, there is an apparent conflict between their treaty obligations: the right of access to court to persons under their jurisdiction and the jurisdictional immunity of international organizations which is an impediment to that right. Reconciliation of the conflict is made more difficult in that neither the right of access to court nor the jurisdictional immunity of international organizations has achieved customary international law status as to be applicable *erga omnes*. Consequently, courts have to and have developed legal standards to reconcile these competing principles.

At issue is whether an international organization's jurisdictional immunity must be conditioned on the availability of an alternative dispute resolution mechanism. Some legal instruments on privileges and immunities oblige international organizations to provide an alternative or appropriate mode of resolution of disputes of contracts or other disputes of a private nature. For example, Article VIII, Section 29 of the Convention on the Privileges and Immunities of the United Nations (General Convention) provides:

The United Nations shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

12 American Convention on Human Rights, art 8(1) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law").

13 African Charter on Human and Peoples' Rights, art 7 ("Every individual shall have the right to have his cause heard").

14 In addition to international human rights treaties, some national constitutions do provide for access to court: Constitution of Italy, art 24(1) ("All may bring a case before a court of law in order to protect their rights under civil and administrative law"); Constitution of South Africa, s 34 ("Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum"); Constitution of Japan, art 32 ("No person shall be denied the right of access to the courts").

15 See Vienna Convention on the Law of Treaties, art 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith").

Similarly, Article IX, Section 31(a) of the Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations (Specialized Agencies Convention) provides:

Each specialized agency shall make provision for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party; (b) Disputes involving any official of a specialized agency who by reason of his official position enjoys immunity, if immunity has not been waived in accordance with the provisions of Section 22.

The Secretary-General of the United Nations (UN) had reported on the procedures in place for the implementation of Article VIII, Section 29 of the General Convention, in response to the request from the General Assembly.¹⁶ With respect to disputes arising out of commercial agreements (contracts and lease agreements), the report stated that,

[I]t has been the practice of the United Nations to make provision in its commercial agreements (contracts and lease agreements) for recourse to arbitration in the event of disputes that cannot be settled by direct negotiations. This practice has also been followed by subsidiary bodies of the United Nations, such as the United Nations Development Programme (UNDP) and the United Nations Children's Fund (UNICEF).¹⁷

It reported that the UN incorporates a standard clause on privileges and immunities in all of its commercial agreements: "Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the UN, including, but not limited to, immunity from any form of legal process".¹⁸ The preservation of privileges and immunities clause,

...which normally follows the arbitration clause, makes clear to the contractor/lessor that the United Nations, by entering into contractual relations with private firms or individuals and by accepting arbitration as the method of dispute settlement, has not agreed to waive its immunity from legal process, which the Organization enjoys in accordance with Section 2 of the General Convention.¹⁹

16 See UNGA Fifth Committee, 'Review of the Efficiency of the Administrative and Financial Functioning of the United Nations' 1995.

17 *Ibid.*, para 3.

18 *Ibid.*, para 6.

19 *Ibid.*

It continued:

It is clear, however, that the 'privileges and immunities clause' does not adversely affect the commitment to arbitration since the Organization has agreed to be bound by the arbitration award as the final adjudication of the dispute, controversy or claim; the privileges and immunities clause provides protection to the Organization against possible court proceedings initiated prior to or after the award unless a waiver of immunity is expressly granted.²⁰

According to the Report, other disputes of a private law character encountered by the UN include "(a) third-party claims for personal injuries (arising outside the peace-keeping context), (b) claims related to United Nations peace-keeping operations, and (c) claims related to operational activities for development".²¹ For tort claims arising from acts within the Headquarters district in New York, the organization has a special Regulation,

...to place reasonable limits on the amount of compensation or damages payable by the United Nations in respect of claims by third parties for death, personal injury or illness or for damaged, destroyed or lost property arising from acts or omissions occurring within the Headquarters district in New York.²²

For claims for personal injury or property damage arising from acts occurring on UN premises in duty stations other than New York, recourse is had to amicable settlement through negotiation, failing which, the matter would be referred to arbitration.²³ Claims arising from accidents involving vehicles operated by United Nations personnel for official purposes are dealt with through the commercial insurance policy with worldwide coverage that the UN maintains.²⁴

Regarding third-party claims for compensation for personal injury or death and property loss or damage resulting from acts of members of a United Nations peace-keeping operation, the UN enters a status-of-forces agreement

20 Ibid.

21 Ibid., para 9.

22 Ibid., para 11.

23 Ibid., para 13.

24 Ibid., para 14.

(SOFA) with host countries which envisage the establishment of a 'standing claims commission' for the purpose of settling most claims.²⁵

The Report states that the United Nations' policy is not to enter into litigation or arbitration with individuals who are aggrieved that they were not selected for positions in the UN, but that the internal dispute resolution mechanism is available to those other individuals who are recruited as staff members and present complaints relating to their terms of employment.²⁶

The International Court of Justice (ICJ), in the *Cumaraswamy* case, raised the issue of the obligation of the UN under Section 29 of the General Convention to provide alternative modes of settlement of disputes, but it did not address whether the organization's entitlement to immunity is conditioned on the availability of an alternative remedy.²⁷ The ICJ noted:

However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that "[t]he United Nations shall make provisions for" pursuant to Section 29.²⁸

In *Georges v United Nations*, the question presented before the United States Court of Appeals for the Second Circuit was whether the fulfillment by the United Nations of its obligation under Section 29 of the General Convention is a condition precedent to its immunity under Section 2 of the General Convention such that the UN's failure to make provisions for appropriate modes of settlement of certain disputes compels the conclusion that its immunity does not exist.²⁹ The Court held that the UN's fulfillment of its Section 29 obligation is not a condition precedent for its jurisdictional immunity under Section 2 of the General Convention. Plaintiffs, citizens of the United States or Haiti, had sued the United Nations, the UN Stabilization Mission in Haiti (MINUSTAH), the Secretary-General, and the former Head of MINUSTAH. They claimed that they "have been or will be sickened, or have family members who have died or will die, as a direct result of the cholera" that was introduced by the Nepalese contingent of MINUSTAH and the epidemic that had ravaged Haiti.³⁰

25 Ibid., para 16.

26 Ibid., para 24.

27 ICJ, *Cumaraswamy Case* 1999.

28 Ibid., para 66.

29 US Court of Appeals for the Second Circuit, *Georges v United Nations* 2016.

30 Ibid., para 90.

To answer the question whether Section 29 is a condition precedent for Section 2, the Court noted that the interpretation of a treaty begins with the text, and where the language is plain, a court must construe it and refrain from amending it. It also noted that a treaty is a contract between nations and must be interpreted upon the same principles that govern the interpretation of contracts between individuals.³¹ It applied the interpretation canon of *expressio unius est exclusio alterius*, in other words, the express mention of something means the exclusion of another. Since Section 2 expressly mentions express waiver as the only circumstance when the United Nations shall not enjoy immunity, by *negative implication* all other circumstances, including failure to fulfill its Section 29 obligation, are excluded. The Court concluded that Section 29 is not a condition precedent for Section 2. It reasoned that conditions precedent to contractual obligations are generally disfavored and must be expressed in plain and unambiguous language—which is lacking regarding Sections 2 and 29 of the General Convention.³²

Other courts have considered the availability of alternative dispute resolution mechanisms in their decision on the jurisdictional immunity of international organizations. The European Court of Human Rights (ECtHR) has been in the vanguard and has developed its own standard to deal with the tension between right of access to court granted by Article 6(1) of the European Convention on Human Rights (ECHR) and the jurisdictional immunity of international organizations. In the *Waite and Kennedy v Germany*, and *Beer and Regan v Germany* cases both decided on 18 February 1999, the ECtHR unanimously held that in giving effect to the jurisdictional immunity of the European Space Agency (ESA), the German courts did not violate Article 6(1) of the ECHR.³³

The applicants in *Waite and Kennedy*, British nationals residents in Germany, were employed by a company to provide services for ESA.³⁴ When the company informed the applicants that their employment would be terminated at the expiration of their contract, they instituted proceedings against ESA before the Darmstadt Labour Court, claiming that under the German labor law, they had acquired the status of employees of ESA. ESA invoked its immunity under its constituent instrument and the Darmstadt Labour Court declared the applicants' action inadmissible. The Frankfurt/Main Labour Appeals Court,

31 Ibid., paras 92–93.

32 Ibid., paras 93–94.

33 ECtHR, *Waite and Kennedy v Germany* 1999 and *Beer and Regan v Germany* 1999. The ECtHR was set up by the Council of Europe member States in 1959 to deal with allegations of violations of the 1950 European Convention on Human Rights.

34 The European Space Agency is an international organization established under the Convention for the Establishment of a European Space Agency.

as well as the German Federal Labour Court, dismissed the applicants' appeal. The applicants then applied to the European Commission of Human Rights, complaining that they had been denied access to a court for the determination of their dispute with ESA regarding an issue under German labour law in violation of Article 6(1) of the ECHR. The Commission declared their application inadmissible and referred the case to the ECtHR.

The ECtHR declared that the right to institute proceedings before courts in civil matters is but one aspect of the 'right to a court' as embodied in Article 6.³⁵ The ECtHR, however, noted that "the right of access to the courts secured by Article 6 [subsection] 1 of the Convention is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State".³⁶ It recognized that States enjoy a certain margin of appreciation, but it remains the province of the ECtHR to decide whether the requirements of the ECHR are met.

The ECtHR determined that to ensure that the right of access is not impaired,

...a limitation will not be compatible with Article 6 [subsection] 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.³⁷

The ECtHR then concluded that the jurisdictional immunity of international organizations had a legitimate objective because the attribution of privileges and immunities is essential to the proper functioning of international organizations, and to freedom from unilateral interference by individual governments.³⁸ The ECtHR noted "that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective".³⁹ Under the circumstances of the case, a material factor for the Court in determining whether granting ESA jurisdictional immunity in Germany is permissible was whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention. The assessment of proportionality "cannot be applied in such a way as to compel an international organization to submit itself to national litigation in relation to

35 ECtHR, *Waite and Kennedy v Germany* 1999, para. 50.

36 *Ibid.*, para. 59.

37 *Ibid.*

38 *Ibid.*, para 63.

39 *Ibid.*, para 67.

employment conditions prescribed under national labour law”.⁴⁰ It therefore held:

Taking into account in particular the alternative means of legal process available to the applicants, it cannot be said that the limitation on their access to the German courts with regard to ESA impaired the essence of their ‘right to a court’ or was disproportionate for the purposes of Article 6 [subsection] 1 of the Convention.⁴¹

Following *Waite and Kennedy*, Belgian and French courts decided not to recognize the jurisdictional immunity of international organizations in cases where they found the dispute resolution mechanism in those organizations to be incompatible with the ECHR. The Belgian Court of Cassation delivered its judgment on 21 December 2009, in three cases in connection with employment disputes between international organizations and their employees that have been making their way through the Belgian court system.⁴²

In *Lutchmaya v General Secretariat of the African, Caribbean and Pacific Group of States (ACP)*, an employee of ACP had successfully challenged the non-renewal of their term appointment before the Belgian Labour Tribunal, which awarded them compensatory damages. When ACP failed to pay the award, the employee sought an order attaching the organization’s bank accounts. ACP contested the attachment and invoked its immunity under its constituent instrument, and the Tribunal upheld the organization’s immunity and vacated the attachment. The employee then appealed to the Brussels Labour Court, which ruled that, if it is to be effective, the right to a hearing consistent with Article 6(1) of the ECHR must include the enforcement of a final decision. The Labour Court applied the principle developed by the ECtHR in *Waite and Kennedy*, and ruled that giving effect to immunity from enforcement would violate Article 6 because ACP did not provide an alternative dispute resolution mechanism for the employee to challenge ACP’s refusal to abide by a decision rendered against the organization. It ordered attachment of ACP’s account.⁴³ Subsequently, ACP filed an appeal of the decision with the Court of Appeals and in turn with the Court of Cassation, which confirmed the decision of the

40 Ibid., para 72.

41 Ibid., para 73.

42 Belgian Court of Cassation, *WEU v Siedler* 2009; *ACP v Lutchmaya* 2009; *ACP v B. D.* 2009.

43 Brussels Labour Court, *Lutchmaya v ACP* 2003.

Court of Appeals denying the immunity of execution against ACP's Belgian bank account.⁴⁴

In a companion case to *Lutchmaya*, ACP had decided not to comply with an order to pay damages to the plaintiff and had opposed the enforcement measures before the Tribunal of First Instance and Court of Appeal of Brussels based on immunity from execution. The Court of Appeal decided that the immunity from execution would be incompatible with Article 6 of the ECHR.⁴⁵ ACP filed an appeal with the Court of Cassation, which rejected the appeal and immunity on the ground that the plaintiff's right of access to court had been unduly limited by the absence of any dispute resolution mechanism with ACP.⁴⁶

In *Siedler v Western European Union*, an employee of the now defunct Western European Union (WEU) had challenged their termination in 2000 before the organization's internal appeals mechanism, and had been awarded damages.⁴⁷ Not happy with the disposition of their appeal, the former employee took their case to the Belgian Labor Tribunal. The claimant argued that their employment contract was subject to national labour law rather than the internal law of WEU. The Labour Tribunal ruled in favor of the claimant, and WEU appealed the decision to the Belgian Labour Court, invoking its jurisdictional immunity. WEU had also argued that Belgian law was inapplicable to the employment relationship between the organization and its staff. At issue was whether the jurisdictional immunity of WEU could be reconciled with the right to a fair trial as guaranteed in Article 6(1) of the ECHR. The Belgian Labour Court concluded that, absent an independent dispute resolution mechanism within an international organization, Article 6(1) mandates that the organization be subject to the jurisdiction of national courts. It concluded that WEU's internal mechanism did not provide the necessary safeguards for an independent tribunal as required under the Convention because the hearings were closed, the decisions were not published, the adjudicators were nominated by the organization for a two-year term, and there was no provision for adjudicators to recuse themselves, calling into question their independence. In other words, the existence of an internal mechanism is not enough—the quality of that mechanism must also be scrutinized to determine whether that mechanism is independent. Consequently, the Labour Court ruled that granting immunity to

44 Belgian Court of Cassation, *ACP v Lutchmaya* 2009.

45 Brussels Labour Court of Appeals, *B.D. v ACP* 2007.

46 Belgian Court of Cassation, *ACP v B.D.* 2009.

47 Brussels Labour Court of Appeals, *Siedler v WEU* 2003.

the WEU in this regard would violate Article 6(1) of the ECHR.⁴⁸ The WEU appealed the decision to the Court of Cassation, which agreed with the Labour Court that the guarantees of a fair trial have not been met by the WEU internal procedure. The Court of Cassation rejected the WEU jurisdictional immunity claim but ruled that the WEU's internal rules, as opposed to the Belgian labour law, would apply to the proceedings before the Belgian courts.⁴⁹

In *Degboe v African Development Bank*, an employee of the African Development Bank (AfDB) who had been terminated appealed the decision to the AfDB's appeals committee, which made a recommendation in their favor.⁵⁰ When the AfDB's president rejected the recommendation, the former employee brought an action before the French Labour Tribunal, which ruled in their favor and ordered the payment of compensatory damages. The AfDB, which did not appear before the Labour Tribunal, appealed the decision of the Tribunal before the Paris Court of Appeals, and invoked jurisdictional immunity. The former employee argued that the AfDB's jurisdictional immunity contravened Article 6(1) of the ECHR. The Paris Court of Appeals applied the principle of *Waite and Kennedy*, and noted that the (then) dispute resolution mechanism within the AfDB did not provide for a binding decision (The case arose before the establishment of the AfDB's Administrative Tribunal).⁵¹ The French Court consequently concluded that respecting the AfDB's immunity would deny its employees an adequate recourse to challenge its decisions and thereby negate their right under Article 6 of the Convention. It declined to dismiss the case on jurisdictional grounds and ordered further proceedings before the national court.

The ECtHR clarified the principle that it had developed in *Waite and Kennedy* in the case of *Stichting Mothers of Srebrenica and Others v The Netherlands*.⁵² The case arose out of the horrors of the 1992–1995 war in Bosnia and Herzegovina. The applicants were a foundation created under Dutch law to bring proceedings on behalf of relatives of the victims of the Srebrenica Massacre, and 10 nationals of Bosnia and Herzegovina who were the surviving relatives of people killed in the massacre. The United Nations Security Council (UNSC) had set up the United Nations Protection Force (UNPROFOR) for the

48 Ibid.

49 Belgian Court of Cassation, *WEU v Siedler* 2009.

50 Paris Court of Appeal, *Degboe v AfDB* 2003.

51 The Tribunal was established by Resolution No B/BD/97/11 of 16 July 1997 of the Board of Directors of the African Development Bank as an independent judicial body for the final resolution of disputes between the Bank and its staff. The decisions of the Tribunal are final and binding, unlike the Appeals Committee which was established in 1989.

52 ECtHR, *Stichting Mothers of Srebrenica and Others v The Netherlands* 2012.

Yugoslav crisis, and the Netherlands was one of the troop-contributing nations. By Resolution 819 (1993), the UNSC had declared Srebrenica in eastern Bosnia a 'safe area'. In 1995, the Bosnian Serb Army overran the 'safe area' and, despite the presence of a battalion of UNPROFOR, made up of lightly-armed Dutch soldiers (Dutchbat), massacred about 8,000 Bosniac men and boys.

The applicants had first brought proceedings against The Netherlands and the United Nations before the Regional Court of The Hague and argued that the jurisdictional immunity of the UN had been overridden by Article 6 of the ECHR and the jus cogens prohibition of genocide. The Regional Court declined jurisdiction against the UN and noted that

...the creation of the United Nations predated the entry into force of the Convention. Moreover, the United Nations was an organization whose membership was well-nigh universal; this distinguished it from organizations such as the European Space Agency, the organization in issue in *Waite and Kennedy* and *Beer and Regan*, which had been created only in 1980 and whose membership was limited to European States.⁵³

The applicants appealed to the Court of Appeals of The Hague, which upheld the judgment of the Regional Court. The applicants then filed an appeal with the Supreme Court, which decided that, pursuant to the Charter of the United Nations and the General Convention, the UN could not be summoned before the national courts of its member States.

Following the exhaustion of proceedings in the Dutch courts, the applicants took their case to the ECtHR, and complained that the recognition of the jurisdictional immunity of the United Nations by the Dutch courts violated their right of access to courts under Article 6 of the Convention. The ECtHR noted:

[T]he attribution of responsibility for the Srebrenica massacre or its consequences, whether to the United Nations, to the Netherlands State or to any other legal or natural person, is not a matter falling within the scope of the present application. Nor can the Court consider whether the Secretary-General of the United Nations was under any moral or legal obligation to waive the United Nations' immunity. It has only to decide whether the Netherlands violated the applicants' right of "access to a court", as guaranteed by Article 6 of the Convention, by granting the United Nations immunity from domestic jurisdiction.⁵⁴

53 Ibid., para 70.

54 Ibid., para 137.

Before the ECtHR applied the principles from its case law⁵⁵ to the jurisdictional immunity enjoyed by the UN, it noted that previous cases before it concerned the jurisdictional immunity of international organizations in disputes between the organization and members of its staff,⁵⁶ or the request to impute the acts of international organizations to State Parties to the ECHR who are member States of those international organizations.⁵⁷ It differentiated those cases from this one because the dispute in this one involved a dispute between the applicants and the United Nations arising out of the action of the UNSC under Chapter 7 of the UN Charter. The Court consequently held that because of the fundamental mission of the United Nations to secure international peace and security, Article 6 of the Convention cannot be interpreted to deny the UN jurisdictional immunity for the acts and omissions of the Security Council:

To bring such operations within the scope of domestic jurisdiction would be to allow individual States, through their courts, to interfere with the fulfillment of the key mission of the United Nations in this field, including with effective conduct of its operations.⁵⁸

The ECtHR noted that in *Waite and Kennedy* as in *Beer and Regan*, it had considered the availability of reasonable alternative means to protect effectively the rights under the Convention a ‘material factor’ in its determination whether the grant of jurisdictional immunity was permissible under the Convention. It conceded that there was no such alternative means in this case, but contended:

It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule. As regards international organizations, this Court’s judgments in *Waite and Kennedy* and *Beer and Regan* cannot be interpreted in such absolute terms either.⁵⁹

55 Ibid., para 139 (citations omitted).

56 See ECtHR, *Waite and Kennedy v Germany* 1999 and *Beer and Regan v Germany* 1999.

57 ECtHR, *Behrami v France* 2007 and *Saramati v France* 2007.

58 ECtHR, *Stichting Mothers of Srebrenica v The Netherlands* 2012, para. 154 (citations omitted).

59 Ibid., para 164, citation omitted to the ICJ’s Judgment *Jurisdictional Immunities of the State* (Germany v Italy: Greece intervening) 2012, para. 101.

The ECtHR further noted:

There remains the fact that the United Nations has not, until now, made provision for “modes of settlement” appropriate to the dispute here in issue. Regardless of whether Article VIII, Section 29 of the Convention on the Privileges and Immunities of the United Nations can be construed so as to require a dispute settlement body to be set up in the present case, this state of affairs is not imputable to the Netherlands. Nor does Article 6 of the Convention require the Netherlands to step in: as pointed out above, the present case is fundamentally different from earlier cases in which the Court has had to consider the immunity from domestic jurisdiction enjoyed by international organizations, and the nature of the applicants’ claims did not compel the Netherlands to provide a remedy against the United Nations in its own courts.⁶⁰

The ECtHR concluded that the grant of immunity to the United Nations in this case served a legitimate purpose and was not disproportionate.⁶¹

Lastly, the position of the Canadian Supreme Court may sum up the predominant view on the availability of alternative dispute resolution mechanism: “The absence of a dispute resolution mechanism or of an internal review process is not, in and of itself, determinative of whether [an international organization] is entitled to immunity”.⁶² It had ruled that the “fact that the appellant has no forum in which to air his grievances and seek remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host State’s courts”.⁶³ It noted that “it is an ‘inevitable result’ of a grant of immunity that certain parties will be left without legal recourse, and this is a ‘policy choice implicit’ in the legislation”.⁶⁴

4 Adequacy of Alternative Dispute Resolution Mechanism

Even when alternative dispute resolution mechanisms are available, there may still arise an issue about the adequacy of such mechanism. Employment relations within international organizations are usually regulated by their internal rules and policy. For the resolution of employment-related disputes, most in-

60 Ibid., para 165.

61 Ibid., para 169.

62 Supreme Court of Canada, *Amaratunga v Northwest Atlantic Fisheries Organization* 2013, para 60.

63 Ibid., para 63.

64 Ibid.

ternational organizations have set up an internal dispute resolution mechanism in the form of administrative tribunals. Judges of administrative tribunals are independent from the organs in the international organization that appoint them. The adequacy of an alternative dispute resolution mechanism revolves around its independence and impartiality. Some courts have denied immunity to an international organization where they considered an internal mechanism not to be independent and impartial. Generally, courts have recognized the jurisdictional immunity of international organizations with respect to employment disputes with their staff.

The Statute of the Administrative Tribunal of the International Labour Organization (ILOAT), which was adopted by the International Labour Conference on 9 October 1946, provides in Article II:

1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.
2. The Tribunal shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of her or his employment and to fix finally the amount of compensation, if any, which is to be paid.⁶⁵

International organizations, such as the World Health Organization (WHO), United Nations Education, Science and Cultural Organization (UNESCO), Food and Agricultural Organization (FAO), and a good many others that have their headquarters in Europe, have accepted the jurisdiction of the ILOAT for the resolution of employment disputes between them and their staff.⁶⁶

The World Bank Administrative Tribunal (WBAT) was established in 1980 and its Statute provides in Article II (1):

The Tribunal shall hear and pass judgment upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member. The words “contract of employment” and “terms of appointment” include all pertinent regulations and rules in force at the time of alleged non-observance including the provisions of the Staff Retirement Plan.⁶⁷

65 ILOAT Statute.

66 ILOAT, ‘Membership’. See ILOAT Statute, Annex.

67 WBAT Statute.

The United Nations Administrative Tribunal was established in 1950 pursuant to the General Assembly Resolution 351 A (IV) of 24 November 1949.⁶⁸ Under Article 2 of its Statute, the Tribunal had jurisdiction over employment disputes between the United Nations and its staff. Article 9 of the Statute provides that “the oral proceedings of the Tribunal shall be held in public unless the Tribunal decides that exceptional circumstances require that they be held in private”.⁶⁹ The United Nations reformed its internal justice system and introduced a two-tier system in 2009, with a first instance, United Nations Dispute Tribunal (UNDT) and the appellate and final, United Nations Appeals Tribunal (UNAT).⁷⁰ Other international organizations, like the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO), have accepted the jurisdiction of the UNDT and UNAT for the resolution of employment disputes between them and their staff.

Administrative tribunals of international organizations are judicial bodies. In its advisory opinion in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Effect of Awards)* case, the ICJ determined that the United Nations Administrative Tribunal was “an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions”.⁷¹ The Court inferred an obligation from the Charter of the UN to establish a dispute resolution mechanism for its staff members:

When the Secretariat was organized, a situation arose in which the relations between the staff members and the [UN] were governed by a complex code of law. This code consisted of the Staff Regulations established by the General Assembly, defining the fundamental rights and obligations of the staff, and the Staff Rules, made by the Secretary-General in order to implement the Staff Regulations. It was inevitable that there would be disputes between the [UN] and staff members as to their rights and duties. The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the

68 UNGA Res 351 A (IV), 24 November 1949.

69 UN Administrative Tribunal Statute, art 9.

70 UNGA Res 63/253, 24 December 2008.

71 ICJ, *Effect of Awards* 1954, 53.

United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.⁷²

The establishment of international administrative tribunals by international organizations is founded on a human rights principle of access to court or the obligation to provide an alternative dispute resolution mechanism under multilateral or bilateral treaties on their jurisdictional immunities. In this regard, when the Administrative Tribunal of the World Bank was established in 1980, the memorandum of the President of the World Bank to the Board of Executive Directors stated that one of the reasons for the establishment of the tribunal is that,

Wherever administrative power is exercised, there should be the possibility, in case of disputes, of a fair hearing and due process. This principle is enshrined not only in numerous national constitutions, it is also reaffirmed in the Universal Declaration on Human Rights.⁷³

The ECtHR has decided whether the Article 6 of the ECHR applies to the administrative tribunals of international organizations in a number of cases. In *Boivin v 34 Member States of the Council of Europe*, the applicant, a dual Belgian and French national, had challenged the termination of their employment with the European Organization for the Safety of Air Navigation (Eurocontrol) before the ILOAT.⁷⁴ The Tribunal upheld the impugned decision. The applicant subsequently filed an application with the ECtHR and complained, inter alia, that the reasoning in the ILOAT judgment had been insufficient under Article 6 of the ECHR. The Court noted that the complaint in the application is actually against the judgment of the ILOAT concerning their employment dispute with Eurocontrol. In other words, the applicant's complaints were not directed against any acts of the respondent States but against the decision of the Tribunal. It pointed out that the ILOAT was outside the jurisdiction of the respondent States, that those States did not intervene directly or indirectly in the employment dispute, and that no action or omission of those States can be considered to engage their responsibility under the ECHR. It distinguished this

⁷² Ibid., 57.

⁷³ World Bank, 'Memorandum of the President', 14 January 1980.

⁷⁴ ECtHR, *Boivin v 34 Member States of the Council of Europe* 2008. The application was declared inadmissible with respect to 32 of the member States for failure to comply with the six-month time-limit, and was only examined with respect to France and Belgium.

case with those cases where the State or States concerned had been involved directly or indirectly such that the responsibility of the respondent States had been at issue. The Court determined that the alleged violation of the ECHR cannot be attributed to France and Belgium. It also pointed out that since Eurocontrol is not a party to the ECHR, its responsibility cannot be engaged under the Convention. Consequently, the Court declared the applicant's complaints incompatible *ratione personae*—in other words, by reason of the person concerned—with the provisions of the Convention, and the application inadmissible.

In *Connolly v 15 Member States of the European Union*, the applicant was a British national resident in London, whose employment with the European Commission was terminated, following disciplinary proceedings, for publishing a book without prior authorization.⁷⁵ The former employee unsuccessfully challenged their termination before the European Community Court of First Instance (abbreviated as TPICE in French) before appealing to the European Community Court of Justice (abbreviated as CJCE in French) which also rejected their appeal. Before the ECtHR, the claimant alleged violation of Article 6(1) of the ECHR, amongst other things. The Court noted that this application originated from a decision of the European Commission to terminate the applicant's employment, as well as the decisions of the TPICE and CJCE. The Court also noted that the applicant, however, thought that the 15 member States of the European Union at the time of the impugned decisions should be held responsible for the violation of the Convention. The ECtHR confirmed its jurisprudence as established in the *Boivin* case and decided that the alleged violation of the Convention should not be imputed to the respondent States and that the responsibility of the European Union, an international organization that is not a party to the Convention, cannot be engaged.

In *Gasparini v Italy and Belgium*, the applicant, an Italian national, was an employee of the North Atlantic Treaty Organization (NATO) and had been working at the organization's headquarters in Brussels.⁷⁶ The applicant brought proceedings before the NATO Appeals Board to challenge the increase in their pension contributions. At the ECtHR, they complained that the proceedings at the NATO Appeals Board had not met the requirements of a fair hearing as enshrined in Article 6 of the ECHR. The ECtHR noted that this complaint was different from that in the *Boivin* and *Connolly* cases. Specifically, the complaint was about the absence of public hearings at the NATO Appeals Board. The Court concluded that, under the circumstances of the procedure under

75 ECtHR, *Connolly v 15 Member States of the European Union* 2008.

76 ECtHR, *Gasparini v Italy and Belgium* 2009.

the NATO Civilian Personnel Regulations, the requirements of fairness were still met without the holding of public hearing. It recalled that the Appeals Board had justified the absence of a public hearings by the need “to preserve its serenity in the specific context of an organization such as NATO”.⁷⁷ Regarding the complaint about the alleged bias or partiality of the NATO Appeals Board, the Court noted that the Appeals Board is composed of three members who were appointed by the North Atlantic Council for three years from outside the organization and with recognized competence. It also noted that the applicant had the right to ask for a change of the composition of the Appeals Board for presumed partiality but failed to do so.

Beygo v 46 Member States of the Council of Europe was an application by a French and a former employee of the Council of Europe, alleging, inter alia, a violation of Article 6(1) of the ECHR.⁷⁸ The applicant claimed that as a result of the composition of and appointment of the members of the Administrative Tribunal of the Council of Europe by the Council of Europe, the tribunal had not provided the guarantees of independence and impartiality required under the Convention. The Court noted that the applicant did not dispute that the alleged violations of the Convention originated from the impugned decision by the Secretary General and the decision of the Tribunal, but claimed that the 46 member States of the Council of Europe should be jointly held responsible for the alleged violation arising from the impugned decision. After recalling the principles enunciated in its case law, the ECtHR held that the alleged violation of the ECHR cannot be imputed to the member States in this case, and consequently concluded that the applicant’s complaint is inadmissible *ratione personae* within the provisions of the Convention.

In *Klausecker v Germany*, the applicant who was physically disabled had applied for the post of patent examiner at the European Patent Office (EPO) in Munich, Germany, but was not appointed because the organization determined that they did not meet the physical requirements of the post as required by the Service Regulations of EPO.⁷⁹ The applicant challenged the decision not to recruit them, claiming that the decision constituted unlawful discrimination against the disabled. Their request for review was dismissed by the President of EPO and their internal appeal was rejected as inadmissible, but they

77 Ibid., 2.

78 ECtHR, *Beygo v 46 Member States of the Council of Europe* 2009.

79 ECtHR, *Klausecker v Germany* 2015.

were advised that they could appeal the decision to the ILOAT which has jurisdiction over employment disputes between EPO and its staff members.⁸⁰

The applicant lodged a constitutional complaint directly with the German Federal Constitutional Court, arguing that the EPO enjoyed jurisdictional immunity in German courts, and complaining that their right of access to court under Article 19(4) of the Basic Law had been violated because they had no remedy within EPO, or before the German courts or the ILOAT. The Federal Constitutional Court found the constitutional complaint inadmissible.

The applicant then filed an application with the ILOAT against the decision by the EPO not to recruit them, and the tribunal dismissed this complaint as irreceivable.⁸¹ The ILOAT considered that it was a court of limited jurisdiction and had no jurisdiction over claims by applicants who had no contract of employment with the international organization. It ruled that it had no authority to order the EPO to waive its immunity. It noted, however, that its judgment created a legal vacuum and considered it highly desirable that the EPO should seek a solution affording the applicant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.⁸²

The applicant then filed an application with the ECtHR, which considered the applicant's complaints about lack of access to German courts and to the EPO internal justice system to fall under Article 6(1) of the ECHR. The Court noted:

The internal system of judicial review within the EPO also guaranteed a protection of fundamental rights comparable to that secured by the Convention. Moreover, despite the restriction of access to that system of internal judicial review for job applicants, the applicant did have, in the circumstances of the present case, alternative means effectively to protect [their] Convention rights. The EPO had offered the applicant to conduct an arbitration procedure which would have afforded [them] effective protection.⁸³

The Court recapitulated the relevant principles from its case law and applied them to the case. It considered that the arbitration that was offered to the applicant, but which was declined, made available to them,

80 ILOAT, in *Fabio Liaci v EPO* 2000, had previously rejected as irreceivable a complaint against EPO by an applicant whose application for a job at the organization had equally been rejected for failure to meet the physical requirements of the post.

81 ILOAT, *R. K. v EPO* 2007.

82 See ECtHR, *Klausecker v Germany* 2015, paras 19 and 20.

83 *Ibid.*, para 55.

...reasonable alternative means to protect effectively [their] rights under the Convention. Therefore, the limitations placed on the applicant's access to the German courts had been proportionate to the legitimate aims pursued by the grant of immunity from jurisdiction to the EPO and the very essence of the applicant's right of access to court under Article 6 [subsection] 1 was not impaired.⁸⁴

It concluded that the denial of access to the internal justice system of an international organization to an applicant who was not recruited does not disclose a "manifestly deficient protection of fundamental rights" within the organization, especially where the applicant was offered arbitration of the impugned decision.⁸⁵ The Court dismissed the application as manifestly ill-founded.

In *Perez v Germany*, the applicant, a Spanish national who had served the United Nations and resided in Germany, had challenged their termination of employment by the UN before the UNAT before filing their application with the ECtHR.⁸⁶ In their application, the former staff member complained that the proceedings before the UN internal justice system,

...had been characterised by manifest procedural, substantive and practical shortcomings and had not met the requirements of a fair trial within the meaning of Article 6 of the Convention. Germany was to be held responsible for these deficient procedures as it had failed to ensure that there was a UN internal dispute settlement procedure protecting [...] fundamental rights in a manner equivalent to the Convention standards.⁸⁷

The applicant argued that Germany, by granting jurisdictional immunity to the UN, "had failed to guarantee [their] access to a fair and public hearing by an independent and impartial tribunal in the determination of [their] civil rights before the German courts, in breach of Article 6 of the Convention".⁸⁸ The Court recalled its case law:

[W]here the impugned decision emanated from an internal body of an international organization or an international tribunal outside the jurisdiction of the respondent States, in the context of a labour dispute that

84 Ibid., para 76.

85 Ibid., para 106.

86 ECtHR, *Perez v Germany* 2015.

87 Ibid., para 47.

88 Ibid., para 48.

lay entirely within the internal legal order of an international organization that had a legal personality separate from that of its Member States. It was decisive for the respondent States to be held responsible under the Convention in those cases whether the States concerned had intervened directly or indirectly in the dispute, and whether an act or omission of those States or their authorities could be considered to engage their responsibility under the Convention. If that was not the case, the Court considered the applicants not to have been “within the jurisdiction” of the respondent States concerned for the purposes of Article 1 of the Convention and therefore declared the applications to be incompatible *ratione personae* with the provisions of the Convention in this respect.⁸⁹

The Court also recalled its case law as established in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*,⁹⁰ and its progeny on the responsibility

⁸⁹ Ibid., para 61 (citations omitted).

⁹⁰ ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* 2005. The applicant in the *Bosphorus* case was an airline charter company incorporated in Turkey which had leased aircraft from the national airline of the former Yugoslavia which was then impounded by Ireland following United Nations Security Council (UNSC) Resolution 757 (1992) which was implemented in the European Community by Regulation (EEC) No 1432/92, and UNSC Resolution 820 (1993) which was implemented by Regulation (EEC) No 990/93. The Court determined that the impoundment was in compliance by Ireland with its legal obligation under Article 8 of Regulation (EEC) No 990/93 flowing from its membership of the European Community. To establish the extent to which a State's action was in compliance with obligations that flow from its membership of an international organization to which it has transferred part of its sovereignty, the Court noted that absolving the member States completely from their Convention responsibility in the areas covered by such transfer would run counter to the purpose and object of the Convention. The Court considered the State to retain liability under the Convention for treaty commitments subsequent to the entry into force of the Convention. The Court took the view: “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides: By ‘equivalent’ the Court means ‘comparable’; any requirement that the organisation's protection be ‘identical’ could run counter to the interest of international cooperation pursued [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection” (para 155). The Court created the so-called *Bosphorus* Presumption: “If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly

of States in complaints about acts of international organizations and their international administrative tribunals:

In *Gasparini*, the Court deduced from the principles developed in the *Bosphorus* case that, when transferring part of their sovereign powers to an international organization of which they are a member, Contracting Parties to the Convention were under an obligation to monitor that the rights guaranteed by the Convention received within that organization an “equivalent protection” to that secured by the Convention system. In fact, a Contracting Party’s responsibility under the Convention could be engaged if it subsequently turned out that the protection of fundamental rights offered by the international organization concerned was “manifestly deficient” [...]. Conversely, an alleged violation of the Convention was not attributable to a Contracting Party because of a decision or measure emanating from an organ of an international organization of which it is a member where it has not been established nor even been alleged that the protection of fundamental rights generally offered by the said international organization was not “equivalent” to that secured by the Convention and where the State concerned neither directly nor indirectly intervened in the commission of the impugned act.⁹¹

The Court then applied its case law to the *Perez* case and held that the mere fact that the impugned decision that was reviewed under the United Nations internal justice system took place in Germany where the applicant worked and resided does not bring the impugned act within the ECtHR’s jurisdiction for the purposes of Article 1 of the Convention. Regarding the alleged violation of Article 6 (1) of the Convention for denial of access to German courts, the Court reiterated:

[I]t would be incompatible with the purpose and object of the Convention if the Contracting States, by attributing immunities to international organizations, were absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. This applies, in particular, to the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial

deficient. In such cases, the interest of international cooperation would be outweighed by the Convention’s role as a ‘constitutional instrument of European public order’ in the field of human rights” (para 156).

91 Ibid., para 62 (citations omitted).

[...]. It follows that the applicant was not estopped from holding Germany responsible for its alleged failure to grant her access to the domestic courts in order to have [their] employment dispute with the UN determined. Therefore, [their] application is compatible *ratione personae* with the provisions of the Convention in this respect.⁹²

The ECtHR concluded that a complaint before the German Constitutional Court would have been an effective remedy but the applicant had failed to exercise that remedy regarding their complaint about the alleged deficiency of the United Nations internal justice system.

The conclusion that could be drawn from the case law of the ECtHR is that if an international organization is not a signatory to the Convention, then it cannot be held accountable by the Court for alleged violation of the ECHR. Applications against international organizations are, therefore, inadmissible *ratione personae*. An application that challenges the internal justice system of an international organization as incompatible with the ECHR is not attributable to its member States unless they have intervened in the dispute or the system is not equivalent to the standards of the ECHR. The Court recognizes the need for the independence of international organizations and therefore respects their jurisdictional immunity where they provide an alternative dispute resolution mechanism. Under some circumstances, the ECtHR will respect the jurisdictional immunity of an international organization even in the absence of an alternative recourse or remedy for an aggrieved party. This is usually the case with international organizations whose member States include States that are not parties to the ECHR. When applicants want to challenge the acts or decisions of international organizations before the ECtHR, they usually do so by invoking the responsibility of the host State of the international organization, or the responsibility of the member States of the international organization for the deficiency in the internal dispute resolution mechanism.

5 Conclusion

The case law of international and national courts demonstrates that the right of access to court is not absolute and may be legitimately limited by jurisdictional immunity. It is widely recognized that jurisdictional immunity of international organizations serves a legitimate purpose. Some courts consider the

⁹² Ibid., para 93.

availability of alternative dispute resolution mechanisms in their determination of whether to uphold jurisdictional immunity. However, the absence of such a mechanism does not always equate to a violation of the right of access to court. Courts are still struggling with striking the right balance between the need to maintain the independence of international organizations through jurisdictional immunity and the need to offer redress to those aggrieved by the international organization. Because of their jurisdictional immunity, proceedings against international organizations can only be brought before administrative tribunals which have very limited jurisdiction. Currently, administrative tribunals are only available for the resolution of employment related disputes between international organizations and their employees.

Recourse is usually had to arbitration for the resolution of commercial and other contractual disputes. Although arbitral panels are not considered courts established by law, they are acceptable as an alternative to dispute resolution by such courts. An alternative dispute resolution mechanism for disputes of a tortious nature involving third parties is still lacking. Absence of redress for victims of tort by international organizations may constitute an accountability gap or denial of justice, but proceedings in national courts are not the ideal way to address them. It is also worth considering whether to expand the jurisdiction of administrative tribunals to also hear such cases. Availability of alternative dispute resolution mechanisms serves as a counterbalance to jurisdictional immunity and a reasonable compromise to access to court.

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Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies

*Kristina Daugirdas and Sachi Schuricht**

Abstract

To date, international organizations have remained largely silent about their obligations under customary international law. This chapter urges international organizations to change course, and to expressly acknowledge customary international law obligations to provide effective remedies. Notably, international organizations' obligations to afford effective remedies need not precisely mirror States' obligations to do so. Instead, international organizations may be governed by particular customary international law rules. By publicly acknowledging obligations to afford effective remedies, international organizations can influence the development of such particular rules. In addition, by acknowledging obligations to afford effective remedies—and by actually providing effective remedies—international organizations can rebut arguments that they are above the law, and can help to retain support for their jurisdictional immunities.

1 Introduction

Individuals and other private actors who have been harmed by international organizations usually will not get very far if they seek recourse in national courts. Immunity typically shields international organizations from such legal

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process.¹ In some cases, these private actors have recourse to other forums or mechanisms for resolving disputes and challenging the conduct of international organizations. Employees of individual organizations can turn to administrative tribunals.² Parties who have entered into contracts with international organizations may be able to invoke the arbitration or other dispute resolution mechanisms written into their contracts.³ Individuals harmed by the acts or omissions of multilateral development banks may be able to turn to specialized accountability mechanisms like the World Bank Inspection Panel (WBIP).⁴ Individuals subject to the United Nations (UN) Security Council's ISIL and Al-Qaida targeted sanctions regime may enlist the Office of the Ombudsperson to challenge their designation.⁵ But many individuals harmed outside of the employment and commercial contexts do not have any avenue to seek recourse from international organizations.

There are many policy reasons for international organizations to develop alternative dispute resolution mechanisms to fill this remedial gap. Back in 1954, the International Court of Justice (ICJ) observed that establishing an administrative tribunal,

to do justice between the [United Nations] and its staff members was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence, and integrity.⁶

Several decades later, Ibrahim Shihata, the former General Counsel of the World Bank, argued that the WBIP would improve “the efficiency of the Bank and of development finance in general.”⁷ Finally, as international organizations’

1 Benvenisti, *The Law of Global Governance* 2014, 96 (“IGOs enjoy absolute immunity from national courts, granted to them either in headquarters agreements with host States or in the constituent treaties that bind all State parties”).

2 Kingsbury and others 2005, 20; Benvenisti, *The Law of Global Governance* 2014, 168–171.

3 Schmitt 2017, 179–183.

4 Suzuki and Nanwani 2005, 206–219.

5 See United Nations Security Council (UNSC), ‘Ombudsperson to the ISIL’.

6 ICJ, *Effect of Awards* 1954, 57.

7 Shihata 1994, 114–115 (“[T]he mere presence of the Panel is likely to make the Bank staff more diligent in the observance of Bank policies. [...] Since these policies and procedures are meant to ensure quality in the Bank-financed projects and to serve broader institutional objectives approved by Bank members (through the Executive Directors), the greater attention paid to them can only serve the Bank, its members as a whole, and in particular the borrowers concerned. Inspection can also raise issues not otherwise known or appreciated and may cause the Bank to adopt more effective or clearer standards in the pursuit of its objectives. In

lawyers have themselves recognized, international organizations' immunity is vulnerable when injured individuals lack access to alternative dispute settlement mechanisms.⁸

In addition, international organizations may have legal obligations to develop such mechanisms. One possible source of such obligations is customary international law. Section 2 explains that there is a strong argument that customary international law binds international organizations. That said, scholars of international law continue to debate whether all or only some customary rules bind international organizations. Moreover, international organizations have been, on the whole, conspicuously reluctant to acknowledge these obligations in public statements. In any event, applying customary international law norms to international organizations is not entirely straightforward. In some cases, rules that were developed mainly by and for States must be adapted to account for differences between international organizations and States and for differences among international organizations.

Section 3 addresses States' obligations to afford effective remedies to individuals who have been harmed by violations of human rights law. This section considers the extent to which these obligations have hardened into customary international law and, if so, what exactly they require of States. As evidenced by States' treaty obligations, effective remedies have both procedural and substantive elements. The precise contours of the obligations, however, are not well defined and States retain significant discretion in crafting such remedies. Moreover, effective remedies are not 'one size fits all'; the necessary components will depend to some degree on which right is violated and the gravity of the violation.

Section 4 considers how an obligation to provide effective remedies might apply to—and be adapted for—international organizations. International organizations' customary law obligations need not precisely mirror States' obligations. Instead, international organizations may be governed by particular customary international law rules. Most significantly, this section argues that

the process, it can enhance the awareness of the borrowers of deficiencies in their own processes and attitudes that need to be corrected [...]. The end result should increase the efficiency of the Bank and of development finance in general"). See also Benvenisti, *The Applicability of the Law of Occupation* 2019 (focusing on UN-led instances of territorial administration and arguing that "accountability is not a burden on functionality. Rather, accountability enhances functionality, and in fact, it is necessary for ensuring functionality").

8 See, for example, Amerasinghe 1982; Kwakwa 2010, 600; Martha 2012, 93–94; *ibid*, 125 ("[M]ost of the calls for eliminating or restricting the immunities of international organizations invoke the absence of alternative dispute-settlement mechanisms for noncontractual disputes in order to justify why the concept of immunity is anathema to the concept of fair play and substantial justice").

the scope of international organizations' obligations to provide effective remedies may well be broader than those of States for two reasons. Such particular customary rules may build on treaty obligations that require international organizations to develop alternative dispute settlement mechanisms in cases that do not necessarily involve a violation of international law. In addition, such norms may develop from the practice of international organizations—like the WBIP and similar institutions at other multilateral development banks—that likewise provide remedies to individuals who have been harmed in instances that may not involve a violation of international law.

Section 5 urges international organizations to not only afford effective remedies—but to expressly acknowledge a customary international law obligation to do so. The International Law Commission (ILC) recently affirmed that international organizations can contribute to the development of customary international law.⁹ By speaking out about their obligations to afford effective remedies, international organizations can actively shape the development of customary international law in this area. Moreover, such engagement can help to ensure the sustainability of international organizations' immunities. The perception that international organizations are above the law erodes their legitimacy—and in particular, support for their immunity.¹⁰ By publicly acknowledging legal obligations to afford effective remedies—and ensuring that they do indeed provide effective remedies—international organizations can better defend against such charges.

2 International Organizations' Obligations Under Customary International Law

In some cases, international organizations have express treaty obligations to develop alternative mechanisms for resolving disputes that cannot be resolved by national courts on account of their jurisdictional immunity.¹¹ Often,

9 ILC, 'Draft Conclusions on Identification of Customary International Law' 2018, conclusion 4(2) ("In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law").

10 Boon 2016, 375 ("[A]s a matter of public legitimacy, the UN must not be seen to be above the law"); Daugirdas, 'Reputation and Responsibility' 2014, 1007–1009. For examples in the popular press, see Yeoman, 27 September 2018; Rosen, 26 February 2013 ("The organization is functionally above the law—and victims of Haiti's cholera outbreak aren't the only ones paying the price").

11 Convention on the Privileges and Immunities of the United Nations (General Convention), art VIII, s 29; Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), art IX, s 31; see also Berenson 2012, 139 (describing multilateral and bilateral agreements that the Organization of American States has

however, such treaty obligations are limited or nonexistent. As a result, any cross-cutting obligation to afford effective remedies must come from another source of law. The most promising candidate is customary international law.¹² But to what extent does customary international law bind international organizations? It turns out that the answer to this question remains somewhat contested.

Arguments that customary international law binds international organizations often reference a 1980 advisory opinion of the ICJ concerning the legality of efforts to relocate the regional office of the World Health Organization (WHO) in Alexandria, Egypt.¹³ Egypt had protested that the proposed relocation would violate a 1951 bilateral treaty between itself and the WHO. In the course of a paragraph that makes the obviously correct and rather trivial point that international organizations lack an absolute right to select the location of their offices, the Court wrote:

International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.¹⁴

Paraphrasing this sentence, many scholars have affirmed that customary international law binds international organizations.¹⁵ Others have expressed doubts, citing the lack of practice to support this conclusion, or taking the position that the ICJ was referring to only a subset of customary international law rules.¹⁶ After all, the statement that international organizations are bound by

concluded); Reinisch, 'Immunity' 2008, 288 (describing the International Atomic Energy Agency's headquarters agreement with Austria).

12 The charters of individual organizations may also be sources of such obligations; so too may be other international agreements to which organizations are parties, such as the specialized agencies' relationship agreements with the United Nations. See, for example, Verdirame 2011; Skogly 2001. The literature on global administrative law suggests some possibilities outside the traditional sources of international law. See Benvenisti, *The Law of Global Governance* 2014, 91–137 (suggesting that such principles are binding based on 'rule of law' principles, international human rights law, or trusteeship); Kingsbury and others 2005, 29 (proposing a 'revived version of ius gentium').

13 ICJ, *Interpretation of the Agreement Between the WHO and Egypt* 1980.

14 Ibid, para 37.

15 See Reinisch, 'Accountability' 2001, 136; Brunnée 2005, 40; Benvenisti, *The Law of Global Governance* 2014, 99; Shelton 2015, 46.

16 Alvarez 2007, 677; Klabbers 2017, 987; see also Wellens 2002, 1 ("As subjects of international law, international organizations [...] are subject to rules and norms of customary international law to the extent required by their functional powers [...]").

“any obligations *incumbent upon them* under general rules of international law” leaves open the question of which obligations so qualify.¹⁷

For their part, most international organizations have said little or nothing about whether and to what extent customary international law binds them.¹⁸ They have neither expressly rejected nor acknowledged the applicability of customary international law other than *jus cogens* norms.¹⁹

Some international organizations weighed in on this question several decades ago during the deliberations over the set of draft articles adopted by the ILC that were eventually codified as the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.²⁰ A number of organizations sought to ensure that any rules resulting from this process could not bind them without their consent.²¹ Some advocated against negotiating a treaty at all. Instead, they proposed that the General Assembly adopt the Commission’s draft articles “as a standard of reference for action destined to harden into customary international law”.²² This proposal indicates that these organizations understood such customary rules would bind them; otherwise, their proposal does not make sense.

More recently, the ILC’s development of draft articles regarding the responsibility of international organizations provided another opportunity for international organizations to address their obligations under customary international law. The final set of articles, adopted in 2011, includes a provision that describes the elements of an internationally wrongful act of an international organization, indicating that there is such an act when “conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that

17 ICJ, *Interpretation of the Agreement Between the WHO and Egypt* 1980, para 37 (emphasis added).

18 Daugirdas, ‘How and Why’ 2016, 372–380; see also Benvenisti, *The Applicability of the Law of Occupation* 2019, 3–4 (describing the United Nations’ silence with respect to the legal framework that applies to UN-led administration of territories); Wellens 2002 (noting a long-established “reluctance by international organizations to acknowledge in explicit terms a legal obligation to comply with human rights”).

19 As defined by the Vienna Convention on the Law of Treaties (VCLT), art 53, a *jus cogens* or peremptory norm is “a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. See also Frowein, 2013.

20 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art 34.

21 Daugirdas, ‘How and Why’ 2016, 373–377.

22 *Ibid.*, 375.

organization”.²³ The commentary elaborated on this second element, noting that the breached obligation may “result from either a treaty binding the international organization or from any other source of international law applicable to the organization”.²⁴ The commentary then quotes the same indeterminate sentence from the *WHO-Egypt* advisory opinion, and notes that a “breach is possible with regard to any of these international obligations”²⁵—that is, the obligations “incumbent upon [international organizations] under general rules of international law, under their constitutions or under international agreements to which they are parties”.²⁶ Thus, the ILC did not stake out a position on the question of which customary international law rules bind international organizations.

In their comments to the ILC, participating international organizations generally agreed that *jus cogens* norms bind them. A handful said so explicitly, and none contested this conclusion.²⁷ When it came to other customary international law norms, however, the organizations that submitted comments did not embrace their application. No organizations directly rejected the view that customary international law binds them—but none directly acknowledged such obligations either.²⁸ Some organizations did suggest that customary international law had virtually no relevance for international organizations because their charters reflect *lex specialis*—or specific rules that displace the more generally applicable rules regarding the responsibility of international organizations.²⁹ Take, for example, these comments by the International Monetary Fund:

23 ILC, ‘Draft Articles on Responsibility of International Organizations’ 2011, art 4.

24 Ibid, art 4, comm (2).

25 Ibid.

26 Ibid.

27 Daugirdas, ‘How and Why’ 2016, 378–379 and n 301 (quoting comments from the International Monetary Fund, the Organization for Economic Cooperation and Development, the Organization for Security and Cooperation in Europe, and the World Bank).

28 For a more detailed discussion of international organizations’ comments, see Daugirdas, ‘How and Why’ 2016, 377–380.

29 The *lex specialis* principle provides that when both a general and a more specific rule govern the same subject matter, the specific rule should take precedence over the more general rule. Koskeniemi 2006, para 60 (“A special rule is more to the point [...] than a general one and it regulates the matter more effectively [...] than general rules. This could also be expressed by saying that special rules are better able to take account of particular circumstances. The need to comply with them is felt more acutely than is the case with general rules. They have greater clarity and definiteness and are thus often felt ‘harder’ or more ‘binding’ than general rules which may stay in the background and be applied only rarely. Moreover, *lex specialis* may also seem useful as it may provide better access to what the parties may have willed”). See also Daugirdas, ‘How and Why’ 2016, 347–348. Note that

[W]hen an organization acts in accordance with the terms of its constituent charter, such acts can only be wrongful in relation to another norm of international law if the other norm in question is either a “peremptory norm” (*jus cogens*) or arises from a specific obligation that has been incurred by the organization in the course of its activities ([for example], by entering into a separate treaty with another subject of international law). However, vis-à-vis all other norms of international law, both the charter and the internal rules of the organization would be *lex specialis* as far as the organization’s responsibility is concerned and, accordingly, cannot be overridden by *lex generalis*, which would include the provisions of the draft articles.³⁰

It would be a mistake to interpret these comments as implying a categorical rejection of the view that customary international law binds international organizations.³¹ First, the *lex specialis* argument is limited to relations between international organizations and their member States: it does not affect the point that customary international law governs relations between international organizations and non-member States. Second, it is important to keep in mind that when States create *lex specialis*, they are not necessarily rejecting general international law. Sometimes *lex specialis* is an elaboration or specification of an already-applicable, general international law rule. And even when States do create *lex specialis* to diverge from otherwise-applicable general international law, general international law norms persist in the background. Those norms fill gaps and influence the interpretation of treaties—including constituent instruments that establish international organizations. Finally, treaties that create *lex specialis* are presumed to align with customary international law unless States have made clear their desire to diverge from it.³² As a result, these rules are already implicit in international organizations’ charters except to the extent that their charters provide to the contrary.

In this context, the Asian Infrastructure Investment Bank (AIIB) is a refreshing—and admirable—counterexample. The AIIB website includes the following statement:

there are some limitations on States’ capacity to derogate from customary international law by creating *lex specialis*. Ibid, 346–347.

30 ILC, ‘Responsibility of International Organizations’, 1 May 2007, 5 (emphases added). For other examples of similar statements, see Daugirdas, ‘How and Why’ 2016, 378–379.

31 Daugirdas, ‘How and Why’ 2016, 379–380.

32 Ibid, 348.

AIIB is an international organization established by the AIIB Articles of Agreement (entered into force on December 25, 2015), a multilateral treaty, the Parties to which comprise the Membership of the Bank. Accordingly, AIIB is both constituted and governed by public international law, the sources of which include applicable international conventions, customary international law, general principles of law and subsidiary means for the determination of rules of law.³³

Just as the ICJ's *WHO-Egypt* opinion raised questions about which rules are 'incumbent upon' international organizations, the AIIB's statement on international law leaves unaddressed the question of which customary international law rules are 'applicable' to the AIIB. But the acknowledgement of at least some customary international law obligations is notable nonetheless.

In prior work, one of the present authors sought to supply a firmer foundation for the conclusion that the entire corpus of customary international law does indeed bind international organizations, at least as a default matter.³⁴ The argument goes, in short, that this conclusion holds regardless of whether one conceives of international organizations as peers of States on the international plane (that is, as entities that exercise independent authority as both a formal legal matter and as a practical matter)³⁵ or as vehicles through which States act.³⁶ The reasons for the conclusion differ, however. On the peer view, customary international law automatically binds international organizations, just as it binds new States, by virtue of their status as members of the international community.³⁷ From the vehicle perspective, the underlying concern is that States will try to evade their international obligations by acting through international organizations. Here, treaty law supplies the relevant baseline: what States can do directly by treaty, they can do indirectly through an international organization. And what States cannot do directly by treaty, they cannot do indirectly through an international organization.³⁸ Thus, States cannot create international organizations that are unbound by customary international law vis-à-vis non-member States because the *pacta tertiis* rule precludes States from using treaties to modify their international obligations to non-parties.³⁹ States can use treaties to create *lex specialis* and modify their customary

33 AIIB, 'The Role of Law'.

34 Daugirdas, 'How and Why' 2016, 325.

35 See *ibid.*, 359–365.

36 *Ibid.*, 345.

37 See *ibid.*, 357–359 and 365–368.

38 *Ibid.*, 345.

39 The *pacta tertiis* rule is codified in the VCLT, art 34 ("A treaty does not create either obligations or rights for a third State without its consent"). See also Chinkin 1993, 71 ("Treaties

international law obligations to other parties—but, as noted above, treaties are generally interpreted to align with customary international law unless States have made clear their desire to diverge from it.⁴⁰ Thus, when it comes to an international organization's interactions with its member States, customary international law binds the organization except to the extent that the member States have clearly expressed their desire for the organization to diverge from it.⁴¹ In sum, customary international law binds international organizations to the same degree that it binds States: international organizations are not more extensively or more readily bound, nor are they less extensively or less readily bound.

3 States' Obligations to Afford Effective Remedies

Numerous international human rights treaties expressly require States to afford effective remedies to victims of human rights violations. There is a plausible, albeit not uncontested, argument that over the past several decades this obligation has—in at least some contexts—ripened into a norm of customary international law.

As a starting point, article 8 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.⁴² Although the status of the UDHR as a binding source of international law is unsettled,⁴³ it is foundational to many other human rights instruments. Among those is the International Covenant on Civil and Political Rights (ICCPR), which similarly obligates each State party to provide effective remedies for violations of rights protected by that instrument. Article 2(3) reads:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy notwithstanding

bind consenting parties only, and strangers to any treaty are legally unaffected by it. This is the classic rule of treaties and third parties [...].”

⁴⁰ Daugirdas, ‘How and Why’ 2016, 347–348.

⁴¹ *Ibid.*

⁴² Universal Declaration of Human Rights (UDHR), art 8.

⁴³ Hannum 1996, 317–335 (summarizing varying customary treatment of the UDHR, whereby some States treat all of the articulated rights as customary international law while others consider only some of them binding).

- that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have the right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.⁴⁴

Similar guarantees are found in other human rights treaties.⁴⁵

Surveys of State practice have reached inconsistent results as to whether States consistently provide effective remedies for violations of human rights, and whether they do so with a sense of legal obligation. One survey of State practice in 1995 indicated that the right to an effective remedy was “not generally included in lists of customary human rights and [was] not the subject of significant domestic jurisprudence”.⁴⁶ Likewise, in 2001, another scholar took the view that,

44 International Covenant on Civil and Political Rights (ICCPR), art 2(3).

45 See European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art 13 (guaranteeing to “[e]veryone whose rights and freedoms as set forth in this Convention are violated [...] an effective remedy before a national authority”); Convention on the Elimination of All Forms of Racial Discrimination, art 6 (obligating state parties to assure “effective protection and remedies, through the competent national tribunals and other State institutions [...] as well as the right to seek from such tribunals just and adequate reparation or satisfaction”); American Convention on Human Rights, art 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights”; obliging state parties “(a) To ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) To develop the possibilities of judicial remedy; and (c) To ensure that the competent authorities shall enforce such remedies when granted”); Charter of Fundamental Rights of the European Union, art 47 (“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal [...]”). For a comprehensive discussion of relevant human rights instruments, see Shelton 2015, 63–73.

46 Hannum 1996, 345; see *ibid.*, 329–335 (noting that governments of the US, Denmark, Switzerland, Australia and New Zealand had not specified whether article 8 of the UDHR counts among the rights therein that qualify as customary international law, while officials from Singapore, China and Germany (and a court from South Africa) had made statements according less-than-binding status to the entire UDHR).

treaty practice as such does not yet provide a sufficiently broad basis for the conclusion that today access to effective judicial or administrative proceedings is an entitlement enshrined in general, [which is to say], customary international law.⁴⁷

However, other scholars have surveyed State practice over largely the same period and concluded that States do recognize “the duty to provide a remedy to victims’ of human rights violations”.⁴⁸ Notably, the most recent and comprehensive review of human rights remedies, completed by Dinah Shelton in 2015, recognizes that “national tribunals [are] hear[ing] and decid[ing] more cases alleging violations of international human rights norms”,⁴⁹ “as states have increasingly limited their governmental immunities and developed innovative responses to human rights violations”.⁵⁰ Extensive work in this area led Shelton to conclude that “[t]he right to a remedy is well established, even a norm of customary international law”.⁵¹ Other scholars, and some international courts, have reached the similar conclusion that treaty-based rights to remedies reflect customary international law rules.⁵²

If it is a customary international law norm, what does the obligation to provide an effective remedy require of States? International human rights instruments that articulate a right to an effective remedy tend to employ vague terms

47 Handl 2001, 52.

48 Bassiouni 2006, 218–221 (surveying contemporary state practice as reflected in constitutions, legislative proposals, and legal systems). The inconsistencies among these surveys may be due to changes over time and to the authors’ consideration of different source materials. For instance, Bassiouni’s survey included proposed legislation that had not yet been adopted by several States (Ibid, 218, n 67).

49 Shelton 2015, 91.

50 Ibid, 141.

51 Ibid, 238.

52 See Inter-American Court of Human Rights (IACtHR), *Aloeboetoe v Suriname (Reparations)* 1993, para 43 (describing Article 63(1) of the American Convention on Human Rights, which requires remedies for violations of human rights, as a codified rule of customary law); cf Permanent Court of International Justice (PCIJ), *Case Concerning the Factory at Chorzów* 1927, 21 (describing the obligation to make adequate reparations as “a principle of international law” which applies regardless of its express articulation in a treaty). See also Reinisch, ‘Immunity’ 2008, 287 (suggesting that the obligation to provide a legal remedy is “implicitly contained in the customary international law prohibition of a denial of justice”); Bradlow, ‘Shield as a Sword’ 2017, 60–61; International Commission of Jurists 2018, 19 (noting that the “obligation is enshrined in so many international human rights treaties, and confirmed by international jurisprudence, that it can be considered to be an obligation of customary international law”).

and do not enunciate specific modalities for providing recourse.⁵³ While States have considerable discretion to design remedial mechanisms, it is clear that an effective remedy encompasses both procedural and substantive elements.⁵⁴ Many human rights instruments refer specifically to both procedural mechanisms and substantive reparations.⁵⁵ Some, most notably the ICCPR, do not explicitly require substantive reparations, but UN treaty bodies have understood even a general reference to an “effective remedy” as encompassing both procedural and substantive relief.⁵⁶ As scholars have observed, these two elements are complementary: “a right of reparation is [...] an empty victory if there is no corresponding mechanism to provide [...] a forum to press a claim or obtain an award”.⁵⁷

Importantly, what qualifies as an effective remedy will depend on the right that is violated, as well as on the gravity of the violation.⁵⁸ With respect to procedural relief, some instruments refer specifically to the development of judicial remedies.⁵⁹ However, most refer more broadly to the provision of

53 See Lasco 2003, 3 (observing that “many international human rights instruments [...] provide rights in vague terms that allow each state to interpret ‘remedy’ as it sees fit”).

54 Shelton 2015, 58 (“Most texts guarantee both the procedural right of effective access to a fair hearing and the substantive right to a remedy”). The former element is often referred to as ‘the right of access to justice’ and the latter as ‘substantive redress’. Ibid, 17. However, some scholars understand these terms—and their relationships to one another—differently. See Schmitt 2017, 92–95 (discussing various conceptions of the right of access to justice, and positing that “the right of access to justice [...] concentrates on the procedural aspect while the [right to a remedy] focuses on the substantive result of the proceedings”).

55 ECHR, art 6.

56 Human Rights Committee (HRC), ‘General Comment No 31’ 2004, para 16 (as explained by the HRC in its interpretation of ICCPR, art 2(3), “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy [...] is not discharged”); PCIJ, *Case Concerning the Factory at Chorzów* 1927, 21 (the PCIJ employed similar logic nearly a century ago, when it explained that the obligation to provide substantive reparations need not be spelled out in a treaty, for it is “the indispensable complement of a failure to apply” protections that are expressly articulated in a binding text).

57 Bassiouni 2006, 232; see also *ibid* (“One of the cornerstones of a victim’s right to reparations is that States have an obligation to have some form of mechanism in place to redress violations of their international and domestic legal obligations”).

58 See International Law Association (ILA) 2004, 37 (noting that “the procedural aspects of remedial action will vary amongst the different categories of potential claimants”); International Commission of Jurists 2018, 77 (citing cases where the European Court of Human Rights (ECtHR) held that the right to a remedy, in ECHR, art 13, does not require a judicial remedy in all instances; rather, “the scope of the remedy varies with the right” at stake).

59 See ICCPR, art 2(3)(b); UNGA, ‘Basic Principles’ 2005, princ 12 (recognizing “access to an effective judicial remedy” as part of the right to remedies); see also Shelton 2015, 96

‘competent’ tribunals,⁶⁰ which may include judicial, administrative or legislative authorities—or a combination thereof.⁶¹ Whatever the nature of the tribunal, in order to provide effective procedural relief, the tribunal should be independent and impartial,⁶² widely accessible⁶³ and capable of processing

(“Access to justice means ensuring the possibility for an injured individual or group to bring a claim before an appropriate tribunal and have it adjudicated, increasingly this means by judicial proceedings”).

60 See UDHR, art 8; Convention on the Elimination of All Forms of Racial Discrimination, art 6 (referring to “competent national tribunals and other State institutions”); Convention on the Elimination of All Forms of Discrimination against Women, art 2(c) (referring to “competent national tribunals and other public institutions”).

61 HRC, ‘General Comment No 31’ 2004, para 15 (various UN treaty bodies have espoused a combination approach. For instance, in its interpretation of ICCPR, art 2(3), the HRC stressed the importance of establishing both judicial and administrative mechanisms, the latter of which “are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies”); Committee on the Rights of the Child (CRC), ‘General Comment No 16’ 2013, para 71 (as another example, in General Comment No 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights, the CRC stated that “[n] on-judicial mechanisms, such as mediation, conciliation and arbitration, can be useful alternatives” to judicial process, but should be provided “without prejudice to the right to judicial remedy”).

62 See Bradlow, ‘Amicus Brief’, 17 August 2016, 20–21 (reviewing the ECtHR’s decisions about “reasonable alternative means of remedy” and concluding that qualifying forums are consistently ‘independent’ and ‘impartial’); International Commission of Jurists 2018, 16 and 52; see also Shelton 2015, 96 (“[Access to justice] means the right to seek a remedy before a tribunal which is constituted by law and which is independent and impartial in the application of the law”); *ibid*, 100–102 (discussing the meaning of independence and impartiality in the context of international human rights law); Schmitt 2017, 108 (proposing “core institutional requirements” of the right of access to justice, including “the right to an independent and impartial ‘tribunal’ established by law”).

63 To ensure accessibility, information about the accountability mechanism should be distributed widely and resources should be allocated so that barriers (often a lack of financial resources or expertise) do not prevent those harmed from accessing procedural remedies. See, for example, HRC, ‘General Comment No 32’ 2017 (interpreting ICCPR, art 14 to require equality of access and equality of arms); UNGA, ‘Basic Principles’ 2005, princ 12(a)-(d), 24 (encouraging states to publicly and privately disseminate information about available remedies and to provide assistance to victims to ensure that they can exercise their rights to remedies); see also International Commission of Jurists 2018, 71 (noting “a tendency towards recognition [...] that an effective remedy implies a positive obligation ... to assist those persons who do not have the means to access justice”); Bassiouni 2006, 260–263 (discussing the duty on states to make known the availability of remedies for human rights violations and to ensure that victims can exercise their rights to such remedies); Shelton 2015, 98 (observing that “most human rights tribunals have held that if the failure to provide legal aid interferes with the right to pursue legal remedies [...] it is itself a human rights violation”).

claims promptly.⁶⁴ Finally, the tribunal should be empowered to render more than merely advisory opinions or recommendations.⁶⁵

Much like the procedural component of the remedy, the nature of effective substantive relief depends on the circumstances of a given case.⁶⁶ To a significant degree, the substantive component of an effective remedy tracks the elements of reparations required for violations of international law.⁶⁷ An effective remedy may involve restitution, or relief that restores the claimant to the same position occupied prior to the wrong; this is generally considered the most effective substantive remedy.⁶⁸ When that is not possible, compensation can cover the cost imposed by the wrong.⁶⁹ If those remedies are not effective, or if the wrong is particularly blameworthy, rehabilitation or satisfaction—such as a public apology, acknowledgment of misconduct, or expression of regret—may be appropriate.⁷⁰ For example, in the case of repeat or widespread wrongs, effective substantive remedies might include a guarantee of non-repetition or

64 See, for example, UNGA, 'Basic Principles' 2005, princ 11(b); International Commission of Jurists 2018, 66 (reviewing ECtHR jurisprudence on the importance of promptness); Shelton 2015, 102 ("The speed with which a remedy can be obtained may be relevant in assessing its effectiveness"). Similarly, regional human rights conventions require the determination of rights and obligations "within a reasonable time". See, for example, ECHR, art 6(1); American Convention on Human Rights, art 8(1).

65 See, for example, UNGA, 'Basic Principles', 2005, princ 17 (encouraging states to provide "effective mechanisms for the enforcement of reparation judgments"); International Commission of Jurists 2018, 81 ("If the judicial power lacks the means to carry out its judgments, the remedy cannot be considered to be effective"); Shelton 2015, 94 (discussing jurisprudence of the African Commission on Human and Peoples' Rights, which requires remedies that are "sufficient, i.e. capable of redressing the violation" and not "discretionary"); Schmitt 2017, 112 (emphasizing the importance of a tribunal with "the power to issue binding decisions which may not be altered by non-judicial authorities").

66 See, for example, ICJ, *Avena Case* 2004, para 119 ("reparation in an adequate form' varies 'depending on the concrete circumstances surrounding each case and the precise nature and scope of the injury"); ILA 2004, 35 ("With regard to the potential [substantive] outcome of remedies, there seems to be a connection between the identity of the party seeking redress, the kind of accountability involved, and the forum before which the remedial action has been brought").

67 See Shelton 2015, 32 ("The law of state responsibility [...] contains useful precedents for evaluating the nature and scope of remedies afforded in state practice"); see also ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' 2001, arts 34–39 (addressing forms of reparation for injury, including restitution, compensation, and satisfaction).

68 Shelton 2015, 19, 33–34, 298, 307 (noting that restitution is the "preferred remedy" among regional human rights courts) and 384.

69 *Ibid.*, 19 and 315 (describing compensation as "a substitute remedy").

70 *Ibid.*, 42–43, 394–397; see, for example, UNGA, 'Basic Principles' 2005, princ 18 and 21 (including rehabilitation as a potential form of redress); HRC, 'General Comment No 31', para

public exposure of the truth.⁷¹ For grave breaches of human rights, the obligation to afford an effective remedy includes a duty of the State concerned to prosecute and punish the person responsible.⁷²

Because the requirements of an effective remedy vary by context, and because States have significant discretion in shaping such remedies, it is difficult to discern consistent patterns in the type, amount, or frequency of reparations awarded.⁷³ However, in her detailed survey of human rights remedies, Dinah Shelton has recognized “a growing consensus on minimum standards”⁷⁴ of redress awarded by subsets of decision-making bodies. For instance, among international arbitral tribunals, compensation is “the most usual form of reparation,”⁷⁵ although such tribunals regularly award various forms of satisfaction as well.⁷⁶ In the case of UN treaty bodies, such as the Human Rights Committee, recommendations for compensation are often accompanied by measures aimed at providing restitution and preventing reoccurrences.⁷⁷ Lastly, while regional human rights courts differ widely in the specificity of their reparation decisions, they regularly consider compensation appropriate and are increasingly ordering or recommending restitution and satisfaction, when appropriate.⁷⁸

16 (explaining that the reparations required under ICCPR art 2(3) can involve “rehabilitation and measures of satisfaction”).

71 See Shelton 2015, 22–24 (discussing restorative justice principles) and 112–120 (discussing the right to truth); Bassiouni 2006, 275–276 (discussing the right to truth).

72 Francioni 2007, 36–37.

73 Shelton 2015, 106 (noting latitude afforded to states in awarding reparations under international human rights instruments), 143 (noting discretion afforded to international arbitrators in awarding reparations, but also arguing that scholarly criticisms that such practice is “inconsistent, even incoherent” are “overstated”), 383 (acknowledging another scholar’s argument that “jurisprudence demonstrates the principle of the complete freedom of the judge or arbitrator, that there are no rules for reparations”), 376 (noting the “highly variable” and “unpredictable” awards by human rights tribunals).

74 *Ibid.*, 19; see also *ibid.*, 298 and 314 (noting consensus among international human rights bodies that restitution is the preferred remedy, but compensation, rehabilitation and satisfaction may be afforded as a substitute).

75 *Ibid.*, 146.

76 *Ibid.*, 159 (noting that international arbitrators often award “[p]ecuniary satisfaction” and have begun to view declaratory judgments as another form of satisfaction).

77 *Ibid.*, 196–200, 306 (noting various types of restitution recommended by the HRC) and 321 (noting that UN treaty bodies “often call for compensation [...] but never quantify the amount due”).

78 *Ibid.*, 205–232 (discussing the ECtHR, which “continues to insist that it is for the states to choose the method of remedying the violation” but has “moved toward more of an emphasis on non-repetition of the violation and on restitution”, as well as the IACtHR, which frequently orders compensation and is increasingly insisting that states publicly acknowledge violations), 307 (noting that both the European and Inter-American courts “now

In sum, effective remedies are not ‘one size fits all’. This point is especially important in evaluating how obligations to afford such remedies apply to international organizations.

4 International Organizations’ Obligations to Provide Effective Remedies

The authors of this chapter are not the first to suggest that the customary international law obligation to provide effective remedies extends beyond States to international organizations.⁷⁹ This chapter emphasizes three points, however, that have not garnered adequate attention. First, international organizations are not simply passive recipients of customary international law rules; they have an active role to play in developing the rules that bind them. Second, in some cases, international organizations’ obligations with respect to effective remedies might diverge from States’ obligations. Just as distinct rules govern treaties to which international organizations are parties and the international responsibility of international organizations, so too there may be—or there may yet emerge—rules concerning effective remedies that are particular to international organizations. Third, the applicable rules may in some cases be further adapted for the circumstances of individual organizations through the development of *lex specialis*.

With the express support of a number of States and some international organizations, the ILC recently affirmed that international organizations can directly contribute to the development of customary international law.⁸⁰ As the ILC put it, in certain cases, the practice and *opinio juris* of international

indicate that restitution is the preferred remedy where this is possible”), 385–388 (discussing evolution of the ECtHR’s reparations awards) and 396–399 (discussing the wide range of the IACtHR’s orders requiring satisfaction and guarantees of non-repetition).

79 See, for example, Benvenisti, *The Law of Global Governance* 2014, 110–111 (proposing that international organizations are “subject to at least basic human rights norms that require them to comply with procedural and due process obligations toward affected individuals”); Bradlow, ‘Shield as a Sword’ 2017, 60–61; ILC 2004, 33 (noting that “[a]s a general principle of law and as a basic international human rights standard, the right to a remedy also applies to IOs in their dealings with states and non-state parties’ and ‘may be seen as a norm of customary international law’); Schmitt 2017, 118 (“[A] customary law to establish administrative dispute settlement mechanisms is progressively emerging for international organizations”).

80 Daugirdas, ‘Creation of Customary International Law’ forthcoming, 32.

organizations “as such” may give rise or attest to customary international law rules.⁸¹

There are several key areas of practice by international organizations, as such, that are directly relevant to establishing and assessing possible customary international law rules concerning effective remedies for violations of individuals’ rights under international human rights law. Most, if not all, international organizations have established access to administrative tribunals to resolve employment disputes. These tribunals were established at least in part to vindicate individual rights under international law.⁸² The Security Council established the Ombudsperson for the Al-Qaida and ISIL sanctions regime following successful legal challenges and widespread criticism that the sanctions regime violated the human rights of designated individuals.⁸³ And the Kosovo Human Rights Advisory Panel was specifically established to examine alleged violations of human rights by the UN Mission in Kosovo.⁸⁴

This practice by international organizations could contribute to the development of customary international law rules regarding effective remedies that apply to States and international organizations alike—but it may also, or alternatively, contribute to the development of rules that apply only to international organizations, or only to subsets of them. There is room for the emergence of such particularized rules with respect to international organizations’ obligations to provide effective remedies.

In its recent work on identifying rules of customary international law, the ILC affirmed the category of “particular customary international law” rules

81 ILC, ‘Draft Conclusions on Identification of Customary International Law’ 2018, concl 4; see also Daugirdas, ‘Creation of Customary International Law’ forthcoming, 1 (arguing this view is correct and supplying a fuller rationale for this conclusion).

82 See, for example, ILC, ‘Comments and Observations’ 2004, 31 (“The area in which the OAS has had to respond to claims alleging violation of international law is labour relations. Indeed, the Organization’s decisions to establish an Administrative Tribunal in 1971 was, in part, based on the need to provide a forum for adjudicating those claims consistent with international standards of due process and additional standards established by the International Labor Organization”); Amerasinghe 1982 (“A second reason for the establishment of the [administrative] tribunal is [...] a principle accepted in many national legal systems and reaffirmed in the Universal Declaration of Human Rights. This principle requires that where administrative power is exercised there should be available machinery, in the event of disputes, to accord a fair hearing and due process to the aggrieved party”); Kwakwa 2010 (addressing the “human rights obligations of international organizations vis-à-vis their staff members” and responding to criticisms that existing mechanisms for resolving disputes with staff members fail to satisfy those obligations).

83 See UNSC, ‘Ombudsperson to the ISIL’.

84 Human Rights Advisory Panel, ‘Kosovo’ 2016, 3.

that bind only a limited number of States, excluding those States that do not participate in the practice or assent to be bound by it.⁸⁵ The Commission has limited its discussion to particular customary law that has emerged, or might emerge, among groups of States linked by geography or by common cause, interest, or activity.⁸⁶ This concept can likewise apply to international organizations as a category, or even to subcategories of international organizations.⁸⁷ Particular customary international law rules can thus account for differences between States and international organizations, as well as differences among international organizations. This kind of tailoring is especially appropriate in the context of obligations to provide effective remedies.

One important way that international organizations' obligations may differ from those of States concerns the *scope* of international organizations' obligations to provide effective remedies. Specifically, international organizations' obligations may be broader than States' obligations in that they apply not only to violations of human rights, but also to other instances where international organizations cause harm to private individuals.⁸⁸

Two main bodies of practice support this claim. First, as noted above, some international organizations have express treaty obligations to develop alternative dispute settlement mechanisms when legal process is blocked in national courts on account of the organizations' jurisdictional immunities.⁸⁹ For example, the 'Convention on the Privileges and Immunities of the United Nations' (General Convention) and the 'Convention on the Privileges and Immunities of the Specialized Agencies' (Specialized Agencies Convention) contain near-identical language in this regard. Article VIII, Section 29 of the former provides:

85 ILC, 'Draft Conclusions on Identification of Customary International Law' 2018, concl 16 and related comm.

86 Ibid.

87 Daugirdas, 'Creation of Customary International Law' forthcoming, 10–11 (suggesting that particular customary international law rules might emerge that apply specifically to international financial organizations).

88 In some cases, States have treaty obligations to provide compensation for lawful activities that cause harm. See, for example, Ronzitti 2007, 115; Guttinger 2010.

89 General Convention, art VIII, s 29; Specialized Agencies Convention, art IX, s 31; see also Berenson 2012, 139 (describing multilateral and bilateral agreements that the Organization of American States has concluded); Reinisch, 'Immunity' 2008, 288 (describing the International Atomic Energy Agency's headquarters agreement with Austria).

The United Nations shall make provisions for appropriate modes of settlement of:

- (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;
- (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.⁹⁰

Implementing these obligations, the United Nations has established procedures for handling, among other things, disputes arising out of commercial agreements, including contracts and lease agreements; tort claims arising from acts within the Headquarters district in New York; and claims arising from accidents involving vehicles operated by UN personnel for official purposes.⁹¹

The second body of relevant practice includes the World Bank Inspection Panel (WBIP) and similar institutions at other multilateral development banks.⁹² At the World Bank, this inspection mechanism is open to individuals who have been harmed by the Bank's violations of certain of its own policies and procedures.⁹³ These 'safeguard policies' address a range of environmental and social issues—but there is no explicit safeguard policy addressing human rights.⁹⁴ Violations of these policies might constitute violations of international law—but there is no requirement that they do so. Notably, there are no treaty provisions that expressly demand the establishment of the WBIP or other similar mechanisms; instead, they have been established and refined based on

90 General Convention, art VIII, s 29; Specialized Agencies Convention, art IX, s 31.

91 UN, 'Report of the Secretary-General' 1995; see also *Difference Relating to Immunity from Legal Process* Verbatim Record (1998), paras 5–14 (explanation by the UN Legal Counsel of the remedial regime established by art VIII, s 29 of the Convention).

92 For a description and comparison of these mechanisms, see Bradlow, 'Comparative Study' 2005.

93 World Bank Inspection Panel Res No IBRD 93–10 & Res No IDA 93–6, 22 September 1993, para 12 ("The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank [...] provided in all cases that such failure has had, or threatens to have, a material adverse effect").

94 World Bank Operational Manual, OP 4.10. There is a reference to human rights in Operational Policy 4.10 regarding Indigenous Peoples, which notes at the outset that the policy "contributes to the Bank's mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples".

'practice and necessity'.⁹⁵ And although they are not identical, the resulting inspection mechanisms converge across institutions to a significant degree.⁹⁶

While particular customary international law can tailor rules to international organizations as a group, or to certain groups of international organizations, it bears emphasis that there is some further room for tailoring obligations to individual organizations. As noted above, customary international law rules bind international organizations as a default matter; as a result, member States have some capacity to alter the applicable customary international law rules by creating *lex specialis*.⁹⁷ Because States are not permitted to alter customary international law rules on human rights to the detriment of beneficiaries, this route is not available to eliminate altogether the obligation to afford effective remedies.⁹⁸ This route is available, however, to further specify the details of individual organizations' obligations to afford effective remedies.

Whether international organizations' practice with respect to providing alternative remedies adds up to a rule of particular customary international law ultimately depends not only on the consistency of this practice across international organizations (or some subset of international organizations), but also on the motivations for that practice—specifically, whether it is undertaken with a sense of legal obligation, or *opinio juris*. For this reason, it matters not only what international organizations do, but what they say about *why* they do it. The next section urges international organizations to say more.

5 Breaking the Silence

International organizations ought to not only ensure that they have in place dispute settlement mechanisms that satisfy the procedural and substantive requirements of effective remedies—but also acknowledge customary international law obligations to do so. By publicly engaging in discourse about their

95 Boisson de Chazourmes 2012, 174.

96 Ibid.

97 See Daugirdas, 'How and Why' 2016, 347–348, and accompanying text for n 40–41.

98 Koskeniemi 2006, paras 108–109; Bradley and Gulati 2010, 211–212; IBRD Articles of Agreement, art IV, s 10. This point is especially important when considering the impact on customary obligations, if any, of language prohibiting political activity in the constituent instruments of numerous multilateral development banks. For the World Bank, the relevant language is that, "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1".

international obligations to afford effective remedies, international organizations can actively shape the development of customary international law in this area, counter the narrative that their immunities place them above the law, and bolster their reputations and their legitimacy.

International organizations' effectiveness depends, in part, on their reputations and perceptions of their legitimacy.⁹⁹ One important aspect of international organizations' reputations—and by extension their legitimacy—is their reputation for legality.¹⁰⁰ In a narrower sense, a reputation for legality depends on compliance with legal obligations. Perhaps one motivation for international organizations' silence with respect to their obligations to afford effective remedies (and their obligations under customary international law more generally) is the desire to preserve their reputations for legality. Just as, for example, States might avoid putting their reputations for compliance on the line by becoming parties to certain treaties, so too might international organizations try to avoid risking their reputations for compliance by not acknowledging obligations under customary international law.

Such an approach is misguided and ultimately self-defeating. To start, international organizations do not insulate themselves from charges that they are non-compliant by not acknowledging the existence of binding obligations in the first place. Thus, for example, in the course of recent litigation challenging the immunity of the International Finance Corporation (IFC), which ultimately reached the United States Supreme Court in the case *Jam v IFC*, Daniel Bradlow argued that the Compliance Advisor Ombudsman—the IFC's variation of the WBIP—does not qualify as an effective remedy.¹⁰¹ Moreover, in a broader sense, a reputation for legality depends on adherence to rule-of-law values

99 See Boon 2016, 375 (“[A]s a matter of public legitimacy, the UN must not be seen to be above the law”); Daugirdas, ‘Reputation and Responsibility’ 2014, 1007–1009. For examples in the popular press, see Yeoman, 27 September 2018; Rosen, 26 February 2013 (“The organization is functionally above the law—and victims of Haiti’s cholera outbreak aren’t the only ones paying the price”); see also Daugirdas, ‘Reputation as a Disciplinarian’ 2019, 225–235.

100 Daugirdas, ‘Reputation and Responsibility’ 2014, 1012–1016; Daugirdas, ‘Reputation as a Disciplinarian’ 2019, 228.

101 Bradlow, ‘Amicus Brief’, 7 August 2016, 17–18 and 22–23 (arguing that the Compliance Advisor Ombudsman meets some but not all of the criteria for effective remedies: “It is accessible to all qualifying stakeholders and it is reasonably fair, although the complainant is not necessarily given an opportunity to respond to the evidence and arguments presented by the IFC’s management. It is not clearly impartial because the IFC’s Board and senior management retain final decision making powers. Moreover, it is not independent because the Compliance Advisor Ombudsman is appointed by and reports to the senior management of the IFC. In addition, it does not necessarily provide the complainants with a meaningful remedy because its findings and recommendations are non-binding”).

and norms.¹⁰² When international organizations fail to provide effective remedies, they are vulnerable to the charge that they are above the law, or that they are abusing their immunities—and as a result, their reputations for legality in the broader sense remain at risk.¹⁰³

Separately, although the trend is not universal, courts that are asked to uphold the immunity of international organizations are increasingly concerned not just with the existence—but also with the adequacy—of alternative dispute settlement mechanisms.¹⁰⁴ Sometimes the motivation for evaluating the adequacy of those mechanisms is ensuring compliance with the State's own human rights obligations. Thus, for example, in *Waite and Kennedy v Germany*, the European Court of Human Rights held that,

[A] material factor in determining whether granting [the European Space Agency] immunity from German jurisdiction is permissible under the [European Convention on Human Rights] is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.¹⁰⁵

In other cases, the adequacy of alternative mechanisms may affect the policy decisions of national governments. When *Jam v IFC* reached the US Supreme Court, only one justice—Justice Breyer—was willing to uphold the absolute immunity of the IFC.¹⁰⁶ Justice Breyer likewise emphasized the importance of adequate dispute settlement mechanisms. He observed that, if the alternative

102 Hurd 2005 (describing the serious threat that Libya posed to the UN Security Council in part by portraying it as acting inconsistently with the rule of law in imposing sanctions in the wake of the bombing of Pan Am 103).

103 Berenson 2012, 145 (noting that abuse of immunities occurs “when international organizations and their officials do not provide alternative independent means for recourse for claims against them”); see also Boon 2016, 375 (“[A]s a matter of public legitimacy, the UN must not be seen to be above the law”); Daugirdas, ‘Reputation and Responsibility’ 2014, 1007–1009. For examples in the popular press, see Yeoman, 27 September 2018; Rosen, 26 February 2013 (‘The organization is functionally above the law—and victims of Haiti’s cholera outbreak aren’t the only ones paying the price’).

104 See Reinisch, ‘Immunity’ 2008, 285 (observing that, when adjudicating cases involving the immunity of international organizations, “more and more national courts are [...] looking at the availability and adequacy of alternative dispute settlement mechanisms”); Martha 2012, 119–120 (describing such cases in Argentine courts).

105 ECtHR, *Waite and Kennedy v Germany* 1999, para 68. See also Singer 1995, 90–95; Treichl 2019, 417–429 (describing relevant case law subsequent to *Waite and Kennedy*).

106 US Supreme Court, *Jam v IFC* 2019, dissenting opinion of Justice Breyer.

mechanisms proved inadequate, the relevant statute allowed the US executive branch to set aside the organization's immunity.¹⁰⁷

International organizations that can credibly characterize their alternative mechanisms as satisfying customary international law standards with respect to the provision of effective remedies will be better able to defend those mechanisms as 'adequate'—and thereby discourage national governments and national courts from evaluating adequacy on the basis of idiosyncratic or 'chauvinistic' criteria.¹⁰⁸ Particular customary international law regarding effective remedies can supply standards that are not only international, but also tailored to the specific context of international organizations.

As an example of constructive participation in the discourse about effective remedies, consider former UN Secretary-General Kofi Annan's commentary regarding the essential features of mechanisms for challenging the continued imposition of targeted sanctions by the Security Council. The routes available for challenging such sanctions have evolved over time. Initially, targeted individuals and entities were able to seek delisting only through their national governments.¹⁰⁹ Starting in 2006, they were able to make such demands directly through a 'focal point'.¹¹⁰ For what is today the targeted sanctions regime for ISIL and Al-Qaida, targeted individuals and entities may present petitions for delisting to an Ombudsperson appointed by the UN Secretary-General.¹¹¹ The Ombudsperson then gathers information from various sources and engages with the petitioner to explain the process and collect additional information if needed; ultimately the Ombudsperson makes a recommendation to the Security Council to maintain or terminate the listing.¹¹² If the Ombudsperson recommends delisting, the individual or entity will be removed from the sanctions list unless, within 60 days, a committee of the Security Council members decides, by consensus, to retain the listing—or if the Security Council makes a decision to maintain the listing. To date, none of the Ombudsperson's recommendations have been overturned.¹¹³

Kimberly Prost, who served as the first Ombudsperson, has argued that the appropriate standard for evaluating the Ombudsperson process was articulated by former UN Secretary-General Kofi Annan. In 2006, Annan set out what

107 Ibid.

108 Prost 2017, 224.

109 Kingsbury and others 2005, 32 and 34.

110 Forcese and Roach 2010, 225 (recounting the evolution of the focal point and ombudsperson mechanisms).

111 UNSC Res 1904, 17 December 2009, paras 20–21; UNSC, 'Ombudsperson to the ISIL'.

112 Ibid.

113 UNSC, 'Ombudsperson to the ISIL'.

were, in his view, the minimum standards for ensuring that the procedures for listing and delisting individuals were “fair and transparent”.¹¹⁴ On the procedural side, Annan explained, listed persons have a “right to be heard, via submissions in writing, within a reasonable time by the relevant decision-making body [...] as well as the right to be assisted or represented by counsel”.¹¹⁵ In addition, listed persons have a “right to review by an effective review mechanism”, where effectiveness “will depend on its impartiality, degree of independence and ability to provide an effective remedy, including the lifting of the measure and/or, under specific conditions to be determined, compensation”.¹¹⁶

Prost praised Annan’s enunciation of these requirements as “carefully crafted, taking into account realities of the practice of the Security Council and what might be achievable in that very particular context”.¹¹⁷ As for how the Ombudsperson mechanism measures up, Prost argued that the Ombudsperson mechanism “as designed and operating in practice to date fulfills the fundamental requirements of an effective review mechanism; one which provides an equivalent protection to judicial review by an independent tribunal”.¹¹⁸ The UN Secretary-General’s intervention didn’t preclude further debate about or criticism of the adequacy of the Ombudsperson mechanism.¹¹⁹ But, as Prost points out, Annan helpfully defined standards that were specifically tailored for an international organization, and that could—and ought to—anchor evaluations of the Ombudsperson mechanism.

When it comes to defining what constitutes an effective remedy in the specific context of international organizations, another valuable resource is the literature on global administrative law. This field focuses on “the mechanisms, principles, practices, and supporting social understandings that promote or

114 UNSC, ‘5474th Meeting’ 22 June 2006, 5.

115 Ibid.

116 Ibid.

117 Prost 2017, 232.

118 Ibid, 233.

119 ECJ, *European Commission et al. v Yassin Abdullah Kadi* 2013, paras 133–134. Most notably, in reviewing measures to implement Security Council sanctions, the Court of Justice for the European Union declined to accord any significance to the existence of the Ombudsperson mechanism because that mechanism did not guarantee effective judicial protection as it had been defined by the European Court of Human Rights, which asks whether the person concerned can “obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list was vitiated by illegality, the recognition of which may re-establish the reputation for that person or constitute for him a form of reparation for the non-material harm he has suffered”.

otherwise affect the accountability of global administrative bodies”.¹²⁰ These principles and mechanisms include ex post review by judicial or other similar bodies¹²¹—as well as other complementary principles and mechanisms, such as transparency, reason-giving, and participation in decision-making.¹²² Scholarship in this area has devoted considerable attention to review mechanisms like the WBIP, the UN Security Counsel Ombudsperson, and the IFC Compliance Advisor Ombudsman.¹²³ For example, Benjamin Saper argues that the IFC Compliance Advisor Ombudsman has advanced the interests of individuals affected by projects funded by the IFC by increasing the IFC’s responsiveness to these individuals—even though the Compliance Advisor Ombudsman lacks the authority to halt projects or to award compensation to injured individuals.¹²⁴

Notably, while global administrative law can inform evaluations of the scope and content of customary obligations to provide effective remedies, the recognition of such obligations can also advance the aims of global administrative law. While scholars in the field have developed a normative case for the adoption of certain principles and mechanisms, they have devoted less attention to arguing that international organizations have legal obligations to do so.¹²⁵ That said, they have recognized that locating such obligations in traditional sources of international law “may be the best way to maintain legal predictability and to sustain rule of law values in international relations”.¹²⁶ Customary international law obligations to provide effective remedies supply just that: a way to cement certain global administrative law principles in a traditional source of binding law that applies to international organizations.

To be sure, by engaging in discourse about their obligations to afford effective remedies, international organizations would face certain risks and costs.

120 Kingsbury and others 2005, 17.

121 Ibid, 39–40; Benvenisti, *The Law of Global Governance* 2014, 240–285.

122 Kingsbury and others 2005, 37–39; Stewart 2014 (distinguishing ex post accountability mechanisms from other related and complementary mechanisms).

123 See Kingsbury and others 2005, 39–40; Benvenisti, *The Law of Global Governance* 2014, 240–285; Saper 2012.

124 Saper 2012.

125 To the extent scholars have tried to ground global administrative law principles in binding sources of law, they have not focused on traditional sources and have not coalesced around any unified theory. Compare Benvenisti, *The Law of Global Governance* 2014, 91–137 (suggesting that such principles are binding based on ‘rule of law’ principles, international human rights law, or trusteeship) with Kingsbury and others 2005, 29 (proposing a “revived version of *ius gentium*”).

126 Kingsbury 2005, 148.

First, organizations will be constrained by their own legal arguments.¹²⁷ Most importantly, having acknowledged legal obligations to afford effective remedies, international organizations will need to confront the possibility that their existing accountability mechanisms fall short of any plausible interpretation of those obligations—and that those mechanisms need to be reformed accordingly. In addition, acknowledging customary international law obligations to provide effective remedies may increase pressure on international organizations to recognize other customary obligations, particularly obligations based on international human rights law. International organizations may also confront increased demands by individuals for compensation. At the end of the day, however, international organizations' current approach is sure to be even more costly by eroding their legitimacy and support for their immunities.

Human rights advocates might raise a different objection—that by exhorting international organizations to shape the customary international law rules that bind them, we are inviting international organizations to minimize their obligations. In our view, this risk is not significant. One feature of legal arguments is that they are not infinitely elastic: implausible arguments about, for example, what constitutes an effective remedy will encounter vociferous objections from scholars, activists and UN special rapporteurs, among others.¹²⁸ Separately, there are countervailing advantages to international organizations' express participation in discourse about their international obligations. By acknowledging international obligations with respect to effective remedies, international organizations would limit their discretion to 'backslide' by paring back or eliminating such mechanisms. This consequence is important in light of some member States' limited enthusiasm for them.¹²⁹ Finally, participation in the development of norms can bolster compliance with those norms. Anthea Roberts and Sandesh Sivakumaran made this point when addressing parallel concerns regarding their proposal that armed opposition groups be

127 See generally Johnstone 2011. For example, Johnstone points out that a government's (or, by extension, an international organization's) rhetorical acceptance of a norm creates a "discursive opening" for critics to challenge its compliance with that norm, eventually inducing governments (or, by extension, international organizations) "to match deeds with words". *Ibid.*, 27.

128 Daugirdas, 'Reputation and Responsibility' 2014, 998 (noting the range of actors who participate in transnational discourse in various forums about international organizations' legal obligations and compliance with those obligations, and noting that that these actors can "initiate and perpetuate discussion, they can contribute new legal arguments or relevant facts, and they can evaluate legal arguments").

129 Bradlow, 'Multilateral Development Banks' 2019, 29–30 (noting the persistence of tensions that independent accountability mechanisms created between borrower and creditor member states of multilateral development banks).

allowed to participate in the creation of international humanitarian law.¹³⁰ Giving ordinarily excluded groups a role in lawmaking affords them a sense of ownership in the law, which makes it psychologically easier for them to accept and respect those laws.¹³¹ Such participation can also help to assure that the rules that are established are rules with which regulated entities can realistically comply.¹³²

6 Conclusion

As international organizations affect individuals in ever-expanding ways,¹³³ it is increasingly apparent that alternative dispute resolution mechanisms are needed to protect and redress those harmed by these international actors. This chapter urges international organizations not only to establish such mechanisms, but also to acknowledge customary international law obligations to provide effective remedies.

There are several benefits to recognizing a customary international law obligation on international organizations to provide effective remedies. From the perspective of international organizations, it offers a way to protect their existing immunities and to develop customary norms that are tailored specifically to them. From the perspective of international human rights law, it offers a way to apply human rights law to powerful, non-State actors—and increases the likelihood that those obligations will be implemented. And from the perspective of global administrative law, a customary obligation offers a way to cement accountability-promoting principles in a traditional source of binding law.

Recognizing this customary obligation is, of course, not costless. It may expose international organizations to increased pressures and demands for compensation, and it might allow international organizations to water down the content of their obligations. The authors of this chapter are not blind to these costs. But we believe that the risks and costs of the status quo are even greater.

130 Roberts and Sivakumaran 2012, 126–127 and 151.

131 *Ibid.*, 127; Blokker 2017, 10 (“Why should [international organizations] fully comply with rules of customary international law without being able to fully participate in its development?”).

132 Roberts and Sivakumaran 2012, 139; see also Prost 2017, 232 (noting this advantage with respect to the minimum standards articulated by former Secretary-General Annan in the context of Security Council targeted sanctions).

133 Kingsbury and others 2005, 23–25.

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What is ‘International Administrative Law’? The Adequacy of this Term in Various Judgments of International Administrative Tribunals

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Abstract

This chapter examines the adequacy of using the term ‘international administrative law’ in international administrative tribunal decisions, and finds it wanting. Whilst it is accepted that there is a set of legal rules applied by administrative tribunals established by international organizations to resolve employment-related disputes, it is misleading to term this ‘international administrative law’. This chapter argues, both that ‘international administrative law’ has a literal legal meaning more aptly applied to the unique treaty-based legal regimes of international organizations, and that ‘international administrative law’ obscures uncertainty about the sources of law governing the employment relationships of inter-governmental institutions. This leads to confusion between substantive law and procedural law applied by international administrative tribunals together with a tendency to refer to ‘international administrative law’ whenever the tribunal could not clearly say what law they were applying.

1 Introduction

The notion of ‘international administrative law’ is frequently referred to by judges of international administrative tribunals (IATs), as well as applicants and respondents in the proceedings of those tribunals. Many seminars organized by IATs use the term ‘international administrative law’.¹ The notion, however, is far from self-explanatory. It surely depicts an important aspect of

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1 For example, a symposium organized by the IMF Administrative Tribunal in April 2014 on the occasion of its 20th anniversary was entitled ‘The Future of International Administrative

the legal relationship between international organizations and their employees, but the use of the term by IATs has not been entirely clear.

Rather than being a *lex specialis* of the employment relations of international organizations, the literal legal meaning of 'international administrative law' suggests instead a set of rules in international law that pertains mostly to the activities of international organizations in the execution of their mandates. This is a whole system of international procedural law, 'administering' or 'executing' the substantive law of international organizations, which support international public interests. When the United Nations (UN) General Assembly establishes a subsidiary organ, such as the UN Development Programme (UNDP) or a peace-keeping operation, it executes one of its mandates under the UN Charter and plays a role as the executive power of the organization. The resolution establishing a subsidiary organ, in this case, is an international institutional law with fully binding force, a substantive 'international administrative law', in other words. When the UNDP enters into a working agreement with a government or another international body, such as UN Specialized Agencies, or even with private enterprises in conducting its technical assistance activities, these agreements or contracts constitute procedural 'international administrative law'.

The UN Security Council decisions are the same. Being an executory organ of the UN, the Security Council is performing an administrative act by making decisions under Article 25 of the UN Charter, among others, to maintain peace and security. In the controversial case of *Kadi v Commission*, a decision by the UN Security Council judged by the Court of Justice of the EU to be infringing Mr. Kadi's human rights (not properly heard before the confiscation of his assets) was nothing but an 'international administrative law', a law enacted by a UN organ to execute its function of maintaining peace and security.² All these decisions are 'international administrative law', in the literal legal sense of the term. If we accept the old theory of Georges Scelle of *dédoublement fonctionnel*, even an administrative act in the domestic legal system can also be an 'international administrative law' at the same time.³ In other words, custom officers at the airport confiscating products being imported against the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (known as the Washington Convention) are not only national

Law: Harmonization? Fragmentation? Dialogue? <<https://www.imf.org/external/imfat/pdf/Symposium3.pdf>> accessed 18 November 2019.

2 ECJ, *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union et al.* (2008).

3 Scelle, 'Le phénomène juridique du dédoublement fonctionnel' 1956.

administrative officers exercising their domestic administrative power, but at the same time are agents of public international law, in this case the Washington Convention. The customs officers would thus be executing ‘international administrative law’.

IATS, on the other hand, are judicial bodies that are not performing executive functions of the international organizations in a strict sense. Their decisions are not administrative acts, but judicial ones and they are not applying ‘international administrative law’ in its literal legal sense, but instead laws governing the employment relations within an international organization. Professor Amerasinghe correctly put in his treatise: ‘...the sources of international administrative law or the law governing employment relations in international organizations.’⁴

A debate on the literal legal definition of ‘international administrative law’, a debate that can be traced back even into the 19th century will be avoided here.⁵ Depending on the background, time and place, (*internationales Verwaltungsrecht*, *diritto internazionale amministrativo*, *droit international administratif*), the meaning of the concept varies greatly.⁶

Properly, therefore, the notion of ‘international administrative law’ is closer to the concept of ‘international institutional law’⁷ or the so-called Global Administrative Law (GAL), proposed by a research group at New York University.⁸ Both notions are based on the assumption that there is an international public interest (*intérêt public international*) or global governance which is administered by a set of international rules. GAL, as presented by Professors Kingsbury, Stewart and Krish, covers a wide range of phenomena that present ‘administrative’ relationships among various stakeholders in the global society.⁹ In that sense, it may not be too wrong to assert that the ‘international administrative law’, as referred to by IATS, is a small component of GAL. After all, IATS perform internal administrative functions in international institutions, with a view to maintaining integrity in their internal employment law system. As long as the

4 Amerasinghe 1988, 102 (emphasis added). Although Chapters 5 to 15 of the book is under a section titled ‘Sources of International Administrative Law’, the ‘Introductory’ section of the book, Chapters 1 to 4, only use the term “employment relations in international organizations”, instead of “international administrative law”.

5 Yamamoto 1967.

6 Von Stein 1982, 23, 37; Rapisardi Mirabelli 1939; Scelle, ‘Theorie du gouvernement international’ (1935).

7 Bowett 1970. However, Bowett’s concept of international institutional law is narrower than that of the author or Yamamoto (see Yamamoto 1967).

8 Kingsbury and others 2005; Kingsbury and Stewart 2012.

9 Kingsbury and others 2005.

maintenance of internal employment law can be conceived as a part of international public interest, judges at IATs are executing administrative functions, hence applying a part of GAL. However, 'international administrative law' does not seem to be an appropriate term to define the laws applied by IATs. The fact that IATs are organs of an international administrative institution does not automatically lead us to conclude that they apply 'international administrative law' in its literal legal sense.

The chapter shall analyze where the problem lies and why this author is uncomfortable when judges refer to the notion of 'international administrative law' in their decisions, under the following headings: Use of the Term 'International Administrative Law' in the Judgments of IATs (Section 2); Sources of 'International Administrative Law' (Section 3); Inaccuracy of the Term 'International Administrative Law' (Section 4); and Application of 'International Administrative Law' in Practice (Section 5); before offering a conclusion (Section 6).

2 Use of the Term 'International Administrative Law' in Judgments of IATs

This section shall consider the use of the term 'international administrative law', firstly in the decisions of IATs themselves; and second, by the respondent international organizations and applicant international civil servants appearing before IATs.

2.1 *Reference in Various Decisions of IATs by Judges*

A short definition of 'international administrative law' (as referred to in IAT decisions) is, for instance, given in a decision of the United Nations Dispute Tribunal (UNDT) in 2010, according to which "[i]nternational administrative law is the law which regulates the relationship between inter-governmental organizations and their staff members"—without going too much into detail.¹⁰ This may be a correct definition of 'international administrative law' known to IATs, but it is silent on the content of the concept. Similarly, the UNDT in a recent decision stated:

The Respondent's refusal to exercise [their] discretion in favour of the Applicant was based on the reasoning that the costing for retroactive promotion was too high and that payment of [a Special Post Allowance]

¹⁰ UNDT, *Samardzic et al. v Secretary-General of the UN* 2010, para 20.

meant that [their] obligations under international administrative law had been met. Such reasoning and considerations were a complete abdication of the Respondent's responsibilities vis-à-vis the staff member and the correct position of international administrative law.¹¹

The Administrative Tribunal of the International Labour Organization (ILOAT) in a case against the European Patent Office (EPO) mentioned:

The contract with [a collective insurance broker] is [...] to be governed by a German statute of 1908 and by the Civil Code of the Federal Republic of Germany. But such legislation cannot affect relations between the EPO and its staff, which are governed solely by its Service Regulations and the material rules of international administrative law.¹²

The World Bank Administrative Tribunal (WBAT), likewise referred to the concept of 'international administrative law':

Since according to well-established principles of international administrative law, grade should correspond to position and compensation should correspond to grade, the Respondent has not acted in violation of the Applicant's terms of employment in adopting a two-year salary grandfathering.¹³

Most recently, the European Bank for Reconstruction and Development (EBRD) Administrative Tribunal stated:

The Tribunal deliberated the procedural aspects of the decision to terminate the Appellant's employment during the probationary period and concluded that the applicable law (Staff Regulations, the Staff Handbook and general principles of international administrative law) had been applied, and that the decision taken by the Bank was the exercise of its discretionary rights and the procedure applied was taken in compliance with the applicable law.¹⁴

11 UNDT, *Elmi v Secretary-General of the UN* 2016, para 38.

12 ILOAT, *Kasperski v EPO* 1988, para 5.

13 WBAT, *Rosario Cardenas v IBRD* 1988, para 21.

14 EBRDAT, *Applicant v EBRD* 2019, para 62 (emphasis added).

The judgments of IATs also provide ample evidence of the widespread use of the term 'international administrative law' amongst the respondent international organizations and applicant international civil servants before them, as we shall see in the next sub-section.

2.2 *Reference by Respondents and Applicants*

Respondents equally refer to the notion of 'international administrative law'. In an ILOAT case, the respondent, the Organization for the Prohibition of Chemical Weapons (OPCW) argued:

If the State Party does not reimburse the OPCW for any national taxation which it has levied, the OPCW will be compelled by international administrative law to reimburse the affected staff member for that amount.¹⁵

In a UNDT case, the counsel for the respondent,

submitted that a staff member's conduct may extinguish any claim he or she may have concerning the legality of an administrative decision. A staff member may not approbate and reprobate, that is, 'blow hot and cold' and that the principles of waiver and estoppel are well-established principles of international administrative law.¹⁶

Applicants too, appear conversant with 'international administrative law'. In a case of the UNDT, the applicant maintained that,

The Respondent's reliance on the UNIFEM Human Resources Selection Guidelines as a basis for the impugned decision is inconsistent with general principles of international administrative law, and the United Nations hierarchy of properly promulgated instruments.¹⁷

In an Asian Development Bank Administrative Tribunal case in 2017, an applicant requested: "A written, public apology by ADB to the Applicant for the

15 ILOAT, *Mr M. L. v OPCW* 2003, para 19 (emphasis added).

16 UNDT, *Ruyooka v Secretary-General of the UN* 2013, para 86 (emphasis added).

17 UNDT, *Alquzaa v Secretary-General of the UN* 2018, para 4 (emphasis added).

breach of his dignity due to him under the basic principles of international administrative law".¹⁸

3 Sources of IAL

While judges and the parties before IATs constantly refer to the notion of 'international administrative law', the Statutes or rules of procedures of IATs themselves have been largely silent on this concept. This is unlike the International Court of Justice (ICJ), for instance, that enumerates clearly in its Statute the laws applied by the Court (in its Article 38). Professor Amerasinghe, after studying meticulously all the constitutive instruments of various IATs, concluded that: "The Statutes of IATs which govern the powers of such tribunals are generally silent in regard to the detailed description of the sources that may be referred to in the application of law to the cases to be decided by them".¹⁹ This classic text by Professor Amerasinghe has a whole chapter about possible sources of IAL, from staff regulations, staff rules, statutes of tribunals, constitutive instruments, general principles of law, equity, municipal law, judicial precedents, and so forth.²⁰

Even if it is accepted that the constitutional instruments of IATs do implicitly have those sources of law in mind, these enumerated sources are not helpful in knowing what sources judges at IATs actually apply when they hear a case. True, they apply contracts of employment, but what legal principles they apply in interpreting the source is not clear. Are they the interpretation rules of the Vienna Convention on the Law of Treaties (VCLT), or are they general principles of law, as mentioned in the ICJ Statute? What seems to be crucial are the legal rules that are used to interpret these sources. More importantly, there seems to be a confusion about the use of 'international administrative law' as a group of norms from which legal rights emerge, on the one hand, and legal principles employed in interpreting or applying the sources of law, on the other. Some judicial decisions and references by both applicants and respondents are using the term 'international administrative law' to mean positive rules to be applied, be they employment contracts or Statutes of IATs, but some others are using the term to show the background for their application, in other words, means by which they come to a legal conclusion or means for interpretation.

18 ADBAT, *Mr. H v ADB* 2017, para 32(e) (emphasis added).

19 Amerasinghe 1988, 108.

20 *Ibid.*, chs 5–15, 101–197.

A concrete example could be given in this context: an applicant claims their contract of employment was unlawfully terminated. The Tribunal, after looking into the facts, does not find proof that the management's decision was wrong. However, by a comparison with another employee, who was in the same situation but was not terminated, the Tribunal found that the management's decision was discriminatory, rescinds the termination decision and orders the applicant to be reinstated or be compensated. Here, the secondary source of law is the contract of employment, but the law applied by the Tribunal to come to the conclusion (the primary rule) is perhaps a general principle of law or general international law. The contract of employment might be a source of law (secondary rule), but not a legal rule (primary rule) applied in the judgment.

Confusing the substantive law with the procedural law can easily be demonstrated when case law is referred to as one of the sources of 'international administrative law'. A great number of IAT decisions refer to the decisions of other tribunals or courts. The *de Merode* case²¹ by the WBAT for example, has been cited in many IATs.²² The interpretation methods used by the WBAT to come to its conclusion in this particular case of *de Merode* cannot have referenced earlier decisions, logically by being the very first in the WBAT. It must have been derived from somewhere, but where?

IATs have not been explicit in answering this question and they have tended simply to refer to 'international administrative law' whenever they could not clearly say what they were applying. When the EBRD Administrative Tribunal states, for instance: "The Tribunal also noted that there is no principle in international administrative law that imposes 100% of salary be paid in case of service incurred illness", the Tribunal appears to justify its decision by referring to 'international administrative law' because otherwise it may be open to a criticism that the Tribunal made a decision in vacuum.²³ Likewise, when the WBAT states: "Since according to well-established principles of international administrative law, grade should correspond to position and compensation should correspond to grade", there persists an uncertainty as to the concrete law, with which the Tribunal came to its decision.²⁴

21 WBAT, *Louis de Merode et al. v World Bank* 1981.

22 See IMFAT, *Mr. E. Verreydt v IMF* 2016, paras 80, 87 and 106; EBRDAT, *Appellant v EBRD* 2007, paras 72–73; UNAT, *Mirella et al. v Secretary-General of the UN* 2018, para 23; ADBAT, *Ferdinand P. Mesch and Robert Y. Siy v ADB (No 4)* 1997, paras 14, 18, 21, 26, 41 and 45 (and in the Dissenting Opinion).

23 EBRDAT, *Appellant v EBRD* 2018, para 16.

24 WBAT, *Rosario Cardenas v World Bank* 1988, para 23.

4 Inaccuracy of the Use of the Term 'International Administrative Law'

In order to show the inadequacy or inaccuracy of using the notion of 'international administrative law', as it is normally used in IATS' decisions, it may be useful to illustrate it by comparing the notion with similar ones. One example can be drawn from the field of 'international economic law'. The Marrakesh Agreement establishing the World Trade Organization (WTO) is undoubtedly the source of law applied in the activities of the WTO, including dispute-settlement bodies (DSBs).²⁵ However, is it helpful to understand the real picture of the application of DSB (Dispute-settlement Understanding, Annex I of the WTO Agreement) by saying that 'international economic law' is applied in the dispute-settlement body? There is no agreement among the scholars in international law how to understand the whole system of WTO law. The majority view seems to be that WTO is a special regime, a self-contained one, to which the general international law does not directly apply.²⁶ What are the rules applied by members of the Panels and the Appellate Body to make their decisions? It is again not helpful to say that 'international economic law' is applied. When the majority view is accepted, namely, that the legal framework of the WTO is a self-contained regime, what is applied there must be a *sui generis* group of norms derived basically from public international law.

Another example can be given from notion commonly referred to as 'international labor law'. The International Labour Organization (ILO) has adopted nearly 200 international labor conventions in the past 100 years. Maintaining that 'international labor law' is applied in the ILO, or saying that the conventions adopted by the ILO are sources of 'international labor law' is not helpful in understanding the true picture of the applicable rules in the ILO's standard-setting and supervisory activities. There must be a distinctly different set of rules, a part of international legal rules, which are applied in the ILO's activities. One thing is certain that not all of the principles enshrined in the VCLT apply to the ILO (for instance, Reservation to an ILO convention is customarily not permitted). It is a collection of all kinds of administrative acts by the ILO, namely the International Labour Conference, the Governing Body, as well as the supervisory bodies, such as the committees set up in accordance with Articles 24 and 34 of the ILO Constitution and the Committee of Experts on the Application of Conventions and Recommendations, which will eventually establish a coherent set of norms governing the activities of the ILO as an

²⁵ Marrakesh Agreement establishing the WTO.

²⁶ Iwasawa 1995, 212–214 (in Japanese).

international legal entity.²⁷ It may be called an international institutional customary law of the ILO, or 'ILO law', but not 'international labor law'.

It would appear that each legal system is in itself a self-contained regime where *sui generis* law applies. There must be a *sui generis* group of norms being applied in the IAT regime.

Therefore, the notion of 'international administrative law', used in the context of IATS, is potentially confusing and there is some uneasiness in its use. Professor Amerasinghe in his book discussed quite rightly "the sources of [international administrative law] or the law governing employment relations in international organizations".²⁸ The title of his book itself is 'The Law of the International Civil Service'. The notion of the law of international civil service or law governing employment relations in international organizations is much more convincing.

Having said so, an answer to the question "What is the law governing employment relations in international organizations?" is still to be provided. As a party to the employment contract is an international legal entity, one thing certain is that the contract is not a pure employment law in the domestic law sense. It becomes even closer to an agreement reached within the system of public international law as the employee themselves is an international civil servant, who has a certain degree of immunities from the local law. It follows that public international law applies here, in principle. But which international law? That is a question for which an answer cannot be immediately offered. A tentative submission may be that international administrative tribunals are applying a group of *sui generis* law, which is a part of public international law or international institutional law, composed of a number of statutory rules, customary international law and case laws of IATS.

5 Application of 'International Administrative Law' in Practice

There seems to be a tendency for judges at IATS, while not consciously realizing it, to apply sets of legal criteria developed in their own jurisdictions when determining what constitutes the law of employment relationships in

²⁷ The Committee of Experts on the Application of Conventions and Recommendations is not entitled to authoritatively interpret Conventions. Only the ICJ, or a tribunal established for that purpose, has been authorized by the Article 37 of the ILO Constitution. However, throughout its history over 90 years, supervisory bodies have been continuously applying Conventions in formulating their comments and a sort of case law (administrative case law) has been created therefrom.

²⁸ Amerasinghe 1988, 102 (emphasis added).

international institutions. As a matter of principle, it is established that IATS do not apply national laws.²⁹ However, various national labor law principles concerning unfair labor practices seem to be tacitly applied in some cases without being explicitly referred to. When judges apply laws that are not officially recognized as sources of applicable laws in IATS, they tend to refer to the concept of ‘international administrative law’, a notion which is not definable.

A very interesting finding was made in a UNDT decision. In 2017, when the UNDT was to judge whether the ‘equal pay for equal value of work’ principle is to be applied in that particular case, the applicant stated: “This principle of the inclusion of pensions into the concept of equal pay for work of equal value has been accepted in the context of jurisprudence and general International Administrative Law under the Equal Remuneration Convention 1951”.³⁰ The Equal Remuneration Convention 1951 is an ILO convention and, as such, it cannot bind the UN because the UN cannot ratify it. It is therefore to be assumed that the words ‘general International Administrative Law under’ had to preface reference to the ILO Convention. This argument seems to maintain that the principle of equal remuneration for equal value of work enshrined in the ILO Convention of 1951 (Number 100) had become customary international law, therefore, it could be used as a source of law in the adjudication of the IATS. The Tribunal, although rejecting the applicant’s plea that they should have been entitled to a higher pension payment in their Special Post Allowance position, judged on the basis of the equal remuneration for equal value of work principle, thereby agreeing tacitly to accept application of ILO Convention Number 100, which had been transformed itself into a general international law. The Tribunal even accepted that the remuneration, as defined by the ILO Convention, included also pension payment.³¹ The scope of application of ILO Convention Number 100 and the passage “payable directly or indirectly”,³² in particular, was considered by the ILO’s supervisory machinery to include pension paid under social security schemes financed by the undertaking.³³ In a way, the UNDT accepted the ‘interpretation’ of the Convention by the ILO’s supervisory body. This fact makes it difficult to judge whether the Tribunal had applied general international law or whether it did apply the ILO convention directly—probably the latter.

Judges with special expertise in ‘ILO law’ would be inclined to take the definition of ILO Convention Number 100 on equal remuneration as a criterion to

29 Amerasinghe 1988, 175.

30 UNDT, *Glavind v Secretary-General of the UN* 2017, para 26 (emphasis added).

31 Ibid.

32 Equal Remuneration Convention, art 1(a).

33 ILO, ‘General Survey’ 1986, para 17.

define wages, if the scope of wages were at stake. However, even judges receptive to 'ILO law' would hesitate to apply ILO Convention Number 158³⁴—on the termination of employment at the initiative of the employer—before an IAT. For this sets quite a high burden on employers and perhaps not enforceable as general international law. Convention Number 100, on the other hand, is one of the fundamental conventions of the ILO, which can be construed as pronouncing established customary law. The same applies to other fundamental ILO Conventions, such as one on non-discrimination in employment and occupation (Number 111)³⁵ or another on the prohibition of forced or compulsory labor (Number 29).³⁶

6 Conclusion

It would be appropriate to recapitulate the findings made so far. The applicable law in IATs, the law governing employment relations in international organizations, is composed of the following: (i) substantive rules, such as employment contracts, staff regulations, staff rules, administrative orders; and (ii) procedural and interpretative rules, such as statutes of tribunals, general principles of law (such as estoppel, good faith, equity, non-abuse of rights, due process), customary international law (including certain human rights principles, such as non-discrimination), judicial precedents (of other courts, both national as well as international, including other IATs—as far as they are consistent with customary international law). The last qualification—consistency with customary international law—is important. Judicial decisions of national courts or regional courts, such as the European Court of Human Rights, and of other IATs are valid laws applicable in IATs, basically to the extent that they reflect established rules in customary international law. For other courts' decisions, those of national courts, in particular, have no *res judicata* on IATs.

On the other hand, it is an undisputed reality that judges refer to other IAT's decisions and more generally to 'international administrative law', whenever they have difficulties identifying concrete rules to support their arguments. This is not inappropriate. As adjudications always have law-making elements, some of the findings of IATs may have a law-creating factor. The WTO's DSB, as well as the ILO's supervisory bodies do create a sort of *sui generis* rules, which had not existed before the establishment of the organization concerned. What

34 Termination of Employment Convention.

35 Discrimination (Employment and Occupation) Convention.

36 Forced Labour Convention.

is called 'WTO law' or 'international institutional law of the ILO' (or 'ILO Law') aforementioned in this chapter, is not only composed of black letter laws, but also of newly emerging principles of law that spring up from the daily activities of the organizations, a spontaneous law of international organizations.

So, the answer to the question raised at the very beginning of this chapter would be that 'international administrative law' is a potentially misleading concept when referred to in the judgments of IATS, because there is no such thing as an a priori 'international administrative law'. However, a look at the whole legal framework of adjudication in the internal justice system of international organizations makes us assume that there is an emerging group of legal norms within the specific regime of IATS, which can be called the 'Law Governing Employment Relations in International Organizations', or 'International Civil Service Law'. It is a group of sui generis law, basically rooted in public international law or 'international institutional law', applying to the specific legal regime of the international civil service.

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The Terms and Conditions of Employment of International Civil Servants: Implied Terms Recognized by the Asian Development Bank Administrative Tribunal

*Damien J. Eastman**

Abstract

This chapter examines the ‘terms and conditions of employment’ applicable under the law of the international civil service, with a focus on ‘implied terms’ of employment arising in the context of the case law of the Administrative Tribunal of the Asian Development Bank (ADBAT). Why is this important? Clearly, as a matter of good governance and good order, an employee ought to have an understanding and appreciation of the respective duties and obligations applicable to the employment relationship between the individual and the employer organization, and by the same token, the employer should have an understanding of the standards against which its actions will be assessed. It is also important because it crystalizes the basis upon which the jurisdiction of an international organization’s administrative tribunal can be invoked. International administrative tribunals are creatures of limited jurisdiction, and they are generally confined to hearing and adjudicating disputes alleging a breach of the ‘terms and conditions of appointment’. This argument is therefore developed through an examination of the jurisprudence surrounding the terms and conditions of employment of international civil servants, and in particular by analyzing the expansive approach to identifying the terms of appointment adopted by the ADBAT.

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1 Introduction

Practitioners in the field of international administrative law are often called upon to interpret the scope and meaning of the terms and conditions of employment of staff. Considerable time has been spent by the various international administrative tribunals established by international organizations to resolve employment-related disputes in addressing the scope of an organization's authority to revise 'fundamental and essential' terms of the appointment, and to that end how to identify whether a term is fundamental and essential.¹ However, a more basic question merits analysis: what comprises the terms of employment applicable between an international civil servant and the employer organization?

This chapter begins with a brief examination of the jurisprudence surrounding the terms and conditions of employment of international civil servants (Section 2), and then explores the jurisprudence of the Asian Development Bank's (ADB) Administrative Tribunal (ADBAT) where the Tribunal has implied a term of appointment in order to exercise jurisdiction over a staff grievance (Section 3) and otherwise the Tribunal's expansive approach to identifying the terms of appointment (Section 4), before offering some conclusions (Section 5).

2 Terms and Conditions of Employment

At the ADB, as in many other international organizations, the terms and conditions of employment begin with the letter of appointment, which typically describes the job title and position description, the salary and the applicable law (for example, public international law).² At the ADB, the letter of appointment will also include reference to the Charter of the ADB,³ the Headquarters Agreement between the Government of the Philippines and the ADB,⁴ the Staff Regulations,⁵ and ADB's internal staff rules.⁶

1 WBAT, *Louis de Merode et al. v The World Bank* 1981; ADBAT, *Perrin et al. v ADB (No 3)* 2018; ADBAT, *Eisuke Suzuki et al. v ADB* 2008; IMFAT, *Daseking-Frank et al. v IMF* 2007; ILOAT, *Ayoub et al. v ILO* 1987; ILOAT, *Ayoub (No 2) et al. v ILO* 1989; and UN Administrative Tribunal, *Applicant v United Nations Joint Staff Pension Board* 2005.

2 WBAT, *Louis de Merode et al. v The World Bank* 1981, para 16; WBAT, *AQ v IBRD* 2009, paras 50–51; WBAT, *Wilfred Biswas v IBRD* 2002, para 2; IMFAT, *Mr. D' Aoust v IMF* 1996, para 11.

3 Agreement Establishing the Asian Development Bank.

4 ADB Headquarters Agreement.

5 ADB Staff Regulations.

6 ADB Administrative Orders.

For the purposes of invoking the jurisdiction of the ADBAT, the Statute of the ADBAT defines the ‘contract of employment’ and ‘terms of appointment’ to include “all pertinent regulations and rules in force at the time of the alleged non-observance including the provisions of the pension plan and staff benefit plans provided by the Bank to its staff”.⁷ International administrative tribunals have also recognized sources other than the written contract and incorporated policies. Famously, in *Louis de Merode et al. v The World Bank*, the World Bank Administrative Tribunal recognized that the practice of the organization—to the extent that it is followed as a legal obligation—and general principles of law, may form part of the conditions of employment. The International Monetary Fund’s Administrative Tribunal in *Mr. R v International Monetary Fund* has recognized that information published on the organizations’ internal website may constitute the ‘living law’ of the Fund, and thus create legally binding obligations on the employer.

For the most part, therefore, the question as to what constitutes the terms and conditions of appointment is relatively straightforward and the source and content of those terms and conditions are normally relatively easy to identify. However, the issues and concerns that might give rise to staff grievances are not as straightforward, and a staff member may have, or wish, to raise concerns about matters that do not neatly fit with traditional notions of contract law based on the concepts of ‘consent and agreement’ in the sense the parties agree to a certain set of mutually corresponding obligations. This is ideally written in clear and understandable terms, where the parameters of a legal relationship are express, defined and have been explicitly agreed.

The law applicable to implying terms into contractual relations in the sphere of national law systems differs from jurisdiction to jurisdiction. As a general principle, a contractual term will normally only be ‘implied’ when a court determines that the ‘intention of the parties’ at the time the contract was formed is that such term was to be included.⁸ Domestic courts have taken various approaches, such as implying a term to give the contract ‘business efficacy’ or to reflect a certain ‘custom or practice’ (for example a contractual term that is notorious) in a particular sector or industry.⁹ Alternatively, a term may be implied in the interest of public policy, if enacted through domestic legislation.

The approach of implying contractual terms has been examined and applied by the ADBAT. By implying contractual terms into the terms and conditions of appointment, the scope for considering and adjudicating a staff grievance becomes potentially wider than if there is a more narrowly focused

⁷ ADBAT Statute, art II (1).

⁸ Beatson and others 2016, 161–178.

⁹ *Ibid.*

inquiry on the written contractual exchanges between the staff member and the organization.¹⁰

3 Implied Terms and Conditions of Employment

There are two key rulings, which coincidentally both involved the fatality of ADB staff members, that illustrate the ADBAT's approach to implying terms and conditions into the terms of appointment. The facts and findings of these two key rulings are described in more detail below.

3.1 *Bares v ADB*

Mr. Bares was an ADB staff member assigned to the legal department.¹¹ As they were leaving work for the day, and when proceeding to the staff car park, they were approached and assailed by a security guard employed by a vendor firm which was contracted by ADB to provide security for ADB's Manila-based Headquarters premises in the Philippines. Mr. Bares and the assailant were involved in a physical altercation, which resulted in Mr. Bares becoming the victim of a homicide.

The facts and circumstances leading to Mr. Bares death remain a mystery. There had been suggestions that Mr. Bares and the assailant were involved in a financial transaction that had gone wrong, precipitating the physical altercation. An independent report commissioned by ADB found no conclusive evidence that this was the reason for the attack, nor could any other reason be identified.¹² The assailant was arrested, tried and convicted for murder under the laws of the Philippines.

Following this death, the family of Mr. Bares and his estate commenced legal proceedings against ADB before the ADBAT claiming USD 4.5 million in damages in respect of liability of the Bank for torts committed as employer of the deceased staff member. No legal proceedings were pursued by the family against the Philippines-based security company who employed the assailant, in the local courts of the Philippines. The gravamen of the dispute therefore did not relate to the vicarious liability of the employer of the assailant, but rather the extent to which ADB breached its obligations to Mr. Bares as an employer.

¹⁰ ADBAT Statute, art II (1) ('The Tribunal shall hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges non[-]observance of the contract of employment or terms of appointment of such staff member').

¹¹ ADBAT, *Bares v ADB* 1995.

¹² *Ibid.*, para. 7.

When considering the case, the Tribunal explicitly stated that although the dependents and estate has framed its claim principally in tort—‘wrongful death’—which would indeed have been a reasonable way to have framed their cause of action in some national legal systems, the Tribunal’s jurisdiction was controlled by its own Statute, where its jurisdiction was limited to claims in the law of contract. The ADBAT summed up the constraint, stating:

This Tribunal has to determine whether the death of Mr. Bares at the hands of the security guard operating on the Bank’s own premises involves a breach of contract on the part of the Bank. The Tribunal must, therefore, identify the relevant contractual terms.¹³

Having stated this constraint, the ADBAT went on to find that, as a general principle of employment law, ADB owed all members of its staff an implied contractual duty to exercise ‘reasonable care’ to ensure their safety and security whilst on ADB’s premises, thus establishing a basis for the Tribunal to assume jurisdiction and determine the case.¹⁴ Having articulated that the Bank had an implied contractual obligation to exercise ‘reasonable care’, the Tribunal went on to evaluate whether ADB had exercised reasonable care in the selection and oversight of the security firm consistent with its contractual ‘duty of care’ in this case.¹⁵ After considering the case, including the documents that evidenced the procedure leading to the selection of the security firm, the Tribunal found there was no evident lack of reasonable care on ADB’s behalf and, as such, ADB had acted consistently with its implied contractual duty of care to its employees, and the case was dismissed.

The *Bares* case was decided only a few years after ADB’s Tribunal was established. The ruling established the legal principle that ADB has an implied contractual duty of care to ensure the safety and security of its staff whilst on ADB’s premises, and the method for the selection and management of vendors contracted to perform such services was subject to review by the Tribunal. The question that then arises is the scope of that contractual duty and what the organization must do in order to ensure that it acts consistently with that implied contractual duty of care. The Tribunal’s decision served to highlight that in undertaking its institutional procurement functions, the ADB must undertake diligence not simply as the contractual counterparty, but with a view to meeting its duty of care to its employees.

13 Ibid., para. 18.

14 Ibid., para. 21.

15 Ibid., paras. 28–41.

3.2 *Jesieline C. Chang et al. v ADB*

This case concerned the death of an ADB staff member from lung cancer.¹⁶ Before describing the specific facts of this case, it is important to provide some general background and context to the medical services that are provided to ADB staff.

For some time, ADB had provided its staff with access to an ‘in-house’ medical clinic at its Manila-based Headquarters. The clinic is operated by an external vendor, including the provision of the clinic’s staff, supplies and operations. ADB also employs in its own staff a medical doctor, separate from the medical and nursing personnel supplied by an external vendor. The medical doctor’s duties include pre-employment medical screening and to be available to interact with the vendor’s staff on difficult or unclear cases. Although the role is not to supervise the clinic per se, the doctor may provide some quality control in certain cases.

Under the ADB’s medical insurance scheme that is made available to ADB’s staff members, ADB staff are entitled to undergo an annual physical examination, which involves bloodwork, ECG tests, x-rays, and other examinations one might expect. Such annual physical examinations may be conducted by the in-house medical clinic.

In the case of *Jesieline C. Chang et al. v ADB*, Mr. Chang had availed of the in-house clinic services and undergone annual physical examination at the in-house clinic for several years. Mr. Chang had undergone x-ray procedures, including chest x-rays, as part of the annual physical examination. Shortly after undertaking a routine annual physical examination, Mr. Chang was unable to overcome a cough and sought medical treatment outside of ADB, where they were diagnosed with late-stage lung cancer.

Mr. Chang lodged a grievance against ADB for what they claimed to be the Bank’s failure to have in place an adequate system to check the quality of the services provided by ADB’s in-house medical provider, so as to avoid any medical misdiagnosis. Mr. Chang sought USD 4 million in compensation to cover lost income, pain and suffering and punitive damages for the alleged negligence in overseeing the vendor who provided the in-house medical facilities. Not long after commencing their grievance, Mr. Chang passed away. Mr. Chang’s dependents and his estate stepped in and continued the claim against ADB on the deceased’s behalf.

Similar to the *Bares* case, the *Chang* claim was framed partly in tortious concepts, but following the *Bares* precedent, the claim also included allegations that ADB had breached its implied contractual duty to exercise reasonable

¹⁶ ADBAT, *Jesieline C. Chang et al. v ADB* 2008.

care. ADB argued that the claim, when properly considered, fell entirely outside the jurisdiction of the Tribunal, because the claim was really based on principles of tortious liability, and the present case did not concern the implied contractual duty for the staff's safety and security in the *Bares* context.

ADB argued that, threefold: (i) the allegations that the provider of the in-house clinic had allegedly misdiagnosed the x-rays, or failed to pick up the symptoms of cancer, were not violations of the employees terms and conditions of appointment and instead, these were properly claims against the third party vendor, and should be pursued against them separately; (ii) if it did have an implied contractual responsibility, then it had 'disclaimed liability' because the relevant provisions of the staff rules included language to the effect that if staff availed of the in-house medical clinic services, they did so at their own risk and by doing so, acknowledged that ADB bore no responsibility for any loss or damage suffered by them as a result; and (iii) if there was an 'implied' contractual duty, ADB had appropriately discharged its duty by acting with all reasonable care in the selection and oversight of the external vendor.¹⁷

The Tribunal ruled that since the Bank voluntarily undertook to provide an in-house clinic providing medical services to staff, the Bank assumed an implied contractual duty to exercise all necessary and appropriate care in selecting and overseeing the chosen vendor, and that this responsibility was not diminished by language in the staff rules disclaiming liability for loss.¹⁸ After stating that ADB had assumed an implied contractual duty, the Tribunal went on to dismiss Mr. Chang's claim. The ADBAT accepted ADB's defense that it had taken all reasonable steps in the process to select an external provider, and providing a reasonable standard of oversight, through monitoring by ADB's medical doctor.

The *Chang* ruling is significant because it confirmed the Tribunal's willingness to imply contractual terms into the employment relationship and clarified that it was prepared to do so when the Bank 'voluntarily' provides a service to its staff members. Although the Tribunal did not appear to expand on the earlier *Bares* jurisprudence that ADB's contractual duty of care was limited to an examination of the process for selecting and providing oversight to third parties vendors.

The ruling is also significant because the Tribunal ruled that ADB could not disclaim liability for loss or damage arising from the use of the services that were voluntarily provided to the staff.¹⁹ This is an interesting point, because

17 Ibid., paras. 19–23.

18 Ibid., para. 28.

19 Ibid., para. 29.

norms of contract law typically permit parties to agree to limit or waive liability for loss and harm suffered, and that express terms typically override implied terms (unless provided by statute). Accordingly, it suggests that the Tribunal sees certain duties as higher norms that cannot be contracted away between an international organization and international civil servants.

4 The ‘Ensemble of Conditions’: Broadly Construing Other Terms and Conditions of Employment

In addition to demonstrating a preparedness to imply terms and conditions into a staff member’s contract, the ADBAT has also taken an expansive approach to the breadth and scope of ADB policies that can form part of a staff member’s terms and conditions of employment.

This approach is illustrated by the recent case of *Ms. D v ADB (No. 3)*.²⁰ This case addressed the question of whether a former ADB staff member could bring a claim concerning their non-selection for a consulting role in ADB some years after their employment as a staff member had been terminated. As the title of the case suggests, this was the third occasion upon which the ADBAT was called upon to address a grievance lodged by Ms. D. The two earlier proceedings concerned unsuccessful attempts to contest termination of employment after Ms. D’s appointment was not confirmed at the conclusion of a one-year probationary period.

At some point in 2016, around seven years after their employment was terminated, Ms. D put herself forward as a member of a team of consultants who had applied for an ADB-funded consultancy assignment. Before addressing the specific facts of the case, and the ADBAT’s ruling, it is important to provide some background and context on the nature of consultants and the manner in which they are recruited.

ADB consultants can be either individual persons or firms, and they provide consulting services which are required to administer ADB loan and technical assistance projects.²¹ Consultants are not ADB staff members, and do not come within the jurisdiction of the Tribunal—there is a separate dispute resolution process that is set forth in their individual consulting contracts.²² There is a volume of internal rules and procedures governing the selection and

20 ADBAT, *Ms. D v ADB (No 3)* 2018.

21 ADB, Consulting Services Operations Manual 2008.

22 Article 11(2) of the ADBAT Statute provides access to staff, namely, “any current or former member of the Bank staff who holds or has held a regular appointment or a fixed-term appointment of two years or more, any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member’s death,

recruitment of consultants at ADB. These are known as ADB ‘Project Administration Instructions’ or ‘PAIS’. These PAIS include provisions applicable to recruiting former ADB staff as consultants.

Generally, former ADB staff are eligible to be recruited as an ADB consultant, unless that former staff member had disciplinary, performance or similar issues during their staff tenure. The policy on non-recruitment of former staff members with performance, disciplinary or other related issues reflects ADB’s policy for managing the potential risks associated with former staff members taking consulting assignments, when considering the track record of their previous employment relationship, and the potential for negative implications for ADB’s reputation generally.

As Ms. D had such performance issues as a staff member—resulting in non-confirmation of their probationary appointment—they were considered ineligible for a consulting assignment.²³ This information was communicated to Ms. D, following which they lodged a complaint with the ADBAT, alleging they were unfairly denied the consulting assignment because of the earlier unfavorable views of their supervisor, which Ms. D alleged were flawed.

ADB argued that Ms. D had no standing to bring the claim to the Tribunal because the PAIS (which govern the recruitment and selection of ADB consultants) did not form part of the terms and conditions of Ms. D’s appointment. Instead, ADB argued that the PAIS reflected more general policies and procedures applicable to consultants, which are not justiciable as a term or condition of employment of staff. In this regard, ADB has in place various policies which address the terms and conditions upon which ADB will engage with external contractors. For example, bidders for certain contracts must agree to abide by aspects of ADB’s anticorruption policies to be considered for a contract. Likewise, ADB has rules where it will generally only engage with service providers from member countries. If an external party does not wish to abide by those aspects of ADB’s policies, ADB can choose not to engage with or do business with those external parties.

In ADB’s submission to the Tribunal in Ms. D’s case, the PAIS were no different from other general policies that govern the manner in which ADB chooses to engage with external parties. In other words, ADB’s position was that Ms. D’s claim was an objection to a more general ADB policy and was not a grievance arising under the terms and conditions of her appointment. In the alternative, ADB argued that the relevant parts of the PAIS were properly applied, and there

and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan or any staff benefit plan provided by the Bank”.

23 ADBAT, *Ms. D v ADB* 2011.

was no abuse of discretion when the determination was made not to further consider Ms. D for the ADB consulting assignment.

On the important question of whether the PAIS formed part of Ms. D's terms and conditions of appointment, thus grounding the ADBAT's jurisdiction to consider the claim, the ADBAT ruled that the PAIS did indeed form part of Ms. D's terms and conditions of appointment. The ADBAT cited to the seminal *de Merode* ruling from the World Bank Administrative Tribunal case,

The contract may be the sine qua non of the relationship, but it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the Bank and staff members.²⁴

The ADBAT ruled that the PAIS, including the provisions addressing recruitment of former staff members, formed part of the ensemble of conditions of employment and thus the Tribunal had jurisdiction to hear the claim.²⁵ After finding that it had jurisdiction to hear the claim, the ADBAT went on to dismiss the case and ruled that Ms. D had not established that the PAIS had been incorrectly applied, and if the only reason was linked to the previous supervisors' alleged improper motivations relating to the assessment of their performance during the probationary period, that had already been adjudicated by the Tribunal in Ms. D's earlier applications and was thus *res judicata* since the Tribunal had already dismissed these earlier claims.²⁶

Although not relying on the technique of implying terms into the terms and conditions of appointment, the ADBAT took what seems to be an expansive view of the 'pertinent rules and regulations' that might be considered to make up the ensemble of employment conditions. As a practical matter, this leaves some uncertainty as to the applicability of ADB's general policies and when such policies may be considered to be part of the ensemble of the terms and conditions of appointment. This ruling does clarify that to the extent that such policies are inextricably linked with a staff member's employment, or former employment, with the ADB, they stand to be reviewed by the Tribunal. This raises the question as to whether this leads to unequal treatment amongst by the ADBAT potential vendors, with former staff members having greater rights of recourse against non-selection decisions than others.

24 WBAT, *Louis de Merode v The World Bank* 1981, para 18 (internal emphases omitted).

25 ADBAT, *Ms. D v ADB (No 3)* 2018, para 58.

26 *Ibid*, para 60; ADBAT, *Ms. D v ADB* 2011; ADBAT, *Ms. D v ADB (No 2)* 2012.

5 Conclusion

The review of the cases decided by the ADBAT described above leaves us with at least three key lessons when thinking about the ensemble of conditions that go beyond the clear text of the letter of appointment.

Firstly, the ADBAT has adopted expanded notions of contract (indeed, with some looking much more like norms of tort law) through a willingness to imply contractual terms that venture beyond the four corners of a letter of appointment, including implied contractual obligations of a duty of care owed by ADB to its staff.

Second, implied contractual duties extend to a duty to provide an appropriate standard of oversight and monitoring of third-party vendors providing services for which ADB staff are beneficiaries. Thus, the failure by a vendor may lead to a finding against ADB, in the event the Tribunal finds that ADB has not discharged the implied contractual duty of care by failing to exercise sufficient diligence over the vendors. It is also somewhat concerning that the *Chang* ruling potentially limits ADB's scope to disclaim liability when staff take advantage of services voluntarily provided to its staff.

Finally, the ensemble of conditions of the contract can extend deep into ADB's policies and procedures that may not, on their face, seem to govern the relationship between the Bank and its staff and may have application to the relationship, and to issues that arise well after a staff member's employment has ended.

These cases demonstrate that the ADBAT has taken an expansive approach to the characterization of the terms and conditions of appointment. One could say that this inclusive approach is necessary in order to ensure that staff have recourse to a dispute resolution forum for claims that would otherwise have no other venue, given the immunities enjoyed by the ADB from jurisdiction in its member's national court systems. This may also be partly explained by local considerations. For example, one might postulate that, as in the *Bares* and *Chang* cases, perhaps there was a reluctance by the families to pursue local legal proceedings against the third party vendors, in what would be an unfamiliar jurisdiction, where the chances for recovery are uncertain.

These cases also raise questions for an international organization when it is assessing its policies and procedures, and to ensure that adequate attention has been paid to the selection and retention of vendors who provide services to and for the benefit of staff members. These rulings do raise questions as to how far the principles of liability extend to an international organization under the implied contractual terms. The standards of reasonable care arising from implied contractual duties before international administrative tribunals are not well defined nor articulated and those standards may differ between

national legal systems—so what norms apply? What are, then, appropriate selection and oversight procedures that are sufficient to meet the reasonable standards that a Tribunal might examine? Thus far, the ADBAT has not articulated when such a standard was not met.

Other questions that arise from these rulings concern the scope of an inter-governmental institution's financial liability if it was found to be in breach of an implied contractual duty. To date, the jurisprudence of the ADBAT has not addressed this issue, since the Tribunal has not found ADB to have transgressed any of the implied contractual duties. However, damages are capped by the ADBAT Statute at the equivalent of three years of the applicant's basic salary, and damages over the cap may only be awarded in "exceptional circumstances".²⁷ How would these be reconciled in a case, for example, where the institution was found to have transgressed from the relevant standard of care, but where principles of damages for a breach of duty of care under tortious principles would result in punitive damages, meriting considerably larger awards than envisaged by the statutory cap?

These are and remain interesting legal questions, and as principles of international civil service law continue to evolve, either the ADBAT or another international administrative tribunal may have an opportunity to further consider and develop some or all of these questions in due course.

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PART 2

*Resolving Employment-Related Disputes at
International Organizations*



To Join or Not to Join: A Comparative Analysis of Joining or Creating an International Administrative Tribunal

*Katherine Meighan and Gabriel Rodríguez-Rico**

Abstract

How well an international organization functions and upholds its privileges and immunities is closely intertwined with the existence of an internal justice system to settle disputes between the institution and its staff. At the apex of such system is the administrative tribunal, mandated to provide final, binding decisions on internal, employment-related issues, taking into account the needs of both the international organization and its staff. Some of such international organizations have opted to join and submit to a multi-jurisdictional tribunal, while others have established their own, independent tribunals (arbitration may also be an option, but due to its substantially different nature and procedures, it falls outside the scope of this chapter). This chapter appraises two different scenarios for international organizations: joining a multi-jurisdictional tribunal that receives appeals from various international organizations or establishing a stand-alone tribunal, either independently or in conjunction with other intergovernmental institutions. This assessment provides a brief retrospective of international administrative tribunals, whilst highlighting governance consideration, jurisprudential issues, as well as other operational points that may arise under each option. Although informed by legal advice and other institutional considerations, the final decision is ultimately a political one made by, and in appropriate consultation with, the relevant stakeholders of the international organization (including the membership, the host State, the mandate beneficiaries, and the staff and management of the international organization). So, to join or not to join? There is no right or wrong answer to this question; instead this chapter strives to inform stakeholders when evaluating their options.

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1 Introduction

How well an international organization functions¹ and upholds its privileges and immunities is closely intertwined with the existence of a suitable internal justice system to properly address its needs and those of its staff.² At the apex of that internal justice system is an international administrative tribunal, the ultimate adjudicator, issuing final and binding judgments on employment-related matters. As bodies of judicial character, these tribunals adjudicate internal, employment disputes between international organizations and their staff,³ balancing “respect for human rights and the need to eliminate the interference of national courts.”⁴ Further, they support organizations in applying administrative actions following principles of equivalent treatment and proportionality for staff, irrespective of their place of recruitment or posting.⁵

The earliest administrative tribunal was established in 1927, merely seven years after the creation of the first modern international organization, the League of Nations.⁶ Since then, such tribunals have multiplied and adjusted to meet the demands of an equally increasing number of intergovernmental institutions.⁷ As part of this evolution, some international organizations have set up their own legal forum, whilst others opted to join one of the tribunals which allow membership of intergovernmental institutions that have not created the tribunal.⁸ Although informed by legal advice, the final decision is ultimately a political one taking into account multiple considerations; further, it is a decision made by and in consultation with the relevant stakeholders of the international organization (including the membership, the host State, the mandate beneficiaries, and the staff and management of the entity).

In this context, it is incumbent upon the relevant stakeholders of international organizations to assess whether it should establish its own tribunal or join a multi-jurisdictional one. This is the case for stakeholders of both new and long-established international organizations, with the latter reviewing

¹ ICJ, *Effect of Awards* 1954, 55–56.

² International organizations are established under an agreement among their respective member states. These agreements typically grant intergovernmental institutions with privileges and immunities, which generally exempt them from the jurisdiction of national legal systems and courts. Consequently, international organizations rely on their internal justice systems for the adjudication of disputes with their staff rather than submitting them to the purview of local courts and their legal framework.

³ Romano 2011, 248.

⁴ Amerasinghe, *Principles of the Institutional Law of International Organizations* 1996, 489.

⁵ Amerasinghe, ‘International Administrative Tribunals in the UN System’ 1998, 227.

⁶ ILO, *90 Years of Contribution* 2017, 21.

⁷ Romano 2011, 241.

⁸ Amerasinghe, *Principles of the Institutional Law of International Organizations* 1996, 495.

periodically whether their respective tribunal continues being the most appropriate legal forum. Whilst some intergovernmental institutions have chosen arbitration for staff dispute resolution,⁹ this option will not be addressed as its nature as a private forum renders it substantially different from the mandate and procedures of an administrative tribunal.

After providing a background overview of such fora, this chapter will examine in turn the complex issues of governance, jurisdiction and operational considerations in both multi-jurisdictional tribunals which admit jurisdiction over multiple international organizations, as well as newly created, stand-alone tribunals. More specifically, this chapter provides a general overview of international administrative tribunals, based on an assessment on their historic background (Section 2), governance and procedures (Section 3) as well as jurisprudence (Section 4) and operational considerations (Section 5) on their functioning. (Section 6 offers a conclusion.) The chapter is limited to legal fora issuing final decisions relating to employment-related disputes and does not review mechanisms that may handle preliminary proceedings such as first-instance review boards. This examination of international administrative tribunals does not intend to prefer one option over any other, but rather to provide an overview and analysis of the current landscape for stakeholders evaluating these important questions.

2 Historic Background of Administrative Tribunals of International Organizations

In its early jurisprudence, the International Court of Justice (ICJ) stated that “the power to establish a tribunal, to do justice as between the [United Nations] and the staff members, was essential to ensure the efficient working of the [organization]”.¹⁰ While the constituent instruments of most international organizations are silent on the matter of the establishment of an international administrative tribunal, it is nonetheless widely accepted that the authority to determine the appropriate tribunal rests with a governing body of an international organization.¹¹

International administrative tribunals are subsidiary organs of judicial character established or recognized by an international organization with the purpose to serve as the ultimate reviewer and arbiter on employment-related

9 Kim and Lee, 19 September 2019.

10 ICJ, *Effect of Awards* 1954, 57.

11 See as an example the following acts of governance organs of IOs establishing international administrative tribunals: Statute of WBAT; Statute of UNAT; Statute of ILOAT.

disputes between international organizations and their staff.¹² For example, the United Nations General Assembly (UNGA), in its capacity as the United Nations' (UN) governing body, established the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT), both of which are subsidiary UN organs. With this clear role in mind, a survey of existing tribunals reveals a broad spectrum. This comprises long-standing, highly respected tribunals founded 60 to 80 years ago, stand-alone tribunals of international financial institutions often founded 20 to 50 years ago, as well as bodies established as recently as in 2019 at international organizations at a smaller scale.

2.1 *Tribunal as Final Arbiter*

As noted earlier, most international organizations have a first-level, independent review board or similar entity to review employment-related disputes between staff and the intergovernmental institution applying its internal legal framework (that is, the relevant internal regulations, including the international organization's corporate, human resources and related rules, policies and procedures) and generally accepted principles of international administrative law. Should the staff member believe that a first-level decision is not appropriate,¹³ appeal to an international administrative tribunal is normally the next and final recourse, while some tribunals also allow the international organization to submit an appeal. Whilst historically both the UNAT and the Administrative Tribunal of the International Labour Organization (ILOAT) allowed for the possibility of a member organization to request an advisory opinion before the ICJ,¹⁴ UNAT's predecessor abandoned this approach in 1995.¹⁵ Later in 2016, ILOAT followed suit.¹⁶ These amendments sought to end the inequality of access to the ICJ between the international organization and its staff members.¹⁷

As the final arbiter on these issues, UNAT, ILOAT and other such fora study the facts of the matter before them and review the international organization's relevant internal regulations and analysis. There are differences among tribunals in their consideration of the underlying factual record—for example,

¹² Romano and others 2014, 14.

¹³ While some first-tier bodies issue independent and binding decisions, others issue recommendations for ultimate decision by the President or Secretary-General of the international organization, as applicable.

¹⁴ Amerasinghe, 'Cases of ICJ Relating to Employment in International Organizations' 2009, 201.

¹⁵ ILO, 'Amendments to the Statute of ILOAT', 14 June 2016.

¹⁶ *Ibid.*

¹⁷ ICJ, *Judgments of ILOAT upon Complaints Made Against UNESCO* 1956, 85.

some tribunals such as the International Monetary Fund Administrative Tribunal (IMFAT) apply *de novo* review¹⁸ to cases while reviewing the relevant factual record established below,¹⁹ while others such as UNAT and ILOAT consider whether there was a discernible error in the judgment of the first-tier body.²⁰ Following the relevant review and analysis, the tribunal then makes the final reasoned decision applying the internal regulations of the respective international organizations under international law.²¹ Thus, the international tribunal is the final arbiter of employment-related disagreements between staff and the relevant international organization.

2.2 *Survey of Long-Existing and Newly Founded Tribunals*

Many international organizations have opted to recognize the jurisdiction of long-standing tribunals which accept external membership.²² Within the international legal community, ILOAT and UNAT are the two long-established, highly respected examples. ILOAT is the successor of the Administrative Tribunal of the League of Nations, originally established in 1927,²³ and the functions of which were transferred to the International Labour Organization in 1946.²⁴ Meanwhile, UNAT was first established as the United Nations Administrative Tribunal in 1949 until it was substantially reformed in 2009 when it adopted its current title, albeit its acronym has remained.²⁵ As discussed further below, given their long-standing nature, these entities have an extensive jurisprudence that has evolved over the decades.

Other international organizations have founded their own independent tribunals. Historically, this trend began with the main international financial institutions establishing stand-alone administrative tribunals including those of the World Bank (1980), the European Bank for Reconstruction and

18 *De novo* judicial review is used in addressing questions of how the law was applied or interpreted by a lower tribunal. This is a non-deferential standard of review, meaning that the reviewing tribunal applying a *de novo* review standard does not place weight on (or, absent a clear error, does not defer to) the findings of the previous court. Accordingly, lower tribunal findings under a *de novo* standard of review may be varied or even overturned by the reviewing tribunal. Other standards of review applied by the appellate or senior tribunal are more deferential, with the senior tribunal placing some weight on the lower tribunal's decisions absent discernible errors therein.

19 IMF, 'IMFAT Reports' 2008, 60.

20 ILOAT, *P. (No. 2) v WHO* 2018, *consid 5*; UN, 'Appeals and Answers'.

21 *Ibid.*

22 ILO, *90 Years of Contribution* 2017, 25–26; see also ILO, 'Membership'.

23 Uddin and Uddin 2012, 669.

24 ILO, 'ILO Administrative Tribunal'.

25 Reinisch and Knahr 2008, 449 and 482.

Development, the Asian Development Bank (1991) and the International Monetary Fund (1992).²⁶

Over the last decade, it has become apparent that the size of an international organization is not a prerequisite for founding a stand-alone tribunal. While intergovernmental institutions with significant staff numbers, such as the International Organization for Migration, with more than 13,000 staff members,²⁷ have decided not to establish their own,²⁸ others at a smaller scale have more recently reviewed setting up their own fora. One such example is the 2019 founding of the tribunal of the Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA), an entity with less than one hundred staff members.²⁹ Furthermore, it may be noted that this option could also be carried out jointly by a handful of smaller intergovernmental institutions which share a similar mandate, geographical location or the like.

3 Governance of Stand-Alone Versus Multi-Jurisdictional Tribunals

All international administrative tribunals enjoy full independence of judgment,³⁰ enabling their impartial review of the relevant law and evidence without improper interference or influence. While ensuring full independence of judgment, tribunals at the same time exercise their powers within the relevant statutes and procedures of their establishment. Accordingly, international organizations which opt to establish their own stand-alone legal forum must generally outline the relevant logistical rules and procedures, as well as cover the concomitant establishment costs. Conversely, those which choose a multi-jurisdictional body would accede to the procedures of the established governing body of the parent organization and be required to pay fees per case brought before the tribunal and, in some cases, the concomitant costs of yearly membership.

3.1 *The Stand-Alone Tribunal: a Tribunal Under One's Own Rules*

Whilst tribunals have complete independence of judgment on cases brought before them, the back-office and logistical functions of tribunals differ in application for stand-alone versus multi-jurisdictional tribunals. An international

26 World Bank, 'World Bank Administrative Tribunal'; ADB, 'Administrative Tribunal'; IMF, 'IMF Administrative Tribunal'.

27 IOM, 'IOM Snapshot 2019'.

28 IOM has recognized the jurisdiction of the ILO Administrative Tribunal. See, ILO, 'Membership (ILOAT)'.

29 Statute of the CTA Administrative Tribunal; Council of Europe, 'CTA AT FAQ'.

30 Gomula 1991, 87.

organization that establishes its own tribunal effectively creates a stand-alone court. As such, the intergovernmental institution has the additional burden of establishing systems, policies and procedures—potentially tackling everything from the required qualification and on-boarding of judges to the mandatory typeface and font of briefs submitted.

At the same time, the international organization may possibly benefit by more nimble and efficient adjustment of the tribunal's processes to the evolving needs of the intergovernmental institution and its staff. Such adjustments might, for example, take into account changes in the international organization's size or location, financial and operational capabilities, novel staff or institutional concerns. In this context, the Asian Development Bank and the World Bank amended their tribunals' statutes in 1995³¹ and 2009³², respectively, in order to enhance their independence, allowing the tribunals to manage their budget independently and stating explicitly that they function independently from the management of the respective organizations. Similarly, the Asian Development Bank introduced a second reform in 2006 to discourage actions brought for frivolous reasons or as potential harassment. Specifically, the entity introduced statute amendments to potentially require applicants to pay compensation for a maximum of three years of their base salary when their submission was "without foundation either in fact or under existing law" or "...intended to delay the resolution of the case or to harass the bank or any of its officers or employees".³³

3.2 *The Multi-Jurisdictional Tribunal: A Tribunal Under the Rules of Others*

An international organization that opts to join a multi-jurisdictional tribunal accedes not only to the relevant jurisprudence (discussed in the next section), but also to the relevant policies, procedures, institutional memory and best practices reflected across the multi-jurisdictional tribunal's legal and operational framework. While such framework may be influenced by the insights of academia, practitioners and the thousands of parties that have been involved in the tribunals' proceedings, multi-jurisdictional tribunals remain nonetheless under the exclusive oversight of their parent international organization's governing body. Hence, in the case of tribunals such as ILOAT and UNAT, any amendment to their Statutes remains under the discretion of the International Labour Conference of the International Labour Organization (ILO),³⁴ and the

31 ADB, *The Administrative Tribunal of ADB* 2012, 78.

32 World Bank, 'Amendments to the Statute of the Tribunal'.

33 Statute of ADBAT, art X(6).

34 Statute of ILOAT, art XI.

UN General Assembly,³⁵ respectively. Moreover, a multi-jurisdictional tribunal may prescribe substantial requirements for the first-tier bodies of the international organizations under its jurisdiction, including on their composition and on the authority who issues the final decision.

As a result, international organizations subject to these tribunals benefit from their long-established legal and operational frameworks, while at the same time having an often broad-ranging consultative role when seeking to initiate or shape potential amendments. Given the high number of hosted participant international organizations, both ILOAT and UNAT provide the benefit of broad consultation with staff and participant institutions before changes are made. Further, given that potential statute amendments fall within the purview of the highest governing body, it may be natural that the process of potential reviews and evolution is a more gradual one for multi-jurisdictional, than for stand-alone, international administrative tribunals.

It is interesting to study, by way of example, the UNAT, which has a long history of reviewing procedures and policies to evolve and adapt as appropriate for staff and participating international organizations. UNAT's predecessor was subject to calls to reform its system since the 1970s in order to, among other things, establish a two-tier system of administrative justice and to foster better representation for staff in disputes with international organizations.³⁶ Reviews continued by means of reports and recommendations as late as 2002,³⁷ and 2005.³⁸ Full reform was ultimately approved in 2009 with the establishment of the current UNAT.³⁹ This tribunal continues to evolve and adapt to the needs of participant intergovernmental institutions and their staff. For example, in 2000, the UNAT's Statute was amended to require appropriate legal qualifications and experience for its judges,⁴⁰ as a response to concerns that previous judges may have lacked sufficient relevant qualifications.⁴¹ This was further strengthened in 2005, when the Statute was again amended to specifically require "judicial experience in the field of administrative law or its equivalent".⁴²

35 Statute of UNAT, art 12.

36 Reinisch and Knahr 2008, 473–474.

37 UN, 'Reform of the Administration of Justice' 2002.

38 UNGA RES/59/283, 13 April 2005.

39 Reinisch and Knahr 2008, 482.

40 Ibid, 460; Statute of UN Administrative Tribunal, art 3(1) (as amended by UNGA RES/55/159, 12 December 2000).

41 Pescatore 1994, 236.

42 Gulati 2011, 520.

The 2009 reform further specified a requirement of a minimum number of years for such judicial experience.⁴³

Therefore, an intergovernmental institution that subjects itself to a multi-jurisdictional tribunal will reap the benefits of simultaneously adopting the jurisprudence and long-established procedures of the entity. At the same time, the parent international organization's ongoing review of its legal framework, procedures and practices to best adapt to the evolving needs of staff and participant intergovernmental institutions may be a more gradual process than that of stand-alone international administrative tribunal.

4 Jurisprudence

This section now turns to considering the jurisprudential ramifications of multi-jurisdictional versus stand-alone international administrative tribunals, in terms of, firstly, 'Foreseeability and Certainty'; and second, 'Standards of Proof and Jurisprudential Consistency'.

4.1 *Foreseeability and Certainty*

Established multi-jurisdictional tribunals such as ILOAT and UNAT have a deep history of over half a century of comprehensive jurisprudence on a wide variety of matters. In a sense, their far-reaching jurisprudence is a blueprint showing the evolution of international administrative law since its creation. This extensive case law serves as reference and guidance to all intergovernmental institutions and their staff, regardless of whether or not they fall under their jurisdiction. By way of example, ILOAT alone has issued over 4,200 judgments and it is now open to more than 58,000 international civil servants from 57 international organizations.⁴⁴

Nevertheless, newly created international administrative tribunals also have some established baseline for their case review. Indeed, the internal law of the international organization itself, both formal and informal, provides a standard for the rights and obligations governing the relationship between the intergovernmental institution and its staff. This includes formal sources such as the articles of agreement and by-laws or other constitutive documents of

43 Statute of UNAT, art 3 ('To be eligible for appointment as a judge, a person shall possess at least 15 years of aggregate judicial experience in the field of administrative law, employment law or the equivalent within one or more national or international jurisdictions. Relevant academic experience, when combined with practical experience in arbitration or the equivalent, may be taken into account towards 5 of the qualifying 15 years').

44 ILO, 'ILO Administrative Tribunal'.

the international organization, as well as its rules and regulations relating to internal human resources, legal and related policies and procedures. Included as a source of this baseline administrative law are related recruitment and other documents, such as the provisions of the appointment letter of the staff member submitting a challenge.⁴⁵ In addition to these formal texts, other sources include the administrative practice of the entity as well as generally accepted principles of international administrative law. Indeed, the commentary to the IMFAT Statute discusses these sources, also indicating that the tribunal should generally not exceed standards of review and limitations applied by other tribunals of international organizations.⁴⁶ To foster a quick database of legal precedents, a new tribunal could also explicitly adopt by reference the generally recognized principles of international administrative law.⁴⁷ Regardless of having adopted by reference other precedents, it is also common practice for a tribunal to support its judgment by referring to the ruling of another international administrative tribunal.⁴⁸ It should be noted, however, that discrepancies remain: for example, while tribunals may rule on the supremacy of general principles of law over an intergovernmental institution's express directives or the language in a letter of appointment,⁴⁹ it remains the case that the interpretation of what constitutes the general principles themselves may vary depending on civil or common law traditions⁵⁰ and the like.⁵¹

In considering formation of a new tribunal, the jurisprudential foundation—including precedents and sources of applicable law—should be reviewed to support foreseeability and certainty for staff and the international organization itself in handling disputes. For example, this could impact the manner in which legal practitioners advise their intergovernmental institution on a particular matter, including through settlement, as they may have somewhat more limited resources to predict how the case may develop during litigation. The same issue may also affect staff's view of and expectations regarding a particular dispute—perhaps even fostering excessively high or low expectations given the lack of known precedent. Further, in the event of proceedings, counsel of

45 Amerasinghe, 'International Administrative Tribunals' 2014, 317.

46 Commentary on the Statute of IMFAT, art III.

47 See as an example: Statute of IMFAT, art III; Statute of the AfDBT, art v; and EBRD Appeals Procedures, art 3.02.

48 ADB, *The Administrative Tribunal of ADB* 2012, 80.

49 *Ibid.*, 79.

50 The main difference between the two systems is that common law uses case law as a primary source, whereas in civil law systems, codified statutes predominate.

51 Powers 2019, 109–112.

staff and the intergovernmental institution alike may find it more challenging to align their legal arguments with the tribunal's precedent and views.

4.2 *Standards of Proof and Jurisprudential Consistency*

Stakeholders of international organizations and legal practitioners should also carefully review the case law of a multi-jurisdiction international administrative tribunal prior to joining it, including matters such as standards of proof and jurisprudential consistency. Understanding that each international organization's governing body may accord varying focus or importance on different elements, this assessment should take into consideration whether the rulings emphasize with appropriate weight and consistency the key institutional issues highlighted by the tribunal's own governing body.

One threshold issue to examine in either joining a multi-jurisdictional tribunal or creating a new international administrative tribunal is the standard of proof to be applied to allegations in the case. For example, one distinction between ILOAT and UNAT is the standard of proof for cases involving potential misconduct. In the former, the tribunal applies a 'beyond reasonable doubt' standard,⁵² while the latter has opted for 'clear and convincing evidence'.⁵³ Whilst there may be differing applications of these standards in practice, this matter gains relevance in the recent efforts to strengthen institutional tools and mechanisms against all types of harassment, including of a sexual nature. A recent study indicates that a majority of the allegations of harassment at international organizations under the jurisdiction of tribunals that require a 'beyond reasonable doubt' are found to be unsubstantiated as a result of an intergovernmental institution's limited capacity to make a case in the "absence of corroborative or independent evidence of the alleged incident".⁵⁴ This may imply a potential chilling effect on complainants as such a high standard cannot be met due to missing corroborative or independent proof given the nature of these matters.⁵⁵ In contrast, the same study found that 'clear and

52 The 'beyond reasonable doubt' standard is generally considered the highest, most rigorous standard of proof, which requires that no other logical explanation can be derived from the facts except that the staff member committed misconduct. See ILOAT, *v. v FAO* 2017, consids 7–9.

53 The 'clear and convincing' standard of proof generally requires that the evidence being presented must be 'highly' and substantially more probable to be true than untrue. See UNAT, *Molari v Secretary-General of the UN* 2011, para 30.

54 UNAIDS, 'Report on Prevention of and Response to Harassment' 2018, 44.

55 *Ibid*, 54.

convincing evidence' is a more appropriate threshold in the context of an international organization's investigation powers in light of these allegations.⁵⁶

An assessment of the tribunals' legal precedent should also take into account the manner, consistency and proportionality in which they have interpreted their statutes and rules. When a tribunal has a large number of members with a concomitantly high caseload, it is important to review the consistency of similar judgments based on similar facts across the judicial oeuvre.⁵⁷

The consistency in the interpretations of an international organization's legal framework is also closely related with the renewals and length of the judges' appointments. Indeed, the longer appointments and renewals of a tribunal membership enables it to establish a stronger doctrine and strengthens its rulings.⁵⁸ Similarly, the weight and proportionality of decisions is a crucial factor, particularly regarding certain remedies such as damages and specific performance. These factors may also vary significantly across institutions—both multi-jurisdictional tribunals and stand-alone tribunals. For example, whilst the damages that the UNAT can award are capped at the equivalent of two-year's compensation of the applicant,⁵⁹ other administrative tribunals such as the one of the Inter-American Development Bank have a one-year compensation cap, except if specific circumstances are met.⁶⁰ This suitability assessment should take into consideration whether the rulings reflect sufficient jurisprudential consistency and an appropriate weight of their decisions based on the matter under its purview, as well as on key issues for the intergovernmental institution.

5 Operational Considerations

Furthermore, there are a series of operational and logistical support matters with a potential substantial impact for an international organization and its

⁵⁶ Ibid, 45.

⁵⁷ Kryvoi 2015, 288.

⁵⁸ A conference on international administrative law held in Paris, France, on 16 May 2000 in commemoration of the twentieth anniversary of the World Bank Administrative Tribunal. During the conference, Ibrahim Shihata stated that the renewals of tribunal members 'enabled the Tribunal to establish a doctrine on many issues and to take strong stands in spite of the complexities of the situations that it has had to address'. See Ziadé, *Problems of International Administrative Law* 2008, Preliminary Materials xv.

⁵⁹ UN, 'Administration of Justice' 2004, 3.

⁶⁰ Statute of IDBAT, art IX(2).

staff, regardless of whether it establishes its own tribunal or submits to a multi-jurisdictional international administrative tribunal. This section shall examine three: (i) the secretariat function; (ii) on-boarding and logistical support of tribunal judges; and (iii) the length of time it takes to issue decisions. Most of these aspects would imply additional expenses for a stand-alone tribunal, whilst they are normally included in the cost associated with a multi-jurisdictional tribunal, which require payments on a case-by-case basis and in some cases in addition to an annual retainer fee depending on the number of staff.⁶¹

5.1 *Secretariat*

Establishing a stand-alone international administrative tribunal requires the international organization to review and set up appropriate structural and logistical procedures which themselves align with its diversity of its staff nationalities, its regional versus global missions and the like. Joining an established multi-jurisdictional tribunal requires a similar examination. In this vein, it is crucial for stakeholders to closely analyse the proposed secretariat structure and functioning so as to identify one most suitable to the needs of the individual international organization and its staff from perspectives including confidentiality, information distribution, and requirements for pleadings (including the potential use of multiple official languages).

The establishment of a secretariat or a registrar function requires enabling a back-office information technology system and related procedures that segregate information and assures the highest level of confidentiality due to the sensitive nature of the information. By way of example, such a system should be capable of electronic or mail case-intake from external parties in order to receive submissions from former staff or external attorneys. Rigorous procedures should be established to maintain data privacy and support confidentiality for those concerned. The more sophisticated the system chosen, the larger the likely financial impact on the international organization—particularly one establishing a stand-alone tribunal.

Multi-jurisdictional tribunals have adopted different methods to receive submissions from international organizations and their staff members. Whilst not a strictly legal matter, it would be also advisable to carefully review the different options which may directly impact resources and skills needed, including as to required languages of pleadings and back-office support needed to complete submissions in a timely manner. For example, although the ILOAT employs both French and English as its working languages, it requires the international organization to draft pleadings in the same language in which the

61 ILO, 'Financing of the Tribunal' 2010, paras 3–4.

staff member initiated the proceedings (that is, French or English) and to submit six hard copies via courier and one in electronic version.⁶² UNAT, on the other hand, allows the intergovernmental institution to conduct submissions in any of the six United Nations official languages (with may result in pleadings by the international organization and the staff member being in different languages) and with solely electronic means of submission.⁶³ Although other tribunals, such as the World Bank Administrative Tribunal and the Asian Development Bank Administrative Tribunal, are silent on the matter, “the practice has been to consider English as the official language”.⁶⁴ Hence, the official languages of an international organization may not necessarily mirror those of its tribunal. Given the breadth of differences across intergovernmental institutions including varying staff nationalities, working and official languages, regional versus global missions, it is crucial to closely examine the secretariat structure and functioning to identify one most suitable to the individual international organization and its staff.

5.2 *On-Boarding and Logistical Support for Judges*

A new stand-alone tribunal would require its own judges, either selected specifically through an open call or from a roster of renowned experts or a similar exercise. It is considered a best practice to engage seasoned, highly respected jurists with specific legal expertise on employment matters;⁶⁵ the recruitment of such legal professionals with strong experience and objectivity allows them to make robust, seamless contributions to the tribunal.

At the same time, each international organization has a unique mission and manner of operation, as reflected in both its legal framework and its practices. Accordingly, it is not surprising that different international administrative tribunals have tailored requirements for the legal expertise of their judges. For example, the international tribunals of international financial institutions normally select judges with expertise on international civil service and international organization administration;⁶⁶ while UNDT and UNAT require

62 Rules of ILOAT, art 8(2).

63 Rules of Procedure of UNAT, art 9(2)(b).

64 Ziadé, ‘Some Practical Issues’ 2008, 88.

65 Reinisch and Knahr 2008, 460–462.

66 Statute of WBAT, art IV(1); Statute of ADBAT, art IV(1). Some multilateral development banks now require experience in litigation and/or arbitration; see, for example, EBRD, ‘EBRD Administrative Tribunal—Appointment of Judges’, 7 September 2016.

experience on national employment law⁶⁷ and ILOAT on appellate judicial expertise.⁶⁸

Whilst a clear separation must be kept between the international organization and the judges to preserve the independence of the latter, a tribunal familiar with its parent organization's rules, policies and procedures may be better suited to determine whether an international organization met its obligations vis-à-vis its staff members. This organizational familiarity can be enhanced through the professional and appropriate on-boarding and logistical support for its independent judges.

A multi-jurisdictional tribunal would absorb the task of supporting its judges; indeed, given the long histories of many such international administrative tribunals, they boast a demonstrated track record of successful on-boarding and logistical support for their roster of judges. However, an international organization that opts to submit itself to this jurisdiction should note that such support would likely be comprehensive and applicable across diverse intergovernmental institutions, rather than tailored to a specific participant international organization. As a result, although the judges will be familiar with the overall system of international organizations, it is likely that they will not be in a position to take into account the nuances and specifics of a responding international organization during proceedings, beyond the information communicated through the pleadings.

On the other hand, an entity that creates its own stand-alone tribunal will not benefit from such a time-tested administrative structure supporting its jurists. Instead, suitable on-boarding and logistical assistance would be needed to support its independent judges to become familiar with the international organization's rules, policies and procedures, as appropriate. While this will involve a financial and time commitment for the international organization, offering such support for judges should enhance their organizational familiarity and ability to operate efficiently within the context. In turn, this should support the jurists' ability to execute their functions in an independent and objective manner to ensure that the international organization meets its obligations vis-à-vis its staff members.

5.3 *Time to Issue Decisions*

The length of time that it takes an international administrative tribunal to review the pleadings, make its analysis and issue the final decision will likely have a substantial impact on the international organization and its staff. As to

67 Elias and Thomas 2012, 164–165.

68 Reinisch and Weber 2004, 103–104.

the first, the timing will implicate the promptness with which the intergovernmental institution can solve pending matters with staff members and, in the event of an adverse decision, adjust its legal framework. As to the latter, the timing will provide staff members with an outcome to the administrative decision they challenge without undue delay, fostering a sense of fairness and efficiency. Relatively prompt decisions also reduce the time of ambiguity and possibly tension waiting for an outcome, thus supporting a sense of foreseeability and certainty for both staff and the international organization.

Therefore, an international organization that establishes its own stand-alone tribunal or joins an existing multi-jurisdictional international administrative tribunal, should carefully review the statute of the tribunal as well as the rules of procedures thereof, particularly as to the relevant bureaucratic and logistical considerations that allow for the issuance of prompt judgments. This would normally include the stated maximum timeframes for the various stages of the process including initial pleadings, rejoinders and sur-rejoinders; the timing and logistics for meetings of the tribunal (for example, whether there are oral hearings in which witnesses may be called; whether judges meet in person at a pre-determined number of sessions per year; whether in person or electronic meetings are used; the sufficiency of administrative support and so forth) and the timing for the issuance of decisions. Such procedures would normally be established and periodically reviewed by the judges themselves and set forth in the rules of procedure for the relevant tribunal. The procedures would, of course, be within the overall framework and time limits for issuance of decisions as set forth in the statute of the tribunal itself.

6 Conclusion

Evolving over the years since 1927, administrative tribunals of international organizations continue responding to the same need: providing an impartial legal forum to resolve employment-related disputes between staff members and the international organization, whilst upholding institutional privileges and immunities. A diversity of tribunals now exists to address an equally varied number of international organizations with different missions, sizes, operations, practices and legal frameworks.

Throughout the decades, each international organization has answered the question: to join or not to join? While some intergovernmental institutions have opted to join and submit to a multi-jurisdictional tribunal, others have established their own, stand-alone tribunals. Both options allow international

organizations to provide staff with an independent avenue of review of administrative decisions whilst protecting the privileges and immunities of the international organization. Indeed, this assessment by the relevant stakeholders should take into consideration intrinsic characteristics, institutional commitments and needs of each individual organization and their staff.

International organizations joining an existing multi-jurisdictional international administrative tribunal may benefit from long-established jurisprudence (which may entail more robust certainty and foreseeability), a demonstrated track record of established governance structures (including entities such as a secretariat, registrar, as well as existing on-boarding and back-office support for judges and tribunals) and well-documented procedures and policies. In benefiting from these elements, the participating international organization would of course be required to pay the concomitant costs of yearly membership and fees per case brought before the tribunal which may be more costly than establishing a stand-alone tribunal. Likewise, a multi-jurisdictional tribunal may adapt its own rules and procedures more gradually to institutional or other changes, and may not have as deep an understanding of the characteristics of each individual participating institution and their staff.

On the other hand, an international organization that establishes its own tribunal effectively creates a stand-alone court. This may allow the international organization to be more nimble and efficient in creating the tribunal and on-boarding judges, and may allow a more tailored approach to the needs of the international organization (for example as to jurisprudential standards, languages of pleadings, time limits, location of any sessions whether in person or via electronic means). Creating a tribunal, though, may also bring with it the additional burden of potentially insufficient jurisprudence, as well as the need to establish governance frameworks (including a secretariat, registrar and support for judges) and also clearly documented policies and administrative support.

This broad-ranging review of international administrative tribunals highlights one consistent factor—namely, that in choosing a tribunal, there is no ‘one-size fits all’ approach. Whilst informed by legal advice and other considerations, the final decision is ultimately a political one made by the relevant stakeholders of the international organization (including the membership, the host State, the mandate beneficiaries, and the staff and management of the entity). So, to join or not to join? While stakeholders may ultimately choose different options, we argue that their underlying assessment should consider the various complex (and sometimes competing) factors outlined in this

chapter in light of the key institutional needs, mission and practice of the international organization and its staff.

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Arbitrating Employment Disputes Involving International Organizations

*Rishi Gulati and Thomas John**

Abstract

This chapter argues that international arbitration needs to be used more frequently in resolving employment-related disputes of international organizations. Especially in the context of claims against international organizations which tend to possess functional immunities, arbitration can play a significant role in ensuring that individuals raising employment claims against them have access to fair trial-compliant modes of dispute resolution. However, this chapter also submits that any arbitral regime must be implemented in good faith. And crucially, without implementing a robust arbitral framework that takes into account the particularities involved in international administrative dispute resolution, any arbitral mechanism is unlikely to fully yield the inherent advantages of arbitration over litigation before traditional international administrative tribunals. Finally, using the example of the arbitral scheme recently implemented by the Hague Conference on Private International Law, this chapter provides a potential blueprint for other international organizations.

1 Introduction

International arbitration is much talked about but little used as a forum of choice to resolve employment-related, or similar, disputes of international organizations—‘international administrative disputes’. This must change. Firstly, international administrative tribunals (IATs) are under ever-increasing workloads and serious delays in the administration of justice to staff members is much too common. It is trite to say that ‘justice delayed is justice denied’. Second, there has been an exponential rise in the number of consultants and

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contractors engaged by international organisations (IOs) who neither have access to IATS, nor to national courts, given IOs' immunities. Of course, the situation faced by this latter category of individuals is especially precarious. At the outset, it is clarified that it is not our intention to conduct a legal analysis on how personnel working for IOs should be categorized (in other words, the traditional dichotomy between 'staff members' and 'contractors'), but simply to suggest the role international arbitration can play in enhancing access to justice for all individuals working for IOs, regardless of how an IO may choose to characterize employment status. To further this aim, we highlight why international arbitration needs to be used more frequently in resolving international administrative disputes.

Following this introduction, we commence by discussing the advantages arbitration can yield (Section 2). Especially in the context of claims against IOs, international arbitration can play a significant role in ensuring that individuals raising employment claims against IOs have access to fair trial compliant modes of dispute resolution (Section 3). However, any arbitral regime must be implemented in good faith (Section 4). Finally, we argue that without implementing a robust arbitral framework that takes into account the particularities involved in international administrative dispute resolution, any arbitral mechanism is unlikely to fully yield the benefits identified. Using the example of the arbitral scheme recently implemented by the Hague Conference on Private International Law (HCCH), an IO headquartered in The Hague, we provide a potential blueprint for other organizations (Section 5).

2 Why Arbitrate?

Arbitration is typically understood as a "non-judicial process for the settlement of disputes where an independent third party—an arbitrator—makes a decision that is binding".¹ The resolution of disputes through arbitral processes dates back to ancient Greek and Roman times, and has been practiced in one form or another in all cultures around the world.² In modern times, especially when it comes to resolving international disputes, the arbitral process has been highly institutionalized, albeit ad hoc arbitrations occur from time to time. International arbitrations are now mostly administered by well-established

¹ CI Arb, 'Arbitration'.

² Kidane 2017, 24–26.

arbitral institutions,³ with arbitrators performing their role in a manner similar to judges, with heavy reliance on past cases.⁴

International arbitration has been used to resolve all manner and form of claims, ranging from typically private disputes (including large-scale commercial disputes), to disputes having a public dimension (especially in the context of investor-State arbitration), as well as employment disputes.⁵ Therefore, arbitral tribunals can be used to resolve a large variety of disputes, including international administrative disputes, should all parties to a dispute agree to do so. Moreover, international arbitration possesses some inherent advantages over traditional litigation. The key advantages include neutrality (staying out of national courts); informality and flexibility (arbitral procedures being less cumbersome than traditional court litigation and existence of party control); speed of the delivery of justice; and crucially, enforceability of arbitral awards through the regime of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, 1958, which has meant that, subject to some exceptions, arbitral awards can be enforced transnationally with relative ease. All those advantages have been subjected to much commentary and there is no need to precis that discussion here.

However, international arbitration has come under some backlash in recent times due to ever-increasing costs associated with arbitrations; issues of opaqueness especially where disputes have a public or administrative law character (such as the case with investor-State disputes); and concerns about the independence and impartiality of arbitrators. Indeed, commentators tend to be either strong supporters of arbitral processes (the pro-arbitration lobby),⁶

3 The International Chamber of Commerce is one prominent arbitral house; the International Centre for the Settlement of Investment Disputes (ICSID) is best known for investment arbitration; for a discussion of the role of global and regional centres, see Stone Sweet and Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* 2017, 49.

4 See Stone Sweet and Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance' 2014, 32 and 43.

5 International commercial arbitration is a forum of choice for resolving large scale cross-border commercial disputes. Parties can include States and IOs as well. Investment arbitration (such as pursuant to the ICSID Convention) is a forum of choice to resolve investment claims (having significant public law elements) between private persons and States; see Menon 2015, 230. Employment disputes are also increasingly being subjected to arbitration where a claim has connections with more than one legal order; see generally, PCA, *Labour Law Beyond Borders* 2003.

6 Advocates of international arbitration point to the enforceability of awards across jurisdictions, avoidance of national jurisdiction, flexibility and ability to select arbitrators as its key advantages; see Kidane 2017, 26.

or strongly oppose it, referring to it as a ‘mafia’ comprising of a limited number of repeat players that arbitrate most major disputes.⁷ Putting that sharp contrast to one side, we consider that whether arbitration is a desirable mode of dispute resolution or not, depends on the context and nature of the dispute to be resolved. More importantly, how an arbitral scheme is implemented is likely to ultimately determine whether it provides for an effective dispute resolution forum. We treat the debate on arbitration as a means to an end—that is, as a framework that can help secure the effective administration of justice—as opposed to an end in its own right. As we argue in the next section, in the context of international administrative claims, international arbitration can play a significant role given the particularities at play.

3 The Impact of Jurisdictional Immunities and the Obligation to Provide Reasonable Alternative Means of Dispute Resolution

The fact that IOs have an internationally binding obligation to provide for “appropriate modes” or “reasonable alternative means” of dispute resolution is not contested.⁸ If such an obligation is not complied with, an IO’s immunity may be breached, for this may result in an impermissible interference into the right to a fair trial. As the European Court of Human Rights has said:

[A] material factor in determining whether granting [an IO] immunity from [...] jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.⁹

Obviously then, the obligation to provide reasonable alternative means of dispute resolution is necessary to ensure compliance with the right to access a fair trial, and from the perspective of the IO, there are strong incentives to provide such alternatives. Failure to do so may open up an IO to the exercise of national jurisdiction. In this respect, IOs justifiably wish to stay out of national courts, fearing intrusions into their independence. Therefore, international arbitration can readily provide for a forum of choice in claims against IOs given that one key advantage of arbitration is its ability to avoid the parties having to litigate claims before national courts.¹⁰ An arbitral process can indeed form an

7 See Michaels 2014, 53–54.

8 See, for example, General Convention, s 29.

9 ECtHR, *Waite and Kennedy v Germany* 1999, para 68.

10 See Kidane 2017, 99–100; Caron and others (eds) 2016, 1.

adequate mode of dispute settlement. As early as 1954, in its *Effect of Awards* Advisory Opinion, the International Court of Justice said that private persons affected by IO conduct (in that case, it was UN employees) may be delivered justice through a judicial mechanism or through arbitral means, drawing a functional equivalence between courts and arbitration.¹¹ In more recent times, the European Court of Human Rights has accepted that arbitration can satisfy the IO's obligation to provide for reasonable alternative means of dispute resolution.¹²

Since IOs generally wish to stay out of national courts, adopting an arbitral mechanism should be an ideal vehicle for IOs to fulfil their access to justice obligations. More specifically, where justice at IATS is noncompliant with fair trial standards, for example, as a result of undue delays in the delivery of justice, arbitral procedures could be a supplement. Albeit, the specific mechanics of how such enhanced choice is implemented will require careful consideration to avoid parallel proceedings and the risk of inconsistent decisions. As we said at the outset, the possibility of arbitration is especially relevant to the large number of individuals engaged by IOs (contractors and consultants) who do not have access to IATS at all. For this category of individuals, international arbitration will then be the only means to access reasonable alternative means of dispute resolution. Clearly, arbitration can play a significant role in international administrative dispute resolution. However, should an arbitral framework be adopted, its success depends on how it is ultimately implemented, a matter on which the remainder of this chapter focuses on.

4 The Need for a Good Faith Implementation of an Arbitral Regime

If an arbitral framework is chosen as a forum of choice, it must be implemented in good faith. Without such a good faith implementation, the regime will fail to provide for reasonable alternative means of dispute resolution. Unfortunately, the IO experience with arbitration has been characterized by the appearance of a lack of good faith, manifesting itself in several forms.¹³ Three points may be made.

Firstly, significant issues can arise in relation to the enforcement of the award. Given that one key strength of the international arbitral regime is the enforceability of awards, any lack of certainty in this respect can reduce

11 ICJ, *Effect of Awards* 1954, 57.

12 ECtHR, *Klausecker v Germany* 2015, para 76.

13 The principle of good faith includes acting honestly, fairly and reasonably. It also prohibits the abuse of rights; see International Law Association, 'Berlin Conference' 2004, 11.

the effectiveness of the system. Regarding this important issue, national courts have tended to take inconsistent approaches on whether consent to arbitrate also results in a waiver of immunities from enforcement.¹⁴ Recent developments have, however, indicated that where an IO enters into an arbitral agreement, any resulting award may be enforced against the IO.¹⁵ Be that as it may, given the uncertainty on the issue of enforcement, in the absence of an express clause in the arbitration agreement removing an IO's immunity from enforcement in respect of the award in question, a private party can have little confidence that arbitration will be an effective way to resolve claims against IOs given the lengths (and associated costs) to which they may be required to seek enforcement. In this context, the lack of good faith shown by IOs in implementing arbitration becomes even more apparent when the practice of some key IOs is considered. Taking the example of the United Nations (UN), on the bases of only two arbitrations, the UN determined that arbitration is not financially viable.¹⁶ Yet, it continues to include an arbitration clause in its general conditions of contracts.¹⁷ In those conditions, the UN also includes a provision that submission to arbitration does not amount to a waiver of UN immunities.¹⁸ Whether or not courts will hold this provision to be valid is a separate matter—the point being that a private person can have little confidence that even if they succeed in an arbitration, the award will be enforced.

Second, apparent lack of good faith on the part of some IOs is confirmed and demonstrated by the arbitration experience specifically in the employment sphere. For example, in one case, the defendant IO (UNESCO) refused to appoint an arbitrator despite entering into an arbitration agreement with one of its personnel. The French courts came to the rescue of the claimant by exercising jurisdiction over the IO, holding that the arbitration agreement waived

14 See Fox and Webb 2015, 394–400.

15 Relying on French jurisprudence, where an IO refused to honour an arbitration award against it concerning a dispute about rental payments, a Lebanese court categorically held that an agreement to arbitrate waived any IO immunities from enforcement; see Obeid Law Firm, 'Arbitration and Immunity from Execution', 10 April 2014, citing Lebanese Execution Bureau decision dated 18 July 2013; also discussed in Mansour, 19.

16 UN, 'Report of the Secretary-General' 2010, paras 168 and 170–172.

17 See UN, General Conditions of Contracts for the Services of Consultants and Individual Contractors 2013, s 16.

18 This is the case regardless of the subject matter of the dispute. For the purported applicability of UN immunities even where arbitration is entered into, see *Ibid.*, s 17; for other cases, a standard clause used by the UN in all its contracts was noted in UN, 'Report of the Secretary-General' 1995, para 6 ("Nothing in or relating to this Contract shall be deemed a waiver of any of the privileges and immunities of the United Nations, including, but not limited to, immunity from any form of legal process").

its immunities.¹⁹ However, in another case, national courts did not come to the claimant's aid. In a case that ultimately reached the European Court of Human Rights, a candidate was denied a job at the European Patent Office (EPO) based on their disability.²⁰ The aggrieved party approached the EPO's internal review mechanism to challenge this allegedly discriminatory treatment, however, the EPO dismissed their claims for lack of standing.²¹ The EPO suggested to the claimant that they may approach the Administrative Tribunal of the International Labour Organization (ILOAT) even though it was clear that the claimant did not possess standing for they were not an EPO employee, a pre-condition to standing before the ILOAT.²²

The claimant approached German courts arguing that their right to access to a court had been breached as they could neither access justice within the EPO, nor at the ILOAT (for lack of standing); and that the EPO had unlawfully discriminated against him.²³ German courts refused to lift the EPO's immunities.²⁴ The complainant then filed a claim before the ILOAT. The Tribunal unsurprisingly determined that the complainant did not possess standing because it was only open to individuals already employed at the EPO. However, it took a dim view of the EPO's conduct, urging it to submit the dispute to arbitration given the legal vacuum that the claimant faced.²⁵ Following the ILOAT's decision, after two years of litigation, the EPO offered the claimant the possibility to arbitrate.²⁶ While the claimant was willing to enter into an arbitration that protected their due process rights (right to a public hearing without undue delay), they did not agree to do so on the terms the EPO offered.²⁷ The arbitration never eventuated.

The claimant subsequently approached the European Court of Human Rights lodging a claim against Germany arguing that the EPO had failed to provide them with reasonable alternative means of dispute resolution. Without analyzing the overall circumstances of the claim where significant delays had already occurred (more than three years had passed since the claimant first

19 Court of Appeal of Paris, *UNESCO v Boulois* 1998.

20 See ECtHR, *Klausecker v Germany* 2015, paras 4–8. The organization stated that at some unknown time in the future, the applicant may not be able to perform their job due to their disability, and that purportedly justify refusing the candidate the relevant job for which they were found to be otherwise suitable.

21 *Ibid.*, para 10.

22 *Ibid.*, para 11.

23 *Ibid.*, para 12.

24 *Ibid.*, paras 14–16.

25 *Ibid.*, paras 19–20.

26 *Ibid.*, paras 21–22.

27 *Ibid.*, para 25.

approached the EPO), the European Court dismissed the claimant's contentions, holding that the belated offer of arbitration constituted reasonable alternative means.²⁸ In the final analysis, over a period of 10 years, a job applicant who was possessed with allegations of discrimination by the EPO approached four dispute resolution forums (the IO itself, German courts, ILOAT and the European Court), being rejected jurisdictionally by each one of them. One may query whether this belated offer to arbitrate in fact is capable of constituting a reasonable alternative means given the delays that had already occurred.

Finally, and perhaps most concerningly, IOs may choose to agree on an arbitration clause simply to oust the jurisdiction of an IAT. For example, at the ILOAT, individuals categorised as non-staff members (such as contractors to an IO) may not access the ILOAT if that tribunal is not expressly selected as a choice of forum in the contract. In its case law, where no alternative mechanisms for such individuals exist, the ILOAT has taken jurisdiction to ensure that access to justice is maintained.²⁹ However, where an arbitral mechanism purportedly exists, the ILOAT refuses to take jurisdiction.³⁰ This the ILOAT does without satisfying itself that the arbitral mechanism is in fact implemented. Such an approach has resulted in the outcome that an IO can oust the jurisdiction of the ILOAT simply by incorporating an arbitration clause in the contract of individual services.

At the UN, it is worth noting that the now discontinued UN Administrative Tribunal did take jurisdiction over cases advanced by certain claimants on the basis that without its intervention, the claimants would suffer a denial of justice.³¹ However, the present-day United Nations Dispute and Appeals Tribunals have not taken the same approach. It bears mentioning that in respect of its consultants and contractors, the UN provides the possibility of arbitration. However, there is no evidence that such arbitrations are actually conducted. The record is poor. As has already been pointed out, there is evidence of only two arbitrations ever being carried out.³² Tellingly, where a UN agency had not appointed an arbitrator despite the presence of an arbitration clause, the French Courts asserted jurisdiction over the defendant international organization on the basis that jurisdictional immunity was waived.³³

28 Ibid., para 76.

29 See the broad interpretation given to the term 'staff member' by the ILOAT (an approach not adopted at the UN tribunals) in the well-known case of *Chadsey v World Postal Union (now UPU)* 1968.

30 See for example ILOAT, *J.-D. M. v ILO* 2010, consid 6.

31 See UN Administrative Tribunal, *Teixeira v Secretary-General of the UN* 1977.

32 UN, 'Report of the Secretary-General' 2010, para 146.

33 See Court of Appeal of Paris, *UNESCO v Boulois* 1998.

What is apparent is that a carefully crafted dispute resolution framework ought to be implemented if an arbitral regime is to have any prospects of providing for a reasonable alternative means of dispute resolution. Below, through the example of the HCCH, we suggest just one blueprint for such a regime which addresses several of the concerns raised above. Of course, different IOs will have distinct needs that should be reflected in any arbitral framework.

5 A Framework for Arbitrating Employment Disputes in IOs—The Hague Conference on Private International Law

A possible example for the use of arbitration by an IO are the Staff Rules Applicable to Officials and Personnel of the Hague Conference on Private International Law (HCCH Staff Rules).³⁴ The HCCH Staff Rules are broadly based on those of the Organisation for Economic Co-operation and Development, but were changed in many regards to account for the very specific realities and requirements of the HCCH.³⁵ One significant change was the inclusion of an arbitration framework that governs certain employment disputes. It was included to provide a fast, efficient and cost-effective dispute resolution mechanism which provides just solutions as well as finality of outcome to the organization, its staff and, in limited circumstances, non-staff members. The HCCH Staff Rules were adopted by the Members of the HCCH and entered into effect on 1 January 2018. This section will now examine this form of dispute resolution under the following four headings: (i) The HCCH Staff Rules—A Brief Introduction to Their Architecture; (ii) Dispute Resolution for HCCH Personnel; (iii) Availability of Arbitration for Others; and (iv) Costs not Addressed in the HCCH Staff Rules.

34 A redacted version of the HCCH Staff Rules can be found at <<https://assets.hcch.net/docs/fa7da3e6-f05d-4721-84be-3da3b411bd0d.pdf>>accessed 23 November 2019. The rule relevant to this paper is Article 62 of the HCCH Staff Rules.

35 The HCCH is affiliated to the enlarged Co-ordinated Organizations. As the Introduction to the HCCH Staff Rules explains, “In 1963, the Member States of the HCCH decided to follow the Staff Regulations of the Organisation for Economic Co-operation and Development (OECD). Based on this decision, the Secretary General of the HCCH decided in 1979 to adopt the Staff Regulations of the OECD ‘*sous réserve des adaptations nécessaires*’ to account for the differences between the OECD and the HCCH”. Over the years, a hotchpotch of directly and indirectly applied OECD Regulations, Secretary General Decisions, but also practices and usages evolved. Transparency and clarity of the rules applicable to staff diminished over time. The efforts by the HCCH undertaken to rectify this resulted in the HCCH Staff Rules.

5.1 *The HCCH Staff Rules—A Brief Introduction to Their Architecture*

The HCCH Staff Rules distinguish between two categories of staff.³⁶ The first category is ‘officials’ who are appointed by instrument in accordance with Chapter 1, Article 2 of the HCCH Staff Rules. The term ‘official’ is not defined. However, the HCCH Staff Rules provide that officials are all persons employed by the organization whose Letter of Appointment states that they are an official of the HCCH.

In addition, the HCCH Staff Rules also include provisions for so-called ‘personnel’ of the organization. The term ‘personnel’ is quasi-defined by demarking this category of staff against officials. Article 47 stipulates that personnel include all persons engaged by the organization who are not appointed officials, and whose letter of engagement, as opposed to the instrument appointing an official, states that they are personnel of the HCCH.

The difference between officials and personnel reflects the HCCH’s approach to planning its human resources. Officials are the core of the HCCH’s workforce. They are appointed to substantive positions, even if their initial appointment is temporally limited.³⁷ Officials are paid from the budget of the HCCH. Their roles and functions are required generally for the pursuit of the mandate, and strategic priorities, of the HCCH. Personnel are engaged to pursue specific purposes or support defined projects. The salaries of personnel are paid from sources other than the organization’s budget, that is, from voluntary contributions. The specifics of the engagement of personnel relevantly shapes the conditions for this category of staff. The relationship with the HCCH is governed in a separate Chapter of the HCCH Staff Rules (Chapter 3). The terms of personnel are generally short and may only be longer than 24 months if exceptional circumstances require.³⁸ Renewals are possible but only for a maximum term of 48 months.³⁹ A term does not carry any expectation for renewal or conversion to the status of an official.⁴⁰

36 The two categories of staff members engaged by the HCCH are those that are appointed by the Secretary General as ‘officials’, and those that are engaged as ‘personnel’. The main difference is their role within the Permanent Bureau as explained below. The HCCH also engages consultants. These are not considered staff and their retainers are not governed by the HCCH Staff Rules but by individually agreed contracts.

37 Article 11 of the HCCH Staff Rules provides the rules for limited and unlimited appointments as well as the conversion procedure.

38 HCCH Staff Rules, art 52.

39 Ibid., art 53.2.

40 Ibid., art 53.3.

5.2 *Dispute Resolution for HCCH Personnel*

The dispute resolution procedure that applies to personnel can be found in Articles 62 and 63 of the HCCH Staff Rules, including the relevant Instructions. It is based on arbitration. In opting for arbitration as its dispute resolution procedure, the HCCH sought to balance the shortness of term of personnel with the obvious length and complexity of the dispute resolution procedure applicable to officials. The final resolution of a dispute through the Council of Europe Administrative Council after personnel had ended their term, was considered to be particularly troubling. Rather, the HCCH considered solutions that would avoid that as a result of lengthy procedures, disputes became entrenched beyond the term of personnel. A faster resolution of disputes was considered to promote access to justice for personnel and to bring quicker closure for the disputants.⁴¹ These policy considerations led to selecting arbitration as the preferred dispute resolution procedure for personnel. It is envisaged that arbitration will offer the HCCH as well as its personnel the anticipated fast, efficient and cost-effective dispute resolution procedure it was designed for.

Article 62.2 of the HCCH Staff Rules stipulates that personnel may have, under certain circumstances, access to what is called a 'simplified dispute resolution procedure'. This simplified dispute resolution procedure is an arbitration procedure that is used to decide certain employment disputes. The circumstances in which this simplified dispute resolution procedure is available are defined in Articles 62.2(a) and 62.2(b) of the HCCH Staff Rules and they are connected to the length of the term of the member of the personnel. Firstly, in accordance with Article 62.2(a) of the HCCH Staff Rules, arbitration is the sole dispute resolution procedure available to personnel members whose engagement with the HCCH is less than, or equal to, 24 months. Especially considering the shortness of the term of this segment of personnel, the exclusive availability of arbitration should greatly facilitate the timely resolution of disputes, that is, within the term.

Second, arbitration is also available to those personnel who are engaged for a term longer than 24 months (and less than, or equal to, 48 months) if they choose this procedure. While Article 62.2(b) of the HCCH Staff Rules provides that these personnel are *prima facie* governed by the dispute resolution procedure that is available to officials, in accordance with Article 62.3 of the HCCH Staff Rules, they can choose arbitration as the preferred dispute resolution procedure. This choice was included as it was thought possible that longer-serving

41 Throughout this chapter, any references to underlying policy considerations are included only to the extent possible and are based on personal notes and the recollection of one of the authors.

personnel may see benefits in having access to arbitration. It also gives expression to the principle of party autonomy in the context of the law of IOS.⁴²

The basic rules set forth in Articles 62 and 63 of the HCCH Staff Rules are further reinforced through a set of detailed Instructions. Instruction 62.1 of the HCCH Staff Rules reinforces, in essence, the rules laid down in Article 62.2 of the Rules, but further clarifies that the simplified dispute resolution procedure is available to those personnel who have been aggrieved by an administrative act made by the Secretary General. Instruction 62.2 of the HCCH Staff Rules also reinforces the rule established by Article 63, repeating that personnel who have been aggrieved by a decision by an administrative act and serve for longer than 24 months (but less than, or equal to, 48 months) can choose a simplified dispute resolution process. Moreover, the Instruction further supplements the rule in Article 63 by stipulating that the parties may choose arbitration either at the time of the engagement of the personnel member, or may do so on an ad hoc basis, after a dispute has arisen.⁴³ This approach was included to pursue two goals: firstly, to maximize flexibility in creating a relationship between the organization and its personnel that is most suited to the situation, and second, to ensure that personnel members and the HCCH can choose this alternative dispute resolution mechanism to gain adequate access to justice at any stage of their term, even if no arbitration clause was included in their Letter of Engagement.

Instruction 62.4 of the HCCH Staff Rules then provides that arbitrations between personnel and the organization are to be conducted under the auspices of the Permanent Court of Arbitration (PCA) in The Hague.⁴⁴ This includes that in accordance with Instruction 62.8 of the HCCH Staff Rules, the arbitration is to be conducted in accordance with the PCA's 'Optional Rules for Arbitration between International Organizations and Private Parties' (Optional Rules).⁴⁵ Instruction 62.5 does provide that the personnel member's Letter of

42 The policy consideration involved, *prima facie*, the overarching principle that the length of the applicable dispute resolution procedure should be commensurate to the length of working with the HCCH. This principle was then balanced with considerations relevant to access to justice, the rule of law and the equality of arms. This led to the inclusion of this choice: the overarching principle can give way to a personnel member's choice, a unilateral selection of arbitration as preferred dispute resolution procedure.

43 This policy was included in order to increase the flexibility of the availability of the procedure.

44 The seat of the Permanent Bureau of the HCCH is The Hague, so the choice of the PCA, also based in The Hague, was a natural one.

45 The fact that the PCA offers such dedicated rules was a further factor adding weight to choosing the PCA as central to the arbitration procedure for personnel members. The rules are available on the website of the PCA <<https://pca-cpa.org/wp-content/uploads/>

Engagement shall include a model arbitration clause as a jurisdictional basis for the arbitration.

When thought was given to devising a suitable arbitration clause, it was considered unnecessary to draft one from scratch if a suitable ready-made clause could be found. It was ultimately found in the form of the 'Model Arbitration Clauses for use in connection with the Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties', comprising two model arbitration clauses, one used for existing, and one for future, disputes.⁴⁶ The model arbitration clause for future disputes is included in the Letter of Engagement for personnel members engaged for a period of service of less than or equal to 24 consecutive months. It is also used for personnel members who are engaged for longer than 24 months (and less than, or equal to, 48 months) if they choose arbitration as their preferred dispute resolution procedure. If a dispute ensues, and the personnel and the HCCH wish to resolve it by arbitration, the model arbitration clause for existing disputes would be selected.

For the purpose of the Model Arbitration Clauses, Instruction 62.6 of the HCCH Staff Rules then stipulates certain parameters relevant to conducting the arbitration.⁴⁷ Firstly, the Instruction provides that the arbitration is conducted by one arbitrator. This counters the default position in Rule 5 of the Optional Rules, according to which arbitrations should be heard by three arbitrators, and thus has been included to keep the costs for the resolution of disputes using arbitration as low as possible. Second, to avoid that the arbitrator needs to set the language of the arbitration in accordance with Rule 17 of the Optional Rules, which could result in argument, delay and with that further costs, arbitrations are to be conducted in English. Third, the HCCH opted for the Secretary General of the PCA as the appointing authority for the arbitration. Fourth, the seat of the arbitration is The Hague, the seat of the HCCH's Headquarters as well as of the PCA. Fifth, and most importantly, the agreement to arbitrate constitutes a waiver of any rights to immunity from execution, to which a party might otherwise be entitled with respect to the enforcement of any award rendered by an arbitral tribunal constituted pursuant to that agreement. This gives effect to Rule 1.2 of the Optional Rules according to which a

sites/6/2016/01/Optional-Rules-for-Arbitration-Between-International-Organizations-and-Private-Parties-1996.pdf> accessed 23 November 2019.

46 PCA, 'Model Arbitration Clauses'.

47 These express rules, some of which modify default approaches suggested in the Optional Rules published by the PCA, seek to devise a system which balances considerations of speed, cost-efficiency and the equality of arms among the parties.

waiver of immunity relating to the execution of an arbitral award must be explicitly stated.⁴⁸

While Instruction 62.6 of the HCCH Staff Rules sets these parameters as default for the arbitration, there is a level of flexibility to accommodate any circumstances that may be encountered in practice. In accordance with Instruction 62.7 of the HCCH Staff Rules, the Secretary General may vary some of the parameters as appropriate.⁴⁹ For example, the Secretary General may decide that the arbitration shall be heard by three arbitrators or that the arbitration shall be conducted in the other official language of the of the HCCH, namely French. The Secretary General may also choose a different appointing authority or select a seat of the arbitration other than The Hague. However, the Secretary General has not been given a similar discretion in relation to a waiver of any right to immunity from execution. Shielding this mandatory waiver from any discretion is consequent in light of the architecture of the dispute resolution procedure and to provide not only a fair procedure, but also a procedure the outcome of which can be enforced against the HCCH, if required. This protects a fundamental aspect of providing personnel of the HCCH with appropriate access to justice.

5.3 *Availability of Arbitration for Others*

As mentioned above, the HCCH Staff Rules only govern officials and personnel of the organization. Other categories of persons providing services to the HCCH including, most notably, consultants, are not governed by the HCCH Staff Rules. However, Instruction 62.2(b) contains an important exception to this principle. This Instruction allows 'candidates' applying for appointments with the HCCH to trigger the arbitration procedure to complain of irregularities in the selection procedure. Within the HCCH Staff Rules, candidates are persons external to the HCCH, who applied for a position with the HCCH through a competitive selection procedure and were short-listed, but who were ultimately not selected. The term 'candidates' is used in relation to both positions for officials and personnel and Instruction 62.2(b) should be read broadly to give access to arbitration for any candidate. If read this way, the

48 For the purpose of providing effective access to justice, the HCCH considered it paramount to ensure the adequate enforcement of any award rendered by an arbitral tribunal. To put this issue beyond doubt, an express waiver was included in the HCCH Staff Rules.

49 These variations are thought to ensure maximum flexibility with regards to the procedure, without, however, compromising its certainty and effectiveness.

exception broadens the group of those who have standing vis-à-vis the HCCH, thus strengthening access to justice.⁵⁰

5.4 *Costs Not Addressed in the HCCH Staff Rules*

Finally, it is worth mentioning that the HCCH Staff Rules do not include express provisions in relation to the costs of the arbitration. Thought was given to including such rules for they could help control the cost of the arbitration and to improve fairness as well as access to justice overall.

There was thought given to including a rule which would have capped the arbitrator's fees. The cap was to be set at EUR 5,000, with the fee payable in equal shares by the parties. The cap was to be subject to a discretion to increase the fee where the complexity of the dispute so required. To ensure adequate transparency, any increase needed to be discussed between the arbitrator and all parties, with the arbitrator required to propose a higher fee in clear and detailed terms.

A second rule pertaining to costs was also considered for inclusion, being designed to abrogate the general principle that costs follow the event. It was felt that this rule can increase parties' uncertainty in relation to the costs of dispute resolution and, if the uncertainty becomes particularly significant, may be detrimental to access to justice. Instead, it was considered to include a rule which mandated that each party was to cover its own legal costs. One issue that remained open was whether this rule should be absolute, or whether an arbitrator should have a very limited discretion to award costs, for example in circumstances of hardship.

These two rules on costs were conceived late in the development of the HCCH Staff Rules and ultimately did not find their way into the latter. Therefore, it was decided to include the two rules in the Letters of Engagement, or arbitrations pertaining to existing disputes, on a case-by-case basis. This prima facie gap ought to be addressed, for example by amending the Instructions in accordance with Article 64.3 of the HCCH Staff Rules. Overall, subject to some gaps, such as on the issue of costs, we suggest that the HCCH regime provides for a blueprint for IOs in terms of how to implement an arbitral framework. Of course, IOs based in different geographical locations may wish to use the services of arbitral institutions more proximate to them. However, the particularities of the HCCH regime are well suited to balance the interests of an IO and access to justice.

⁵⁰ Extending the availability of the dispute resolution procedure to candidates is a direct reaction to the ECtHR's decision in ECtHR, *Klausecker v Germany* 2015 (see para 76 therein for a more detailed discussion).

6 Conclusion

Arbitration can, in principle, constitute an effective and desirable vehicle for IOs to comply with their access to justice obligations and ensure the delivery of justice to all those individuals working for IOs. However, if arbitration as a mode of dispute resolution is to succeed in providing a reasonable alternative to national courts, it must be implemented in good faith. Several matters need to be resolved. Some of these include ensuring certainty about the enforceability of awards by providing for express clauses in the contract of employment confirming that IOs' immunities have no role to play when it comes to the enforcement of arbitral awards; incorporating appropriate rules on appointment of arbitrators; and clearly prescribing how costs are to be allocated. Finally, through the example of the HCCH, we provide just one blueprint for other international organizations. We consider the HCCH model, with appropriate adaptations, to be a useful model to implement a strong arbitral regime that protects individual rights as well as assists IOs in discharging their obligations to provide reasonable alternative means of dispute resolution.

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The Global Fund to Fight AIDS, Tuberculosis and Malaria: The Journey of a Public-Private Partnership

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Abstract

The Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) is a unique multilateral institution: originally conceived as a public-private partnership, it was established as a not-for-profit foundation under Swiss law, before gradually evolving into an international organization. The Global Fund Secretariat is based in Geneva and is composed of some 780 employees. This chapter examines the role international administrative law has played in the effective and efficient functioning of the Global Fund. The genesis of the Global Fund, its institutional features and governance structures are presented in Section 1 and the initial administrative arrangements concluded between the Global Fund and the World Health Organization to enable the Global Fund to conduct its operations are discussed in Section 2. Sections 3 and 4 examine the internationalization of the status of the Global Fund through the prisms of the privileges and immunities of the organization and its officials, and the resolution mechanisms of employment-related disputes, respectively. Considerations regarding the legal framework applicable to Global Fund employees are also addressed.

1 Genesis, Institutional Features and Governance Structures

The Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund) was created in 2002 following a recognition by the international community that a joint and novel effort was necessary to combat Human Immunodeficiency Virus (HIV)/Acquired Immunodeficiency Syndrome (AIDS), tuberculosis and

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malaria which had reached historical heights of infection at the turn of the millennium. The nascent stages underlying the creation of the Global Fund go back to the Group of Eight (G8) summit held in Okinawa, Japan in 2000.¹

In April 2001, at the African Summit on HIV/AIDS, Tuberculosis and Other Infectious Diseases, Kofi Annan, the then Secretary General of the United Nations (UN), proposed the creation of a global fund “dedicated to the battle against HIV/AIDS and other infectious diseases”.² Interestingly, he alluded in his remarks to the public-private nature of this new structure when he noted that the fund,

must be structured in such a way as to ensure that it responds to the needs of the affected countries and people. And it must be able to count on the advice of the best experts in the world—whether they are found in the United Nations system, in governments, in civil society organizations, or among those who live with HIV/AIDS or are directly affected by it.³

Shortly thereafter, in June 2001, the UN General Assembly called for the,

establishment, on an urgent basis, of a global HIV/AIDS health fund to finance an urgent and expanded response to the epidemic [mobilizing contributions] from public and private sources, with a special appeal to donor countries, foundations, the business community, including pharmaceutical companies, the private sector, philanthropists and wealthy individuals.⁴

Immediately after the adoption of the Declaration of Commitment on HIV/AIDS, the G8 countries expressed in Genoa, in July 2001, their determination “to make the fund operational before the end of the year” and committed USD1.3 billion. Interestingly again, the G8 countries noted that the fund will be a “public-private partnership” and called “on other countries, the private sector, foundations and academic institutions to join with their own contributions—financially, in kind and through shared expertise”.⁵

1 G8 Communiqué Okinawa 2000.

2 Annan, 26 April 2001.

3 Ibid.

4 UNGA Res S-26/2, 27 June 2001, Annex, para 90.

5 G8 Communiqué Genova 2001.

Given the urgent need to mobilize resources and initiate large-scale financial disbursements to fight the three diseases—in support of the attainment, initially, of the Millennium Development Goals—a Transitional Working Group, established in July 2001, decided in December 2001 to incorporate the fund in Switzerland and conclude agreements with the World Bank, as the trustee, and the World Health Organization (WHO), as the support service provider. This recommendation was acted upon and the Global Fund was registered as a not-for-profit foundation under Swiss law on 24 January 2002, holding its first Board meeting four days thereafter. At the time, it was considered that this approach would help to speedily implement the public-private partnership nature of the nascent institution consistent with the desire expressed by the UN General Assembly in the Declaration of Commitment on HIV/AIDS and avoid the delays usually associated with the establishment of a traditional international organization. Reflecting the urgency for the Global Fund to start its operations, the Board of the Global Fund approved in April 2002 the first round of grants.⁶

Since its inception, the core principles, governance structures and *modus operandi* of the Global Fund have substantially remained the same. Indeed, there are four core principles based on which the Global Fund operates, namely: partnership; country ownership; performance-based financing; and transparency.⁷ The idea underlying the first principle is that governments, civil society, communities affected by the diseases, technical partners, the private sector, faith-based organizations and other funders must work together and be involved in the decision-making process to achieve impact. Country ownership is based on the recognition that local experts are best placed to structure programs and implement grants; as such, countries design, lead, make investment decisions and manage their programs. More generally, on-going financing depends upon performance and proven results and a high degree of transparency is adhered to in all Global Fund work including applications for funding, funding decisions, grant performance, results, governance and oversight.

These core principles are visible in the governance structures of the Global Fund and in its operational model. Indeed, the highest governing body of the Global Fund is the Global Fund Board which is currently composed of 20 voting constituencies and eight non-voting members, representing mainly the technical partners with whom the Global Fund works.⁸ The voting constituencies are divided into two groups—namely, on the one hand, the donor group,

6 The Global Fund, Board Decision GF/Boz/DPo6.

7 The Global Fund, 'The Framework Document' 2001.

8 The Global Fund, Bylaws, art 7.1.

which consists of eight donor country representatives, one private sector representative and one private foundations representative; and, on the other hand, the implementer group which encompasses seven developing country representatives, two nongovernmental organization (NGO) representatives and a representative of an NGO who is a person living with HIV/AIDS or from a community living with tuberculosis or malaria.⁹

The Board's composition reflects, in this sense, the partnerships between donor and recipient governments, civil society, the private sector, private foundations, communities affected by the diseases and the technical partners, on which the Global Fund is based. To strengthen further the balance between the various stakeholders, the Board's decisions require the support of a qualified two-thirds majority of the constituencies of each group to pass. These features are also present in the structures and charters of the Board's standing committees—namely, the Strategy Committee, the Audit and Finance Committee and the Ethics and Governance Committee—and represent a marked evolution from the traditional multilateral model where each State receives an equal vote, but also from the development bank model where shareholders hold votes in proportion to their financial participation.

The Global Fund raises and invests nearly USD 4 billion a year to support programs in more than 100 countries. The money, which is raised in replenishment conferences held every three years, comes in a predominant proportion from governmental donations and, to a lesser extent, from non-governmental donations. Broadly speaking, the money raised by the Global Fund is transformed into grants and allocated to recipient countries to respond to the plans developed by each country coordinating mechanism to fight the diseases in a given country. These plans are reviewed by an independent panel of experts to determine if they will achieve the envisaged results. Once finalized, the plan is submitted to the Global Fund Board for approval and local experts and partners can start using the grant money to deliver programs and implement the plans. The programs and grants are continuously monitored by local fund agents and subject to the audits and investigations conducted by the Office of the Inspector General.¹⁰

9 Each constituency can be formed by one or more members. See full list of constituencies available at <<https://www.theglobalfund.org/en/board/constituencies/>> accessed 28 November 2019. The seven developing country seats are allocated to six constituencies based on each of the six WHO regions and to an additional constituency from Africa. The WHO has no role in selecting Board Members. WHO regions are used only as a reference for aggregating developing countries into regional groups.

10 The Global Fund, 'Overview'.

2 Initial Hosting and Employment Arrangements

Prior to the establishment of the Global Fund, the WHO and the Swiss Government submitted a joint proposal to host the Global Fund in Geneva. The WHO promised to provide administrative services to the Secretariat through a unit dedicated solely to the support of the Global Fund and the Swiss Government contributed to the establishment of the Secretariat in Geneva and committed to provide the Global Fund over time with certain tax exemptions and other benefits.

As such, shortly after its establishment in Switzerland, the Global Fund concluded, in May 2002, an Administrative Services Agreement (ASA).¹¹ The officials hired to work for the Global Fund were employed by the WHO, in accordance with the WHO's Staff Regulations, and thereafter assigned to Global Fund projects. Through this arrangement, the Global Fund formally had no employees of its own but maintained a legal personality and governance structures distinct from the WHO's. And while the Global Fund had no privileges and immunities until 2004 (see Section 3 below), WHO employees assigned to the Global Fund projects enjoyed the privileges and immunities, not only as defined in the Agreement concluded between the Swiss Federal Council and the WHO to determine the legal status of this organization in Switzerland, but also, more broadly, under the Convention of 21 November 1947 on the Privileges and Immunities of the Specialized Agencies.¹² In conjunction with this agreement, and notably to ensure the funds contributed to the Global Fund could be efficiently held and managed, and also benefit from immunities from execution and jurisdiction consistent with funds held by multilateral organizations, a Trustee Agreement was entered into between the Global Fund and the World Bank in May 2002. This arrangement, with some amendments, remains applicable today.

Some five years after the conclusion of the ASA, the Global Fund Board decided in November 2007, that the Global Fund would discontinue the ASA with the WHO not later than December 2008, and that new administrative and employment arrangements would be put in place.¹³ Accordingly, when the ASA was terminated in 2008, WHO officials assigned to Global Fund projects were simultaneously offered contracts of employment directly with the Global Fund and a Human Resources Policy Framework (HRPF), effective as of 1 January

11 The Global Fund, Board Decision GF/B02/DP10.

12 Specialized Agencies Convention.

13 The Global Fund, Board Decision GF/B16/DP21.

2009, was adopted by the Board to cater to the Global Fund's administrative autonomy from the WHO.¹⁴

The HRPF defined a new compensation and benefits package for the Global Fund, which would differ from the WHO's in several ways. In view of these changes, to avoid imposing any material financial disadvantage on staff as a result of their transfer from the WHO to the Global Fund, the HRPF committed that WHO staff would not be disadvantaged by the transition to the new compensation and benefits package. To fulfill this commitment, the Secretariat adopted a set of grandfathering rules, which were incorporated by reference to Global Fund employment contracts signed by staff transferring from the WHO, which identified certain WHO benefits that would remain in effect for such staff and provided a time-limited compensation mechanism to cover individual cases where the package on offer by the Global Fund would prove less advantageous compared to the package offered by the WHO. The new employment contracts were effective as of 1 January 2009.

While the termination of the ASA broadened the Global Fund's autonomy and flexibility to fulfill its mandate, one consequence was the loss of privileges and immunities enjoyed by former WHO officials under the Convention on the Privileges and Immunities of the Specialized Agencies.

3 Privileges and Immunities of the Global Fund

In addition to the privileges and immunities enjoyed by WHO employees assigned to Global Fund projects under the Convention on the Privileges and Immunities of the Specialized Agencies, Switzerland and the United States had granted, in 2004 and 2006 respectively, privileges and immunities, prior to the Global Fund's separation from the WHO.

Indeed, shortly after the initial establishment of the Global Fund as a Swiss foundation, the Global Fund Board considered options regarding the future legal status of the Global Fund; namely, to keep status quo, to expand the immunities of the Global Fund by way of a headquarters agreement, to move to the status of an independent international organization or to become a specialized institution within the United Nations. Among these options, the expansion of the privileges and immunities through a headquarters agreement was considered the most optimal way forward.¹⁵ At the time, it was noted that the Global Fund was "engaged in high-risk activities of a scope and scale

¹⁴ The Global Fund, Board Decision GF/B17/EDPo8/16.

¹⁵ The Global Fund, 'Report of the Governance and Partnership Committee' 2003, pt 6.

typically undertaken only by international organizations and governments, and that it [was] exposed to potential legal liabilities that are significant".¹⁶ The conclusion of a headquarters agreement was seen therefore as a significant step to protect the Global Fund in Switzerland against liabilities that may arise based on its activities.¹⁷

As such, the Global Fund and the Swiss Federal Council concluded in 2004 a Headquarters Agreement which recognizes the international juridical personality and legal capacity of the Global Fund in Switzerland and provides to the Global Fund a similar set of privileges and immunities as those enjoyed by other international organizations in Switzerland.¹⁸ The Global Fund was also designated—by President George W. Bush in 2006 pursuant to Executive Order 13395—as a public international organization entitled to enjoy the privileges, exemptions and immunities under the International Organizations Immunities Act¹⁹ in the United States.

However, following its separation from the WHO, the only set of protections that applied to the Global Fund, its officials and assets were those granted by Switzerland and the United States, and the protection afforded to its funds under the trusteeship of the World Bank. Against this background and in recognition of the significance of this consequence, a working group of legal experts was convened shortly after the separation from the WHO to develop an instrument—the Agreement on Privileges and Immunities (P&I Agreement)—to enable countries to grant privileges and immunities to the Global Fund and to recognize its legal personality beyond its original anchor as a Swiss foundation. The Global Fund Board affirmed the importance of privileges and immunities, acknowledging the challenges and risks faced by Global Fund and its staff without such protections, and formally called upon States, in December 2009, to consider granting privileges and immunities to the Global Fund through either the P&I Agreement or domestic laws.²⁰

16 The Global Fund, 'Report of the Governance and Partnership Committee' 2004, pt 4.

17 Ibid. The options of maintaining *status quo* or becoming a quasi-governmental organization were considered to present limited benefits that were outweighed by a number of disadvantages. The options of becoming an intergovernmental organization or a specialized institution within the United Nations were considered burdensome, given treaty making formalities, and less appropriate as the private sector and NGO members of the Global Fund Board would not be able to be party to the treaty creating the Global Fund and the Global Fund was never intended to be part of the United Nations system. See, the Global Fund, 'Report of the Governance and Partnership Committee' 2003, pt 6.

18 Agreement between the Swiss Federal Council and the Global Fund.

19 US Executive Order 13395, 13 January 2006.

20 The Global Fund, Board Decision GF/B20/EDP04.

Under the P&I Agreement—which entered into force in April 2019 following the deposit of the 10th ratification instrument by Senegal—the Global Fund is afforded juridical personality; Global Fund assets, income and property, wherever located, are immune from all forms of legal process; and officials, representatives of States and other persons constituting the organs of the Global Fund, members of technical groups or other experts are granted privileges and immunities broadly similar to those granted to such officials of other international organizations.²¹

As a result of the entry into force of the P&I Agreement, the Global Fund now enjoys privileges and immunities in some 15 countries; namely, the countries that ratified the P&I Agreement, in addition to Switzerland and the United States.²²

4 Resolution of Employment Disputes

Prior to the termination of the ASA with the WHO, the Global Fund applied to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT). Considering the eligibility criteria for membership set out in the Tribunal's Statute, the Global Fund outlined in its request its compliance with the criteria and highlighted, in this regard, its international character by referring to the Headquarters Agreement concluded with the Swiss Federal Council and its designation as an international organization in the United States.²³ The Global Fund also underscored that it is exempt from applying national law in its relations with its employees and enjoys immunity

21 The Global Fund, 'Global Fund Agreement on Privileges and Immunities Enters into Force', 17 April 2019.

22 Burkina Faso, Eswatini, Ethiopia, Georgia, Liberia, Malawi, Moldova, Mozambique, Rwanda, Senegal, Togo, Uganda and Zimbabwe. A small number of countries, Burundi, Côte d'Ivoire, Gabon, Ghana, Montenegro and Niger have already signed the P&I Agreement, but the process of ratification is still ongoing.

23 ILOAT Statute, art II, para 5 and related annex ("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").

from legal process under its Headquarters Agreement. It also observed that it has a permanent governance structure and its Board accepted that awards rendered by the ILOAT are chargeable to the Global Fund budget—thereby ensuring compliance with such awards—and added that “Global Fund staff members expressed support for the use of the ILOAT as it is the dispute settlement mechanism employees are already familiar with and trust”.²⁴ In November 2008, the request was approved by the International Labour Organization Governing Body and the ILOAT became the final arbiter for the resolution of employment-related disputes at the Global Fund. In this respect, the admission of the Global Fund to the Tribunal’s jurisdiction and the conferral, on the same year, of observer status for the Global Fund to participate in the sessions and works of the United Nations General assembly represent additional steps in the evolution of the Global Fund into an international organization.²⁵

As is often the case in other international organizations, employees must exhaust the internal means of redress prior to submitting a complaint before the ILOAT. To that effect, an employee must first file a grievance through a request for resolution which is reviewed by the Head of Human Resources. If the employee is dissatisfied with the response from the Head of Human Resources, they can challenge the same before the Appeal Board. The appeal is reviewed by a panel composed of an independent Chair and two peer colleagues. After the appeal process, a recommendation of the Appeal Board is submitted to the Executive Director who has the option to accept or reject it, and the employee may then decide to challenge the final decision of the Executive Director before the ILOAT. Apart from the formal internal mechanism, informal mechanisms for the resolution of employment-related disputes are also made available to staff, including a staff counselor, an ombudsman and mediation services.

Since the recognition of the jurisdiction of the ILOAT in 2008, to date, the ILOAT has rendered more than 30 judgments in relation to complaints brought by Global Fund employees on a wide variety of topics, regarding, among other things, termination of appointments (as a result of restructurings, unsuccessful probations, disciplinary cases), performance evaluations, modifications of salary and grading structures, and eligibility for benefits under specific Global Fund policies.

24 International Labour Office, ‘Matters relating to the Administrative Tribunal of the ILO’, November 2008, Appendix.

25 UNGA Res 64/122, 16 December 2009.

Some of the cases were brought by former WHO officials alleging acquired rights considerations under the above-mentioned grandfathering rules.²⁶ By way of example, some former WHO officials challenged the decision of the Global Fund to reduce the expatriate premium starting 1 January 2015. The progressive reduction was spelled out in the HRPF adopted by the Board shortly prior to the separation from the WHO and the employees were informed at the time of the progressive phasing out of this benefit. The employees sought however to have the expatriate premiums maintained at 100% without any reductions for the period of employment with the Global Fund based on an alleged breach of the Global Fund grandfathering rules. The ILOAT, however, rejected the complaints filed by these employees.²⁷ Similarly, the challenge by a former WHO official to the decision of the organization to make changes to the grading system and salary structure was not successful. The employee in question argued, among other things, that the implementation of the revisions constituted a breach of the commitments of the Global Fund under the grandfathering rules and thereby caused injury to him. The ILOAT rejected this argument and found that there was no evidence to support an allegation regarding an immediate or future injury to the employee as a result of the adoption of the revisions. The Tribunal noted in that respect that the complainant continued to hold the same title and responsibilities even if the nomenclature of their grade level changed.²⁸

More generally, it has been observed that since its separation from the WHO in 2009, the Global Fund “has been trying to define its identity oscillating

26 While international organizations may amend the employment conditions of their staff members, they must take into account the general legal principle of acquired rights. According to the ILOAT, “the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment” (see ILOAT, *Ayoub et al. v International Labour Organisation* 1987, consid 13). The Tribunal determines whether the altered term is fundamental and essential by assessing the nature of the altered term, the reason for the change and the consequences and effects of the change (consider 14).

27 ILOAT, *R. M. (No 2) v Global Fund* 2018; ILOAT, *D. v Global Fund* 2019. The Tribunal noted in consideration of 11 of *D. v Global Fund* 2019 that the complainant “provided no evidence to prove that by reducing the expatriate premium [...], the Global Fund breached its commitment to her under the ‘grandfathering’ clause. [The complainant did not show] how the reduction ‘created a financial prejudice’ to her by reference to the overall value of the benefits and allowances she received as a WHO staff member. In other words, she has not explained how the reduction of the expatriate premium as from January 2015 breached her guaranteed retention of the total value of the benefits and allowances to which she was entitled under the pre-existing conditions as a WHO staff member”.

28 ILOAT, *B. (No 2) v Global Fund* 2018.

between its affinities with the private sector and its history with the WHO".²⁹ Indeed, while on the one hand, the work of the Global Fund is guided by a clear mission with specific targets and deadlines aiming to end the three diseases as public health threats by 2030 and a strong emphasis is put on agility, flexibility and differentiation, to ensure value for money for the beneficiaries of Global Fund grants and for the donor government, non-government and private sector contributors, on the other hand, the main features of the Global Fund's disputes resolution mechanism resemble those of other United Nations-type intergovernmental organizations. These contrasts are also reflected in the Tribunal's jurisprudence. Indeed, while the Tribunal recognized that the Global Fund was a public-private partnership with a "unique international legal personality"³⁰ and rejected the application of the Noblemaire principle to the Global Fund as it is not part of the UN Common system,³¹ the Tribunal sanctioned the Global Fund when it considered that it disregarded some general principles of international administrative law applicable to international organizations.³²

5 Conclusion

By and large, the journey of the Global Fund has been a successful one. Health programs supported by the Global Fund partnership have saved 32 million lives and overall, the number of deaths caused by AIDS, tuberculosis and malaria each year has been reduced by 40% since 2002 in countries where the

²⁹ Otis 2016.

³⁰ ILOAT, *C. C. v Global Fund* 2014, consid 2.

³¹ The Tribunal provided the following observations on the Noblemaire principle in *B. (No 2) v Global Fund* 2018, consideration 12, "the Noblemaire principle, which dates back to the days of the League of Nations and which the system of the United Nations took over, embodies two rules. One is that, to keep the international civil service as one, its employees shall get equal pay for work of equal value, whatever their nationality or the salaries earned in their own country. The other rule is that in recruiting staff from all Member States, international organisations shall offer pay that will draw and keep citizens of countries where salaries are highest. However, it is a principle that generally has been applied to organisations which participate in the United Nations common system". The Tribunal concluded in the same paragraph, "It cannot be assumed, as the complainant seems to suggest, that the Noblemaire principle should be grafted on to those legal arrangements notwithstanding that the Global Fund is not part of the common system. The Tribunal rejects the suggestion it should be".

³² ILOAT, *M. F. A. A. v Global Fund* 2015, consid 13; ILOAT, *J. (No 2) v Global Fund* 2019, consid 15.

Global Fund invests.³³ As an embodiment of the efforts of the international community to develop fora suitable to reinvigorate multilateral engagement, the Global Fund complements the mandate of existing treaty-based institutions and has aimed to develop a specific approach to institutional governance based on its unique model of operation.

The Global Fund reflects the example of a novel multilateral organization seeking to increase its efficiency and to maximize its impact while operating—due in large part to the non-application of national employment laws, to the immunity of the organization from national courts and the international civil servant character of its employees—within the confines of traditional employment dispute resolution mechanisms and international administrative law. Since the inception of the Global Fund, international administrative law has played a central role whether through the administrative arrangements concluded with the WHO, the recognition of the jurisdiction of the ILOAT, or the continuous strengthening of the Global Fund's employment-related processes and frameworks in support of the achievement of the overall strategy of the organization. The law of employment relations will certainly continue to play an important role within the next years of the Global Fund's mission to end the epidemics of HIV/AIDS, tuberculosis and malaria by 2030.³⁴

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Evolution of the Grievance System of the European Bank for Reconstruction and Development: Lessons Learnt and Way Forward

*Nobert Seiler**

Abstract

Vested with privileges and immunities, international organizations are neither subject to the substantive provisions of national employment law, nor to the jurisdiction of national labour courts or similar domestic judicial authorities for the adjudication of labour disputes. Nevertheless, it is generally recognised that staff members of international organizations are entitled to have their grievances about decisions of the organization concerning their employment be heard by an internal dispute resolution mechanism, including the right to appeal such decisions to a judicial authority for an independent review. As an international organization promoting the rule of law in the countries where it operates, the European Bank for Reconstruction and Development (EBRD) has regularly adapted since its creation its internal dispute resolution mechanism to emerging legal trends, and the ever-increasing requirements of the case law of international administrative tribunals. In the last reform of its internal justice system, initiated in 2017, the EBRD revised the first stage of its system with the aim to enhance its speed and effectiveness, at a reasonable cost for the staff members and the EBRD. Bearing in mind that the main purpose of the first stage is to establish the facts of the matter in dispute and to report the findings and recommendations to the EBRD President for decision, the EBRD has now evolved towards a more inquisitorial process. In force since February 2018, the new first stage of EBRD's internal justice system offers the necessary due process and fairness to staff members for the review of their grievances, without transforming the committee conducting that stage into a quasi-judicial body. After all, the purpose of the first stage of the system is to deliver a report and recommendation to the EBRD President, assisting them in their consideration of the matter in dispute.

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1 Introduction

As the International Court of Justice (ICJ) noted already in 1954 in the Advisory Opinion, *Effects of awards of compensation made by the United Nations Administrative Tribunal*, it was “inevitable that there would be disputes between the organization and staff members as to their rights and duties”.¹ In order to address these disputes, it is widely recognised that the right to an internal dispute resolution mechanism as well as to a subsequent appeal to a judicial authority are safeguards that the staff of international organizations shall enjoy.² Therefore, international organizations not subject to national employment law such as the European Bank for Reconstruction and Development (EBRD), progressively instituted mechanisms with the view to safeguard rights of their staff members, but also to protect their jurisdictional immunity.

In order to protect the rights of staff members, international organizations need to establish processes for the review of staff grievances meeting general principles of fairness and due process.³ In this respect, most international administrative tribunals share the same view on the main principles to be observed. For instance, the Administrative Tribunal of the International Labour Organization (ILOAT) has held that an internal appeal process is an “extremely significant element of the entire system of review of administrative decisions affecting the rights of staff”,⁴ and that “an official should not, in principle, be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body”.⁵ In the same vein, the World Bank Administrative Tribunal (WBAT) has noted that, in conducting its business, an internal review committee “is, of course, bound to follow basic requirements of fairness”.⁶

1 ICJ, *Effects of Awards* 1954, 57. See also Thévenot-Werner 2014, 26.

2 ILOAT, *G. (No. 2) v UPU* 2017, para 2; see also ILOAT, *C. T. v AITIC* 2009, para 15; ILOAT, *E.E.É. A. v CTA* 2012, para 20 (“the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. This is especially true since internal appeal bodies may normally allow an appeal on grounds of fairness or advisability, whereas the Tribunal must essentially give a ruling on points of law”).

3 Talvik 2014, 63.

4 ILOAT, *O. S. v EPO* 2013, para 9. See also Talvik 2014, 63.

5 ILOAT, *V. C. v CDE* 2012, para 13. See Also Thévenot-Werner 2014, 29.

6 WBAT, *Yang-Ro Yoon (No. 12) v IBRD* 2010, para 22 (“the Appeals Committee is, of course, bound to follow basic requirements of fairness, but it is not a judicial body that is required to comply with rules of judicial order and process”); see also WBAT, *Yang-Ro Yoon (No. 19) v IBRD* 2012; Thévenot-Werner 2014, 33.

The availability of an internal justice system for the review of administrative decisions affecting the rights of staff is also an important safeguard for the jurisdictional immunity of international organizations. It is now well established that, in the absence of adequate judicial review mechanisms, some national courts, on the basis of, notably, international public order principles, will not hesitate to declare themselves competent to adjudicate disputes between international civil servants and their international organizations. For instance, in 2005 and 2014, the French Cour de Cassation held that the jurisdictional immunity of the African Development Bank⁷ and of the Pacific Community⁸ does not protect these organizations from proceedings brought by an employee or a former employee of these international organizations in the domestic courts, when no alternative mechanism has been established to hear the employee's complaint. Furthermore, since 1999 and the decisions in *Waite and Kennedy v Germany* and *Beer and Regan v Germany*,⁹ it is clear that the European Court of Human Rights (ECtHR) will not hesitate to assess the alternative dispute resolution mechanisms established by international organizations in the light of Article 6(1) of the European Convention on Human Rights (ECHR),¹⁰ stipulating the right to a fair trial and the "right to a Court".¹¹

7 Court of Cassation of France, *AfDB v X* 2005. Unlike the appeal court in the same case, the Court of Cassation decision did not refer to the ECHR but to the international public order.

8 Court of Cassation of France, *X v Pacific Community* 2014. See also Thévenot-Werner 2014, 26.

9 ECtHR, *Waite and Kennedy v Germany* 1999, para 67; ECtHR, *Beer and Regan v Germany* 1999, para 57. For analysis of these judgments see notably Reinish and Weber 2014, 59–100.

10 See also ECtHR, *Stichting Mothers of Srebrenica and Others v The Netherlands* 2012, para 163. In this case, which related to a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under the UN Charter, the ECtHR reminded that it considered it a "material factor", in determining whether granting an international organisation immunity from domestic jurisdiction was permissible under the Convention, whether the applicants had alternative means to protect effectively their rights under the Convention. However, the ECtHR also made clear that the absence of an alternative remedy is not ipso facto constitutive of a violation of the right of access to a court. While this case provides a useful interpretation of *Waite and Kennedy v Germany* 1999, it must be underlined that, as recognised by Cogan 2013, 889, '[t]he Court stressed repeatedly in its decision, as it had in previous cases, that the core mission at issue here was of singular importance (the maintenance of international peace and security). Hence, the need for immunity, and the independence that such immunity confers on organizations, was, as a policy matter, critical. Article 6 had to be read accordingly'.

11 The right of access to a court was first established as an aspect of the right to a tribunal under art 6 (1) of the Convention in ECtHR, *Golder v UK* 1975, paras 28–36. In that case, the Court found the right of access to a court to be an inherent aspect of the safeguards en-

The purpose of this chapter is to review the development of the internal dispute resolution mechanism of the European Bank for Reconstruction and Development (EBRD) since its inception, in the light of these trends and considerations.

2 Evolution of the EBRD Internal Dispute Resolution Mechanism Between 1991 and 2018

The EBRD was established in 1989 by a multilateral treaty, the Agreement Establishing the EBRD, and it commenced operations in April 1991. In the preamble of the Agreement Establishing the EBRD, its members expressly declare their commitment “to the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics.”¹² Furthermore, a majority of EBRD member countries are also signatories of the ECHR.¹³ Throughout its existence, the EBRD has therefore been keenly aware of the increasing judicial scrutiny of international organizations, leading the Bank to continuously adapt its internal justice system for addressing staff grievances.

Already in August 1991, the Bank adopted its Staff Regulations, which expressly called on the President of the EBRD to establish appropriate procedures for the consideration of complaints and grievances of staff.¹⁴ Consistent with this provision, the President adopted the first version of the Bank’s Grievance and Appeals Procedures (GAP) shortly thereafter, in 1992. According to

shrined in art 6, referring to the principles of the rule of law and the avoidance of arbitrary power which underlay much of the ECHR. See ECtHR, Guide on Article 6 of the European Convention on Human Rights 2019, paras 84–125.

- 12 Agreement Establishing the EBRD, preamble; ICJ, *Effects of Awards* 1954, 57 (“It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them”).
- 13 It is however to be noted that the EBRD itself is not part to the ECHR. In this respect, in a case involving the EPO, the ILOAT held that while “[t]he Member States of the [Organization] are all signatories to the European Convention on Human Rights, the Organization [...] as such is not a member of the Council of Europe and is not bound by the Convention in the same way as signatory states” (ILOAT, *J. M. W. v EPO* 2004, para 11).
- 14 Section 10 of the EBRD Staff Regulations then stated, “Appropriate procedures shall be established by the President for the consideration of complaints and grievances of individual persons on the staff of the Bank on matters involving the consistency of actions taken in their individual cases with the regulations governing personnel and their conditions of service”.

these initial GAP, grievances against decisions affecting the rights of staff members were to be heard by an Appeals Committee consisting of an external legal expert acting as chair, and staff members participating in the proceedings as assessors, some of whom were elected by staff and some appointed by the President. The role of the Appeals Committee was to hear cases, establish the facts of the matter and issue reports and recommendations to the President for final decision. The President was free to accept the recommendations of the Appeals Committee or to depart from them, as long as reasons were provided in his final decision.

The GAP were first revised in 1995, providing for alternates of the elected and appointed staff members serving on the Appeals Committee. The second revision of the GAP, which took place in 1997 following a thorough review of the GAP and after consultations with EBRD's Staff Council, introduced more substantial changes to the appeals process. The revised GAP introduced new procedures for the election of staff representatives on the Appeals Committee as well as the reimbursement of legal expenses of up to GBP 2,500 of grieving staff. Also, and while this commitment was not expressly set out in the rules, the President undertook to accept and implement the recommendations of the Appeals Committee, giving it a de facto decision-making role. Simultaneously, the President approved the establishment of EBRD's Ombudsman function.

In 1999, the Board of Directors of the Bank asked the chair of the Appeals Committee to consider whether the basic objective of the appeals system (to safeguard the employment rights of staff members in a manner that is practical, cost-effective while not prejudicing the Bank's ability to carry out its mandate) was met by the existing arrangements. The report of the chair of the Appeals Committee concluded that the scope of matters that could be considered under the GAP was too narrow and that the Bank should set up a system under which staff members could seek an independent review of substantially all administrative decisions adversely affecting their rights as employees. In order to do so, the Bank had the possibility to arrange for such an independent review either by enabling its staff to submit grievances for adjudication to an administrative tribunal established by another international organization, such as the WBAT or ILOAT, or by establishing its own administrative tribunal.¹⁵

In light of the conclusions of this report, in 2002, Section 10 of the Staff Regulations was amended and the grievance system was revised, introducing a

¹⁵ Amerasinghe 2012 refers to the role played by the WBAT as an inspiration for the creation of the EBRD Administrative Tribunal.

new administrative tribunal which was to assume the functions of the Appeals Committee.¹⁶ The newly created EBRD Administrative Tribunal was also chaired by an independent legal expert and supported by staff assessors, some of whom are elected by staff and some appointed by the President. The jurisdiction of the Administrative Tribunal was wider than that of the Appeals Committee, including for the first time grievances of staff on probation and fixed-term contracts and appeals of decisions of committees under the Bank's retirement plans. Unlike the former Appeals Committee, which reported to the President, the Administrative Tribunal rendered decisions in its own right on the matters falling under its jurisdiction.

Following the undertaking given in 2002 by the President to review the new grievance system in the 12-month period following the third anniversary of its implementation, the EBRD carried out another review of the system in 2006. In this exercise, the EBRD again paid attention to the grievance systems established by other international organizations, with a particular focus on other international financial institutions (such as the International Monetary Fund, the World Bank, the Inter-American Development Bank and the Asian Development Bank). Up to this time, the Bank's system featured the Administrative Tribunal as its only tier for the review of management decisions in staff matters giving rise to grievances. Following the review, the Bank decided to follow its peers and established a two-tier system for the review of such decisions,¹⁷ with a Grievance Committee serving as the first tier, and an Administrative Tribunal as the second and final tier.¹⁸ The composition and function of the Grievance Committee shared many similarities with the original Appeals

16 EBRD Staff Regulations, s 10 ("Appropriate procedures shall be established by the President in order to consider and address complaints and grievances of individual staff members of the Bank based on individual or regulatory decisions taken by the Bank in relation to their employment, including decisions of any administration committee established in accordance with the rules governing any retirement plan of the Bank. These procedures shall include the creation of an Administrative Tribunal which will have power to make awards in favour of the staff member (or former staff member as the case may be) but not to make any awards inconsistent with any resolutions or decisions adopted or taken by the Board of Governors or the Board of Directors of the Bank").

17 It resulted from the analysis carried out by the EBRD at that time that the World Bank (with the Appeals Committee), the International Monetary Fund (with the Grievance Committee), the Asian Development Bank (with the Appeals Committee) and the Inter-American Development Bank (with the Conciliation Committee) had set up a system guaranteeing review by a Committee before potential challenge before their respective administrative tribunals.

18 The EBRD did not follow the path previously followed by the ILOAT and the United Nations Administrative Tribunal and allowing the International Court of Justice to act as a final review body in staff member disputes. In this regard, see Gomula 2012.

Committee—it was chaired by an external legal expert supported by two staff assessors, and its purpose was to hear cases and submit reports and recommendations to the President for decision. Recommendations made by the Grievance Committee were not binding on the President, and grieving staff members were entitled to lodge an appeal against the President’s decision before a newly constituted Administrative Tribunal.¹⁹ The Administrative Tribunal consists of a panel of judges appointed by the Board of Directors of the EBRD on the recommendation of the President, following consultation with the Vice President responsible for Human Resources, the General Counsel and the Staff Council.²⁰ It is empowered to take final decisions on all matters before it.

3 The 2017 Reform and the Creation of the Administrative Review Committee

In 2017, 11 years after the establishment of the Bank’s two-tier system, and following a sharp increase in the number of grievance cases,²¹ the Bank once again embarked on a review of its internal dispute resolution mechanism. The review, which was focused on the first tier of the system, was completed in February 2018 with the entry into force of the new Directive on Administrative Review Process (Directive) and the establishment of the Administrative Review Committee, replacing the Grievance Committee. The second tier of the system continues to operate in accordance with the Appeals Procedures adopted in 2006, which since then have only been amended occasionally to address minor technical aspects.

Just like its predecessor, the now-discontinued Grievance Committee, the Administrative Review Committee consists of a legal professional as its chair, and two assessors from a roster of EBRD staff, some of whom are elected by

19 EBRDAT, *Staff Member “A” v EBRD* 2017, para 81 (“The Tribunal does not find in the Bank’s law any indication that the President is barred from rejecting GC recommendations in whole or in part. To be sure, the President’s decision must comply with Bank law and must not be discriminatory, arbitrary or otherwise an abuse of discretion”). See also, EBRDAT, *Floriana Bajrami v EBRD* 2016, para 16 (“The Tribunal accepts the Bank’s argumentation that in accordance with ss 1.03 and 8.01(a) of the Grievance Procedures, GC’s recommendations are not mandatory for the Bank’s President”).

20 EBRD Directive on Appeals Process, s 2.02 (d).

21 The President received six requests for review in 2012, none in 2013 and 2014, seven in 2015, eight in 2016, eight in 2017 and 13 in 2018.

staff and others appointed by the President. Also like the Grievance Committee, the task of the Administrative Review Committee is to establish the facts giving rise to the grievance, and to submit to the President reports and recommendations for their decision. The main elements of the reform can be summarised as follows.

3.1 *From a Quasi-Adversarial to a More Inquisitorial Process*

The first and essential purpose of the reform carried out in 2017 was to change the fundamental character of the proceedings at the first tier of the Bank's internal dispute resolution system. Indeed, over the years (and perhaps as the result of the influence of chairs familiar with litigation practices in common law systems), Grievance Committee proceedings had become increasingly adversarial, with advocates representing their parties' case or position to the Grievance Committee, offering evidence, examining and cross-examining witnesses, and making written and oral submissions on behalf their clients. For most cases, proceedings started with a directions hearing where the chair of the Grievance Committee asked the parties to identify the evidence they intended to present to the Committee in order to establish the facts.

Therefore, although the Grievance Committee was not designed to be a judicial or quasi-judicial body, and instead was responsible for determining the facts of the matter in dispute and submitting its recommendations for the President's decision, staff members had almost no choice but to engage lawyers and to rely on their support throughout the proceedings before the Committee. These complex proceedings had a deterrent effect on staff members who were reluctant to engage external counsel for an internal procedure. Furthermore, they resulted in considerable financial costs for the Bank since it was the Bank's general practice to cover the legal costs incurred by staff members (even when the staff member did not prevail with the grievance).²²

A review of the procedures of other international financial organizations revealed that, while certain organizations such as the International Monetary Fund allow staff members to be represented by external legal counsel in the first stage of their internal dispute resolution system, others go the opposite way. For example, the World Bank's staff manual expressly provides that, during the peer review process, the requesting staff member and responding manager are required to draft submissions in their own words and that attorneys may not draft submissions.²³ In the same vein, the staff manual specifies that

22 Until 2017, legal costs awarded per case ranged from GBP 6,000 up to more than GBP 43,000.

23 World Bank Staff Manual, s 8.04.

attorneys are not allowed in hearings and that the staff member and manager involved may each be accompanied by an advisor which is a current or former staff member, but who may not be engaged in the practice of law.²⁴

As a result of the EBRD's latest reform, while staff members remain free to seek and receive legal advice on their case and to have their submissions prepared by lawyers,²⁵ they are not represented by lawyers in Administrative Review Committee proceedings. Members of the Bank's Office of the General Counsel do not appear in proceedings before the Administrative Review Committee on behalf of the Bank and do not participate in any hearing organised by the Administrative Review Committee.²⁶

Instead, it is the duty of the Administrative Review Committee to make its own inquiries and to issue directions in order to establish the facts of the cases before it. Like in other inquisitorial proceedings, the Administrative Review Committee is free to hear the parties and conduct its inquiries on the basis of the evidence offered by either party to support their case, and on the basis of any other evidence it considers necessary for its report and recommendation to the President.

Nearly two years following the adoption of the new proceedings, it is evident that the reduced role of lawyers at the first tier has led to a significant reduction in costs, but has also resulted in a moderation of the tone of oral and written submissions to the Administrative Review Committee. As detailed further below, in the absence of external counsel it is also more likely that both parties will be willing to pursue mediation.

3.2 *A Faster and More Efficient Resolution of Internal Disputes*

International organizations are not exempt from observing the legal maxim, justice delayed is justice denied. For example, the ILOAT held that 17 months

²⁴ World Bank Staff Manual, s 8.05.

²⁵ EBRD Directive on Administrative Review Process, s 6.4.2 ("A Staff Member may also seek advice from a person from outside of the Bank, including a lawyer for the drafting of their request for review of an Administrative Decision which is subject to review in accordance with the Administrative Review Process set out in this Directive and for the drafting of any comments and/or expressing views in accordance with paragraph 6.4.2(g) above, subject to such person concluding a confidentiality undertaking [...]").

²⁶ EBRD Directive on Administrative Review Process, s 6.4.2 ("The Staff Member and the representative of the Bank may be accompanied to a meeting with the Administrative Review Committee by a person of their choice, including another current or former staff member, so long as such person is not a lawyer or engaged in the practice of law, the Staff Legal Adviser, a lawyer in Corporate teams of the Office of the General Counsel, or the Ombudsperson").

for issuing a report on an internal appeal relating to disciplinary issues was unreasonable and granted the staff member involved substantial damages.²⁷

By 2015, the average time required by the EBRD's Grievance Committee to deliver a 'Report and Recommendation' to the President was nearly 15 months (with a minimum of 10 months and a maximum of 21 months). As a consequence, in the interest of both staff members and the Bank, it had become apparent that the Bank had to speed up its process.²⁸ The Bank addressed this specific issue by introducing strict procedural timelines for the proceedings of its Administrative Review Committee. The Directive provides that the Administrative Review Committee has 90 working days from its receipt of a request for review (more or less four months) to complete its consideration of the matter and submit a Report and Recommendation to the President for decision.²⁹

This is an ambitious procedural constraint and two years after the adoption of the Administrative Review Process, it can be observed that the reform had the effect to substantially speed up the treatment of requests for review. In practice, except in complex cases requiring more fact finding where the Administrative Review Committee requested that the parties submit additional documents or address specific questions, all Administrative Review Committee Reports and Recommendations have been prepared within 90 working days. While the Bank does not formally have the ability to sanction the Administrative Review Committee if a Report is not delivered by the 90-day deadline,

27 ILOAT, *R. (No. 2) v UNESCO* 2019, consid 14.

28 See EBRDAT, *A. v EBRD* 2017, para 51. The Administrative Tribunal criticised the time taken by the Grievance Committee for delivering its report and recommendations, underlining notably that the Grievance Committee had to inform the Appellant about the delay in preparation of its report. Had the applicant asked for such remedies, the Administrative Tribunal then added that it would have granted pecuniary remedies due to that delay.

29 EBRD Directive on Administrative Review Process, s 6.4.2(j) ("The Administrative Review Committee shall take all necessary steps to provide its Report and Recommendation to the President and to the Staff Member as expeditiously as possible, but no later than 90 days after the request for review was referred to the Chair of the Administrative Review Committee by the President, unless the Administrative Review Committee determines that additional time is required and justified in exceptional circumstances beyond its control, such as: (i) significant complexity of the matter under review, requiring a considerable volume of information and/or documentation to be collected and assessed; or (ii) delays, due to objective reasons (e.g. illness, travel), in obtaining essential information either from the Staff Member or the Bank or in obtaining written documentation. In the event that the Administrative Review Committee requires additional time, it shall promptly inform the Staff Member and the Bank in writing, specifying the reasons necessitating the need for additional time").

the Bank has significantly accelerated the timeline of the proceedings before the Administrative Review Committee.

3.3 *Streamlining of the Proceedings*

The clarity of procedures is key to their success and to the smooth functioning and effectiveness of a grievance system.³⁰ It is indeed essential for international organizations not to create procedural traps or unnecessarily convoluted procedures. As an example, international administrative tribunals such as the Administrative Tribunal of the International Monetary Fund (IMFAT) and the ILOAT notably alerted international organizations to the risks resulting from the multiplication of distinct internal review mechanisms and the subsequent effects on the lack of legal certainty.³¹ For example, the ILOAT expressed its scepticism about the “confusion in the relevant texts, the multiplicity of conflicting remedies and the inability on the part of the existing mechanisms [...] to exercise their [...] powers effectively”.³²

Facing similar issues after decades of regulatory evolution, other international organizations such as the United Nations moved to abolish many of their specialised internal advisory bodies. Instead, creating one single independent body, the management evaluation unit.³³ After four reforms in the course of more than twenty years, the EBRD encountered similar challenges, with a broad diversity of ways to contest administrative decisions and the unnecessary multiplication of layers of review. For instance, prior to the 2017 reform, every administrative decision had to be challenged first with the Managing Director, Human Resources. When unsatisfied with the outcome of this review, the staff member was then free to submit a new request for review to the Vice President responsible for Human Resources. It was only after receipt of the review decision of the Vice President responsible for Human Resources that the unsatisfied staff member was able to submit a request for review to the President—who in turn referred the matter to the Grievance Committee for its assessment. The multiplication of layers and procedural requirements had a deterrent effect on staff members. For example, the review of the matter by the Vice President responsible for Human Resources following the review and decision by the Managing Director, Human Resources was generally perceived as a mere rubberstamping of that decision. With the adoption of the Directive,

30 Thévenot-Werner 2014, 25.

31 IMFAT, *Ms. “J” v IMF*, para 89.

32 ILOAT, *A. T. v ILO* 2004, para 6; see also Thévenot-Werner 2014, 30.

33 For an independent assessment of the new system in place, see UNGA, ‘Report of the Interim Independent Assessment Panel’ 2016.

the Bank abolished this second layer of management review. Procedures are now faster and clearer because, unless the challenged administrative decision was taken by the Managing Director, Human Resources,³⁴ the matter only needs to be reviewed by the Managing Director, Human Resources and not by the Vice President responsible for Human Resources before the staff member can file a request for review to the President.

The EBRD also simplified the procedures for determining whether requests for review submitted to the President are admissible (for instance, whether or not the required steps prior to such submission to the President have been duly undertaken and completed, whether the applicable time limits have been met and whether the request expressly articulates the outcome and remedies sought by the staff member). Prior to the reform, every request for review had to be referred to the Grievance Committee, even if it was manifestly inadmissible. Then, the Bank had to challenge the competence of the Grievance Committee to hear the matter and enter into a new round of submissions with the staff member on such jurisdiction issues. Therefore, even manifestly inadmissible request for review (such as time barred requests) often gave rise to a time consuming and costly exchange of submissions between the Bank and the staff member.

Under the new system, upon receipt of a request for review, the President has fifteen working days to assess the admissibility of the request for review. Should the President decide that the matter is inadmissible, the staff member will be informed and may file an appeal directly with the Administrative Tribunal. By adopting this mechanism the Bank respects the rights of defence of the staff member without delaying the process and creating unnecessary costs and submissions for the Bank and the staff member.

Last, the Bank worked on the relationship between internal dispute resolution mechanisms and disciplinary proceedings as these two set of rules previously worked independently from each other. The Bank has introduced a provision guaranteeing that any process under the internal appeals procedure will be stayed pending receipt of the outcome of any disciplinary procedure launched in parallel on a related matter by or against the staff member using the internal dispute resolution process.

34 As an example, the decision to transfer a staff member is adopted by the Managing Director, Human Resources so that it will first have to be challenged before the Vice President responsible for Human Resources.

3.4 *A Step Further Towards a More Frequent Recourse to Mediation*

In multicultural environments such as international organizations where staff members are often informed by different moral sensibilities, engaging into costly and lengthy formal dispute resolution proceedings may not always be the most effective approach to address conflicts between the organization and its staff.

In this respect, the Bank has been following the global trend in international organizations towards the promotion of mediation mechanisms. Indeed, as notably underlined by Gheeta Ravindra, former mediator of the International Monetary Fund, “poorly managed conflict results in enormous costs in the form of wasted management time, higher turnover, lower productivity and formal grievances”,³⁵ and “simply having the option of mediation demonstrates to staff that their concerns are taken seriously and that they are in line with the values of the corporate culture”.³⁶ Also, in the same vein, the ‘Report of the Interim Independent Assessment Panel on the System of administration of Justice at the United Nations’ makes clear that,

[M]anagers should be encouraged to respond positively to mediation attempts. The prime consideration for both parties should be that an agreed solution is better than protracted legalistic debates. Conflict resolution is about the continuation of working relationships, not about winning.³⁷

Until 2017, the EBRD was offering mediation only prior to the filing of formal grievances. However, it was not possible to seek recourse to mediation once a request for review was submitted to the President. Since the reform, mediation is possible at every stage of the process, and can even be suggested as a course of action by the Administrative Review Committee itself. While the new system enhances the possibilities to use mediation, mediation must remain an option dependent on the will of the parties and the Bank has not adopted the approach of other organizations consisting in imposing mediation or conciliation as a preliminary step to any judicial challenge.³⁸

35 Ravindra 2014, 35.

36 Ibid, 39.

37 UNGA, ‘Report of the Interim Independent Assessment Panel’ 2016, 2.

38 See for instance, EIB Staff Regulations, art 41 (requiring that, prior to initiating any proceedings before the Court of Justice of the European Union, an amicable settlement shall be sought and a request for conciliation made).

3.5 *Towards More Transparency and Legal Certainty*

Prior to the 2017 reform, an abstract of every Report and Recommendation issued by the Grievance Committee was published on the intranet of the Bank. However, staff members did not have access to the (redacted) subsequent decision taken by the President after consideration of this Report, so that no great clarity was given to staff members about the Bank's position in the matters in dispute. Following the reform, a summary abstract of the Report and Recommendation is still published, but it is accompanied by the subsequent decision of the President (in a redacted form). Staff members can now stay abreast of the Bank's legal position on the issues which have given rise to grievance proceedings.

Along with the main points of the 2017 reform discussed above, the EBRD has made a series of miscellaneous additional changes to its first-tier proceedings. For example, staff members now have an express duty to cooperate with the Administrative Review Committee; all time limits are now expressed in working days while the previous rules offered a potentially misleading combination of days and months; last but not least, the previous system permitted the President to review regulatory decisions taken by the Board of Directors or the Board of Governors of the Bank (composed of Finance Ministers of member countries). This anomaly has been corrected in the new proceedings, and regulatory decisions taken by the President, the Board of Directors or the Board of Governors can only be challenged in the EBRD Administrative Tribunal.³⁹

4 Conclusion

As an international organization promoting the rule of law in the countries where it operates, the EBRD has adjusted its own internal dispute resolution system over time to satisfy prevailing international standards, taking into account emerging legal trends as well as the case law of international administrative tribunals.

Following the latest reform, the Bank benefits from a system delivering both legal certainty and procedural flexibility, at a reasonable cost for the Bank and staff member. While there is always room for improvement, the current system provides staff members with the necessary due process and fairness protection, without transforming the committee conducting the first-tier review for the consideration of the President into a quasi-judicial body.

39 This is also the case for individual decisions taken by the committees established under the retirement plans of the Bank.

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PART 3

*The Role and Reform of International Administrative
Tribunals*



The Commonwealth Secretariat Arbitral Tribunal: The Evolution and Explanation of Changes to the Tribunal's Statute

*Alice Lacourt**

Abstract

This chapter seeks to interrogate the rationale for the establishment of the Commonwealth Secretariat Arbitral Tribunal (CSAT) and examine how the Statute creating the Tribunal has evolved. Several applicants in the early cases before CSAT brought parallel litigation before the domestic courts of the United Kingdom. Arguments based on local law acted as a counterpoint to developments in the case law and Statute of CSAT. The resulting CSAT decisions delineated key principles on human rights and access to justice, which are still relevant today. CSAT—and the nature of the applications before it—continues to evolve, and this chapter concludes by identifying some lessons learned so far and what to expect going forward.

1 Introduction

This chapter is divided into six sections. In this first section, the domestic law framework of the Commonwealth Secretariat is considered, together with identifying the present-day principle features of the Commonwealth Secretariat Arbitral Tribunal (CSAT), as well as the wider context. Sections 2 and 3 provide a brief history of the Commonwealth Secretariat and overview of its organizational structure and governance, respectively. Section 4 examines how employment-related disputes were initially resolved at the Commonwealth Secretariat and the factors that led up to and informed the establishment of CSAT. Section 5 then analyses how the early cases before the Tribunal in fact shaped CSAT, together with the evolving roles of the Board of Governors

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and the Commonwealth Secretariat. In conclusion, Section 6 considers the present-day and future roles of CSAT as well as suggesting some lessons-learned for the future.

1.1 *The Domestic Law Framework*

In 1966, the Parliament of the United Kingdom (UK) enacted the Commonwealth Secretariat Act to give effect to the 1965 Agreed Memorandum on the Commonwealth Secretariat.¹ The Act conferred legal personality and granted the organization as well as its staff certain privileges and immunities. In 1995, the Governments of the Commonwealth decided to create a statute to establish an arbitral tribunal to hear contractual disputes, including disputes pertaining to employment relations within the Commonwealth Secretariat. As the Secretariat evolved, it had identified a real need to provide a dispute resolution forum at the international level without recourse to dispute resolution in domestic law and the need to waive immunity from local jurisdiction and enforcement. The creation of this tribunal, known as the Commonwealth Secretariat Arbitral Tribunal, followed the reluctance of local courts to adjudicate over cases brought by employees of the Commonwealth Secretariat in view of its immunity from jurisdiction.²

1.2 *The Principal Features of CSAT Today*

CSAT was established under Article I of the Statute.³ Article II explains the character of CSAT as an international administrative tribunal, with jurisdiction over applications by staff, the Secretariat or others contracting with it.⁴ There are eight members, including a President who presides over the first instance panel of three judges as described in Article IV.⁵ The Tribunal is supported by a suitably qualified lawyer as Executive Secretary, answerable only to the Tribunal, who is appointed by the Commonwealth Secretary-General in accordance with Article V.⁶ It always sits in London, although it can, under Article VII.2, convene elsewhere for reasons of efficiency and subject to budgetary considerations.⁷

1 Agreed Memorandum on the Commonwealth Secretariat. On use of informal instruments, rather than treaties, in the Commonwealth see Aust 1986, 788.

2 Court of Appeal of England and Wales, *Gadhok v Commonwealth Secretariat* 1977.

3 Statute of the CSAT (Statute), art I.

4 *Ibid*, art II.

5 *Ibid*, art IV.

6 *Ibid*, art V.

7 *Ibid*, art VII.2.

The Tribunal decides by majority, as set out in Article IX, and its decisions are posted on the Tribunal's public website.⁸ Article X provides that the Tribunal may order the rescission of the decision, specific performance or, in addition, compensation for any loss or damage.⁹ The President may convene a five-strong Review Board under Article XI, if a decision is challenged for error of fact or law or unreasonableness. The Review Board may substitute its own determination, order a re-hearing, or refuse to grant any remedy. Decisions are final and binding upon the parties.¹⁰ Concerning applicable law, Article XII provides that in employment cases, international administrative law applies to the exclusion of domestic law, whereas in contract cases, CSAT applies the law specified in or most closely connected with the contract.¹¹

1.3 *The Wider Context*

CSAT is one of many international administrative tribunals (IATs) created towards the end of the 20th century for the purpose of adjudicating contractual disputes, principally staff employment claims, against international organizations. Since 1995, it has heard more than 40 cases.¹² Its Statute has evolved in light of experience, and in accordance with international standards of transparency and due process, as well as parallel litigation before the domestic courts of England and Wales in the early years of operation. To date, the domestic courts have deferred to CSAT jurisdiction, upholding the immunity of the Commonwealth Secretariat from the jurisdiction of the domestic courts of the UK and steering clear of disturbing CSAT arbitral awards on grounds of irregularity. Since 2005, the Tribunal and its members have enjoyed immunity from domestic jurisdiction and its decisions are no longer subject to a statutory appeal function under UK arbitration law. The immunity of CSAT judges has never been tested.¹³

All IATs may be said to be shaped by three factors: (i) what they are able to do—the powers and expectations vested in them by the member States that create them; (ii) what they do in practice—determining questions of contractual relationships frequently relating to employment with the relevant international organization; and (iii) the context in which they operate—applicants from time to time resort to the domestic or regional jurisdiction of the host

8 See *ibid*, art XIII.2. The current Statute, Rules, judgments and list of members are available online at <<https://thecommonwealth.org/tribunal>> accessed 3 April 2020.

9 In employment cases, compensation is normally limited to three times net annual remuneration. See *ibid*, art X.1.

10 *Ibid*, art XI.

11 *Ibid*, art XII.

12 As of March 2020.

13 Commonwealth Secretariat Act 1966, s 1(2) and sch, paras 1 and 6.

country, to address a perceived vacuum in the contractual dispute settlement process available at the international level.

A review of the formation of CSAT, and how and why its Statute has evolved since it was established, provides a useful insight for new international organizations. It may inform the consideration of whether to establish a separate IAT for the organization, or whether to recognize the jurisdiction of an existing IAT that allows for this. This assumes there is an obligation to provide for a dispute settlement forum, as appears to be the case in light of case law and the consistent practice of international organizations.¹⁴

2 A Brief History of the Commonwealth Secretariat

The origins of the Commonwealth may be traced back to the nineteenth century. The association as known today was fused during decolonisation of former dominions from the UK.¹⁵ In 1949, the London Declaration recognized India's independence as a Republic while continuing its full membership in the Commonwealth of Nations.¹⁶ The eight founding members—Australia, Britain, Canada, India, New Zealand, Pakistan, South Africa and Ceylon—dropped the 'British' prefix and the requirement for allegiance to the British Crown to become 'The Commonwealth of Nations'. Now it is known simply as 'The Commonwealth'. It is not a treaty-based organization but a voluntary association of independent sovereign states. Members can leave without serving notice; and re-join, subject to verification that they comply with the fundamental values set out in the Commonwealth Charter.¹⁷

At first, the organization was administered by the UK Government's Commonwealth Relations Office. As the membership grew, Commonwealth Prime Ministers decided in 1964 to establish an independent Commonwealth Secretariat. The resultant intergovernmental instrument was concluded by Heads of Government, meeting in London in 1965.¹⁸ Last updated in 2005, the Revised Agreed Memorandum on the Commonwealth Secretariat (Revised Agreed

14 See for example ICJ, *Effect of Awards* 1954, 57; Klabbers 2015, 246–252.

15 See the concise history in Roberts 2017; for a more detailed, historical review, see Dale 1982.

16 London Declaration, 26 April 1949.

17 Zimbabwe left in 2003. Pakistan, The Gambia and Maldives have left and re-joined. See Commonwealth Secretariat, 'Our History'. The Charter was adopted at the Commonwealth Heads of Government Meeting (CHOGM) on 14 December 2012 and signed by HM The Queen on Commonwealth Day 2013. See Charter of the Commonwealth (Commonwealth Charter).

18 See Commonwealth Secretariat, 'Our History'.

Memorandum)¹⁹ records that the UK will arrange for the Secretariat to be accommodated in Marlborough House in London.²⁰ The memorandum sets out the roles and functions of the Secretariat and of the Secretary-General as its Chief Executive. It assigns to the Secretariat, its staff, and members of CSAT privileges and immunities comparable to those enjoyed by High Commissions. The UK and other Commonwealth members have legislated accordingly, giving the Secretariat legal capacity and privileges and immunities under domestic jurisdictions.

Today, the Commonwealth is a voluntary association of 54 independent, sovereign states, with shared principles and values reflected in the Commonwealth Charter, and, in most cases, a shared common law legal system.²¹ The language of the Commonwealth meetings is English, and many, but not all, member countries have an historic association with the UK.²² The combined population of the Commonwealth is 2.4 billion, with more than 60% under 30 years old. The Commonwealth is one of the largest international organizations after the United Nations, with enormous convening power across the five regions of Africa, Asia, Caribbean and Americas, Pacific, and Europe. It also has two ‘sister’ organizations, the Commonwealth of Learning and the Commonwealth Foundation, and over 80 Commonwealth Accredited Organizations.²³

3 Organization and Governance

The Queen is Head of the Commonwealth.²⁴ The principal organs of the Commonwealth are the Commonwealth Heads of Government Meeting (CHOGM) and the Commonwealth Secretariat.

19 Revised Agreed Memorandum, 12 May 2005.

20 Marlborough House is a Royal Palace placed at the disposal of the Commonwealth by HM The Queen since 1964.

21 The Queen is Head of State in 16 of the 54 ‘member countries’, as they are known. Member countries are listed at <<https://thecommonwealth.org/member-countries>> accessed 3 April 2020.

22 The Edinburgh Communiqué, 27 October 1997, para 20 (“Heads of Government [...] agreed that in order to become a member of the Commonwealth, an applicant country should, as a rule, have had a constitutional association with an existing Commonwealth member; that it should comply with Commonwealth values, principles and priorities as set out in the Harare Declaration; and that it should accept Commonwealth norms and conventions”).

23 More information is available at <<https://thecommonwealth.org/>> accessed 3 April 2020.

24 At the CHOGM 2018 in London, Heads decided that the Prince of Wales should succeed HM The Queen upon her death or abdication. See CHOGM 2018 Leaders’ Statement, para 3.

CHOGMs are held biennially in a Commonwealth city. Decisions are recorded in a communique at the end of the meeting, and the leader of the country hosting CHOGM is Chair-in-office until the next meeting. The Secretary-General is appointed by the Commonwealth Heads of Government acting collectively. They are to be a person of high standing, and a significant part of their duties entails visiting member countries of the Commonwealth.²⁵

The Secretary-General is the Chief Executive of the Commonwealth Secretariat, which has approximately 220 members of staff, across 32 Commonwealth nationalities. The Secretary-General and Secretariat staff derive their functions from the authority of the Heads of Government. They act in the service of the Commonwealth countries collectively.²⁶

The Board of Governors (BoG) meets annually or more frequently as required. It approves and monitors the four-year strategic plan and the annual delivery plan and budget.²⁷ The BoG is made up of representatives of all Commonwealth governments and is comprised of senior officials of member countries—in practice, at High Commissioner level. An Executive Committee (ExCo) of the BoG meets quarterly,²⁸ and an independent Audit Committee, appointed by the ExCo and reporting to the BoG, meets quarterly with the Secretariat and the internal and external auditors.

4 Resolution of Staff Disputes in the Early Years, and the Decision to Establish CSAT

From the outset, Heads of Government committed to legislate to provide the Secretariat legal personality and accord certain privileges and immunities. The exceptions were: when privileges and immunities were expressly waived; in respect of motor vehicle accidents; and when arbitration proceedings were

25 Revised Agreed Memorandum, 12 May 2005, para 28. See also Doxey 1989, ch 3. Commonwealth Secretaries-General to date, with country of nomination, are: Arnold Smith (Canada, 1965–1975), Sir Shridath Ramphal (Guyana, 1975–1990), Chief Emeka Anyaoku (Nigeria, 1990–1999), Don McKinnon (New Zealand, 2000–2008), Kamalesh Sharma (India 2008–2016) and the Rt Hon. Patricia Scotland QC (Guyana, 2016 to date).

26 Ibid, para 5.

27 The strategic plans, reports and financial statements are available at <<https://thecommonwealth.org/about-us/accounts-internal-reports>> accessed 3 April 2020.

28 The role and functions of the BoG and ExCo are set out in the Revised Agreed Memorandum, 12 May 2005, Annex B.

taken in respect of written contracts.²⁹ The Commonwealth Secretariat Act 1966 (1966 Act) provided for disputes to be resolved by arbitration, which could be enforced under the UK's Arbitration Acts.³⁰ There was no provision for arbitration under the laws of other Commonwealth countries nor did contracts specify the governing law. In practice, employment and any other disputes were resolved informally. The arbitration process was never formally invoked, although it was already clear that the exception to immunity did not extend to litigation before employment tribunals.³¹

A restructuring of the Secretariat in 1993 brought matters to a head. One staff member, unhappy about redundancy, threatened to take their case to a UK employment tribunal. The then Secretary-General, Chief Anyaoku, after taking advice and consulting the Commonwealth Secretariat Staff Association and member Governments, proposed that Heads of Government amend the Staff Regulations regarding termination of appointment and oblige parties to submit disputes, including employment disputes, to a new CSAT to the exclusion of other fora. According to the Statute of the new tribunal, international administrative law would apply to employment cases. Decisions would be final and binding but could be revised if new facts emerged.³²

CSAT was modelled on the United Nations and the World Bank Administrative Tribunals. Nonetheless, its jurisdiction extended beyond employment contracts governed by international administrative law, in that it also covered international enforcement of commercial contracts, applying the domestic law governing the contract. Building on the framework set in the Agreed Memorandum, CSAT offered a comprehensive solution to potential contractual disputes involving the Secretariat. In this way, it was ahead of the curve compared to tribunals whose jurisdiction is limited to international administrative law. The case noted above was settled in the end, without resort either to domestic arbitration or to CSAT, but from 1998 there were a series of cases testing the relationship between CSAT and the UK domestic courts.

29 Agreed Memorandum on the Commonwealth Secretariat, paras 39–40 and Annex A.

30 Commonwealth Secretariat Act 1966, s 1(3). The 1966 Act referred to the Arbitration Act 1950 and Arbitration Act (Northern Ireland) 1937, was amended by the Arbitration Act 1996, then omitted by the International Organisations Act 2005.

31 See Court of Appeal of England and Wales, *Gadhok v Commonwealth Secretariat* 1977, an unfair dismissal case where the employee's application was rejected by the Employment Tribunal, EAT and Court of Appeal.

32 Commonwealth Circular Letter (CL) No 23/94, 10 June 1994.

5 How the Early Cases Shaped the Structure of CSAT and the Respective Roles of the Board of Governors and the Commonwealth Secretariat

This section will now track the history of this reformed CSAT under the following seven headings: (i) The 1995 Statute; (ii) The 1998 Rules and the First Hearing; (iii) Amendment to the Statute in 1999—Planning for Contingencies; (iv) Amendment of the Statute in 2004—Fairness, Transparency and Human Rights; (v) Amendment to the Statute in 2005—Immunity from UK Domestic Jurisdiction; (vi) The Sumukan Litigation Clarifies the Position on Immunity; and, lastly, (vii) Further Changes to the Statute in 2007 and 2015—Diversity, Review, Conflicts and Documents Production.

5.1 *The 1995 Statute*

From the outset, as noted above, the Tribunal was given jurisdiction over all contractual disputes involving the Secretariat. Cases could be brought by contractors, the Secretariat or its staff. The Tribunal was initially designed as an arbitral mechanism, entitling parties with contracts with the Secretariat to have disputes settled by arbitration without recourse to dispute settlement under the domestic law of the UK. The effect was to apply the growing body of international administrative law to the activities of the Secretariat rather than the domestic law of any one member State. The Tribunal could only exercise jurisdiction once internal remedies had been exhausted and only if an application had been brought within three months of the dispute arising. An exception could be made where it was not reasonably practicable for the application to be brought within this timeframe.³³

At its inception on 1 July 1995, the Tribunal was composed of three members.³⁴ All were Commonwealth judges, no two being nationals of the same country; of high moral character; and qualified for high judicial office or jurisconsults of recognized competence with at least 10 years' experience. The President, appointed by the Secretary-General, had a three-year term renewable once, while the two remaining members were appointed ad hoc, one by the aggrieved staff member and one jointly by the Secretary-General and the Commonwealth Secretariat Staff Association (CSSA). The Secretariat was responsible for the administrative arrangements and for meeting the Tribunal expenses.

33 Ibid, annexed Draft Statute of the Arbitral Tribunal of the Commonwealth Secretariat, art II.

34 Commonwealth CL No 19/95, 5 June 1995.

The Statute could be amended by the Secretary-General having consulted the Commonwealth Secretariat Staff Association and Governments.

Subsequently, with the adoption of the Arbitration Act 1996, the UK arbitration landscape changed, and the parties could no longer agree to exclude the right of appeal to the High Court of England and Wales completely.³⁵ CSAT decisions could be subject to the jurisdiction of the UK Courts, which could order payment or mandate that the Secretariat take certain actions, thereby subjecting the Secretariat's disputes indirectly to the jurisdiction of the UK domestic courts. The real possibility of challenge was illustrated by the early cases and parallel proceedings before the domestic courts.

5.2 *The 1998 Rules and the First Hearing*

In 1998, with Justice Ulrich Cross of Trinidad presiding, CSAT promulgated the 'Rules of the Commonwealth Secretariat Arbitral Tribunal' and delivered its first judgment.³⁶ In *Hans* (1998) an international recruit, appointed by the Secretariat and based at the Commonwealth Youth Programme (CYP), Asia Regional Centre in Chandigarh, India, was unable to bring their dispute before the local employment tribunal in view of the Secretariat's immunity from suit. Bound by the principles of international administrative law under Article XII of its Statute, CSAT determined the purpose of probation with reference to jurisprudence of the World Bank and International Labour Organisation Administrative Tribunals and referred to C.F. Amerasinghe's publication, 'The Law of the International Civil Service'.³⁷

The applicant won three months' salary in damages for procedural injustice relating to the early termination of their contract, together with costs of the CSAT hearing; but they were unable to reclaim legal costs relating to the failed proceedings in India. CSAT held that,

[t]he Applicant is at liberty to pursue [their] interest in a court or tribunal which [they think] could redress [their] perceived wrongs. It is not the fault or liability of the Respondents if [the Applicant] chooses a court or tribunal which has no jurisdiction over the Respondents.³⁸

35 Arbitration Act 1996.

36 The current Statute, Rules, judgments and list of members are available online at <<http://thecommonwealth.org/tribunal>> accessed 3 April 2020.

37 CSAT, *Gurmeet Hans v The Commonwealth Secretariat and Ms Seelawathi Ebert, Regional Director CYP* 1998.

38 *Ibid*, 10. In CSAT, *Dr A S Saroha v The Regional Director, CYP (Asia) 2000*, a local staff member recruited directly by the CYP: Asia Centre could not bring a case against the Secretariat

5.3 *Amendment to the Statute in 1999—Planning for Contingencies*

In light of lessons learned from *Hans*, and having consulted the Tribunal President and the CSSA, Secretary-General Anyaoku amended the Tribunal Statute on 24 June 1999.³⁹ The amendments provided for the contingency of the Tribunal President being prevented from sitting, and increased the membership of the panel to the President plus four judges. The Tribunal would normally be composed of the President alone, and could sit as a panel of three in complex matters. Where a substantial number of applications had to be dealt with, separate chambers could be constituted. In addition, the revised Statute provided for an alternate Secretary and for decisions to be taken on the basis of the documents unless oral proceedings were warranted. It also introduced a time limit of 60 days for an application to review the judgment.

Mohsin (2001) tested the system.⁴⁰ A former staff member won their case for procedural injustice after a performance review board did not provide them with an opportunity to comment on oral evidence heard in their absence. The oral hearing had been stalled due to the ill health of both the Tribunal President Ulrich, combined with the limited availability of the second Tribunal member, C.F. Amerasinghe, who eventually withdrew. The President designated the third panel member, Anesta Weeks QC, to conclude the case sitting alone, and this was enshrined in an order with the consent of the parties.

The applicant also brought a claim before the UK Courts, under the 1996 Arbitration Act, alleging that the process did not comply with the European Convention on Human Rights, in that there had been extensive delays in determining the case, and the Tribunal was not composed in a way that was sufficiently independent of the Commonwealth Secretariat. The Secretariat pleaded immunity and did not appear in the proceedings. Judge Steel held that the Secretariat had no immunity in respect of arbitration proceedings, applying the decision of the Court of Appeal in *Gadhok v Commonwealth Secretariat*.⁴¹ Written evidence disclosed in these domestic proceedings aired the extent to which

for want of jurisdiction, because CYP was a separate legal entity from the Secretariat; CYP also had immunity from Indian jurisdiction.

39 Following Commonwealth CL No 14/99, 29 April 1999; CL No 23/99, 29 June 1999.

40 CSAT, *Selina Mohsin v The Commonwealth Secretariat* 2001 (CSAT/3 No 1; CSAT/3 No 2). In CSAT 3 No 1, CSAT laid the ground rules for CSAT jurisdiction, being the 'internal law of the organisation' and international administrative law principles to the exclusion of the national laws of member countries, while '[r]eference will be made to judgments of other international administrative Tribunals' as recognized in WBAT, *Louis De Merode et al. v The World Bank* 1981, para 28.

41 See High Court of England and Wales, *Selina Mohsin v The Commonwealth Secretariat* 2002, paras 11–12.

the CSAT judges disagreed over the appropriate way to proceed. Nevertheless, Judge Steel ruled that the claimant had accepted CSAT jurisdiction in their employment contract with the Secretariat; had not challenged before CSAT the decision to proceed with a single arbitrator; and there had been no substantial injustice. The claimant could not show that they “did not know, and could not with reasonable diligence have discovered, the grounds for [their] objection”.⁴²

The interface was tested again in *Faruqi* (2001–2002). The application in CSAT of international administrative law, which governs employment relations of the employees of international organizations, was compared with parallel arguments before the UK domestic courts about privileges and immunities, arbitration and human rights. Unfortunately, due to the illness and eventual retirement of the CSAT President, Ulrich Cross, and a change to the applicant’s legal team, an application to CSAT for urgent interlocutory relief could not be addressed for some seven months. The applicant requested interim relief to maintain the status quo in respect of their employment at the Secretariat, together with an order against the Secretary-General for costs to date and assistance with future legal costs and a requirement to consult the applicant over the composition of the Tribunal.

The new CSAT President, Duncan Chappell, sitting alone, rejected this request. The Tribunal recalled that CSAT was an international body and Article IX of the Statute served as an exclusion agreement from the laws of any country. The European Court of Human Rights (ECtHR) had already decided in *Waite and Kennedy v Germany* that the immunity of international organizations from domestic jurisdiction did not impair the right of access to the courts nor was it disproportionate to the objective of ensuring the proper function of international organizations.⁴³ The principles relied on were the same: in international administrative law, as in domestic and regional human rights law, there was an obligation to act impartially and afford a fair hearing. Other regional and international human rights tribunals addressed this.⁴⁴ CSAT concluded:

It would be inappropriate for the Tribunal to adopt in toto any one of these international treaties. Rather, the Tribunal must distil from them the principles that do reflect the essence of international administrative

42 Ibid, para 28.

43 CSAT, *Runman Faruqi v The Commonwealth Secretariat* 2002 (CSAT/5 No 1), paras 32–38, citing ECtHR, *Waite and Kennedy v Germany* 1994; ECtHR, *Beer and Regan v Germany* 1995; Court of Appeal of England and Wales, *Gadhok v Commonwealth Secretariat* 1977. See also ECtHR, *Perez v Germany* 2015; ECtHR, *Klausecker v Germany* 2015.

44 CSAT, *Runman Faruqi v The Commonwealth Secretariat* 2002 (CSAT/5 No 1), para 49.

law in regard to the provision of an independent and impartial forum for the resolution of disputes.⁴⁵

CSAT decided that general principles of fairness were reflected in the CSAT Statute and the Secretariat's rules and regulations. Moreover, adequate consultation, including with the staff association, ensured a transparent and fair selection process by consensus in accordance with the Commonwealth's governing principles. Urgent interim relief for pecuniary damage was not warranted because compensation, if awarded, could redress such damage.

In parallel domestic proceedings, the UK High Court declined to issue an injunction to stop CSAT from proceeding to a full hearing. Judge Brindle QC considered that any statutory power they had to issue an injunction was limited. It was exercisable only in a "very compelling case where justice could not be done without the grant of an order and the philosophy underlying the Act was not infringed by making such an order".⁴⁶ This was not such a case. CSAT was not a 'public authority' bound by the Human Rights Act 1998, and Article IX of the CSAT Statute was an exclusion agreement preventing an appeal to the domestic courts on a point of law. Nonetheless, the Tribunal President had applied similar principles in international administrative law. Should the applicant pursue High Court litigation after the full CSAT hearing, the prospect of wasted costs, was "not the sort of overwhelming point or the sort of unusual or exceptional circumstance which justifies this court in intervening in the arbitral process".⁴⁷ The High Court declined to issue an interim injunction, which would set a precedent and would be tantamount to opening the floodgates on "nearly every case where a complaint could be made against a provisional ruling".⁴⁸

CSAT convened an oral hearing before the full panel of the President, Anesta Weeks and Justice Hassan Jallow. It found that all the parties to the Agreed Memorandum, including the UK, had created an international tribunal whose judgments were final and not subject to further domestic law review. This did not result in a jurisdictional gap compared to the domestic law of member countries. Rather, it meant that CSAT had to apply the 'internal law' of the Secretariat, including the Staff Regulations and Rules, Grievance Procedure and staff rotation policy; and its role was not to act as a merit review body but to

45 Ibid, para 50.

46 High Court of England and Wales, *Runman Faruqi v Commonwealth Secretariat* 2002, 7.

47 Ibid, 10.

48 Ibid.

ensure that discretionary authority was properly exercised.⁴⁹ CSAT upheld the Secretary-General's application of the new staff rotation policy, which had been set by Heads of Government, limiting the length of tenure of senior staff.⁵⁰

An example of collective litigation by staff members of the CSSA took place in 2003, when they argued that the Secretariat's decision not to pay Cost of Living Allowance (COLA) was a breach of their contracts of employment. CSAT held that the Secretariat's decision should be rescinded and reconsidered using appropriate methodology. Decisions of the International Labour Organization Administrative Tribunal and other international administrative tribunals demonstrated that there was neither a right to receive the annual cost of living payments nor a right to the automatic indexing of salaries. Furthermore, the CSAT found that there had been adequate consultation with staff about the budget shortfall behind the decision to withhold the COLA, but the information methodology used to prepare the annual budget was inadequate. The Tribunal ordered the Secretariat to pay each CSSA member a nominal payment of GBP 100 as compensation.⁵¹ The applicants did not bring parallel litigation before the UK domestic courts.

5.4 *Amendment of the Statute in 2004—Fairness, Transparency and Human Rights*

By mid-2003, in light of the *Faruqi* litigation, the CSAT President and members again raised concerns about vulnerability to supervisory jurisdiction of the UK Courts under the 1996 Arbitration Act. A concern was emerging in exchanges with the Tribunal, and within the Secretariat, that Tribunal members—very distinguished judges and jurisconsults in their own right—might have their findings challenged in the UK Courts or even be sued over the way they conducted arbitrations. They might decline to be appointed to CSAT as a result.

The Secretariat faced the following three choices as a result of this dilemma: firstly, accept that the (then) 54 members of the Commonwealth were, as might be perceived, beholden to the jurisdiction of one country—namely the UK; second, abolish the Tribunal, relying on UK employment law alone (which

49 CSAT, *Runman Faruqi v The Commonwealth Secretariat* 2002 (CSAT/5 No 2), 8.

50 *Ibid.*, 14.

51 CSAT, *Commonwealth Secretariat Staff Association v The Commonwealth Secretariat* 2003, 12. The ensuing decision to pay an inflation-based COLA by lump sum, rather than a regular increase and bonus, was challenged unsuccessfully in CSAT, *Simmons and Others v The Commonwealth Secretariat* 2005.

could be expensive in terms of litigation costs and may not be the preference of non-UK staff); or third, accept the jurisdiction of another body, such as the International Labour Organisation Administrative Tribunal if it was willing, thereby 'off-shoring' the resolution of staff matters, out of reach of the jurisdiction of the UK Courts.

Instead, the Secretariat sought to work with the UK as host country, provided that CSAT and its members were immune from the domestic jurisdiction of any member State. This would depend on the UK Government amending the 1966 Act when parliamentary time could be found. Limited time in the legislative programme meant that the issue could not be resolved until 2005 (see Section 5.5, below).

In 2004, Secretary-General McKinnon proposed to Member Governments that the CSAT Statute be reviewed in light of lessons learned and in order to align it with other international administrative tribunals. The aim was to reflect fairness, transparency, and international human rights law principles, consistent with the Secretariat's status as an international organization. There was also a need to limit the potentially large contingent liability to member Governments that would arise if the Tribunal's decisions were open to challenge before the domestic courts of member States. The revisions to Article IV provided for the Tribunal to be composed of three members sitting together, empanelled by and including the President, out of a total component of the President and four other judges, each serving a four-year term renewable once. The President and members would henceforth be selected by Commonwealth Governments for appointment by the Secretary-General, on a regionally representative basis and taking into account views of the Secretary-General and CSSA. CSAT could take account of human rights principles and the practice and procedure of other international tribunals and oral hearings, if convened, would be held in public.

Importantly, henceforth the Statute would be amended by Commonwealth Governments, in consultation with the CSAT President, the Secretary-General and the CSSA.⁵² Thus, from 2004 the Secretary-General pulled back from the facilitating role of appointing judges. From then on, this was done upon selection of the Heads of Government, initially at an Extraordinary Meeting of the BoG on 6 October 2004, and thereafter at BoG meetings or occasionally by correspondence.

52 Revision of 18 February 2004 further to Commonwealth CL No 17/2003, 29 October 2003; CL No 2/2004, 18 February 2004.

5.5 *Amendment to the Statute in 2005—Immunity from UK Domestic Jurisdiction*

In 2005, the UK amended the 1966 Act to extend immunity from jurisdiction of the UK Courts over written contracts entered into by the Secretariat; to afford immunities to CSAT judges and officials and expert witnesses; and to institute an internal tax system. The International Organisations Act 2005 was brought into force once the BoG approved revisions to the Statute, included as Annex C to the Revised Agreed Memorandum. Proceedings before the Tribunal no longer constituted an ‘arbitration’ for the purposes of UK domestic law, and the Tribunal judgements were deliverable in an open sitting.⁵³

5.6 *The Sumukan Litigation Clarifies the Position on Immunity*

The final case to consider in this series is *Sumukan*.⁵⁴ This was the only CSAT case based on a commercial contract rather than a staff contract. The applicant company was unsuccessful in a claim for ownership of a website created under a consultancy contract and alleged unfair early termination of the contract. The Secretariat asked the CSAT President to stay on after the expiry of their term to complete these hearings, and the BoG was informed. The consultant then brought a series of proceedings in the UK Courts challenging the outcome.

A director of the company also brought separate proceedings before the employment law courts in London. Their case was dismissed in view of the Secretariat’s immunity from suit and legal process under the 1966 Act.⁵⁵ The director argued in the Employment Appeal Tribunal that they had been subject to gender and race discrimination, and that any immunity should therefore be waived because they would otherwise be denied access to a fair hearing in accordance with the European Convention on Human Rights. But Judge Langstaff doubted that the Commonwealth Secretariat was a ‘public authority’ within the meaning of Section 6 of the UK Human Rights Act 1998, such that immunity had to be waived. The Judge ruled that, “Save in an attenuated sense, an international organization cannot be said to be an arm of any one member

53 Commonwealth BoG, Proposed Amendments to the Statute of the Arbitral Tribunal, 12 May 2005. See also Commonwealth Secretariat Act 1966, s 1(2) and sch, paras 1 and 6.

54 CSAT, *Sumukan Ltd v The Commonwealth Secretariat* 2003 (CSAT/8 No 1); 2005 (CSAT/8 No 2); 2005 (CSAT/8 No 3).

55 Decision of Mr Pearl, chairman sitting alone on 19 September 2005, case number 2201284/2005, upheld on review by Ms Cook (sitting alone), judgment of 16 December 2005. See United Kingdom Employment Appeal Tribunal, *Jananyagam v Commonwealth Secretariat* 2007, judgment of 12 March 2007, para 9.

or contracting State, though it may be regarded as an arm of several States acting jointly”.⁵⁶ There was an alternative remedy available to the claimant, through the rights of their company to apply to CSAT for breach of contract.

The company also sought to challenge the CSAT decision before the UK Courts, by invoking Section 69 of the Arbitration Act 1996. The UK Courts held that the contract contained an enforceable exclusion agreement with regard to the supervisory jurisdiction of the courts.⁵⁷ The Court of Appeal agreed that the limited waiver did not infringe upon Article 6 of the European Convention on Human Rights, because there remained a possibility of resort to the courts if there was an absence of impartiality or some other irregularity.⁵⁸

In further proceedings before the UK Courts, *Sumukan v Commonwealth Secretariat*, the company argued that the Tribunal appointment process was not sufficiently independent of the Secretariat.⁵⁹ Lord Justice Toulson presiding, indicated that institutional independence was critical to immunity from suit to be compliant with Article 6 of the ECHR (in other words, the right to a fair trial).⁶⁰ However, the same test did not apply to a case of a contractual dispute.⁶¹ The court would only intervene if there were a “serious irregularity causing substantial injustice”.⁶² At first instance, the judge was not persuaded that procedural defects and lack of consultation with the BoG regarding the de facto extension of the President’s tenure posed any “serious irregularity causing substantial injustice” for the purpose of Section 69, but the Court of Appeal held that these defects were fatal and that the Secretariat should have taken all appropriate steps to ensure that the Tribunal members had been properly appointed.⁶³ The claimant did not take the case back to CSAT on the merits.

These cases conclusively determined that the Secretariat may invoke immunity before the UK Courts in employment and contract cases. CSAT provides a suitable dispute resolution forum and only in exceptional cases will the UK Courts consider the enforceability of an award. However, the point has not been tested beyond the Court of Appeal. It cannot therefore be ruled out that,

56 Ibid, para 26.

57 High Court of England and Wales, *Sumukan Ltd v The Commonwealth Secretariat* 2006, paras 20–21.

58 Court of Appeal of England and Wales (Civil Division), *Sumukan Ltd v The Commonwealth Secretariat* 2007, para 61.

59 High Court of England and Wales, *Sumukan Ltd v The Commonwealth Secretariat* 2007, para 21.

60 Ibid, para 66

61 Ibid.

62 Ibid.

63 Court of Appeal of England and Wales (Civil Division), *Sumukan Ltd v The Commonwealth Secretariat* 2007, para 48.

despite the latest design of the Tribunal, as it has evolved over time, a significant practical problem could lead to litigation before the UK Courts. An example might be if long-standing vacancies on CSAT lead to a significant delay in dealing with applications, such as to cause a fundamental denial of justice.

5.7 *Further Changes to the Statute in 2007 and 2015—Diversity, Review, Conflicts and Documents Productions*

Following the *Sumukan* litigation, the Statute was further revised in 2007, when the Tribunal was expanded from five to eight members and a new review function was introduced, for manifest error of law or fact. Provisions were introduced to ensure gender as well as regional balance; to deal with the eventuality of a member passing away or being otherwise unable to continue sitting; to provide for cases to be determined on the papers; and for the President and other members to continue to sit in an ongoing case, after the expiry of their term, until an application was determined. The meaning of ‘Staff’ was defined to include those at Commonwealth regional offices, the Commonwealth Youth Programme and the Commonwealth Small States facility in New York. CSAT jurisdiction was expanded to such other international or intergovernmental Commonwealth bodies as may wish to use the Tribunal to settle staff disputes, such as the Commonwealth of Learning or the Commonwealth Foundation—in such a way as various other international administrative tribunals allow other organizations to submit to their jurisdiction, notably the Administrative Tribunal of the International Labour Organization.⁶⁴

The Statute was amended again in 2015, to allow the Tribunal to receive late applications in view of extended delay by the Secretariat in taking necessary measures and to provide for recusal in the case of actual or perceived conflict of interest. Other changes empowered the Tribunal to require the production of documents or the attendance of officials as witnesses. These changes were tabled as points of clarification, to remain consistent with developments in other Tribunals, such as the International Monetary Fund Administrative Tribunal, and in light of experience in cases since 2007.⁶⁵

64 Commonwealth CL No 5/2007, 30 March 2007. To date, no such organizations have addressed a declaration to the Secretary-General recognizing CSAT jurisdiction.

65 Commonwealth BoG, Revision of the Statute of CSAT, 28 May 2015; proposals agreed by the Board on the Annual Meeting of the Board of Governors 2015. The amendment to Article VI.4 for rules on application for anonymity followed the decision in CSAT, *Julius Ndung'u Kaberere v The Commonwealth Secretariat* 2014, paras 15–28.

6 Conclusion: The Role of the Tribunal Today and in the Future

The Tribunal, which normally meets at the Commonwealth Secretariat's headquarters at Marlborough House in London, offers accessible and quick access to justice to adjudicate those employment disputes which are not successfully resolved through the internal grievance system. This is highly valued by the Secretariat, its staff and the BoG—which maintains a close interest in any disputes reaching the Tribunal.

A review of CSAT decisions shows a familiar range of workplace complaints, from interpersonal staff relationships that have deteriorated, to alleged unfairness of pay increments, to non-renewal of contracts, regrading and redundancy.⁶⁶ Regular themes include the need to deal with staff cases promptly and fairly, ensuring that decisions are well-reasoned and well-evidenced and the need for transparency—staff cannot be deprived of their rights without due process and due notice. Reference is made in a number of cases to decisions of other international administrative tribunals. Even where there is no express reference, in practice, a background check of case law will have been made to ensure that principles are developed in step with key cases of other international administrative tribunals.

Over time, CSAT and its Statute have evolved in light of the changing context. Changes to the Statute have responded to developments in the legal framework of the headquarter's country, progressive best practice across other international administrative tribunals, and in light of CSAT's own practice and jurisprudence. The Tribunal itself has matured as an independent and effective body, whose Statute and membership are decided upon by governments. As the Tribunal continues to progress, four lessons may be learned going forward:

- (i) The overwhelming majority of CSAT cases have concerned employment matters. It is essential that the Tribunal has amongst its members a strong foundation in employment law and experience in managing written and oral proceedings, in addition to the statutory requirement of appropriate geographic representation and gender diversity.
- (ii) Vacancies should be filled as soon as notified and not carried for longer than absolutely necessary. Even though the chances of an application being brought appear remote, or it is seen as unlikely that a litigant might challenge a decision by way of review, the Tribunal must be staffed and ready to deal with the possibility. Without sufficient judges, the President

66 Beyond the scope of this chapter. See for example Borda 2013.

- is not in a position to form a Review Board. An inability to hear an appeal could trigger an application to the UK Courts for lack of due process. So might a procedural deficiency in an appointment.
- (iii) Judicial members are paid an honorarium and per diem. There might be no cases for a long period of time—or several at once. Although the Tribunal's work may be highly rewarding and a valuable personal contribution to the Commonwealth, care should be taken to ensure that nominees for appointment to the Tribunal are aware of the variable time commitment involved in what is largely voluntary work.
 - (iv) CSAT was created to provide a forum for settlement of disputes about contracts with the Secretariat, including employment disputes, in view of statutory immunity from the jurisdiction and enforcement of the local courts. Other Commonwealth organizations that enjoy immunity from the domestic jurisdiction of the host country might consider whether to avail themselves of CSAT jurisdiction by making an application under the Statute. Any employment disputes that cannot be resolved informally might otherwise be referred to the local domestic courts, leaving the organization with little alternative to waiving immunity. If no waiver is forthcoming, the organization could face a challenge under domestic law, based on denial of justice.

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The Effectiveness of the North Atlantic Treaty Organization in an Era of Adaptation: The Role of the North Atlantic Treaty Organization Administrative Tribunal

*Steven Hill and Nick Minogue**

Abstract

This chapter discusses the role that the North Atlantic Treaty Organization (NATO) Administrative Tribunal (AT) plays in the work of the political and military alliance charged with defending the security of its 29 members in Europe and North America. It explores how the AT's creation in 2013 has contributed to organizational success, played a valuable role in upholding respect for the rule of law, and driven change within the organization. NATO has a peculiar legal structure that must take into account the interests of a wide range of stakeholders, including military and political elements. The successful work of NATO is dependent upon effective and continual adaptation, both internally, with regard to its regulatory frameworks, and externally, with regard to NATO's primary mission of defense and deterrence. Success in the process of internal adaptation is not predicated only upon the smooth functioning of the AT, but also upon the effectiveness of the entire civilian staff member complaint resolution process. In the future, NATO will continue to invest in its system of dispute resolution and rely upon the AT to help demonstrate its commitment to the rule of law.

1 Introduction

In 2013, the North Atlantic Treaty Organization (NATO) completed a major overhaul of its employment dispute resolution processes leading to the establishment of a new administrative tribunal, the NATO Administrative

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Tribunal (AT). Since then, the AT has registered approximately 25 new cases each year.¹ Its AT's Annual Reports and its judgements (with names redacted) are available to the public through the NATO website.² The establishment of the AT was a major reform that has influenced NATO's culture and how the organization functions.

In the broadest terms, the reform was an important indicator of NATO's commitment to the rule of law, including a respect for the rights of staff members as reflected in international administrative law. The importance of the rule of law has been hardwired into the Alliance from the outset. The Preamble of the 1949 North Atlantic Treaty, which established the Alliance, affirms that NATO was founded for the collective defense of its members, on the basis of the principles of democracy, individual liberty and the rule of law.³ Respect for the rule of law and the role it plays in the security of the Allies is thus inherent in the exercise of NATO's core functions, including the way in which NATO's internal legal order is constituted.

This chapter begins by introducing NATO's legal structure, noting how its unique structure places emphasis on a culture of respect for the rule of law (Section 2). This is followed by two sections which, respectively, present the legal and the historical background to NATO's 2013 reform of its employment dispute resolution processes, providing the impetus behind the need for modernization and shedding light onto how it was done (Sections 3 and 4). The next section continues by explaining how the administrative tribunal was implemented within NATO, noting the importance of a broader commitment to dispute resolution (Section 5). It also explores how the existence of an administrative tribunal may affect NATO's work moving forward. This is followed by a conclusion (Section 6). Ultimately, the creation of, and successful functioning of, a robust rule of law-compliant dispute resolution procedure within NATO plays a crucial and valuable role in NATO's adaptation and its very existence helps drive necessary change.

2 NATO's Legal Structure

This section provides an overview of the legal structure of the NATO system, providing essential context to the successful functioning of the AT. The North Atlantic Treaty established the North Atlantic Council (NAC), the supreme

1 NATO, '2018 Annual Report of the NATO Administrative Tribunal', 5.

2 NATO's website has a section dedicated to the Administrative Tribunal (AT). It provides basic information about the AT as well as its judges, schedule of sessions, and its judgements. See NATO, 'NATO Administrative Tribunal', 14 June 2019.

3 The North Atlantic Treaty, Preamble.

decision-making body of the Alliance on which all Allies are represented.⁴ The NAC takes its decisions by consensus.

Below the NAC are the civilian and military structures of the Alliance. The civilian structure was established by the 1951 Ottawa Agreement, which provides for the legal status of NATO, and the formation of the International Staff, headed by the Secretary General.⁵ The International Staff supports the various civilian committees that carry out the preparatory work for decisions taken by the NAC itself.⁶ The civilian side also includes a number of other civilian bodies and agencies established by the NAC, which share in the legal personality of NATO, but are responsible for their own internal rules and finances. These include, for example, the NATO Communications and Information Agency and the NATO Support and Procurement Agency. Each of these entities in the civilian structure is subject to NATO's internal personnel rules, the Civilian Personnel Regulations (CPRS).⁷

The military command structure of NATO also provides advice to the NAC, but is very much a separate pillar from the civilian staff, and derives its legal status under the so-called Paris Protocol to the NATO Status of Forces Agreement.⁸ The Paris Protocol establishes the legal personality of the NATO Supreme Commands—the Supreme Headquarters Allied Powers Europe and the Allied Command Transformation—and provides for the establishment of their subordinate commands. On the military side, responsibility for the employment of the military staff remains with the Ally who contributes them. Therefore, this chapter focuses on the civilian side, who remain under the

4 Ibid., art 9.

5 Ottawa Agreement.

6 OLA operates as an independent office within the International Staff. OLA's primary role is to provide legal advice to the Secretary General of NATO, the International Staff and, as appropriate, the NAC and other NATO bodies, on a very broad range of matters. In addition to advising on matters of public international law (such as international humanitarian law, treaty law and practice, privileges and immunities, and so on), it also advises on the interpretation of the NATO legal texts, and the International Staff's internal rules and regulations. The two Military Commands and the various other NATO civilian agencies each have their own office of legal advisers. OLA works closely with these on questions engaging the responsibilities of the NAC and the Secretary General. In terms of the role of OLA in the dispute resolution process, the office cooperates with the relevant services at the decision stage to prepare legally sound staffing decisions, and also provides advice during the internal review process. And in case of an appeal, OLA defends the appeal on behalf of the Secretary General, both in writing and at formal hearings. But in addition, when an appeal concerns another NATO Body, OLA has the possibility to intervene in the case on its own initiative or to be invited to do so by the administrative tribunal, especially when the issue at stake could have consequence of a NATO-wide magnitude.

7 NATO Civilian Personnel Regulations (NCPR).

8 Paris Protocol.

purview of the 1951 Ottawa Agreement, and how employment is regulated and employment-related disputes are resolved.

3 Legal Framework for the NATO Dispute Resolution System

This section describes the legal framework to NATO's 2013 reform of its employment dispute resolution processes. Current and past NATO dispute resolution systems were created in accordance with the 1951 Ottawa Agreement that provides for NATO's legal status, and for its immunities from jurisdiction and execution before national jurisdictions, including domestic courts.⁹ Against this background, Article 24 of the 1951 Ottawa Agreement, which follows the model of Article 8 of the Convention on the Privileges and Immunities of the United Nations, states that the NAC shall make provision for appropriate modes of settlement of certain types of disputes, which include those between NATO and civilian staff.¹⁰

Prior to the reforms sparked in mid-2013, Article 24 was implemented through the NATO Appeals Board,¹¹ yet over the years this institutional configuration came to be the subject of criticism. Created in 1965, the Appeals Board was the primary method of resolving employment disputes. In the early 2000s, scrutiny was placed on the adequacy of the Appeals Board as a modern dispute resolution mechanism, in light of evolving norms of human rights and standards of access to justice in NATO's member States. In particular, a number of cases were brought before national courts challenging the jurisdictional immunities of NATO on the basis of the alleged incompatibility of the NATO internal dispute resolution mechanism with Article 6 of the European Convention of Human Rights (ECHR), which provides for a right of due process.¹² Although NATO would disagree in principle that its dispute resolution procedures should be subject to the European Court of Human Rights' (ECtHR) substantive review, the ECtHR repeatedly found in such cases that the NATO

9 Ottawa Agreement.

10 *Ibid.*, art 24.

11 Chapter XIV of the 1964 NATO Civilian Personnel Regulations provided for the first iteration of the NATO Appeals Board. Such Appeals Board consisted of four individuals, including: a Chairman; a representative of the Administration; a representative of the Staff Committee, a committee formed to protect the professional interests of members of the staff; and a member of the staff at the same grade as the appellant. The Appeals Board had 15 days to give an opinion once a complaint was submitted by the appellant or head of NATO body. Decisions made by the Appeals Board were final.

12 For example, ECtHR, *Chapman v Belgium* 2013.

Appeals Board was of a sufficient standard under its Article 6 jurisprudence. For example, in the case of *Gasparini v Italy and Belgium*, from 2009, the ECtHR found that NATO's internal dispute resolution mechanism could not be found 'manifestly deficient' specifically because a lack of publicity had not undermined procedural fairness and because the complainant had a mechanism to argue against partiality.¹³ Likewise, in the case of *Chapman v Belgium*, from 2013, the ECtHR found that the NATO Appeals Board was an effective internal procedure that afforded the appropriate protection to the complainant.¹⁴ The ECtHR reached similar conclusions with respect to the European Space Agency's Tribunal in its 1999 judgments in the cases of *Beer and Regan v Germany*¹⁵ and *Waite and Kennedy v Germany*.¹⁶

Despite the ECtHR judgments that the Appeals Board was indeed adequate, the NAC decided, in 2011, to conduct a thorough review of the dispute resolution system with the aim of its modernization.¹⁷ It tasked an independent panel of experts to assess the existing complaints and appeals system and make recommendations for its modernization in the light of organizational needs and contemporary standards of human rights and legal protections.

The panel of experts made a number of recommendations. These included an increased focus on the resolution of complaints earlier in the process before they escalate into formal disputes, and increased use of mediation and other forms of dispute resolution. To this end, the panel of experts endorsed the introduction of an administrative review process, including at a senior level. The panel of experts then went on to suggest that the NATO Appeals Board become an administrative tribunal with the rules governing its constitution and function to be reflective of its judicial character, its independence and its professionalism. With regard to the new administrative tribunal, the panel of experts recommended that it be given the possibility to award specific performance and other nonmonetary measures beyond mere rescission of decisions.

13 ECtHR, *Gasparini v Italy and Belgium* 2009.

14 ECtHR, *Chapman v Belgium* 2013.

15 ECtHR, *Beer and Regan v Germany* 1999, recognizing that the right of access to a court under Article 6 may be subject to a limitation so long as "limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (para 49).

16 ECtHR, *Waite and Kennedy v Germany* 1999, recognizing that the right of access to a court under Article 6 may be subject to a limitation and that "the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments" (para 63).

17 NATO, 'NATO Administrative Tribunal', 14 June 2019.

These recommendations were amongst those approved in the 2013 amendments to NATO's internal personnel rules, the CPRs. These amendments established, with effect from 1 July 2013, the AT that NATO now utilizes. This was a major milestone in the internal NATO reform process. It cemented the right of staff to have access to a full-fledged tribunal, both independent and impartial, to adjudicate appeals against decisions taken by NATO and indicated the important role that a rule of law-compliant judicial review procedure should play in an international organization like NATO.

4 Establishment of the Administrative Tribunal and New Rules since 2013

Any administrative tribunal must be effectively organized and carefully structured to inspire a commitment to the rule of law within an organization and respond to the needs of its staff. NATO's revised system of dispute resolution was created to that end. This section considers how the revised system improved upon the base of dispute resolution procedures established by the NATO Appeals Board and notes an important emphasis on the revised system's use of informal processes in tandem with the AT.¹⁸

Structurally, the AT is composed of five members of different nationalities, including a President, proposed by the Secretary General and appointed by the NAC for a five-year term.¹⁹ The members of the AT may be reappointed to one further term by the same procedure.²⁰ The members of the AT may not be members or former members of the staff or of the delegations to the NAC, and are required to be completely independent in the exercise of their duties.²¹ The decisions of the AT are taken by a panel of three judges or a full chamber of five.²² Further, it falls to the Secretary General to put in place the administrative arrangements necessary for the functioning of the AT, including designating a Registrar who, in the discharge of their duties in support of the AT, is responsible only to the AT.²³ Finally, the AT retains a critical level of independence

18 NATO, '2013 Annual Report of the NATO Administrative Tribunal'.

19 NCPR, annex IX, arts 6.1.1–2.

20 *Ibid.*, art 6.1.2(c).

21 *Ibid.*, art 6.1.1.

22 *Ibid.*, art 6.1.4.

23 *Ibid.*, art 6.4.1.

in terms of budget management, though expenses are ultimately borne by NATO.²⁴

After exhausting an internal review procedure,²⁵ staff or former staff may appeal a decision taken by the Head of a NATO body, such as the Secretary General, to the AT.²⁶ This can be done when staff members consider a decision to be affecting their conditions of work or service and when such a decision does not comply with the terms and conditions of their employment including their contracts or the internal personnel rules.²⁷

The AT is a valuable resource for staff complaint primarily because it is competent to decide disputes and award remedies.²⁸ Its decisions are final and binding on the parties, and not subject to any type of appeal, although there are limited procedures for clarification and correction.²⁹ Available remedies include the annulment of a decision; the specific performance of an obligation (such as a pay increase, promotion, transfer or reinstatement of employment); and the payment of compensation.³⁰

Importantly, the revised system is much more than the official procedures which characterize the operations of an administrative tribunal. The revised system also puts major emphasis on pre-litigation procedures, providing for a two-step administrative review,³¹ greater use of mediation,³² and an improved complaints procedure.³³ The 2013 reform placed greater responsibilities on NATO managers, and ultimately the Heads of the NATO bodies, to address, and wherever possible, to resolve, issues instead of leaving them for resolution by the AT through a contested legal proceeding.

In summary, the newly revised dispute resolution system is better equipped to help NATO adapt to internal and external circumstances and to inspire organizational change. It does so primarily through the AT, which was set up to respect human rights guaranteed to staff and former staff as evidenced by its impartial and independent structure and by an emphasis on pre-litigation procedures.

24 Ibid., art 6.4.2.

25 NCPR, ch XIV, art 61.

26 Ibid., art 62.1.

27 Ibid., art 61.

28 NCPR, annex IX, art 6.2.

29 Ibid., art 6.8.4(a).

30 Ibid., art 6.9.1.

31 Ibid., art 2.

32 Ibid., art 3.

33 Ibid., art 4.

5 Impact on the Adaptiveness of NATO

The creation of an administrative tribunal, together with an emphasis on informal dispute resolution, more generally contributes to an international organization's ability to adapt. It does so in the sense that it offers an international organization legitimacy by presenting staff a forum to challenge changes and therefore provides an opportunity for an international organization to receive validation of changes made. Additionally, the creation of an administrative tribunal supports adaptation in the sense that it promotes effectiveness by ensuring that an international organization adheres to its own rules, highlighting areas for growth and evolution where needed.

NATO's ability to continually adapt has been central to its longevity and success since the Alliance's beginning. Indeed, NATO's defense and deterrence posture has had to continually shift over a wide variety of geopolitical environments, namely: from the Cold War years; to the 1990s unrest in the Western Balkans; to the transatlantic response to the 9/11 attacks; and, finally, to today's challenging security environment headlined by new methods of warfare.³⁴ Adaptation is, in principle, a core principle in maintaining the defense and deterrence posture NATO was founded upon.

This need to adapt, however, exists for internal procedures just as much as it does for the newsworthy external threats and political circumstances. Indeed, NATO has the need to adjust its administrative and institutional organization according to developments of the law, culture and modernization. To this end, NATO recently completed a functional review of its headquarters function in Brussels, in which NATO reviewed how its headquarters works and where it may be able to change. This was done with the aim of streamlining decision-making and increasing transparency.

The AT plays a crucial role in such internal adaptation, not only where actual challenges are launched and the AT opines on the lawfulness of changes introduced, but also as a spur to NATO to ensure that employment decisions are taken consistently and on the basis of defined rules. One recent trend is toward more detailed guidance and policy definition on how decisions affecting employees are taken, improving both transparency and consistency. The AT has played an important role in encouraging this and in providing a certain degree of muscle to the arguments from in-house legal advisers advocating this sort of good practice.

Policymakers also benefit from the increasing body of jurisprudence generated by the AT, providing important guidance to new employment policies as

34 NATO, 'Strategic Concepts', 12 June 2018.

they are crafted. NATO legal advisors similarly benefit from the wider body of jurisprudence generated from the administrative tribunals of other international organizations. The AT has cited both the Administrative Tribunal of the International Labour Organization and the Tribunal of the Council of Europe in its recent judgments. Notably, the NATO internal civilian personnel regulations specifically refer to the competence of the AT to rule on the internal personnel regulations themselves in the event that a provision seriously violates a general principle of international civil service law.

Three recent cases brought before the AT show the impact of the AT's judgments on policymaking in NATO, even in situations where there was no specific condemnation of NATO processes or where NATO's management came out vindicated. In a case brought by a former medical adviser, who had sought the transformation of their contract into a permanent staff contract, the AT concluded that it did not have competence to hear the case because the medical adviser's contract contained a dispute resolution clause providing for arbitration.³⁵ Nonetheless, the case highlighted a lack of clarity and consistency in the drafting of similar contracts. This soon became the impetus for reform across all consultancy contracts.

In another case, the AT ruled against a practice in NATO of repeatedly providing temporary contracts, rather than offering a more long-term staff contract.³⁶ This then led to a full review of the chapter in the internal personnel rules on temporary staff. In a further case, the AT ruled in favor of a staff member's claim for an allowance, notwithstanding that this was contrary to the applicable rules.³⁷ The AT did so on the basis of a previous example where management had allowed the allowance on an exceptional basis. Thus, the AT found that management's discretion was not to be unfettered in this regard, but must be exercised in a manner consistent with past decisions, or be overturned as discriminating between equivalent cases. The Organization has since taken this approach into account in its decision-making practices.

As exemplified in these cases, the administrative tribunal's ruling may have an influence on NATO regardless of whether or not NATO's defense was successful. In the case of the former medical advisor, NATO responded to the ruling by reviewing how it contracts with consultants even though the AT dismissed the case for lack of competence. Though NATO may have been successful on procedural grounds, NATO still recognized the need to change internal processes simply based on the issues raised by the case. Relatedly, the

35 NATO Administrative Tribunal, *ZS v NATO International Staff* 2015.

36 NATO Administrative Tribunal, *T v NATO International Staff* 2014.

37 NATO Administrative Tribunal, *MS v NATO International Staff* 2017.

successful defense of policy in an administrative tribunal provides an opportunity for NATO to build legitimacy amongst the staff so long as the AT is seen as a robust, independent arbitrator of issues. In these ways, the AT plays an important role in the adaptability of NATO and how adaptation is perceived by its staff.

Despite the benefits an administrative tribunal brings to an organization like NATO, it is not without its risks. Namely, there is always the possibility that focus on a robust administrative tribunal at the expense of other aspects of an organization's employment dispute resolution system leads to the creation of a litigation culture. This concern has yet to be realized at NATO. While the initial volume of appeals were at a worrisome rate, the AT's workload has lately appeared to stabilize or even decline.³⁸ This recent trend can, at least in part, be attributed to concerted measures to promote more informal forums or processes for the resolution of disputes without recourse to litigation. At the same time, in common with all international organizations, NATO needs to remain conscious of the risks of overreliance on formal dispute resolution procedures. Organizations risk a drift toward a culture of grievance and litigiousness unless they ensure that that vast majority of staff issues are addressed in a sensitive, transparent and effective way prior to the triggering of formal processes.

Noting this, NATO is working hard to build up a myriad of ways to resolve disputes outside of the AT. It is anticipated that the focus, in the near future, will remain on improving the processes by which staff concerns are raised and addressed earlier in the dispute resolution process. For example, the most recent set of the changes to the internal personnel regulations introduced the possibility of mediation at all stages of the complaints process.³⁹ Additionally, NATO is also in the process of reviewing and revising its processes for dealing with inappropriate behavior in the workplace (notably including bullying and harassment), and is in the initial stages for considering the establishment of an ethics board. The exact parameters of such a board have yet to be conceived, but the very discussion signals an organizational desire to provide staff with accessible routes for addressing issues. Other ideas in the pipeline include potentially establishing an Ombudsperson for administrative decisions, and also defining what role independent investigations might play within NATO followed by how and when these should be conducted.

For international organizations, ensuring access to justice for their staff is part of the corollary of an organization's privileges and immunities. This is especially so because international organizations typically function outside the

38 NATO, 'NATO Administrative Tribunal Statistics 2013–2018'.

39 NCPR, annex IX, art 3; see also NCPR, ch XIV, art 61.

purview of national judicial systems. An administrative tribunal, therefore, plays an important role in demonstrating an international organization's commitment to the rule of law and the upholding of individual rights. But the success of any international organization comes down to the engagement and well-being of its staff, and this is driven much more by the confidence they feel that their concerns will be listened to and responded to by the international organization without recourse to formal process, than by the robustness of a final appeal.

The present work being done by NATO on harassment supports this concept. A harassment case that ends up before the administrative tribunal—however the matter is determined—is already one with significant personal detriment to all those involved. Having the mechanisms in place to address such issues early, and in a way that has the confidence of staff, is the area that will have the largest impact on ensuring a positive and inclusive work culture within NATO, and should be an area of key focus for the immediate future.

Clearly, not all disputes will be able to be resolved below this level. For instance, increased life expectancy and related increases in medical costs are likely to continue to put pressure on budgets and the acquired rights of staff, and therefore require the AT's adjudication. Regardless, it is valuable for the staff to have multiple and tailored resolution procedures at their disposal, thus contributing to NATO's adaptation through organizational responsiveness and participation.

6 Conclusion

The AT, and the dispute resolution process that sits beneath it, is essential to NATO in supporting—and at times prompting—its effective adaptation, and as an expression of the adherence to the rule of law that underpins the Alliance. As important as it is to get right the establishment and functioning of an employment administrative tribunal, it is only part of the story in establishing a system of dispute resolution that contributes to a happy and motivated staff, and it is this above all that drives any international organization's successful adaptation.

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Building an Administrative Tribunal of an International Financial Institution from Scratch: Lessons from the European Stability Mechanism

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Abstract

This chapter describes the background and decisions that lay behind the creation of the Administration Tribunal of the European Stability Mechanism (ESM) in 2014. It explains the unusual options and policy choices that presented themselves, given that the ESM was established as an international organization with its own treaty. The ESM stands largely outside the European Union's (EU) legal order, under public international law, but operationally must be very closely coordinated with the competent EU institutions to ensure consistency with EU law. The chapter covers the procedural and resourcing issues the ESM resolved with the help of the European Free Trade Association, and its registry, to which the ESM outsourced the forum for oral hearings and registry support. In addition, the chapter touches on the underlying philosophy and aspirations of the ESM human resources and legal functions in the context of ESM's mandate and its desired relationship with a highly professional, expatriate staff. This chapter looks at the needs the ESM sees for other means of dispute resolution for staff and how it is trying to meet these, possible avenues for case management before the relevant tribunal makes its final decision and the current 'multi-forum' situation of the jurisprudence which may adversely influence policy-making.

1 Introduction

The legal basis and operational context of the European Stability Mechanism (ESM) are perhaps generally not well understood, even within Europe. The ESM is often confused with the institutions of the European Union (EU), or the bilateral sovereign loan facility operated by the European Commission, the European Financial Stability Mechanism. The situation is made even more

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confusing by the fact that the ESM's predecessor organization, the European Financial Stability Facility (EFSF), is still in existence.¹ The EFSF is no longer able to lend money and cannot undertake new programmes but it is still a large presence in the international financial markets and continues to be governed as a separate and very different legal entity from the ESM.

This chapter will first explain how the ESM was formed and give some detail on its legal basis. In the context of addressing the formation of ESM's administrative tribunal, this is perhaps particularly important, as the ESM is neither a body nor an agency of the EU, nor a multilateral development bank, nor even a *fund* like the International Monetary Fund (IMF). Yet the ESM is at the heart of the European Union—being arguably the first *de facto* institution to be formed by, and for, only those EU member States who participate in its currency union, the countries of the Euro area or 'Eurozone'.

This chapter will rehearse very briefly the historical context for the ESM's formation (Section 2). Next, the interface that this has created—at least for the time being—between the legal framework of the European Union on the one hand, and public international law as it affects other treaty-based international organizations, on the other, will be addressed (Section 3). This will be followed by the choices the ESM made, and the decisions taken in that context, regarding the establishment of the ESM Administrative Tribunal, its Statute and its Rules of Procedure (Section 4). As a past practitioner of national employment law in the United Kingdom (UK), the author will also offer some observations, from their viewpoint as a relative outsider, on getting to grips with the law of the international civil service as the General Counsel of the ESM and the EFSF (Section 5).

2 The History and the Legal Framework of the ESM

The sub-prime crisis in the United States in 2008 came immediately before the European financial crisis and there was a European conviction that this was a problem firmly 'Made in America'.² However, whatever the truth of that, by 2010 Europe had its own, undeniably home-grown, financial meltdown. Some countries lost market access completely or looked likely to do so, even though they were full EU and Euro area members. The financial markets started speculating that the European currency union could not survive without some of its weaker members leaving and reinstating their own national currencies.³

1 ESM, 'EFSF: An Active Issuer'.

2 Cossu-Beaumont and others 2015, 179.

3 Dabrowski 2019, 131.

So, the EFSF was set up as a ‘temporary’ firewall in June 2010. From a design point of view it was a far cry from an international organization made by treaty. Instead, it was an ‘off the shelf’ special purpose vehicle, formed under Luxembourgish company law, with very limited capital, and a staff of seven. All the same rights and obligations rested upon its directors and employees as in any other private company in that country. There were no privileges and immunities. It then borrowed in huge size on the international capital markets under sovereign guarantees provided by its shareholders, the Euro area member states. This money was the cash that formed the funds made available for similarly large loans to those countries that required this ‘backstop’ facility. The EFSF still exists as a legal entity today and continues to be a big issuer of bonds, but it can no longer make new loans.⁴

Then, in 2011, the ESM was planned as the successor to the EFSF. However, the finance ministers of the Euro area decided that it was impossible to establish the ESM under the EU treaties.⁵ There was simply no time. Quite apart from the preparation, negotiation and drafting, the required treaty revisions would have led to referendums in some countries. The ESM therefore was established under its own treaty, as an independent international organization, much like the IMF. A link was added to the EU legal framework by the addition of a new sub-paragraph (3) to Article 136 of the Treaty on the Functioning of the European Union (TFEU).⁶ This states that the countries of the Euro area are free to set up their own stability mechanism, to be activated if indispensable to safeguard the stability of the euro area as a whole. It is a permanent solution for a problem that arose early in the sovereign debt crisis: the lack of a backstop for Euro area countries no longer able to tap the markets. The EFSF and ESM remain separate legal entities but share staff, facilities, and operations. Together, the EFSF and the ESM have a €1,000 billion balance sheet,⁷ and have disbursed €295 billion to five Euro area member states.⁸

There is a significant EU tradition of initial intergovernmental arrangements being a transition state towards integration within the EU legal framework. Examples are Schengen,⁹ the Prüm Convention,¹⁰ and the Social Policy

4 ESM, ‘EFSF: An Active Issuer’.

5 ESM, *Safeguarding the Euro in Times of Crisis* 2019, 134 and 135.

6 Treaty on the Functioning of the European Union, art 136 (3).

7 ESM, ‘Financial Report’; EFSF, ‘Financial Statements’, 11.

8 ESM, ‘Facts’.

9 Schengen Agreement (incorporated into EU law by the Treaty of Amsterdam in 1999).

10 Prüm Convention (partially incorporated into EU law in 2008).

Agreement.¹¹ These all started life as treaties or agreements outside the EU legal framework and all have now been brought wholly or partially within it. Another such transitional example, signed in the same year as the ESM Treaty in 2012, is the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG).¹² The TSCG was established as an international treaty, binding all EU member states barring Croatia, the Czech Republic and the UK. Accession by Croatia and Czech Republic is pending. The UK took the decision in 2012 not to accede. The TSCG is intended to strengthen the ‘economic pillar’ of the economic and monetary union, according to its own Article 1, and was established after the financial crisis. It aims, among other things, to foster stricter fiscal discipline and enhance economic policy coordination. Although it is a separate treaty, the TSCG establishes strong links and makes many references to EU law and EU entities, as well as to the ESM. By acceding to the TSCG, Euro area member states have taken on obligations that extend beyond their obligations under the present EU Treaties. The TSCG itself foresees, by Article 16, that its substance will become part of the EU legal framework.

We should therefore see the ESM in its proper evolutionary legal context. The ESM’s Managing Director has stated on many occasions that they fully expect the ESM to become part of the EU legal order in due course and with its own enabling amendments to EU primary law.¹³

3 The Choice of the Employment Law System for the ESM

So, how does this affect the ESM regarding its employment law system and means of redress for ESM staff? There are, of course, three well-recognized systems or ‘families’ of international civil service rules. These are the UN Common System; the Civil Service System of the EU; and the Civil Service System of the Coordinated Organizations. Then there is perhaps a fourth category into which, by default, the ESM falls. This family is what Gerhard Ulrich has described as the ‘Mixed (hybrid) civil service system’.¹⁴ None of us, however,

11 Agreement on Social Policy (which went back to the Joint Agreement of the Social Partners of 31 October 1991, was annexed to Social Policy Protocol of the Treaty of Maastricht 1992 and became a revised Social Chapter of the EC Treaty by the Treaty of Amsterdam 1997).

12 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

13 Regling, 30 September 2019.

14 Ullrich 2019, 45.

operates in a vacuum, and, as Ulrich points out, within this quite disparate group of mostly smaller international organizations, there are discernible blocks which have similar staff regulations driven by the functional similarity of their work and mission. As is also apparent from Schermers and Blokker's extensive comparative work set out in their 'International Institutional Law', there is some "unity within diversity" and indeed, as those authors also say in that work, and notwithstanding the title of this chapter, there is actually no such thing for a new international organization as truly 'starting from scratch'.¹⁵ One of the things which Ulrich says in his book is that he hopes that it will contribute to the development of more unity, in this family of civil service rules.¹⁶ This would be particularly beneficial when it comes to the jurisprudence created by our various tribunals and this point will be addressed later.

3.1 *The Incompatibility of the Existing Civil Service Tribunals with the ESM*

The first decision point for the ESM in establishing a dispute resolution mechanism for its staff was whether to ask one of the tribunals for an existing system of civil service law to take jurisdiction. Given the ESM's location, mission, and shareholders, could it ask this of the Civil Service Tribunal of the EU? In formulating the first version of its staff rules, the ESM was necessarily outside the EU Staff Regulations itself, and indeed, it made a virtue of that necessity in a number of ways. One of the most relevant and important in the present context is ESM's ability to hire staff from anywhere in the world rather than being restricted to nationals of its member States.¹⁷ Nevertheless, the ESM considered that it would be natural to ask the Civil Service Tribunal of the EU (as it then was) to take jurisdiction over its staff cases. This was also certainly the view of several of the member States.

The legal basis of the competence of the EU Civil Service Tribunal (which has recently been subsumed into the General Court) is Article 270 of the TFEU which states that "[t]he Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations[...]".¹⁸ The ESM does not fit into this provision. Indeed, the Commission wrote the ESM in 2014 to say that there was simply no precedent for an attribution of competence to the EU Courts for disputes concerning the staff of an international organization

¹⁵ Schermers and Blokker 2018, 47.

¹⁶ Ullrich 2019, 45.

¹⁷ ESM, *Safeguarding the Euro in Times of Crisis* 2019, 183.

¹⁸ Treaty on the Functioning of the European Union, art 270.

like the ESM. The ESM suggested concluding an agreement with the EU itself for access to the court for its staff, but the Commission pointed to the ‘closed’ categories of possible agreements with international organizations or third countries contemplated in Article 216 of the TFEU. This states that the EU may conclude an agreement with international organizations where the EU Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Again, the Commission view was clear that this excluded such an agreement with the ESM. The other possibility was the Administrative Tribunal of the International Labour Organization (the ILOAT), but this was ruled out on the grounds that, at the time at least, it appeared to be already overburdened with pending cases and the ESM’s staff regulations were too different in character from those with which it was familiar.

3.2 *The Establishment of the ESM Administrative Tribunal*

The incompatibility of any existing civil service tribunal left the ESM with the necessity of creating its own. Quite apart from it being the right thing to do, not having an independent administrative tribunal at all would, of course, have exposed the ESM to the possibility of national courts taking jurisdiction, itself a threat to our privileges and immunities, in view of Article 6(1) of the European Convention on Human Rights (ECHR). This states that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. In the key judgment of the European Court of Human Rights (ECtHR) in the 1999 case of *Waite and Kennedy v Germany*, the ECtHR recalled that the rights set out under Article 6(1) of the ECHR are not absolute, but could be subject to limitations. The Court said that it must be satisfied that any such limitations did not restrict or reduce the access left to the individual in such a way, or to such an extent, that the “very essence” of the “right to a court” was impaired.¹⁹

Furthermore, any limitation would not be compatible with Article 6(1) if it did not pursue a legitimate aim and if there were not a “reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.²⁰ The ECtHR’s key finding for present purposes is that, a “material factor” in determining whether granting the European Space Agency immunity

19 ECtHR, *Waite and Kennedy* 1999, para 59.

20 *Ibid.*, para 59.

from the jurisdiction of German courts was permissible under the Convention was “whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention”.²¹ In *Stichting Mothers of Srebrenica and Others v The Netherlands*, the ECtHR stepped back from the automatic contingency between jurisdictional and alternative means by ruling that “no such alternative means existed either under Netherlands national law or under the law of the United Nations. It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court”.²²

The task therefore faced was how to build such a reasonable alternative means to protect the rights of staff while remaining within very tight budget constraints and being proportional to the ESM’s small size. A dedicated ESM staff tribunal implied significant initial and ongoing costs, plus the issue of providing for a forum for hearings and securing administrative support for the handling of the pleadings and court documents. The ESM was designed as an organization which could be scaled up or down easily. Many staff were, and still are, recruited on fixed term contracts and many fully expect to go back to their career elsewhere, usually in their home country, after a spell with the ESM in Luxembourg. But apart from this, the key to scalability in the operational design was that a high proportion of the ESM’s internal functions were outsourced. The same logic was therefore applied to the formation of the ESM’s very own administrative tribunal (the ESMAT).

Once its decision-making bodies had settled on this option of an administrative tribunal purely for ESM staff cases, sceptical questions were asked in the European Parliament. One particular Member of the European Parliament (MEP) went so far as to say that a tribunal for just 100 people (the ESM’s total staff at the time) was “contrary to the principle of good administration and the appropriate use of public finances”.²³ Other MEPs seemed to agree that it was “manifestly disproportionate”.²⁴ The consensus seemed to be that instead of establishing its own tribunal, the ESM could have used the Civil Service Tribunal of the EU as the obvious and efficient solution. Yet, what MEPs missed, at least at first, (aside from permission to adhere to the EU Civil Service Tribunal had already been refused) was that this was to be conceived as an efficient procurement exercise. Experienced judges responded to public tendering and jurists were selected according to rigorous standards overseen by a panel which

21 Ibid, para 68.

22 ECtHR, *Stichting Mothers of Srebrenica and Others v The Netherlands* 2012, para 164.

23 European Parliament, ‘Parliamentary Questions’, 5 December 2013

24 Ibid.

included an external member appointed by the chair of the ESM's Board of Governors.²⁵ The ESMAT was duly formed of very high quality and experienced judges.²⁶ Yet, crucially, there are very few fixed costs associated with this tribunal. Each member of the panel only receives a predetermined, fixed sum, by way of remuneration for each case concluded and on which they sit, together with their reasonable expenses. Accordingly, the costs for the ESMAT are largely proportionate to the number of cases with which it must deal. Finally, Article 17 of the ESMAT Statute provides that should access to the Court of Justice of the EU be granted, the ESMAT will be wound up.²⁷

4 The Infrastructure and Case Management of the ESM Administrative Tribunal

A further innovation concerned the ESMAT's infrastructure, its registrar support and its physical forum for oral hearings. Rather than invest significant time and money in providing a space for hearings and staff and an IT system capable of receiving and dealing with the filing of pleadings, ESM outsourced this. The provider of all these services to the ESM is the Court of Justice of the European Free Trade Association States (the EFTA Court). After a period of intense and highly constructive negotiation and cooperation, principally with the Registrar of the EFTA Court at the time, Gunnar Selvik, the ESM signed a comprehensive Memorandum of Understanding with the EFTA Court in December 2014.²⁸ Importantly, the Registrar role itself is not performed by the EFTA Registrar. That responsibility stays with the ESMAT, but all the services required by the registrar function are fulfilled by the EFTA court using its own resources and staff. Financial compensation, in a fixed amount, was agreed at a very fair and proportionate level and, again, is entirely dependent, after the set-up costs, on the occurrence of actual cases. Perhaps the lesson to be drawn from this, is that necessity is the mother of invention.

In terms of the ESMAT's Statute and Rules of Procedure themselves, there are three notable experiences in the context of the ESM's aim of efficiency and flexibility.²⁹ Firstly, although the Statute of the ESM was necessarily drafted as an internal legal department exercise at the start, the ESM involved the full

25 Ibid.

26 ESM, 'Composition of the Tribunal'.

27 ESMAT Statute, art 17.

28 EFTA Court, 18 December 2014.

29 Statute of ESMAT; Rules of Procedure of ESMAT.

tribunal in the formulation of the Rules of Procedure and in a complete overhaul of the Statute. This was a very valuable exercise in obtaining exposure to practice elsewhere. In addition, the judges had their own firm views. These included ensuring high standards for access to justice by staff, the timelines involved for filing an appeal, for rendering a judgement, and many others. They very much took the part of the potential litigant in this respect. The ESM was also able to test the procedures by filing an appeal and running through all the administrative actions in a full dry run. Second, the ESM principle of flexibility continued to apply so that more could be added later, if necessary, without trying to second-guess every possible scenario at the outset. Article 28 of the ESMAT Rules of Procedure states that the full tribunal can decide to direct proceedings as they see fit, where nothing is otherwise specifically provided for, and gives very broad guidance on what this could include. Third, encouragement was provided to conclude proceedings quickly, yet always mindful of the *Waite and Kennedy v Germany* requirement for proportionality.³⁰ This included a reference in the Statute to the ESM's mandate and mission, its limited resources and the imperative need to provide time critical interventions. An explicit provision was also included in Article 8(6) to the effect that, unless justified by exceptional circumstances, the tribunal must conclude any appeal within a period of six months following the day it has been validly lodged.

5 Conclusion

By way of conclusion, there are some things which are very noticeable to the author as a practitioner from a common-law, national jurisdiction. Some of these are perhaps inevitable, and go with the territory, and include a certain amount of simplification and slimming down of the options and rules of procedure available in a fully-fledged national system of law. Yet, as regards some others, could these be improved upon? Three such observations follow.

The number of important tribunals is not trivial. Each has its own jurisprudence and, of course, this is to a large extent specific to the civil service system or family to which it belongs. Yet, for a risk averse institution, as international organizations tend to be, there is perhaps a multiplication effect of the tribunal decisions that frighten HR departments and decision-makers in our institutions. The reality is that you can often find a tribunal decision which supports 'worst case scenario' thinking as regards a potential staff dispute, whether this is when such a dispute is actually in prospect, or when drafting policies and

30 ECtHR, *Waite and Kennedy v Germany v Germany* 1999, para 59.

rules, at least where the law is perhaps not so clear. It may be that they can be distinguished one from the other by lawyers with the relevant knowledge and experience. Nevertheless, the author's experience is that there remains a tendency arising from this situation that the policy direction becomes more risk averse than is really warranted, or than is in the interests of the institution. Solutions to this are not so obvious, but the more one can support and encourage 'unity within diversity' in this crucial aspect the better.³¹

Second, the management of cases and the narrowing down of the issues in dispute in very busy courts, at least in the author's jurisdiction of practice, have been the subject of intense scrutiny and focus in order to improve efficiency. Perhaps one of the leading examples of this, in terms of practical outcomes, is the Commercial Court in London. As one senior practitioner and judge recently put it, "it is not necessarily that it is difficult to make a decision, it is that it is often difficult to work out what needs to be decided—so that is where there is a lot of emphasis". The Commercial Court insists on at least one 'Case Management Conference', a 'List of Issues' and an agreed 'Case Summary', with a maximum limit on the length of this last document.³² The focus is on disclosure and the key facts in order to produce a crystal clear picture on which the parties can agree and which then provides the judges with the matters requiring their decision—and only those matters.³³ Of course, one must be mindful of the context of an administrative tribunal, which does not always lend itself to this ultimate degree of case management—especially where the complainant is not represented. Nevertheless, some of these techniques are surely useful. The field of international administrative law certainly does yield one recent example of 'preventive' or 'determinative' and pro-active dispute resolution in perhaps a similar vein or spirit. This is the decision of the Asian Development Bank's (ADB) Administrative Tribunal in 2018 in relation to a broad revision of the ADB's compensation and benefits package which included changes to the education allowances for dependent children of certain of its staff.³⁴ The notable feature in this context is not so much the result but the process. The decision was made after the ADB and staff cooperated in order to agree a direct application to the tribunal on behalf of (initially) 106 staff members on a tightly defined series of facts and legal issues. The process seems to have been highly efficient and very much in the category of a collaborative effort to make

31 Schermers and Blokker 2018, 23.

32 Business and Property Court 2019, 14–15.

33 For a flavour of some of these techniques, see *ibid*, 16–17.

34 ADBAT, *Perrin et al. v ADB (No. 3)* 2018, paras 1–3.

sure that the judges only had to decide on the questions, not on what those questions were.

The third observation relates to the tendency for Staff Regulations and Rules in international organizations to increase in length and complexity over time, driven very often by the desire of staff for more clarity in specific situations, on the one hand, and by the need to produce auditable paper trails and black-letter regulatory support for managers in taking decisions. Unfortunately, these completely understandable factors can result in an enormous rule book and a concomitant loss of perspective on the underlying relationship between employer and employee. That relationship should be a joint enterprise, a means to an end, not an antagonistic relationship of legal position taking and constant recourse to rival interpretations of the Staff Regulations and Rules. Having said all that, it is, of course, inevitable that conflicts will arise. Having a toolkit available, which includes, but does not begin and end with, the formal tribunal, is therefore important. The ESM is reviewing its internal procedures for preventing, resolving and adjudicating staff concerns and grievances and the institution has committed considerable resources to make sure that people management training and conflict coaching are both available and actually taken up by staff. This includes guest speaker workshops and diversity training. In addition, the ESM has appointed an external mediation service which can be particularly useful for longer standing grievances that have not otherwise been amenable to an internally brokered solution. Of course, this is only relevant to grievances which do not include breaches of the ESM's Code of Conduct.

Lastly, this gives rise to an aspiration, much easier to articulate than to execute, of course. Nevertheless, aspirations are important. They frame the ESM's policy making and drive its internal culture. The ESM's aspiration is to keep its rule book slim, to keep flexibility high, to minimise the need for litigation and to maintain a healthy relationship of mutual respect and tolerance with the ESM's amazing staff.

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PART 4

*International Administrative Law and the
Effectiveness and Integrity of International
Organizations*



The Manager's Duty to Resolve or Report Misconduct: The Example of the International Monetary Fund's Retaliation Policy

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Abstract

This chapter examines the International Monetary Fund's (IMF) retaliation policy, which was substantially updated in February 2019 following an extensive benchmarking exercise against similar policies at comparable international organizations. The chapter discusses the key elements and changes to the policy, with an emphasis on the manager's special duty in preventing and resolving retaliation. It makes the case for the importance of this manager's duty and other key elements of the IMF's updated retaliation policy, for the operation and integrity of the organization's dispute resolution system.

1 Introduction

It is axiomatic that protecting employees from retaliation is good for them and their employer. Anti-retaliation programmes are especially important in safeguarding the rights of international civil servants, who are not protected under national laws, by ensuring access to and the integrity of their dispute resolution systems. An effective anti-retaliation program requires several complementary elements. To be sure, there must be clear and specific policies against retaliation. Legitimate systems are also needed for addressing reports of retaliation. Not least, leadership at senior levels is critical to drive an organizational

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culture of valuing and addressing employee concerns and preventing retaliation for raising such concerns.

This chapter presents a case study based upon an update in 2019 to the retaliation policy at the International Monetary Fund (IMF).¹ It summarizes the rationale for the update, and the key issues that were addressed following an extensive benchmarking exercise. We then turn to one element of the IMF's policy that was not substantively changed but deserves further attention: the manager's special role in preventing retaliation. Our thesis is that, as a core feature of their managerial role and a function of the duty of loyalty to their multilateral employer, managers have—or they ought to have—a special duty to resolve or report policy violations, including ethical violations. The recognition of this duty, and steps to make it effective, are important for an organizational culture that is committed to preventing retaliation.

2 Description of the IMF Retaliation Policy and Key Aspects

The following section will describe the IMF Retaliation Policy at the time of writing, and four key aspects of that policy: (i) definitions of retaliation and protected activities; (ii) the expedited review process to address complaints of retaliation; (iii) higher standards of proof; and (iv) the mandatory duty for managers to resolve or report any ethical concerns.

2.1 *Genesis of the 2019 IMF Retaliation Policy*

The IMF first adopted a stand-alone retaliation policy in May 2011. This policy was substantially updated on February 2019, following an extensive benchmarking exercise that was conducted against policies in place at comparable international organizations (IOs).² In mid-2018, the IMF Ethics Office formed a working group comprised of several offices of the Dispute Resolution System

¹ For background information on the rule of law at the IMF within which this retaliation policy exists, see generally Liu 2019, 61–78.

² Benchmarking exercise included seventeen international organizations: African Development Bank (AfDB) Group; Asian Development Bank (ADB); European Bank for Reconstruction and Development (EBRD); Inter-American Development Bank (IDB); International Fund for Agricultural Development (IFAD); International Labour Organization's (ILO) International Labour Office; International Telecommunication Union (ITU); Islamic Development Bank (IsDB); Pan American Health Organization (PAHO); United Nations Educational, Scientific and Cultural Organization (UNESCO); United Nations Office for Project Services (UNOPS); United Nations Fund for Population Activities (UNFPA); United Nations Relief Work Agency (UNRWA); United Nations Secretariat (UN Secretariat); World Health Organization (WHO); World Intellectual Property Organization (WIPO); World Meteorological Organization (WMO).

(DRS),³ and with the collaboration of the Legal Department and the Human Resources Department, to propose revisions to the retaliation policy.

The IMF working group agreed in the context of its discussions that the previous IMF retaliation policy lacked the detailed information on procedures found in most comparable organizations' policies and that this might be a factor underlying the perceptions sometimes expressed by employees to DRS Officers that use of the DRS might lead to retaliation against them. It was agreed that such perceptions are incompatible with an effective dispute resolution system.

As a result of the IMF's review of its retaliation policy, the framework through which retaliation concerns are addressed was strengthened in four key aspects, notably by (i) introducing a clear and broad definition of retaliation and the protected activities to which it relates; (ii) establishing a framework that includes an expedited review process by the IMF Office of Internal Investigations (OII) to address complaints of retaliation; (iii) establishing higher standards of proof when responding to retaliation allegations and (iv) retaining a mandatory duty for managers to resolve or report any ethical concerns. Each of these key aspects will be explored in the sections below.

2.2 *Definitions of Retaliation and Protected Activity*

The new IMF retaliation policy⁴ introduced comprehensive definitions of retaliation and protected activity with the aim of ensuring that any employee raising a retaliation concern receives the full protection of the policy.⁵ Under the new IMF retaliation policy, retaliation is "any direct or indirect adverse action recommended, threatened, or taken because an individual engaged in a protected activity". These adverse actions include, without limitation, termination of employment, demotion or denial of opportunities for promotion, detrimental reassignment or transfer, unfavorable performance evaluations, removal from a team or project, withholding of funding or other resources for a work project and withdrawing delegated authority.

The IMF's policy defines protected activities more broadly than the policies of most other IOs. In the IMF's review of its retaliation policy, it was observed that for many IOs their anti-retaliation measures only protect 'whistle-blowing' activities. Whistleblowing is generally understood as the "disclosure

3 In addition to the Ethics Office, the DRS Offices at the IMF are the Ombudsperson, the Mediation Office, the Office of Internal Investigations, the Grievance Committee and the Registrar of the Administrative Tribunal.

4 IMF Staff Handbook, Annex 11.01.6: Retaliation Policy (IMF Retaliation Policy), paras 2.1–2.2.

5 The policy defines 'employee' broadly to include staff members, contractual employees, interns and volunteers. *Ibid*, para 1.1.

of information related to corrupt, illegal, fraudulent or hazardous activities [...] to individuals or entities believed to be able to effect action”.⁶

The IMF’s definition of a protected activity is broader as it includes not only whistleblowing, but also other specified activities done in good faith: using the IMF dispute resolution mechanisms; participating in any type of related proceeding as a witness; assisting another employee in using those channels; or cooperating in proceedings led by the Office of Internal Audit or the Independent Evaluation Office.⁷ It was considered vital to the effective functioning of the DRS that all employees should feel confident that they will not experience retaliation for participating in the DRS in any capacity. Moreover, because retaliation can suppress the reporting and resolution of all other substantive claims (for example, harassment), it was determined that allegations of retaliation should be given heightened scrutiny and expeditiously addressed.

2.3 *Expedited Review Process to Address Retaliation Complaints*

In the new retaliation policy, the process for correcting the consequences of retaliation is clarified. Moreover, the timeframe for conducting the review of any retaliation allegation was shortened in line with procedures adopted by several other international organizations.⁸ Under the new retaliation policy, a retaliation allegation filed within six months of the allegedly retaliatory action is undertaken by OII against a 45-day timeline. This change was instituted for the purpose of ensuring that timely remedial action would be implemented if retaliation has occurred.

Furthermore, in accordance with best practice for whistleblower protection rights to guarantee comprehensive relief when a whistleblower prevails, the new process provides: (i) whether interim protective measures should be recommended to protect the staff member; and (ii) whether there has been a retaliatory action that should be invalidated. It is worth noting that this process

6 Transparency International, 5 November 2013, 4.

7 IMF Retaliation Policy, para 1.1.

8 See, for examples, other IOS’ retaliation policies providing for an expedited review: IFAD Whistleblower Protection Procedures, section ‘Reporting retaliation’ (ii)(b) (‘Normally within 45 days of formal acknowledgement of the complaint, the Ethics Office shall provide the complainant with an indication of the expected period of time it considers reasonable and necessary to undertake the review and shall seek to complete such a review normally within 90 days of the acknowledgement’); ILO Whistleblower Protection Policy, para 9 (‘The Ethics Office shall complete the preliminary review within 45 working days of the date of receipt of the complainant of retaliation’), note that ILO has since issued a new version of this rule in November 2019; UNESCO Whistleblower Protection Policy, para 19 (‘The Ethics Office will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation’).

is separate from any related misconduct investigation that may follow to establish the personal accountability of an employee who has engaged in retaliation. Any related misconduct investigation is handled in accordance with the Fund's general rules on misconduct.

2.4 *Higher Standards of Proof*

The IMF retaliation policy was also amended to reflect best practices in terms of the standards of proof that apply to the initial review of allegations of retaliation. While the standard of review in the disciplinary context has not changed, there is a change in the context of the initial expedited review by OII to determine if corrective measures are needed.

2.4.1 Reversed Burden of Proof

In the context of the initial expedited review by OII, the new policy places the burden of proof on the IMF, consistent with the importance the organization places on considering immediate interim corrective measures. This change is also aligned with the recognized practice in the administrative resolution of retaliation cases implemented by comparable international organizations. For example, the African Development Bank (AfDB) Group, the Asian Development Bank, the Inter-American Development Bank (IDB), the United Nations Office for Project Services and others have followed this standard.⁹

9 See, for examples, other IOs' retaliation policies where the burden of proof rests with the organization: AfDB Group Whistleblowing and Complaints Handling Policy, para 6.6.7 ('Where Bank Personnel can show evidence that prior to the alleged Retaliation, the Bank Personnel had reported or was in the process of reporting an instance of Fraud, Corruption or any other Misconduct to the Hotline, Auditor General or the Division, or pursuant to any other reporting mechanism provided under this Policy, such Bank Personnel shall be deemed to have satisfied the minimal burden of proof. The burden of proof shall then shift to the Bank to prove by clear and convincing evidence that the action taken by the Bank against such Bank Personnel was for separate and legitimate reasons, and not in reprisal or Retaliation for the malpractice reported by the Bank Personnel'); ADB Whistleblower and Witness Protection Policy, para 6.5 ('If OAI determines that there has been Retaliation against a staff for having report a suspected Integrity Violation or Misconduct or for having cooperated with an OAI investigation and that the Staff's action related to the investigation was a contributory factor in the Retaliation, the burden of proof will shift to ADB to show by clear and convincing evidence that the same action would have been taken in the absence of the Staff's report or cooperation'); IDB Whistleblower Reporting and Protection Policy, para 13 'Where an employee has made a prima facie case of Retaliation for having acted as a Whistleblower (i.e., by showing that s/he is a Whistleblower, as defined herein, and that s/he has a reasonable belief that his/her having acted as a Whistleblower was a factor in a subsequent adverse employment action, the burden of proof would then shift to the Bank to show by clear and convincing evidence that the

Under the new IMF retaliation policy, when a staff member complains of alleged retaliation, the organization bears the burden to demonstrate that the same adverse action would have been taken for separate and legitimate reasons.¹⁰ This reversed burden of proof standard makes good practical sense in several ways: (i) it calls the organization to account because the organization has far better access to evidence of the reasons for the action taken, since the evidence is inherently owned and held by the organization and (ii) the negative consequences of not effectively addressing retaliation—discouraging employees from raising concerns and using the DRS—are considered to outweigh the negative consequence of mistake in unwarranted reversal of an administrative action based on an erroneous conclusion it was retaliatory and unjustified.

2.4.2 Standard of Proof: ‘Clear and Convincing Evidence’

In addition to reversing the burden, also a higher standard of proof by “clear and convincing evidence” was adopted for OII’s review of retaliation allegations against the organization (as compared to the preponderance of evidence standard that applies in the disciplinary context at the IMF).¹¹ In accordance with the new IMF retaliation policy,¹² during the expedited review of a retaliation allegation, OII will “consider whether there is clear and convincing evidence” to support a finding “that the same employment action taken by the organization would have been taken, for separate and legitimate reasons, even in the absence of the complainant’s protected activity”. If the standard for clear and convincing evidence has not been met, then it will be concluded that retaliation has occurred, and a recommendation will be made to management for remedial action.

The new wording of the IMF retaliation policy establishes that, when reviewing retaliation allegations as opposed to investigating misconduct, OII will assess evidence in a manner that is much more favorable to the

same employment action would have been taken absent the Whistleblowing’); UNOPS Protection Against Retaliation Policy, para 2.2 (‘The present OI is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However, the burden of proof shall rest with UNOPS to demonstrate by clear and convincing evidence that it would have taken the same action absent the protected activity [...] or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity’).

¹⁰ IMF Retaliation Policy, para 4.3.

¹¹ IMF Staff Handbook, ch 11.02, para 5.9.

¹² IMF Retaliation Policy, para 4.3.

complainant. When deciding a dispute over the IMF's response to retaliation allegations as opposed to disciplinary action, the IMF Grievance Committee and Administrative Tribunal will apply their own standards of review. Because the IMF Administrative Tribunal (IMFAT) has not yet had the occasion to examine retaliation cases under the new retaliation policy, there is no guidance available yet on its application of the Fund's retaliation policy and of the standards of proof.

2.5 *Mandatory Duty for Managers to Act upon, Resolve, and/or Report Ethical Concerns*

During the review of the IMF's retaliation policy, a specific duty for managers to "to act upon, resolve, and/or to report ethical concerns" was retained.¹³ While the whistleblower policies of all comparator international organizations benchmarked during this exercise have a duty to report misconduct, there is wide diversity in the scope of this duty. For example, the IDB's whistleblower policy mandates that, "Supervisors, as defined herein, have a duty to report any misconduct, including suspected misconduct reported to them by others".¹⁴ Other comparators have gone even further, placing a duty to report on all employees. This is the case with the United Nations Secretariat's policy, which includes a "duty of staff members to report any breach of the Organization's regulations and rules".¹⁵ Comparable language can be found in the policy of the AfDB Group's, which provides that, "Bank personnel are required to disclose acts related to fraud, corruption, or any other misconduct that come to their attention".¹⁶ The IMF appears to be unique in requiring its managers to both resolve and report wrongdoing. The mandatory duty for managers will be further examined below in Section 4.

3 **The Purpose and Origins of the Manager's Duty to Resolve or Report Misconduct**

The following section will address: (i) the manager's duties of care and loyalty; (ii) the manager's duty to report and/or resolve and (iii) the legal force of the duty to report.

13 IMF Staff Handbook, ch 11.01, s 11, para 11.4.

14 IDB Whistleblower Reporting and Protection Policy, para 4.1 (emphasis added, capitalization of terms omitted).

15 UN Secretariat Protection Against Retaliation Policy, para 1.1.

16 AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1 (capitalization of terms omitted).

3.1 *The Manager's Duties of Care and Loyalty*

The duty of IMF managers to resolve or report ethical concerns that come to their attention is grounded in the common law of agency, under which a paid agent is subject to the duty to act with care and to be loyal to the principal.¹⁷ Similar duties of loyalty are implied into employment contracts in certain civil law jurisdictions as well.¹⁸ These duties encompass the corollary duty of an agent to disclose to the principal information that is relevant to the affairs entrusted to the agent.¹⁹ In the employment context, these duties are commonly invoked as prohibiting self-dealing by an employee, but they also require attentive performance on the part of the employee.²⁰

In the United States (US), for example, these duties have been applied to all employees, regardless of whether they play a managerial role.²¹ However, US courts are more likely to apply higher standards of care and loyalty to managers, and especially senior managers, officers and directors, who are in positions of trust and confidence.²² These duties are implied and do not need to be included in written employment contracts. These duties also have an important practical basis. It is beneficial for the employer to require its managers to act in the employer's interest in order to limit its liability because the acts of the managers may be attributed to the employer itself.²³

3.2 *The Manager's Duty to Report and/or Resolve*

The IMF manager's duty to resolve or report wrongdoing is in line with a well-established expectation in various jurisdictions and fora that an employer should take reasonable steps to address or report certain misconduct. For example, in the case of *Mr. "F" v International Monetary Fund*, the IMF was held liable by the IMFAT when supervisors failed to take effective measures to deal

¹⁷ American Law Institute (ALI), *Restatement (Second) of Agency* 1957, ss 379 and 387.

¹⁸ Global Legal Group, March 2011, 76, 83 and 123.

¹⁹ ALI, *Restatement (Second) of Agency* 1957, s 381.

²⁰ See generally, Grebe 2002, 1815–1828.

²¹ Employees are agents of their employers and owe the traditional fiduciary duties of loyalty and performance (ALI, *Restatement (Third) of Agency* 2006, s 7.07(3)(a); US District Court for the Middle District of Florida, *Aquent LLC v Mary Stapleton and Italent LLC* 2014), 1348–1349.

²² See generally, Cavico and others 2018; US District Court for the Eastern District of Pennsylvania, ED *Numeric Analytics, LLC v McCabe* 2016.

²³ ALI, *Restatement (Second) of Agency* 1957, s 219(1) ('A master is subject to liability for the torts of his servants committed while acting in the scope of their employment'); US Supreme Court, *Burlington Indus v Ellerth* 1998, 759 (holding the employer vicariously liable for hostile environment created by a supervisor).

with religious intolerance and harassment in a work unit.²⁴ The manager's duty to address wrongdoing was reiterated in the IMFAT case of *Ms. "GG" (No. 2) v International Monetary Fund*.²⁵ Here, the Applicant's complaint included an allegation that the managers of her former department retaliated against her for reporting misconduct of another staff member. The Administrative Tribunal noted the special responsibilities of managers and "underscore[d] in particular the following propositions: unfair treatment may take the form of inaction as well as action; supervisors carry special responsibilities to ensure fair treatment of staff members [...]"

Likewise, in the US, a key factor in establishing an employer's liability for harassment claims by employees is whether the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action.²⁶ The US Equal Employment Opportunity Commission (EEOC) is the agency that administers and enforces federal civil rights laws against workplace discrimination. In published guidance to employers, the EEOC emphasizes the employer's responsibility to take immediate and appropriate action:

Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing

24 IMFAT, *Mr. "F" v IMF* 2005, paras 98, 100 and 122.

25 IMFAT, *Ms. "GG" (No. 2) v IMF* 2015, paras 192–195.

26 See, US Court of Appeals for the First Circuit, *Lipssett v University of Puerto Rico* 1988, 901 ('in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it') (emphases added); US District Court for the Eastern District of Wisconsin, *Zabkowicz v West Bend Co.* 1984 (Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct); US Court of Appeals for the Fourth Circuit, *Katz v Dole* 1983, 256 (holding employer liable for hostile environment sexual harassment under Title VII if the 'employer knew or should have known of the harassment, and took no effectual action to correct the situation'); US Court of Appeals for the Seventh Circuit, *Hunter v Allis-Chalmers Corp* 1986, 1421 (holding employer liable for hostile environment racial harassment under section 1981 if management level employees 'knew, or in the exercise of reasonable care should have known, about the campaign of harassment' and failed to take reasonable steps to prevent it).

anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains.²⁷

In advising employers how to appropriately handle harassment in the workplace, the EEOC also recommends that the employer “require managers and other employees with human resources responsibilities to respond appropriately to harassment or to report it to individuals who are authorized to respond”.²⁸

3.3 *The Legal Force of the Duty to Report*

Although the IMF’s retaliation policy as well as the whistleblower policies of several other IOs set forth a duty to report, it is not apparent whether that duty is merely aspirational or intended to give rise to accountability on the part of responsible employees for breach of the duty. That ambiguity may be contrasted with certain other IMF policies, including the harassment policy, which makes clear that a manager’s failure to act as prescribed may be considered a performance matter or even misconduct.²⁹

The failure to state in the policy that a breach of the duty to report may constitute misconduct probably forecloses the use of disciplinary measures to hold employees accountable for breach of the duty. But a manager’s failure to report retaliation could still be dealt with as a performance matter. By specifically articulating the IMF managers’ duty to resolve or report ethical concerns, in the IMF’s retaliation policy, the IMF has indicated the criticality of that duty to the retaliation context. Consistent with the implied duties of care and loyalty, it is reasonable to hold managers accountable through performance management for supporting the rule of law within the institution by resolving or reporting misconduct that drains resources and detracts from the IMF’s mission.

In a 2017 report, the EEOC stressed that a commitment to an inclusive and respectful workplace is not in and of itself enough. Leadership must ensure accountability mechanisms are in place. The report recommends that

27 US Equal Employment Opportunity Commission (EEOC), ‘Harassment’ (emphasis added).

28 EEOC, ‘Tips for Small Businesses’.

29 IMF Staff Handbook, Annex 11.01.2, para 5.2 (‘Failure by a manager to effectively address a situation of potential harassment of which he or she becomes aware can be seen by staff as condoning, or complicity therewith. It may also be considered a performance matter and noted in the manager’s annual performance review. An egregious failure to act, if established following an investigation, may also amount to misconduct warranting disciplinary measures’.

employers make mid-level and front-line managers responsible for their part in monitoring and stopping harassment, “including through the use of metrics and performance reviews”.³⁰ IOs could consider broader use of metrics and performance reviews to add greater force to the duty to report retaliation.

4 Aspects of the Manager's Duty to Resolve or Report Misconduct

The following section will address: (i) the proper subjects of the manager's duty to resolve or report misconduct; (ii) the standard of evidence that triggers the duty; (iii) the action the manager is required to take; and (iv) who is required to act.

4.1 *What are the Proper Subjects of a Manager's Duty to Resolve or Report Misconduct?*

While all the comparator international organizations benchmarked during the exercise to reform the IMF's retaliation policy have a duty to report misconduct included in their whistleblower protection or retaliation policies, the subject of this duty is not always clear and varies across organizations. The IMF's retaliation policy requires IMF managers to resolve or report “ethical concerns that come to their attention”.³¹ It is unclear whether the term ‘ethical concerns’ covers the more common and weighty concepts of ‘breach of rules’ and ‘misconduct’ or is meant to require the reporting or resolution of even mere ‘concerns’. Moreover, this language is sufficiently vague to cover all subject matters, including subjective perceptions of bullying and discriminatory behaviors in any context. Yet, this duty is found only in the IMF's retaliation policy, indicating perhaps that the duty to report and resolve is limited to ‘ethical concerns’ however defined, solely in connection with retaliation.

Several other international organizations' whistleblower policies require reporting of suspicions of wrongdoing and breach of the rules, while still other organizations attempt to specify the precise wrongdoing to be reported, such as fraud or corruption.³² This specificity is also provided in other IMF policies

30 National Sexual Violence Resource Center (NSVRC), 20 October 2017, 8–9.

31 IMF Staff Handbook, ch 11.01, s 11, para 11.4.

32 See, for examples, other IOs' description of reportable subjects: UNESCO Whistleblower Protection Policy, para 2 ('All staff members have a duty to report any breach of the Organization's regulations and rules to officials whose responsibility it is to take appropriate action'); WHO Whistleblowing and Protection Against Retaliation Policy, para 17 ('WHO staff members have a duty to report suspicions of wrongdoing. Individuals who report such cases in good faith are entitled to protection against retaliation in accordance with

such as its harassment policy which requires the IMF manager to address or report “complaints of harassment, or harassment of which they otherwise become aware”.³³

Where the universe of matters mentioned to be reported may be vague, managers arguably have an implicit duty to resolve or report anything and everything within their ambit that could harm the employer. Such a broad and persistent duty may be impractical, and risks diluting the duty to report or resolve. Moreover, the consistent performance by managers of such a broad and persistent duty could impact staff morale by creating an informant culture. This in turn could discourage employees from disclosing substantive misconduct that could harm the institution and so undermine the purpose of the duty to report or resolve. It would appear then, that a manager’s duty to report

the provisions of this policy’); ADB Whistleblower and Witness Protection Policy, para 4.1 (‘As provided in AO 2.02, Staff have the duty to report any suspected Integrity Violation or Misconduct to OAI’); AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1:

In line with the Code, Rules, and Code of Conduct, Bank Personnel are required to disclose acts related to Fraud, Corruption, or any other Misconduct that come to their attention. Similarly, in line with the Bank’s Good Governance policy, the Bank requires its Development Partners and Stakeholders to disclose acts of Fraud, Corruption and Misconduct including such acts that involve Bank Personnel and/or Bank Projects as well as actions that undermine operations and mission of the Bank. The typical disclosures thus required of Bank Personnel and concerned Third Parties include, without limitation, the following:

4.1.1 Unlawful acts or orders requiring violation of a law, gross waste, mismanagement, abuse of authority, substantial and specific dangers to public health or safety;

4.1.2 Failures to comply with statutory obligations in host countries, duty stations, or countries of assignment;

4.1.3 Fraud, which means any act or omission, including a misrepresentation, that knowingly and recklessly misleads, or attempts to mislead, a party to obtain financial or other benefit or to avoid an obligation;

4.1.4 Corruption, which means the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party;

4.1.5 Misconduct, which means failure by Bank Personnel to observe the Bank’s rules of conduct or standards of behavior;

4.1.6 Coercive practices, which mean impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

4.1.7 Collusive practices, which mean an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party; and

4.1.8 Any other activity which undermines the Bank’s operations and mission.

33 IMF Staff Handbook, Annex 11.01.2, para 5.2.

should strike a balance by mandating the reporting or resolution of certain substantive kinds of wrongdoing only in order to be effective.

4.2 *What Standard of Evidence Triggers the Duty?*

The effectiveness of the manager's duty to report or resolve rests in part on the standard of evidence that triggers the duty. On the one hand, requiring the manager to have firsthand knowledge or tangible evidence of a wrongdoing could have a cooling effect and discourage the manager from reporting or addressing a legitimate issue that may exist. On the other hand, if the standard of evidence is mere 'suspicion' or 'ethical concerns that come to their attention' the volume of matters reported could be excessive and detract resources from the more significant instances of wrongdoing.

As a practical matter, information concerning employee wrongdoing often comes to the attention of the manager as hearsay rather than from the manager's own observation or other direct evidence.³⁴ As a rule, courts in common law countries typically exclude hearsay evidence because it is potentially unreliable and is not subject to cross-examination.³⁵ As a result, there is a misunderstanding that any hearsay statement is inherently untrustworthy. In fact, many exceptions to the hearsay rule have developed over time in common law legal systems, in cases where the evidence is deemed sufficiently trustworthy.³⁶ By comparison, a less restrictive approach to hearsay evidence is generally taken by civil law legal systems, wherein hearsay is admissible in principle and its origins considered for purposes of attributing its probative weight.³⁷ This tolerance of hearsay evidence may be attributed to the limited reliance on juries in civil law jurisdictions and a high confidence in the ability of professional judges to properly weigh any unreliable or inappropriate evidence.³⁸ Among international courts and tribunals as well, there is generally no prohibition against hearsay evidence.³⁹

In the context of a manager's duty to resolve or report, hearsay evidence is not being used to make a final determination or convict a wrongdoer. Instead,

34 Black's Law Dictionary defines 'Hearsay' as 'testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others'.

35 See generally, Evans 1974, 261–301; Donnelly 1956, 455–483.

36 For exceptions to the hearsay rule in US federal courts, see US Federal Rules of Evidence, rr 801–807.

37 See generally, Maffei 2012; Blumenthal 2001, 93–116.

38 Blumenthal 2001, 99.

39 ILOAT, *Y. G. v FAO* 2009, consid 17; ILOAT, *Italo Danilo Coitinho Fraquelli v UNIDO* 2001, consid 17(d); UNDT, *Applicant v Secretary-General of the UN* 2013, para 43.

it provides information for the manager to further investigate and may lead to other relevant evidence. Furthermore, because determinations about the veracity or credibility of the hearsay evidence can be made in due course, it would be premature to exclude hearsay evidence from the manager's duty to report or resolve.

4.3 *What Action is Required?*

Under the IMF's retaliation policy, the IMF manager is required to take action in connection with ethical concerns by acting upon, resolving or reporting (or a combination of all three) the matter. This includes basics such as asking for clarification and additional information to ensure that the question or concern raised is fully understood, consulting as needed with superiors to address the issues raised, and following up as soon as possible with the employee who raised the concern.⁴⁰

The IMF manager's two-fold duty appears to go further than the comparator international organizations reviewed during the IMF's benchmarking exercise. Where the organization specifically identifies the manager's role in its whistleblower protection or retaliation policy, the requirement is to report only.⁴¹ However, the requirement that the manager act or report misconduct is not uncommon in the private sector workplace.⁴² The duty to act in response to wrongdoing is also recognized by the IMFAT in the case of *Ms. "GG" (No. 2) v International Monetary Fund*, where the tribunal noted that the plaintiff's reporting of wrongdoing was consistent with a manager's "special responsibility to ensure fair the treatment of staff members" and duty under the IMF's Discrimination Policy to "create and maintain a supportive and encouraging work environment for all employees and take all reasonable actions necessary to prevent and address undesirable or inappropriate behavior".⁴³

It may be that organizations that require managers, as well as other employees, to report misconduct through established reporting mechanisms and human resource or ethics officials, have determined that such potentially sensitive matters are best handled by trained professionals. However, this approach arguably disempowers the manager who is closer to the front line where the

40 EEOC, 'EEOC Enforcement Guidance', 25 August 2016, pt v(B).

41 IDB Whistleblower Reporting and Protection Policy, para 4.1.

42 See EEOC, 'EEOC Enforcement Guidance', 25 August 2016, pt v(B); and NSVRC, 20 October 2017, 12, for recommendations by the EEOC that managers and supervisors be trained how to effectively respond to harassment and retaliation claims that they observe or that is reported to them, of which they have knowledge or information, or report the matter, even before it reaches a legally actionable level.

43 IMFAT, *Ms. "GG" (No. 2) v IMF* 2015, paras 193 and 195.

matter arose, and who may be more attuned to various imperatives that could facilitate informal resolution. Where the manager is empowered to act to address a wrongdoing, it is critical that the manager be properly trained.⁴⁴ In resolving or reporting the wrongdoing that has come to their attention, IMF managers are also expected to be familiar with the retaliation and other relevant policies, to be vigilant for signs of retaliation against the reporting employee and, subject to their own obligations to report the matter to the designated human resources or ethics officials, they are expected to handle the matter discreetly and maintain its confidentiality.

4.4 *Who Must Act?*

The whistleblower policies of many of the benchmarked IOs contain broad obligations on all employees to report wrongdoing.⁴⁵ The only action required of reporting employees under these policies is participation in investigations or dispute resolution processes as requested. The other international organizations that separately require managers to report do not also require them to act to resolve the matter, as does the IMF. As noted above, the restriction of an employee or manager with knowledge of wrongdoing to reporting only, has the benefit of ensuring that potentially sensitive matters are properly handled by trained professionals.

The approach taken in the IMF's retaliation policy also values this benefit, as indicated by the manager's ability to report the matter to human resource or ethics professionals at any point. It also seeks the advantage of an earlier resolution provided by the managers' ability to themselves address and resolve disputes. In this regard, the managers are the first of three lines of defense in mitigating the risks of employee wrongdoing as they are positioned all across the

44 See note 42, noting that the EEOC advises employers to allocate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment and retaliation complaints.

45 See, for examples, other IOs' retaliation policies containing an obligation on all employees to report wrongdoing: AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1 ('In line with the Code, Rules, and Code of Conduct, Bank Personnel are required to disclose acts related to Fraud, Corruption, or any other Misconduct that come to their attention [...]'); ADB Whistleblower and Witness Protection Policy, para 4.1 ('As provided in AO 2.02, Staff have the duty to report any suspected Integrity Violation or Misconduct to OAI'); UN Secretariat Protection Against Retaliation Policy, para 1.1 ('It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation'); WHO Whistleblowing and Protection Against Retaliation Policy, para 17 ('WHO staff members have a duty to report suspicions of wrongdoing').

organization and well placed to serve this role.⁴⁶ The second line of defense is the trained and experienced professionals administering the informal DRS, including the ombudsman and the investigator. The internal audit function and the Administrative Tribunal are the third line of defense. This risk model provides for mutually reinforcing roles within the organization, where each line looks at risk from its unique perspective and the work of each complements and reinforces that of the others.

5 Further Considerations for IOs When Formulating a New or Improving an Existing Retaliation Policy

Each international organization has its own mission, structure and organizational culture. Inevitably, given the diversity of IOs, organizations will resort to different approaches to an effective anti-retaliation program, and it is not the intention of this chapter to advocate for a single 'best' practice. There is a range of best practices.

Some best practice standards for formulating new and improving existing whistleblower protection, as a subset of retaliation policy, have been collected by Transparency International under a list of international recognized principles.⁴⁷ There is a guiding principle for,

protected individuals and disclosures all employees and workers in the public and private sectors need: (i) accessible and reliable channels to report wrongdoing; (ii) robust protection from all forms of retaliation and (iii) mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing.⁴⁸

In addition to this guiding principle, the following practices are identified by Transparency International: the employer should (i) ensure preservation of confidentiality ("the identity of the whistleblower may not be disclosed

⁴⁶ See generally, The Institute of Internal Auditors (IIA), January 2013: 'The Three Lines of Defense' is an audit risk model that provides a coordinated approach to risk management by organizing the groups responsible for managing the organization's risks and controls into three levels or 'lines of defense'. While it does not map precisely to the IMF anti-retaliation program, the model nonetheless provides a useful framework for identifying the roles and responsibilities of key stakeholders within the program.

⁴⁷ Transparency International, 5 November 2013, 4.

⁴⁸ Ibid.

without the individual's explicit consent"); (ii) have the "burden of proof on the employer"; (iii) guarantee personal protection for whistleblowers "whose lives or safety are in jeopardy"; (iv) maintain "whistleblower regulations and procedures [that are] highly visible and understandable"; (v) ensure "timely and independent investigations of whistleblowers' disclosures"; (vi) provide for a "full range of remedies [covering] all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole" including "interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering" and (vii) develop and offer comprehensive whistleblower training "for public sector agencies and publicly traded corporations and their management and staff".⁴⁹

Another consideration for IOs, as intergovernmental institutions, are the positions of its member States. For example, international financial institutions know well that the US Treasury is required by law to instruct its Executive Directors of each institution that it is the policy of the US that each institution effectively implement and enforce policies and procedures which reflect best practices for the protection of whistleblowers from retaliation.⁵⁰ Although this advocacy by the US was not the proximate cause of the IMF's own review of its retaliation policy, the US policy informed the process.

Among other things, the US Treasury advocates for "(i) protection against retaliation for internal and lawful public disclosure; (ii) legal burdens of proof, (iii) statutes of limitation for reporting retaliation, (iv) access to independent adjudicative bodies, including external arbitration; and (v) results that eliminate the effects of proven retaliation".⁵¹ With regard to the legal burdens of proof requirement, the US Treasury advocates for a 'clear and convincing' burden on the organization. In particular, if the complainant sufficiently alleges that an adverse action occurred because of lawful whistleblowing, the organization must prove by clear and convincing evidence that it would have taken the same action for independent reasons regardless of the protected activity.

The US policy also requires access to independent adjudicative bodies. This with the aim of guaranteeing an independent due process. Also, the US policy calls for comprehensive relief when a whistleblower prevails; this is also required under the US law. Any retaliation policy should require that the effects of retaliation be eliminated (namely, that the retaliatory action and all its consequences be invalidated). Another requirement under the US standard is that

49 Ibid, 5, 6, 7, 9 and 10.

50 Consolidated Appropriations Act (US), s 7029.

51 Ibid, s 7048(b).

international financial institutions implement a best practice statute of limitations for reporting retaliation. According to best practices for national and international organizations whistleblower policies, six months is the minimum functional statute of limitations for whistleblowers to become aware of or act on their rights. Although, one-year statutes of limitations are consistent with common law rights and may be preferable.

6 Conclusion

An effective anti-retaliation program is crucial for protecting the rights of international civil servants and the operation and integrity of the international organization's dispute resolution system. In the IMF's experience, a key feature of an effective anti-retaliation program is the manager's special duty to resolve or report policy violations. Placing this obligation on the organization's leadership at senior levels best ensures an anti-retaliation organizational culture. This is particularly true where the duty is made effective by properly training managers to respond to retaliation claims or report the matter at the earliest opportunity and holding them accountable in this regard. Still, there are several aspects of this duty that remain to be clarified at the IMF and to be determined by any other IOs intending to adopt this duty, including (i) the precise wrongdoings to be addressed; (ii) the standard of evidence that triggers the duty and (iii) the specific actions required of the manager to resolve or report the wrongdoing. While IOs should tailor their own approaches to prevent and address retaliation given their diverse structures and cultures, the IMF's experience to date indicates that the manager's special duty to resolve or report retaliation is important for an organizational culture that is committed to preventing retaliation.

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Procedural Requirements in Staff Misconduct Cases: The Evolving Approach of the African Development Bank Administrative Tribunal

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Abstract

With specific reference to staff misconduct cases, this chapter examines, with examples from its case law, how the African Development Bank Administrative Tribunal (AfDBAT) addresses arguments of procedural irregularities and violation of due process. The AfDBAT, in determining whether an irregularity exists or not according to the applicable rules and principles, takes into consideration elements such as the prejudice sustained by an applicant and the fairness of the process. When it determines that an irregularity exists, the AfDBAT takes into consideration the seriousness of the irregularity or other due process violation in deciding whether the decision to impose the disciplinary measure should be vitiated or sustained and whether the procedural irregularity or other due process violation should lead to the award of damages.

1 Introduction

International organizations depend on their staff members for the delivery of their important mandates. In so doing, the administration of employment relations causes international organizations to regularly make employment-related decisions. One type of decision affecting the employees of intergovernmental institutions that is frequently challenged before international administrative tribunals is the imposition of disciplinary measures on staff members who are found to have committed misconduct. Grounds commonly used to legally challenge disciplinary measures include procedural irregularities and violation of due process. Although the various administrative tribunals of international

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organizations will generally recognize the principles that procedures should be followed and due process should be respected, the application of such principles by the tribunals may vary.¹

Following this introduction, this chapter will begin by briefly presenting the African Development Bank Administrative Tribunal (AfDBAT) and the legal framework within which it operates (Section 2) so as to better understand the Tribunal's case law. Then, Section 3 of this chapter focuses on the approach taken by the AfDBAT when applicants raise arguments of procedural irregularities or violations of due process in cases of staff misconduct. The chapter uses the case law of the AfDBAT to illustrate the Tribunal's early recognition of the principles of respecting proper procedures and due process and how it developed its own jurisprudence regarding those principles over the years. Lastly, Section 4 presents some overarching observations and conclusions.

2 Legal Basis and Background to the African Development Bank Administrative Tribunal

The Board of Directors of the African Development Bank² established the AfDBAT and adopted its Statute on 17 July 1997³ and appointed the AfDBAT's first judges on 16 December 1997.⁴ The Statute of the Administrative Tribunal of the African Development Bank (Statute) came into force on 1 January 1998.⁵ The AfDBAT held its first session in July 1999 and, as of its latest session in April 2019, has issued 131 published decisions.

The AfDBAT is composed of six judges who must be nationals of member States of the AfDB at the time of their appointment.⁶ Although the Statute's requirement regarding diversity is limited to prohibiting that two judges be nationals of the same State,⁷ historically, the Board of Directors appoints the six judges from among the 'six regions'⁸ recognized by the AfDB to ensure balanced geographical representation. The Board, in selecting judges, also takes

¹ Powers 2018, 115–120.

² Agreement Establishing the African Development Bank.

³ AfDB, Board of Directors Resolution B/BD/97/11.

⁴ AfDB, Board of Directors Resolution B/BD/97/18.

⁵ Statute of the AfDBAT, art XVII.

⁶ *Ibid.*, art VI (1).

⁷ *Ibid.*

⁸ The six regions consist of: Western Africa, Southern Africa, Eastern Africa, Northern Africa, Central Africa and Non-Regional Member States.

into account diversity of gender, legal traditions and language.⁹ The judges must be persons of high moral character who possess the qualifications required for appointment to high judicial office or are jurisconsults of recognized competence.¹⁰

According to the Statute, the applicable law before the AfDBAT shall be “the internal rules and regulations of the Bank, and generally recognized principles of international administrative law concerning the resolution of employment disputes of staff in international organizations”.¹¹ The AfDBAT hears applications contesting ‘administrative decisions’¹² that affect staff members’ conditions of employment, after exhaustion of the Bank’s internal recourse mechanism¹³ and hears appeals of staff members contesting disciplinary measures imposed on them.¹⁴

3 Review of the Case Law of the AfDBAT

This section chronologically reviews the case law of the AfDBAT in which applicants raised arguments of procedural irregularities or violations of due process in cases of staff misconduct, whilst identifying a succession of eras. The purpose of this is to: (i) underline how the AfDBAT first incorporated in its jurisprudence, as important principles, the requirement to follow proper procedures and to respect due process; (ii) show how the AfDBAT developed its approach to assess the existence of a violation of those principles; and (iii) demonstrate how the AfDBAT now proceeds when it determines the existence of a violation.

3.1 *Importance of the Principles of Respecting Proper Procedures and Due Process (1999–2005)*

Arguments regarding procedural violations and disregard of due process were raised by applicants in some of the earliest applications before the AfDBAT.¹⁵

9 The AfDB is a bilingual institution, with the two official languages being English and French.

10 Statute of the AfDBAT, art VI (1).

11 Ibid, art V (1).

12 Ibid, art II (1) (i).

13 Ibid, art III.

14 AfDB Staff Rule 102.09 provides, “A staff member against whom a disciplinary measure has been imposed shall have the right to appeal such a measure, and may lodge his/her appeal with the Administrative Tribunal within sixty (60) days of the date of the letter of notification of the disciplinary measure”.

15 ‘Due process’, in the context of disciplinary proceedings, broadly refers to the requirement that proceedings be fair and in accordance with the applicable rules and general

For example, in its first 20 judgments, the AfDBAT already dealt with arguments pertaining to the right to obtain assistance from former staff members in defense against disciplinary charges,¹⁶ to the denial of access to documents¹⁷ and to the denial of the opportunity to be heard and to defend oneself.¹⁸ In another early case, *M. A. B. v AfDB*, the AfDBAT, noting that the AfDB had not yet enacted rules for investigations and procedures preceding summary dismissal, decided that “The requirements to be complied with by the Bank must therefore be derived from principles of natural justice as evolved in the jurisprudence of international administrative tribunals”.¹⁹

The AfDBAT indicated with clarity its position on the importance of due process in two judgments rendered on 1 December 2005, namely, *Mr. C. G. S. v AfDB*²⁰ and *Jenkins-Johnston v AfDB*.²¹ These two cases arose from similar facts. The AfDB offers its staff members an education benefit whereby it covers a portion of the school fees of staff members’ children when certain conditions are met. One feature of the education benefit is that it can be paid in advance if a staff member provides evidence of registration in an acceptable school along with a pro forma invoice. In 2002, the AfDB engaged in an audit of the management of education benefits and, in the course of this audit, discovered that in both these cases, the staff members had each received an advance to cover school fees for their respective children, but that they failed to immediately inform the AfDB that their children had dropped out of university after the start of the school year. Both staff members were summarily dismissed.

In the first case, *Mr. C. G. S. v AfDB*, the applicant argued that due process was not complied with, claiming that they were not heard and that certain documents necessary for their defense were withheld. The disciplinary process followed was not the regular disciplinary process, which involves referring the matter to a disciplinary panel, but rather a summary dismissal which is applicable only for cases of ‘serious misconduct’.²² The AfDBAT held as follows:

principles of law. As an example of such requirement incorporated in applicable rules, AfDB Staff Rule 101.02 (a) provides, “No disciplinary measure shall be imposed against a staff member unless and until he/she has been given the opportunity to answer the charges against him/her. The staff member shall be informed of the allegations against him/her by written notification”.

16 AfDBAT, *Mr. I. U. I. v AfDB* 2000, para 2.

17 AfDBAT, *W. B. O.—O. v AfDB* 2001, paras 40, 42.

18 AfDBAT, *Mr. T. B. B. v AfDB* 2002, para 33.

19 AfDBAT, *M. A. B. v AfDB* 2001, para 23.

20 AfDBAT, *Mr. C. G. S. v AfDB* 2005.

21 AfDBAT, *Jenkins-Johnston v AfDB* 2005.

22 AfDB Staff Rule 101.02 (c).

The summary dismissal procedure is distinct and does not derogate from due process. The requirements that the Bank has been expected to observe derive from the principles of natural justice as evolved in the jurisprudence of international administrative tribunal[s]. In observing these principles, a staff member must be unequivocally be put on notice of the charges laid against [them]. [They] must also be given an unrestricted opportunity to exonerate [themselves] on charges laid against [them].²³

In that case, the AfDBAT found that due process was respected²⁴ and ultimately decided to reject the application on the merits, particularly because the applicant did not account for the money received and that they failed to disclose to AfDB that their child was no longer in school until after the conclusion of the audit.²⁵

In the second case, *Jenkins-Johnston v AfDB*, the applicant also argued that due process was not respected in that their case should have been referred to a disciplinary panel instead of being dealt with under the summary dismissal procedure. Mr. Jenkins-Johnston's situation was different than the one of Mr. C. G. S. in that Mr. Jenkins-Johnston, after realizing that they should have informed the AfDB about the change of status of their child, proceeded to inform the AfDB, recognized having committed an offence and started to reimburse the AfDB nine months before they were even informed of the education benefits' audit.²⁶ The AfDBAT sided with the applicant and decided that although the applicant did commit misconduct, the AfDB mischaracterized the offence as a 'serious misconduct' and nullified the summary dismissal and ordered their reintegration, stating that the usual disciplinary procedure should have been followed for regular misconduct.²⁷ The following quote from the judgment that underlines the importance ascribed to following proper procedure and respecting due process:

While understanding the highly appreciable and morally respectable reasons for Bank Management to severely reprimand punishable offences in order to prevent misconduct detrimental to the Bank's interests and the integrity of its staff, the Tribunal raises to an even higher level the principle of right to due process that fully guarantees the right to defence.²⁸

23 AfDBAT, *Mr. C. G. S. v AfDB* 2005, para 38.

24 *Ibid.*, para 39

25 *Ibid.*, para 43.

26 AfDBAT, *Jenkins-Johnston v AfDB* 2005, para 53.

27 *Ibid.*, para 54.

28 *Ibid.*

This early jurisprudence clearly indicates that the AfDBAT was cognizant of the principles developed in the jurisprudence of other international administrative tribunals regarding procedures and due process and was keen to adopt them as part of its jurisprudence. This was expected considering Article v(1) of the Statute prescribes that the AfDBAT would apply “generally recognized principles of international administrative law concerning the resolution of employment disputes of staff in international organizations”.

3.2 *Flexibility rather than Strict Formality in Determining the Existence of a Violation (2006–2009)*

Although the AfDBAT took a strong stance on the importance of respecting the requirement to follow proper procedures and to respect due process, the AfDBAT has displayed, in its subsequent jurisprudence, a certain level of flexibility in determining the existence of a violation of procedures or of due process. The cases mentioned in this sub-section will illustrate that, instead of simply limiting its analysis to determining whether a procedural requirement was strictly followed, the AfDBAT takes into consideration the purpose behind that specific requirement in examining all the facts and circumstances of the case in order to determine if the purpose was met.

In *Mr. Ablassé Ouedraogo v AfDB*, the applicant, a special advisor to the AfDB President, was accused of leaking negative information to the press and was summarily dismissed on that basis.²⁹ The trigger for the dismissal was an article published in a popular publication criticizing the management of the AfDB. The information contained in the article led to the suspicion that the applicant was at the origin of a leak. The applicant was verbally informed that they were suspected to be responsible for the leak. The applicant reacted by sending back a memorandum describing the verbal accusation and denying any involvement. The applicant was subsequently summarily dismissed by a letter that simply informed them of their dismissal, but without any reference to specific facts or charges.

The applicant argued that the procedure followed was irregular because the letter of dismissal did not state the offence with which they were charged.³⁰ The AfDBAT acknowledged that the letter of dismissal did not state the factual basis for the dismissal. However, considering that the applicant himself documented in a memorandum the charges verbally levied against him, the AfDBAT held that “under these circumstances, it was not necessary to renew the points

²⁹ AfDBAT, *Mr. Ablassé Ouedraogo v AfDB* 2008.

³⁰ *Ibid.*, para 30; see AfDB Staff Rule 101.02(a) which requires that staff members be notified by written notification of allegations of misconduct.

at issue in writing”³¹ and found that “the guarantees of due process [...] were respected”.³²

The AfDBAT could have taken a more formalistic approach and considered that the letter of dismissal, in the absence of details of the charges and facts supporting a dismissal, does not meet the procedural requirements and therefore the decision is vitiated. Instead the AfDBAT considered that, although the purpose of the letter was to inform the applicant of the charges, the applicant was clearly aware of the charges since they documented them themselves.

In *Mr. S. S. M. D. v AfDB* an AfDB manager was accused of soliciting a commission from an AfDB supplier on a contract for the supply of photocopiers. After investigations, the applicant was summarily dismissed for serious misconduct.³³ The applicant submitted that they were denied due process because they were only given 10 days to respond to the charges against them, whereas Rule 101.03(b) of the AfDB Staff Rules requires that a staff member be given 14 days within which to respond. While acknowledging that the period to respond to charges given to a staff member in cases of summary dismissal should ordinarily be at least 14 days, the AfDBAT held that:

That said, in the particular circumstances of this case, the Tribunal is not persuaded that the brevity of the period provided to Mr. D. to respond to the charges against [them] compromised the fairness of these proceedings. Not only did [they] not request any additional time to respond or suggest that the time provided was inadequate, [their] response was actually provided five days before the expiry of the time provided to [them]. Obviously, in this case, no additional time was necessary.³⁴

Again, instead of taking a strict formalistic interpretation of the rules to decide that giving a shorter period to respond than the regulatory 14 days vitiates the process, the AfDBAT took into account the facts of the case in taking a flexible approach and determined that, in the circumstances of this case, the staff member being given a shorter period to respond did not compromise the fairness of the process.

31 AfDBAT, *Mr. Ablassé Ouedraogo v AfDB* 2008, para 30.

32 Ibid. On the merits, the AfDBAT ruled in favor of the applicant because “no proof whatsoever was proffered by the Respondent”.

33 AfDBAT, *Mr. S. S. M. D. v AfDB* 2009.

34 Ibid., para 50.

3.3 *Consequences of Violations of Proper Procedure or Due Process (2010–Present Day)*

In certain judgements issued after 2010, the AfDBAT determined the existence of a violation, but nevertheless did not rescind the challenged disciplinary measure. The AfDBAT took into consideration the particular facts of each case in order to determine what should be the appropriate consequence, if any, to procedural irregularities or violations of due process. The case law described below will show that the AfDBAT may maintain the validity of the challenged decision despite recognizing a serious breach of procedures.

K. M. R. v AfDB is an example where the AfDBAT declared that due process was not followed but decided not to rescind the termination and instead awarded damages as compensation for the violation.³⁵ Mr. K. M. R. was a new staff member still on probation when the AfDB was contacted by their country's authorities to pressure the applicant to provide income-related information to a court within the context of divorce proceedings brought against them. The applicant was ordered by the AfDB to comply with the request.³⁶ The applicant refused to comply and instead levied accusations of harassment against the AfDB. Although a disciplinary process was initiated, the applicant was ultimately terminated on the basis of non-confirmation of their appointment following probation.³⁷

The AfDBAT found that the applicant was not accorded due process since no disciplinary panel was established to investigate or consider allegations against the applicant. Instead, the applicant's contract was terminated without the applicant being afforded any opportunity to be heard. Having found that the process initiated by the AfDB in this case was clearly initially intended to be disciplinary in nature, it determined that the procedural safeguards guaranteed by the AfDB Staff Rules were not respected.³⁸ However, the AfDBAT indicated that:

Notwithstanding the procedural irregularities identified above, the Tribunal observes that the Applicant significantly contributed to the termination of his probationary appointment by stubbornly refusing to comply with official instructions and persisting in his combative and

35 AfDBAT, *K. M. R v AfDB* 2010.

36 AfDB Staff Regulation 3.10 states, "...privileges, immunities and exemptions are granted to staff in the interests of the Bank. Consequently, they do not excuse staff members from discharging their civic or private obligations or from observing the laws and police regulations of the host country".

37 AfDBAT, *K. M. R v AfDB* 2010, para 26.

38 *Ibid.*, paras 32–33.

disruptive behavior. [They] must therefore blame [themselves] for what befell [them]. This did not exonerate the Bank from its obligation to grant the Applicant proper due process before terminating [their] appointment. However, in light of the conduct of the Applicant, the Tribunal will limit the remedy awarded to moral damages for the Bank's breach of procedure.³⁹

Two factually-related decisions issued in 2016, *B. O. v AfDB* and *E. O. v AfDB*, are examples of decisions where the facts overwhelmingly established the existence of the misconduct, but the AfDBAT, although it maintained the termination decision on the strength of the evidence, found the AfDB liable to pay damages because of the existence of procedural violations.⁴⁰ The facts of those two cases are virtually the same: both applicants were investigators in the AfDB department charged with investigating misconduct and sanctionable practices in projects financed by the AfDB. In the context of particularly sensitive sanctions procedures initiated against a company accused of bribery in an AfDB project, the law firm representing the accused company informed the AfDB that they had received two anonymous letters containing AfDB confidential information on the case, including the leaking of the strategy elaborated by AfDB's external counsel against the accused company. An initial screening identified the two applicants as likely suspects. The applicants were suspended with pay for 16 months pending the end of a lengthy investigation. The investigation determined that the two applicants were involved in the leak of information and in obstruction of the investigation. The applicants were subsequently dismissed after following the regular disciplinary procedure before disciplinary panels.

One of the arguments raised by the applicants to challenge their dismissal was with regards to the duration of their suspension. Rule 101.01(a) of the AfDB Staff Rules provides that a "staff member may be suspended from duty, pending investigation, for a period, which shall not exceed three [...] months but may be extended for not more than three [...] additional months to permit the completion of disciplinary proceedings". They argued that the failure for the AfDB to comply with the time limits provided for in the Staff Rules with regards to investigations and suspension should have the effect of vitiating the disciplinary actions.⁴¹ Since the judgments in *B. O. v AfDB* and *E. O. v AfDB*

39 Ibid., para 36.

40 AfDBAT, *B. O. v AfDB* 2016 and *E. O. v AfDB* 2016.

41 AfDBAT, *B. O. v AfDB* 2016, para 67; AfDBAT, *E. O. v AfDB* 2016, paras 21, 81–82.

contain very similar wording, we will only quote from the *B. O. v AfDB* decision to illustrate the AfDBAT's position regarding that argument:

The question to be determined by the Tribunal is the effect of the Bank's violation of Staff Rule 101.01(b) resulting in the suspension of the Applicant for a period of 16 months. The Tribunal has previously cautioned the Bank to respect statutory time limits and noted that its failure to do so could, in appropriate circumstances, lead to the setting aside of a decision taken out of time. (*S.A.C. v African Development Bank*).

[...].

In light of the gravity of the allegations against the Applicant and the weight of the evidence incriminating [them], the Tribunal has concluded that it is not appropriate to set aside the disciplinary action on the basis of undue delay. However, having regard to the prolonged suspension and the flagrant disregard by the Bank of the statutory time-limits, it is appropriate that the Tribunal award the Applicant a nominal amount of damages under this heading.⁴²

A recent case, *J. P. M. E. v AfDB*, is another example of a case where the AfDBAT identified a violation of due process but did not set aside the challenged disciplinary measures.⁴³ In that case, the AfDB accused the applicant of unlawfully using the travel card that was provided for the exclusive purpose of authorized missions. The applicant was found to have made numerous irregular cash withdrawals and payments with the travel card. When confronted with this accusation the applicant spontaneously admitted having misused the travel card. They also repeated this admission to the AfDB investigators and to the members of the disciplinary panel. The applicant was dismissed for misconduct. However, the applicant subsequently learned that the disciplinary panel heard the testimony of several other staff members, including their erstwhile supervisor. The applicant argued before the AfDBAT that they were not given the opportunity to challenge their testimony. The AfDBAT agreed with the applicant that they were not afforded an opportunity to challenge the testimonies before the disciplinary panel and indicated that,

[It] is concerned by the fact that the Disciplinary Panel received and reviewed evidence in the absence of the Applicant. The Applicant was not afforded an opportunity to rebut such testimony. This is a violation of the

⁴² AfDBAT, *B. O. v AfDB* 2016, paras 72, 74; see also AfDBAT, *E. O. v AfDB* 2016, paras 98, 101.

⁴³ AfDBAT, *J. P. M. E. v AfDB* 2018.

ordinary rules of due process and could amount to a fundamental breach. However, in the circumstances of this matter, where the Applicant has admitted to the contraventions with which [they have] been charged and was given an opportunity to explain [their] conduct before the Disciplinary Panel, there has been no material violation of his rights. In addition, having regard to the financial documents produced by the Bank, the evidence against the Applicant was indisputable. The Tribunal confirms the Disciplinary Panel's actions on this issue.⁴⁴

In that case, The AfDBAT rejected the application and did not award any damages for the violation of due process.⁴⁵

4 Observations and Conclusion

From 1999 to 2005, relying heavily on the jurisprudence of other administrative tribunals, the AfDBAT clearly considered that general principles of law can be elaborated and evolve in other administrative tribunals' jurisprudence and that such jurisprudence is relevant to it as a source of law. The AfDBAT clearly considered as important the requirement to follow proper procedures and to respect due process in cases of staff misconduct and proceeded in developing its own jurisprudence regarding arguments of procedural irregularities or violations of due process, building upon already established principles such as the respect of due process.

Between 2006 and 2009, the AfDBAT adopted a balanced approach to the issue of procedural irregularities and due process violation. Regarding procedural requirements set out expressly in AfDB rules, the AfDBAT did not approach procedural requirements in a dogmatic way but sought to understand the objectives behind the rules and made its determination based on whether the objectives have been met or not.⁴⁶

The examination of the case law developed in the latest era (since 2010 to the present day) presented in this chapter may raise the question as to whether the AfDBAT's strong statement in *Jenkins-Johnston v AfDB*, to the effect that it "raises to an even higher level the principle of right to due process",⁴⁷ has been contradicted by more recent judgments. Has the AfDBAT softened its stance regarding procedural irregularities and violation of due process in the last

44 Ibid, para 57.

45 Ibid, para 60.

46 See AfDBAT, *Mr. Ablassé Ouedraogo v AfDB* 2008 and *Mr. S. S. M. D. v AfDB* 2009.

47 AfDBAT, *Jenkins-Johnston v AfDB* 2005, para 54.

decade when compared to the earlier years of the Tribunal? Why has the AfDBAT maintained challenged disciplinary decisions in cases where it expressly recognized the existence of a violation of due process?

There is no contradiction between holding a principle to a high level and seeking to determine if a principle has been followed in spirit. The AfDBAT has in fact thus far shown consistency in its approach throughout its history—in determining whether a violation exists or not, it will always consider the overall fairness of the process followed and whether applicants have been offered the opportunity to be heard and to defend themselves.

The facts of each misconduct case brought before the AfDBAT differ, each case being unique. Although the AfDBAT has made it clear that due process is of paramount importance, this does not mean that any violation would automatically vitiate the whole disciplinary process and lead to automatic rescission of disciplinary decisions if the process was otherwise fair. When it makes a finding that there is a procedural irregularity or other violation of due process in a particular case, the AfDBAT then determines whether it is nevertheless possible to dispose of the case. If the violation has deprived the applicant from being heard or of being able to defend themselves, the AfDBAT will rescind the disciplinary decision like it did in *Jenkins-Johnston v AfDB*.⁴⁸

However, if the AfDBAT determines that the violation did not deprive the applicant of a defense, then the AfDBAT will examine the case on the merits and make the appropriate decision based on the evidence and the parties' arguments. At the same time, the AfDBAT generally awards damages to the applicant to compensate the prejudice caused by the violation, even in cases where the original disciplinary decision is maintained, as has happened in *B. O. v AfDB* and in *E. O. v AfDB*, discussed above.⁴⁹

The AfDBAT's balanced approach, which consists in assessing the fundamental fairness of the disciplinary process, does not negate or otherwise diminish the importance of due process. The AfDBAT's reluctance to automatically rescind a decision on the mere existence of a violation without first determining whether the violation actually affected the fairness of the process, is indicative of its concern with ensuring that justice be fully rendered in disciplinary matters, taking into account due process.

In conclusion, the AfDBAT's approach in misconduct cases amounts to answering the following questions: Has there been a violation of procedures or due process? If the answer is 'No', then the case is heard on the merits. If the answer is 'Yes', the following question must be answered: Was the process nevertheless fair, having allowed the accused to be heard and to present a proper

48 AfDBAT, *Jenkins-Johnston v AfDB* 2005.

49 AfDBAT, *B. O. v AfDB* 2016 and *E. O. v AfDB* 2016.

defense? If the answer to the second question is ‘No’, then the AfDBAT will set aside the decision on the basis that the violation amounts to a material violation of the accused’s rights. If the answer is ‘Yes’, however, the AfDBAT decides the case on the merits, but also systematically decides on whether the violation justifies imposing damages on the AfDB to compensate the applicant for this violation.

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Macro-Trends in the Performance Management of International Civil Servants and Their Legal Implications

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Abstract

The purpose of this chapter is to explore three performance management trends within international organizations and evaluate their legal implications. It seeks to identify different ways of combining well-settled principles of international civil service law, including the principle of ‘acquired rights’ and the right to appeal, with career systems increasingly focused on promoting meritocracy (the ‘what’), continuous feedback and feedforward (the ‘how’) and people managers (the ‘who’). Drawing on their experiences as legal practitioners and on a selection of jurisprudence from international administrative tribunals, the authors attempt to identify the balance between the legal features specific to managing the performance of international civil servants with the demands for accountability and sustainability in the delivery of a public service mission. The goal is not to provide a comprehensive study but rather to foster discussion and contribute to the overall debate on how to enhance the functioning of international organizations whilst allowing them to best achieve their mission. The authors wish for an outcome where this public service mission can emerge strengthened.

1 The What: careers in International Organizations—From Seniority to Merit-Based Career Advancement

Career advancement in international organizations—the upward progression of an employee’s career in terms of remuneration and responsibilities—is dependent on two main drivers: seniority and merit. Whilst the first one rewards the time worked for an organization, the second rewards the employee’s

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contribution to the organization's goals and is based on performance. Seniority refers to the number of years or months employees have spent in service whilst performance refers to how well these employees have performed their duties. These two drivers seem to always be present in the design of career systems in international organizations, but the emphasis on one or the other—or the way they are combined—varies greatly from one organization to the next. At the risk of oversimplification, some general trends have nevertheless been observed.

On one side of the spectrum, advancement is directly correlated to the individual performance rating attributed to employees in their regular (usually yearly) performance evaluations.¹ This means that better individual performance leads to quicker career advancement in a way that is not pre-established. Such systems are found in some international financial institutions.

On the other side of the spectrum, advancement is granted through organization-wide advancement exercises (usually yearly ones) but can be withheld on an individual basis when performance proves unsatisfactory.² This means that advancement is largely pre-established and, as a rule, the same for all employees irrespective of their individual levels of performance. In these career systems, which are found in some political and technical organizations, quicker advancement is reserved for only particularly meritorious employees and limited in number.

Between these two ends of the spectrum, different ways of shaping career progression have emerged where, for instance, advancement results from a merit-based selection of employees amongst those who perform well. This means that satisfactory performance is a pre-condition for advancement but is not necessarily sufficient.³

In recent years, some international organizations have undergone major career reforms aimed at shifting from seniority-based advancement through annual salary increments towards advancement schemes more focused on merit. The European Organization for Nuclear Research (CERN) first had its Merit-Oriented Advancement Scheme (MOAS) reform tested before (and upheld by) the Administrative Tribunal of the International Labour Organization (ILOAT) some 25 years ago.⁴ Since then, other technical organizations have followed suit, such as the European Patent Organization in 2015.

1 World Bank Staff Manual, r 6.01.

2 UNHR Portal Guidelines on Withholding Salary Increment, 1.

3 EPO Service Regulations, arts 47–49.

4 ILOAT, *Antoine Guyen v CERN* 1994, para 1; ILOAT, *Markus Audria v CERN* 1995, consids 1 and 3; ILOAT, *Edith Feldmann v CERN* 1995, para 1; ILOAT, *Monique Häusermann v CERN* 1995, para 1; ILOAT, *Eddy Penny v CERN* 1995, paras 1–3; ILOAT, *Maryse Seissau v CERN* 1995, para 1.

These career system reforms rely on the premise that merit-based advancement will lead to higher staff engagement and better service delivery. Whilst each organization has its own policy reasons for venturing into the shift from seniority to merit-based advancement (be it financial sustainability, enhanced efficiency or both), it is interesting to explore the legal boundaries which international civil service law sets around such important shifts and whether the principle of 'acquired rights' has any place in the career advancement of an international civil servant. Indeed, the principle of acquired rights lies at the core of wide policy reforms in international organizations for it sets the legal parameters of permissible unilateral changes to employment conditions and has often been put forward in litigation to challenge such policy changes. It is of interest, for discussion purposes, to recap how some international administrative tribunals have defined the principle of acquired rights, and to then assess the outcome of a few, illustrative, cases selected from the relevant jurisprudence.

1.1 *The Principle of 'Acquired Rights'*

Using the expression 'acquired rights' is a convenient way to cover multiple references to the same reality in the jurisprudence of international administrative tribunals. At the risk, here again, of oversimplification, this reality boils down to limiting the legislative power an international organization possesses to unilaterally amend key conditions of employment of its staff. The very term 'acquired rights' implies and suggests the idea of protection and the notion that such rights may expect to survive future variation.⁵ Are there any such rights in relation to career advancement?

Firstly, in its famous decision in *Louis de Merode et al. v The World Bank*, the World Bank Administrative Tribunal (WBAT) defined the Bank's power of amendment and, as a counterpoint, the Tribunal's power of review, particularly in respect of acquired rights:

As has been stated, while the fundamental and essential elements of the conditions of employment may not be amended unilaterally, the non-fundamental and non-essential elements are subject to unilateral amendment. This power is discretionary and it is not for this Tribunal to substitute its own judgment for that of the competent organs of the Bank in exercising that discretion. However, the Bank's power to amend non-essential terms may be exercised subject to certain limitations. Discretionary power is not absolute power.

5 ILOAT, *Ayoub et al. v ILO* 1987, consid 12, cited in UNAT, *Lloret Alcañiz et al. v Secretary-General of the UN* 2018, para 86; UNAT, *Quijano-Evans et al. v Secretary-General of the UN* 2018, para 52.

First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.

The principle of non-retroactivity is not the only limitation upon the power to amend the non-fundamental elements of the conditions of employment. The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing “the highest standards of efficiency and of technical competence”. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal.

The Tribunal must be satisfied itself in each case that the Bank’s power to change the non-fundamental elements in the conditions of employment of its employees has not been exercised either retroactively or in an arbitrary or otherwise improper manner.⁶

Secondly, although the ILOAT had already referred to the concept of acquired rights in its judgment *Robert V. Lindsey v International Telecommunication Union*,⁷ it is in its judgment *Ayoub et al. v International Labour Organization*, that it provided a generic definition of acquired rights and established a methodology to assess an alleged breach of acquired rights:

In Judgment 61 (in re Lindsey) the Tribunal held that the amendment of a rule to an official’s detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment. That calls for some explanation. Although there will be breach of an acquired right only if one of two conditions is fulfilled, the two are in

⁶ WBAT, *Louis de Merode et al. v The World Bank* 1981, paras 45–48.

⁷ ILOAT, *Robert v. Lindsey v ITU* 1962.

fact but one. Disturbance of the structure of the contract posits impairment of a fundamental term, and the latter the former. A somewhat broader framing of the doctrine is wanted so that it will cover not just terms of appointment that were in effect at recruitment but also terms that were brought in later and were calculated to induce the staff member to stay on. The reference to a “term of appointment in consideration of which the official accepted appointment” was never meant to import a subjective test: did this term or that actually make the staff member sign on or decide to stay? What the Tribunal had in mind was a term of the sort that might sway his decision. In some instances only the existence of a particular term of appointment may form the subject of an acquired right. But there are other contingencies in which the arrangements for giving effect to the term may also give rise to such a right. Stated in that way the doctrine is broader than the rule against retroactivity. Whereas the doctrine looks to the future as well as to the past, the rule merely forbids altering what already belongs to the past. So before ruling on the plea the Tribunal must in each case determine whether the altered term is fundamental and essential.

There are three tests it will apply.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?⁸

This landmark judgment has consistently been referred to by the ILOAT ever since.⁹

⁸ ILOAT, *Ayoub et al. v ILO* 1987, paras 13–14.

⁹ For a recent example, see ILOAT, *H. (No 4) et al. v EPO* 2019, para 7.

Thirdly, in its recent judgment *Quijano-Evans et al. v Secretary-General of the United Nations*, the United Nations Appeals Tribunal (UNAT) defined its approach to acquired rights as follows:

An “acquired” right should be purposively interpreted to mean a vested right; and employees only acquire a vested right to their salary for services already rendered. Promises to pay prospective benefits, including future salaries, may constitute contractual promises, but they are not acquired rights until such time as the quid pro quo for the promise has been performed or earned. Moreover, the fact that increases have been granted in the past does not create an acquired right to the future increases or pose a legal bar to a reduction in salary.

The limited purpose of Staff Regulation 12.1, therefore, is to ensure that staff members are not deprived of a benefit once the legal requirements for claiming the benefit have been fulfilled. The protection of acquired rights therefore goes no further than guaranteeing that no amendment to the Staff Regulations may affect the benefits that have accrued to, or have been earned by, a staff member for services rendered before the entry into force of the amendment. Amendments may not retrospectively reduce benefits already earned. In the final analysis, the doctrinal protection of acquired rights is essentially an aspect of the principle of non-retroactivity. The aim is to protect individuals from harm to their vested entitlements caused by retrospective statutory instruments.¹⁰

These judgments show multiple approaches towards the definition of ‘acquired rights’: a broad and comprehensive one held by the WBAT; a more generic one, combined with an assessment methodology, held by the ILOAT and a narrower one held by the UNAT.

1.2 *Recognition of Acquired Rights*

Whereas employees have often invoked the principle of acquired rights in litigation to challenge a change in their employment conditions, including in relation to career advancement, they have rarely achieved a successful outcome before the international administrative tribunals who seldom censure such changes—and those cases where they do, mostly involve compensation and benefits aspects or access to judicial review. The WBAT has recognised ‘acquired

¹⁰ UNAT, *Quijano-Evans et al. v Secretary-General of the UN* 2018, para 52, citing UNAT, *Lloret Alcañiz et al. v Secretary-General of the UN* 2018, paras 90–91.

rights' to tax reimbursement on salaries,¹¹ to periodic adjustment of salary¹² and to the availability of an impartial adjudicator of employment claims.¹³ Similarly, the ILOAT has, for instance, considered a non-resident's allowance¹⁴ or pension entitlements to be 'acquired rights'.¹⁵

The most specific legal considerations both directly relevant to career advancement and referring to the principle of acquired rights were identified in the jurisprudence of the ILOAT and address promotion as follows:

...rules on promotion do confer an acquired right insofar as they offer staff an expectation of advancement. But the particular arrangements for the grant of promotion confer no such right because on recruitment staff cannot foretell how they will fare in their career. [...] In any event an organization may change the rules on promotion for the sake of efficiency and so as to cope with changing circumstances.¹⁶

One may conclude from the above that the only 'acquired rights' specifically conferred by a career system is an expectation of advancement or in other words, a career prospect—which can encompass different forms of career moves (upwards towards increased responsibilities or through a competitive process, across between technical and managerial functions). It is worth mentioning that the Tribunal has also left the door open to changes made necessary by efficiency requirements or changing circumstances.

It would seem that it is therefore first and foremost the reason behind the reform that drives the robustness of a change in career system. This aspect is equally emphasised in the *de Merode* case of the WBAT, where the manner in which the change is prepared or applied is to be taken into account when assessing whether the change is permissible. Ultimately, the answer to the question of permissibility seems to lie in the specific reasons for the change rather than in the change itself.

11 WBAT, *Louis de Merode et al. v The World Bank* 1981, para 82.

12 WBAT, *Louis de Merode et al. v The World Bank* 1981, paras 111 and 112; WBAT, *Lyra Pinto v IBRD* 1988, para 40; WBAT, *Elena Gavidia v IFC* 1988, para 26; WBAT, *Bechir C. Chakra v IBRD* 1988, para 30; WBAT, *Rosario Cardenas v IBRD* 1988, para 31; WBAT, *Alan Berg v IBRD* 1988, para 43.

13 WBAT, *AK v IBRD* 2009, para 31.

14 ILOAT, *Poulain d'Andecy v FAO* 1960, para 5.

15 ILOAT, *Ayoub (No 2) et al. v ILO* 1989, para 24.

16 ILOAT, *M. S. et al. v EPO* 2014, para 14, citing ILOAT, *Barahona and Royo Gracia (No 2) v ICPO* 1990, para 4.

The interesting perspective given by these three international administrative tribunals is that their findings can be used to frame in simple (yet hopefully not simplistic) terms, the fundamentals of career advancement in the literal sense of the word. Whether these tribunals have established a narrow or a broad interpretation of the concept of acquired rights, none appear to adopt a position in law which would prevent as such international organizations from moving towards performance-based career systems.

2 **The How: Performance Evaluations—From Annual or Biannual Performance Reports to Continuous Feedback and Feedforward**

In 2017, a leading consultancy firm stated that the performance management revolution was in full flight and that organizations across all sectors and regions were changing the way employee performance was measured and evaluated.¹⁷ Yearly formal performance evaluations are giving way to continuous performance feedback. Continuous feedback allows for the performance of an employee to be evaluated on an ongoing basis rather than in a formalised way (through evaluation reports) at pre-defined intervals (at the end of the year). This shift reflects the organization's acknowledgement that performance management is an everyday task rather than a yearly one. It also relies on the premise that continuous feedback will lead to higher staff engagement and better service delivery in an organization.

Why would an organization venture into continuous feedback? The traditional end-of-year performance evaluation 'ceremony' creates dissatisfaction. Managers responsible for conducting evaluations and evaluated employees alike do not greet performance evaluations with enthusiasm. Beyond mere bitterness, this response is rooted in experience. Reasons for this may be that such exercises do not warrant the time invested, that they do not protect against managers' bias, that they are usually focused on the past rather than the future, on tasks rather than individual development, and that they follow a judgmental approach in many ways, often lacking in the substance needed to truly steer professional development. Added to this is a high risk of cultural misunderstandings which are common in international organizations. This combination of elements is a major cause for conflict in the workplace and for litigation, as evidenced by the rich body of jurisprudence of international administrative tribunals on the matter.¹⁸

¹⁷ Deloitte 2017, 65.

¹⁸ The ILOAT index of cases for instance shows 457 references under 'Work appraisal'.

By contrast, continuous performance feedback (and feedforward) provides more, and therefore better, data for people decisions, encourages conversations and focus on content and performance methods rather than on the sole results.¹⁹ It is presented as a means rather than an end. Overall, this is an attractive prospect for an organization wishing to increase its career system's focus on performance.

What would be the consequences—from a legal perspective—of such a shift for those international organizations who are eager to catch up with the latest trends? A pre-condition to accessing means of redress under international civil service law is the existence of an administrative decision which adversely affects the legal situation of an employee. In performance management, this has long been embodied by the traditional evaluation report. The ILOAT thus held that:

...prima facie the complainant is entitled to have [their appraisal report] for what [they] thinks it to be worth; a doubt thrown on its value is not a ground for denying it. Furthermore, its usefulness to the complainant is not to be judged exclusively by reference to the main purpose of the report as set out in [the] Staff Rule [...]. Appraisal reports constitute a record of service which as a general rule an official is entitled to have for his own satisfaction as well as for use if he is seeking other employment [...].²⁰

What would happen—from a legal standpoint—if performance evaluations as we know them today were to become a means to steer future performance rather than an end to record past performance? What would happen—from a legal standpoint—if a formalised record at pre-defined intervals, so prevalent today in the legal framework of international organizations, were replaced by multiple discussions aimed at providing instant feedback, when and as needed, as part of an ongoing manager-employee exchange? The proposition is that ongoing feedback discussions—taken separately—could not qualify as an administrative decision adversely affecting the legal situation of an employee. Each conversation would be a step in the overall continuous performance evaluation, but could not, in and of itself, embody the evaluation or modify the legal situation of an employee. Otherwise, organizations would run the risk of multiplying decisions to an extent no longer sustainable.

19 Feedforward in performance management refers to a continuous and constructive conversation between employees and their manager, focused on future performance.

20 ILOAT, *Francis Donal Schofield (No 2) v WHO* 1980, para 4.

Would there then be a challengeable decision adversely affecting the legal position of an employee? It is worth recalling that appraisal reports have not always been considered challengeable administrative decisions. In its early days, the ILOAT ruled that:

...the evaluation expressed in that report was made within the exercise of a discretion and constituted only an opinion preliminary to a decision by the Director General relating to the grant of an annual increment, and there can be no recourse to the Tribunal in relation to this evaluation [...].²¹

It later reiterated this position in more specific terms, and dismissed as irreceivable a claim for the quashing of an evaluation report issued in the context of an employee's probation:

A plea to quash can be directed only against a decision, that is, against an act deciding a question in a specific case. A performance report embodies no decision capable of being rescinded. A complaint seeking such relief is not receivable.²²

The performance report was considered an intermediary step in the taking of a different administrative decision, be it termination of service, non-renewal of appointment or salary increment. Later, the ILOAT altered its approach and began to consider that judicial review was warranted:

The words complained of are contained in an appraisal report whose function it is to evaluate past performance and conduct and not to give directives for the future. Moreover, the facts as they appear in the dossier show that there was no act or omission by the complainant which could prompt any special directive for the future, let alone any criticism of the past. The Tribunal will not normally entertain complaints about the contents of appraisal reports; it is essential to their value that the supervisor should be granted great freedom of expression and normally, if there be any errors of judgment on [their] part, they can be sufficiently remedied by the incorporation in the appraisal report of the staff member's point of view. But in the circumstances of this case the Tribunal feels bound to conclude that the words complained of were inserted in the report under

²¹ ILOAT, *René Roux v ILO* 1956, para 11.

²² ILOAT, *P. C. de C. v WHO* 1967, para 1.

a total misconception of the situation and that justice requires that they should be expunged.²³

It is worth noting here that the Tribunal relied on the assumption that the appraisal report in question—in its classical form as is widely used today—was about evaluating past performance rather than steering future performance development.

Finally, the Tribunal asserted control over the appraisal report, and qualified it as a discretionary autonomous decision subject to judicial review, albeit a limited review:

The impugned decision, which relates to the assessment of an official's performance, is of a discretionary nature. Hence the Tribunal may quash it only if it was taken without authority, or tainted with a flaw of form or of procedure, or based on an error of fact or of law, or if essential facts were overlooked, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.²⁴

So, what could be the way forward? Our proposition is to combine the features which safeguard access to means of redress specific to the international civil service so that continuous performance feedback may under certain circumstances become a challengeable act. Already today at the United Nations, only formal performance evaluations recording a rating below satisfactory may be contested via formal means of redress since the satisfactory ones are considered to have no adverse legal effect on their recipient. Only administrative decisions taken on the basis of the results of a performance review that affects a staff member's conditions of service may be appealed through the United Nations' internal justice system.²⁵ The UNAT went as far as to reverse a decision of its predecessor, the United Nations Dispute Tribunal, in relation to the challengeable nature of a satisfactory evaluation report in the following terms:

Pursuant to Section 15.1 of ST/AI/2010/5, staff members having received the rating of "successfully meets performance expectations" cannot challenge the performance appraisal by way of rebuttal. Section 15.1 provides:

23 ILOAT, *Gerard Joseph Glynn v WHO* 1971, para 3.

24 ILOAT, *Stefaan Bernard Peeters (No 2) v IPI* 1978, para 3.

25 UN Secretariat Performance Management Policy, s 14.

Staff members who disagree with a “partially meets performance expectations” or “does not meet performance expectations” rating given at the end of the performance year may, within 14 days of signing the completed e-PAS or e-performance document, submit to their Executive Officer at Headquarters, or to the Chief of Administration/Chief of Mission Support, as applicable, a written rebuttal statement setting forth briefly the specific reasons why a higher overall rating should have been given. Staff members having received the rating of “consistently exceed performance expectations” or “successfully meets [sic] performance expectations” cannot initiate a rebuttal.

Pursuant to Section 15.7 of ST/AI/2010/5, “[t]he rating resulting from an evaluation that has not been rebutted is final and may not be appealed. However, administrative decisions that stem from any final performance appraisal and that affect the conditions of service of a staff member may be resolved by way of informal or formal justice mechanisms”.

In the instant case, there was no evidence of any adverse administrative decision stemming from [the complainant’s] performance appraisal. The FRO’s comment on [the complainant’s] output—a comment made in a satisfactory appraisal—was not a final administrative decision. It did not detract from the overall satisfactory performance appraisal and had no direct legal consequences for [the complainant’s] terms of appointment.

We find that the [United Nations Dispute Tribunal] erred in law in finding that [the complainant’s] satisfactory appraisal constituted an appealable administrative decision.²⁶

There is therefore interest in finding a position which lies at the crossroads between the approaches of these tribunals, and which addresses pragmatic concerns around the severe consequences unsatisfactory performance may have on the very employment of staff.

It is worth highlighting that the jurisprudence of international tribunals is abundant regarding unsatisfactory performance and displays principles which have appeared stable over time and consistent across tribunals. These principles mainly revolve around the duties of an employer, namely: to inform in a timely manner and in specific terms about the unsatisfactory aspects of the performance; to give a reasonable opportunity for the employee to remedy

²⁶ UNAT, *Ngokeng v Secretary-General of the UN* 2014, paras 29–32.

shortcomings; to warn in specific terms of the risks attached to the unsatisfactory performance; and to afford due process.²⁷

The proposition is that there would be no pre-established administrative decision in the context of continuous performance feedback. There is however always a need for legal certainty in the employment relationship. On the employee's side, this is afforded by a particular act that allows for the possibility of redress without necessarily having to wait for dire consequences. On the employer's side, this is afforded by an act that opens and closes a time limit for challenge by the employee. Both sides meet when the employee is notified of unsatisfactory performance likely to lead to consequences which are difficult to reverse in practice, such as termination of service. Such notification is already a prerequisite under general principles governing performance evaluation. It is therefore a convenient starting point to embody the necessary adverse legal effect.

In conclusion, with feedback and feedforward becoming an ever more prominent trend, there is a need, from a legal standpoint, to identify the challengeable decision in the interests of both the employee and the employer. There is also a need, in more general terms, to strike the right balance between the legitimate right to appeal and the possibility for international organizations as employers to see performance evaluations evolve according to the latest trends without having to fear a paralysing volume of litigation.

3 The Who: Performance Management—From Technical Experts to People Managers

There can be no performance management without managers. The best management tools would fail without good managerial practices and the professionalisation of managers is high on the agenda of reformers.

In recent years, we have witnessed a trend whereby behavioural competencies have become more prevalent in international organizations' performance management schemes. Whilst behavioural competencies (namely, motivational, interpersonal or managerial skills) are intrinsic capabilities that are typically applicable to any role or organization, technical competencies are focused on disciplinary expertise (for example, law and jurisprudence for a lawyer, accounting standards for an accountant) and the application of this expertise to perform effectively in a given role. It is no longer solely what an

²⁷ ILOAT, *A. R. v OIE* 2012, consid 9; WBAT, *Kiran Singh v IBRD* 1988, para 21, citing *N. Samuel-Thambiah v IBRD* 1993, para 32.

employee delivers that contributes to their performance but how this technical output is delivered.

This trend has been translated into jurisprudence to an extent that employees' shortcomings in few (but essential) behavioural competencies can afford sufficient ground for termination of service. The UNAT has observed in this respect:

[The complainant's] claim that it was wrong to terminate [their] service on the basis of the concerns about only two of the eleven competencies in [their performance evaluation] is not supported by any authority. In addition, it is reasonable for the Administration to view the competencies of leadership and communication as the important requirements for [their] position [...].²⁸

In the same vein, the WBAT has observed:

In this case, there can be no doubt that the Applicant was a competent staff member whose technical and professional abilities were never at issue. The problem was essentially one of difficulties in [their] interpersonal relationships.²⁹

The main legal issue behind the growing importance of behavioural competencies lies in performance assessment by managers. Managers have to evaluate people rather than technical output, and behavioural competencies cannot be measured with figures. The jurisprudence of international administrative tribunals has long acknowledged the discretionary and non-mechanical nature of the assessment made by managers of their employees. The ILOAT has articulated it as follows:

Assessment of merit is an exercise that involves a value judgement. It is usual to refer to decisions or recommendations involving a value judgement as "discretionary", signifying that persons may quite reasonably hold different views on the matter in issue and, if the issue involves a comparison with other persons, they may also hold different views on their comparative rating. The nature of a value judgement means that point-to-point comparisons are not necessarily decisive.³⁰

28 UNAT, *El Sadek v UNRWA* 2019, para 55.

29 WBAT, *Kiran Singh v IBRD* 1998, para 9.

30 ILOAT, *J. T. M. v EPO* 2011, para 7.

Overall, international administrative tribunals have exercised restraint when reviewing performance assessments conducted by managers:

The UNDT made several errors of law when it found UNICEF's decision not to renew [the complainant's] contract for poor performance was not supported by the [Performance Evaluation Report] and was unlawful. Initially, the Dispute Tribunal reviewed *de novo* the Agency's decision. It did not accord any deference to UNICEF's conclusion that [the complainant's] performance was poor. Instead, it placed itself in the role of the decision-maker and determined whether it would have renewed the contract, based on the [Performance Evaluation Report]. This is not the role of a reviewing tribunal under the UNDT Statute.³¹

In the context of increased value judgment entailed by the evaluation of behavioural competencies, and with due deference to the conclusions drawn by managers as to the satisfactory nature of their employees' performance, international administrative tribunals are likely to place more emphasis on procedural or substantive safeguards which are critical to governing the way unsatisfactory performance is determined.

As far as procedural safeguards are concerned, the checks and balances put in place by international organizations in the evaluation of performance can take many shapes and forms and can to some extent be decisive. The ILOAT has for instance insisted on the role of the manager's own manager in supervising an evaluation exercise where the relationship between the employee and the manager is at issue:

...it is well settled by the Tribunal's case law that if the rules of an international organization require that an appraisal form must be signed not only by the direct supervisor of the staff member concerned but also by [their] second-level supervisor, this is designed to guarantee oversight, at least *prima facie*, of the objectivity of the report. The purpose of such a rule is to ensure that responsibilities are shared between these two authorities and that the staff member who is being appraised is shielded from a biased assessment by a supervisor, who should not be the only person issuing an opinion on the staff member's skills and performance. It is therefore of the utmost importance that the competent second-level

31 UNAT, *Said v Secretary-General of the UN* 2015, para 40.

supervisor should take care to ascertain that the assessment submitted for [their] approval does not require modification.³²

International organizations have also set up various bodies whose role it is to calibrate, harmonise or review the evaluation of performance by managers, or to monitor performance evaluation exercises at organization level.³³ What these safeguards have in common is that they create peer or institutional pressure to ensure fairness in the process.

As far as substantive safeguards are concerned, some international administrative tribunals are placing particular emphasis on the record available to support the conclusion that an employee's performance falls short of expectations, as well as on the existence of "a rational objective connection between the information available and the finding of unsatisfactory work performance".³⁴ To put it in the words of the WBAT when defining its scope of judicial review for discretionary decisions, this safeguard is about whether the adverse performance evaluation was made on an "observable"—this goes to the record—"and reasonable basis"—this goes to the link and proportionality between the record and the performance findings.³⁵

In summary, the shift in the way managers evaluate performance and place greater emphasis on behavioural competencies necessarily brings wider discretion into the performance assessment exercise. Given dominant and recent trends observed in the jurisprudence of international administrative tribunals, it is suggested that the robustness of a finding of unsatisfactory performance is likely to increasingly revolve around the robustness of the process conducted and around the wealth of record available.

4 Conclusion

It is hoped that this concise exploration of macro-trends in performance management will resonate with professionals familiar with the functioning of international organizations and that it will feed the discussion around the legal implications of these trends. This chapter will have fulfilled its purpose if it has fostered the appetite of international organizations to adapt their approach to

32 ILOAT, *B. (No 2) v EPO* 2016, para 14.

33 See, for instance, UN Secretariat Performance Management Policy, s 14; EPO Guidelines on Performance Development, s II (1); World Bank Staff Manual, r 9.o6.

34 UNAT, *Sarwar v Secretary-General of the UN* 2017, para 74.

35 WBAT, *EG v IBRD* 2017, para 86.

performance management, bearing in mind how best to achieve their mission. Its goal will have been met if, at the same time, it has contributed to identifying adequate safeguards of the independence and impartiality of international civil servants through an evolution of the jurisprudence of international administrative tribunals on the matter.

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Appendices



2019 AIIB Law Lecture: The Rise of Sustainable Development in International Investment Law

*Nico Schrijver**

Abstract

In recent decades, sustainable development gained currency as a principle of international law remarkably quickly. It is an integrated concept, having economic, environmental, social and governance dimensions. Sustainable development is by now well anchored in various sources of international law, especially treaty law and soft law instruments, and ranging from international environmental law and human rights law to international economic law and investment law. As to the latter, (inter-)regional economic treaties and bilateral investment treaties increasingly incorporate sustainable development. This also gave rise to the concept of responsible investment, which is an approach to conducting business and managing assets that includes environmental, social and governance factors as well as taking public values into account in investment strategy. The UN General Principles of Business and Human Rights (Ruggie Principles) and the Sustainable Development Goals of the World Development Agenda 2030 are closely related to the evolution of the principles for responsible investment. Obviously, many obstacles to their implementation do exist. These include the lack of enforcement mechanisms, controversial investment practices and widespread patterns of unsustainable production and consumption. This chapter concludes by examining what the role of international investment law, both as a value system and a concrete regulatory framework, can be for achieving sustainable development and responsible investment.

1 Introduction

This lecture examines the rise of sustainable development in international investment law. For this purpose, the meaning of the concept of sustainable

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development and its inception into international law is first discussed (Section 1). Secondly, the gradual incorporation of sustainable development into international investment law and the emergence of the concept of ‘responsible investment’ is addressed (Section 2). Obviously, many obstacles do still exist for the implementation of the principles and rules of sustainable development and responsible investment. Therefore, the last part of this lecture (Section 3) discusses how to overcome these obstacles and what the role of international law in general and international investment law in particular can be in achieving sustainable development and responsible investment.

2 The Meaning of Sustainable Development and Its Inception into International Law

‘Sustainable development’ is a key term in international politics which in a remarkably short period of time has also become firmly established in international law.¹ The World Commission on Environment and Development headed by former Prime Minister Brundtland of Norway defines this concept in its report ‘Our Common Future’ as development that “meets the needs of the present generation without compromising the ability of future generations to meet their own needs”.² This is still an admirably concise description of the core of the meaning of sustainable development. Firstly, this description demonstrates an awareness of the finite capacity of our planet and its natural resources. Second, it also takes into account the interests of future generations, including our grandchildren, to meet their own needs, hence highlighting the principle of intergenerational equity.

In a way, sustainable development builds on and combines three principal chapters of international law. Firstly, international environmental law, which is a relatively young chapter of international law;³ second, international economic law, especially as far as it relates to development;⁴ and third, human rights law.⁵ This lecture refers both to substantive rights—such as the right to life, the right to health and the right to an adequate living standard—and to procedural human rights—such as citizens’ access to information, access to

1 Schrijver, *The Evolution of Sustainable Development in International Law* 2008, 173–207; also in The Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law* 2007, vol 329, 217–412.

2 World Commission on Environment and Development 1987, 43.

3 See Sands and Peel 2018; Birnie and others 2009.

4 See Schrijver and Weiss 2004; Bhuiyan and others 2014.

5 See Danish Institute for Human Rights, ‘Human Rights and Sustainable Development’, 13 July 2018.

justice and participation in environmental decision-making. Hence, in a way, sustainable development represents the best of all worlds.

The work of the present author has distinguished seven main elements of the principle of sustainable development.⁶ The first, and perhaps the most firmly grounded in international law, is the sustainable use of natural resources. Many treaties now emphasize this dimension, whether in relation to fishery agreements, sustainable timber production or preserving biological diversity. Second, also very important, is sound macroeconomic development and what the facilitating role of international law can be toward this end. The third element is environmental conservation, a key component of sustainable development. The fourth is equity, both between current and future generations (that is intergenerational equity), but also equity for and among the people living now: that is intra-generational equity. Fifth, there is the element of time. The time dimension of sustainable development is both short and long-term. This is particularly evident in the Paris Climate Agreement.⁷ In the short-term, we have to act now if we would like to prevent further destruction of the precious planetary climate system. But there is also a need for a sustained, long-term strategy. In terms of the Paris Agreement: by 2050 we should operate as energy-neutral as much as possible and by 2100, the global temperature rise should be well below two degrees Celsius.⁸ Element number six relates to human rights, public participation and justice for all. Lastly, number seven, perhaps the most important but at the same time the most complicated element, is how to integrate the environmental, the developmental and the human rights concerns and how to blend them into a comprehensive integrated and effective international law system in the pursuance of sustainable development.⁹

Sustainable development did not come about overnight in international law. Its roots can be traced to some early treaties, for example, nature management treaties and anti-pollution in river treaties, some of which even date back to the nineteenth century. Furthermore, we can also note the concept of the maximum sustainable yield in international fisheries law of the early part of the twentieth century.¹⁰ Yet the concept of sustainable development was really launched through so-called soft law in the period of the United Nations. In particular, the 1972 Stockholm Declaration¹¹ and the 1992 Rio Declaration on

6 Schrijver, *The Evolution of Sustainable Development in International Law* 2008, 208–219.

7 Paris Agreement.

8 *Ibid.*, art 2, para 1(a).

9 See New Delhi Declaration of Principles of International Law Relating to Sustainable Development, princ 7.

10 Cf UN Convention on the Law of the Sea (UNCLOS), arts 61(3) and 119(1).

11 See UN, 'Report of the United Nations Conference on the Human Environment', 16 June 1972, 3–5. For a comprehensive analysis of the debates and the text, see Sohn 1973.

Environment and Development¹² have been instrumental in putting sustainable development high on the international political agenda. In their track, soon new multilateral environmental agreements were concluded. Examples of follow ups of the Stockholm Declaration include the Convention on International Trade in Endangered Species (CITES, 1973),¹³ the Convention on Wetlands of International Importance especially as Waterfowl Habitat (1974)¹⁴ and the Convention on Long-Range Transboundary Air Pollution (CLRTAP, 1979).¹⁵ Off-springs of the Rio Declaration include the first Climate Change Convention (UNFCCC)¹⁶ and the Convention on Biological Diversity (both from 1992),¹⁷ in addition to the earlier adopted Ozone Convention and its Montreal Protocol, which have proven to be effective for the protection of the ozone layer.¹⁸ Furthermore, we now see the incorporation of the principle of sustainable development also in international economic agreements. The agreement to establish the World Trade Organization adopted in 1994 serves as an important example since it integrates sustainable development as an important objective of this new international economic institution.¹⁹

In Europe, we can also note that the 2007 Reform Treaty of Lisbon on the Functioning of the European Union (EU) includes as many as 27 references to the concept of sustainable development.²⁰ Somewhat hesitantly behind are human rights treaties as well as international investment agreements, but that may be a matter of time.

Apart from consolidating and codifying sustainable development in treaty law, soft law is instrumental in further clarifying and progressively developing the scope and meaning of sustainable development. This brings us to the role of the Sustainable Development Goals (SDGs), adopted in 2015.²¹ Their forerunners are the eight Millennium Development Goals, adopted at the

12 Declaration of the United Nations Conference on Environment and Development (Rio Declaration).

13 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

14 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention).

15 Convention on Long-Range Transboundary Air Pollution (CLRTAP).

16 United Nations Framework Convention on Climate Change (UNFCCC).

17 Convention on Biological Diversity (Biodiversity Convention).

18 Vienna Convention for the Protection of the Ozone Layer (Vienna Convention); Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).

19 See the preamble of the Marrakesh Agreement establishing the WTO (WTO Agreement).

20 Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (Treaty of Lisbon).

21 UN, 'Sustainable Development Goals'.

beginning of this millennium.²² In 2015, they have been succeeded by 17 SDGs with as many as 169 targets.²³ They are part and parcel of the wider United Nations World Development Agenda 2015 to 2030.²⁴ These SDGs are of course not hard law, but they do carry some important normative value. It could well be argued that in part they embody ‘programmatory’ law and ‘aspirational’ law, in the sense of guidelines for the desirable future development of international law in support of sustainable development.²⁵ The SDGs also have concrete targets and include monitoring, reporting and evaluation procedures. Many governments, international organizations, and non-state actors, including businesses, have subscribed to the SDGs.²⁶ The various elements of the concept of sustainable development as discussed above, come clearly to the fore. For example, SDG 1 is that of poverty reduction (‘leaving nobody behind’); SDG 3—of paramount interest to all of us—relates to good health; SDG 6 on the availability and sustainable management of water and sanitation for all; SDG 13 on combating climate change and its impacts; SDG 14 on conserving and sustainably using the oceans, seas and marine resources; SDG 15 on the sustainable use of terrestrial ecosystems, forests and biological diversity; SDG 16 refers to promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels.²⁷ To achieve this, we need cooperation. This is also amply reflected in SDG 17 on global partnership for the achievement of the global goals.²⁸

There is also an increasing body of international jurisprudence including from the International Court of Justice.²⁹ In the *Danube Dam* case between Slovakia and Hungary for the first time in 1997, in the *Pulp Mills* case between Argentina and Uruguay in 2010 and most recently in the case between Costa Rica and Nicaragua regarding certain activities and the construction of a road by Nicaragua in the border area, we can note the Court’s recognition of sustainable development as a concept in international law.³⁰

22 UN Millennium Declaration. An extensive analysis of the substance and the state of affairs of the Millennium Development Goals is given by UNDP in *Human Development Report 2003*; and in the annual *Millennium Development Goals Reports*.

23 For a general overview of the SDG-making process, see Kamau and others 2018.

24 UN, ‘Transforming Our World’, 25 September 2015.

25 For the notion of ‘programmatory’ law, see Dupuy 1977, 245–258.

26 See Weiss and Browne 2014.

27 UN, ‘Sustainable Development Goals’.

28 Ibid.

29 See Sands 1999, 390–396; Stephens 2010, 55–56.

30 Ibid.

In sum, we can amply note the rise of sustainable development in international law: firstly, in areas of direct environmental relevance, such as rivers, seas, oceans, water resources, biological diversity, living and non-living natural resources and transboundary resources. In many of these fields, there has been intensive treaty-making. But now sustainable development is also on the rise in some other areas, such as trade agreements, economic cooperation treaties, rights of indigenous peoples, trade and investment and protection of the environment during armed conflict.³¹

What about sustainable development in international investment law? That is Section 3 of this lecture.

3 Sustainable Development in International Investment Law

International investment law is the branch of international law that deals with the promotion and protection of foreign investment as well as with the regulation of its activities.³² Traditionally, it was focused on how to minimize risks and how to maximize benefits for foreign investors as well as for capital importing countries.³³ For long, there was hardly a relationship between international investment law on the one hand and international environmental law and sustainable development on the other.³⁴ Currently, a trend can be noted in international investment law to address also the impacts of foreign investment that go beyond the economic and financial domain. For in recent decades, the impact of investment activities has given rise to significant political, environmental, human rights, sustainable development and other public interest concerns.³⁵ In response, quite some transformation is taking place in modern international investment law in this regard. For example, trends can be discerned toward recognizing the need for expanding the regulatory space of States for public policies and toward subjecting foreign investment increasingly to duties. Examples of these public policy concerns include compliance with labour standards, respect for human rights and promotion of sustainable development and public health. These public policy concerns are leaving their marks on international arbitration, albeit hesitantly.³⁶

31 Dam-de Jong 2015.

32 See Muchlinski and others 2008.

33 Schwarzenberger 1969.

34 See Schrijver, *Sovereignty over Natural Resources* 1997, ch 4, 120–142.

35 See the analysis by Subedi 2016; Chi 2018.

36 See Beharry and Kuritzky 2015, 383–429; Marley 2014, 1003–1039; Kube and Petersmann 2016, 65–113.

International investment law is based on a variety of sources. They include international investment agreements (bilateral, regional, multilateral), customary international law norms, general principles of law, national investment law and soft law norms. In most of these sources, sustainable development, as a concern, is a late comer in international investment law.³⁷ Only recently is it starting to manifest itself.

As regards existing investment agreements, few of those in force do refer to sustainable development and environment. However, this is changing because there is a clear trend among the newest treaties to address labour, environmental and sustainable development concerns.³⁸

For example, the Comprehensive Economic and Trade Agreement between the EU and Canada, commonly known as CETA, contains a separate chapter on sustainable development (Chapter 23), next to chapters on labour and the environment.³⁹ Similarly, the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP) contains chapters on labour, the environment and development.⁴⁰ Furthermore, in negotiation instructions, for example for the China-EU bilateral investment treaty (BIT)—called the Comprehensive Agreement on Investment—the parties have made it clear that the BIT should also build upon the SDGs.⁴¹

A similar trend can be noted when examining the most recent BITs. Most of the newly concluded treaties after 2014 contain clauses related to sustainable development. These can be in the form of general references to protection of the environment or promoting sustainable development in the preamble or more specific substantive provisions in the body of the BITs such as, for example, by preserving regulatory space for public policies of host States and discouraging parties to relax environmental standards in an effort to attract foreign investment. This trend can also be noted in recent Model BITs. This lecture will use the Netherlands as a point of reference, but could also have taken the US Model BIT or that of Belgium-Luxembourg as examples.⁴² On 22

37 See the analysis by Chi 2018.

38 See Prislán and Zandvliet 2015.

39 Comprehensive Economic and Trade Agreement between Canada, of the One Part, and the European Union and its Member States, of the Other Part (CETA between the EU and Canada), especially chs 23 (sustainable development), 24 (labour) and 25 (environment).

40 Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP), respectively chs 19 (labour), 20 (environment) and 23 (development).

41 See Bian and Li 2020, 40–53. See also Chi 2018, 167.

42 2012 US Model BIT; 2019 Belgium-Luxembourg Economic Union Model BIT.

March 2019, the Netherlands published its new model BIT.⁴³ The amended text serves as a policy response to the changing economic landscape and the rise of public values and the increasingly leading role of the EU in the field of foreign investment regulation as a result of the Lisbon Reform Treaty on the EU; but also to discontent concerning the Dutch liberal coverage of investor and investment in its BIT, enabling many shell companies and sandwich corporations to benefit from protection under Dutch BITs. Furthermore, in the Netherlands and in the EU at large there is a clear tendency in favour of strengthening the right of the state to regulate, especially on environment and sustainable development issues as well as combating tax avoidance. Among the objectives of the new Dutch Model BIT feature the goals to attract and promote “responsible foreign investment” and “contribute to sustainable economic development”.⁴⁴ The model BIT refers at nine places to sustainable development and includes an extensive Article 6 entitled ‘Sustainable development’, consisting of seven clauses:

Article 6—Sustainable development

1. The Contracting Parties are committed to promote the development of international investment in such a way as to contribute to the objective of sustainable development.
2. Each Contracting Party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labour protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.
3. The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women’s participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve

43 The full text of the 2019 Netherlands Model Investment Agreement is available at: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>> accessed 8 March 2020.

44 2019 Netherlands Model Investment Agreement, preamble, para 1.

- the participation of women in the economy, including in international investment.
4. The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labour laws in order to encourage investment.
 5. A Contracting Party shall not adopt and apply domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade.
 6. Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental [International Labour Organization] Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental [International Labour Organization] Conventions that it has not yet ratified.
 7. The Contracting Parties are committed to cooperate as appropriate on investment-related sustainable development matters of mutual interest in multilateral fora.⁴⁵

This Dutch Model BIT reflects the clear trend not to seek the lowering of protection in domestic environmental law or labour law so as to encourage foreign investment and clearly reaffirms state obligations under multilateral treaties, such as fundamental International Labour Organization (ILO) conventions and the Paris Climate Agreement. In addition, stricter definitions on both ‘investment’ and ‘investor’ have been included in Article 1 of the Dutch Model BIT.⁴⁶ In order to qualify under the terms of the BIT a legal person must have “substantial business activities” in the territory of the Contracting Party.⁴⁷ (This means that the so-called ‘Salini criteria’ are incorporated in the BIT.⁴⁸) Furthermore, some new obligations are incumbent upon the Contracting Party, including: good administrative behaviour; providing access to affective mechanisms of dispute resolution; and protecting against business-related

45 Ibid., art 6.

46 Ibid., art 1(a)-(b).

47 See Ibid., art 1(b)(ii).

48 See, for example, ICSID, *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco* 2001, paras 52–58.

human rights abuses.⁴⁹ Moreover, it is notable that some new obligations have been formulated for investors in the sense that they have to demonstrate corporate social responsibility.⁵⁰ A last notable feature to mention is the clear preference for the establishment of a Multilateral Investment Court rather than continuing investor-State dispute settlement through ad hoc or institutionalized international arbitration.⁵¹

An important normative role is also played by all kinds of soft law instruments, most notably well-drafted declarations, guidelines and general principles in the context of international organizations. Early examples include the Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises (1976, revised in 2011), the ILO Tripartite Declaration on Social Policies and Employment (1977, revised in 2017), the ILO Declaration on Fundamental Principles and Rights at Work (1998) and the UN Global Compact (2004), initiated by former UN Secretary-General Kofi Annan.⁵² Closely related are the Principles for Responsible Investment (PRI), launched in 2006, which is an investor initiative in partnership with the UN Environment Programme, the Finance Initiative and the UN Global Compact.⁵³

More recent efforts incorporate sustainable development more clearly. Key documents in this regard are the UN Guiding Principles on Business and Human Rights, also known as the Ruggie Principles and endorsed by the Human Rights Council in 2011.⁵⁴ These 31 Guiding Principles come under the three pillars of Protect, Respect and Remedy (PRR), which reflect corporate social responsibility and human rights diligence in a variety of ways.⁵⁵ They have been further elaborated as regards sustainable development in:

- The UNCTAD Comprehensive Investment Policy Framework for Sustainable Development;⁵⁶
- The Sustainability Framework of the International Finance Corporation (IFC), member of the World Bank Group;⁵⁷

49 See 2019 Netherlands Model Investment Agreement, art 5.

50 *Ibid.*, art 7.

51 *Ibid.*, art 15.

52 OECD 2011; ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up; UN, 'The Global Compact Leaders Summit 2004—Final Report', 24 June 2004.

53 See UN, 'Principles for Responsible Investment'.

54 See UN, 'Guiding Principles on Business and Human Rights', 21 March 2011.

55 See Ruggie 2013.

56 See Chi 2018, 28–30.

57 IFC Sustainability Framework.

- Numerous self-regulatory codes of conduct of industry and individual businesses;⁵⁸
- A Renewed EU Strategy 2011–14 for Corporate Social Responsibility;⁵⁹ and
- The AIIB Environmental and Social Framework, adopted in 2016.⁶⁰

Of course, here I should also mention SDG 8 on ‘Decent Work and Economic Growth’. Its targets include promoting policies that focus on entrepreneurship, creativity and innovation. They may well relate to sustainable development and responsible investment since they aim at creating jobs that stimulate economic growth without harming the environment.⁶¹

3.1 *Key Decisions of International Courts and Tribunals*

Also mentioned under this sub-section is the integration of sustainable development in the decisions of international courts and tribunals. Section 2, above, already referred to some cases before the International Court of Justice in which sustainable development was recognized as a relevant legal concept, including the *Danube Dam* case, the *Pulp Mills* case and the *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* case. We can also identify an increasing number of environment-related, sometimes sustainable development-related cases in Investor-State Disputes. Categories of such cases include the following sectors of economic activity:⁶²

- Access to water cases involving water supply as a public service and sewage services, especially in Latin America—*Aguas del Tunari v Bolivia* or *Urbaser v Argentina*, among other cases;⁶³
- Chemicals cases—*Methanex v USA*;⁶⁴
- Waste management—*Metalclad v Mexico*;⁶⁵

58 See the extensive resource website which also includes codes and statements of individual companies at <www.business-humanrights.org> accessed 20 March 2020. See also International Chamber of Commerce (ICC), ‘Business Charter for Sustainable Development’, September 2015, also available at <<https://iccwbo.org/publication/icc-business-charter-for-sustainable-development-business-contributions-to-the-un-sustainable-development-goals>> accessed 20 March 2020.

59 EuroCommerce, 7 March 2012.

60 AIIB Environmental and Social Framework.

61 See also the work of UNIDO in this field at <www.unido.org>.

62 See the informative reports by International Institute for Sustainable Development (IISD), *Key Cases from 2000–2010* 2011; IISD, *Key Cases from the 2010s* 2018.

63 IISD, *Key Cases from 2000–2010* 2011, 95; IISD, *Key Cases from the 2010s* 2018, 25–30.

64 IISD, *Key Cases from 2000–2010* 2011, 81–87.

65 *Ibid.*, 72–80.

- Mining—*Gold Reserve v Venezuela* or *Pac Rim v El Salvador*;⁶⁶
- Oil and gas—*Chevron v Ecuador*;⁶⁷
- Tourism—concerning resorts or wildlife sanctuaries in Kenya, Barbados or Costa Rica;⁶⁸
- Energy—*Vattenfall v Germany*; *Eiser v Spain*;⁶⁹
- Good governance—*Churchill Mining v Indonesia*; *Metal Tech v Uzbekistan*;⁷⁰
- Public health—*Philip Morris v Uruguay*; *Philip Morris v Australia*.⁷¹

In combination, these may suffice to demonstrate that in international investment law sustainable development is also on the rise, both in standard-setting through normative instruments and in arbitral decisions in environment and sustainable development-related cases.

4 Conclusion: Shortcomings, Obstacles and Solutions

Sections 1 and 2 of this lecture have amply demonstrated that sustainable development has gained currency in international law relatively quickly. A fascinating feature is that sustainable development functions as an integrative concept, having economic, environmental, developmental, social and governance dimensions. Sustainable development is by now well anchored in various sources of international law, most notably treaty law and in other normative instruments, often with a soft law character. In addition, sustainable development is also frequently being addressed in the proceedings and the decisions of international courts and tribunals. Sustainable development is in the process of being integrated in various fields of international law, ranging from international environmental law, human rights law (albeit hesitantly) to international economic law and international investment law. However, a coherent framework to incorporate sustainable development concerns in international law is still lacking. Rather, one notes a disordered patchwork of all kinds of

66 ICSID, *Gold Reserve Inc. v Bolivarian Republic of Venezuela* 2009; IISD, *Key Cases from the 2010s* 2018, 36–41.

67 PCA, *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* 2009.

68 IISD, *Key Cases from 2000–2010* 2011, 162–174; PCA, *Peter A. Allard v The Government of Barbados* 2012; ICSID, *Compañía del Desarrollo de Santa Elena S.A. v The Republic of Costa Rica* 1996.

69 ICSID, *Vattenfall AB and Others v Federal Republic of Germany* 2012; IISD, *Key Cases from the 2010s* 2018, 10–14.

70 IISD, *Key Cases from the 2010s* 2018, 31–35, 61–66.

71 *Ibid.*, 42–47; PCA, *Philip Morris Asia Limited v The Commonwealth of Australia* 2012.

international norms in a wide variety of sources with an unequal status, ranging from treaties through judicial decisions to a host of non-binding normative guidelines. Some authors have compared it with an Asian noodle bowl.⁷²

For long, international investment law and sustainable development have been at odds with each other. However, that situation has drastically changed in the two recent decades. Foreign investment regulation has started to include linkages with public interest concerns, such as labour standards, environmental protection, sustainable development, public health and animal welfare. Integrated standard-setting is still subject to considerable improvement. There is a need to reform the international investment agreement system in order to address more effectively the sustainable development concerns associated with foreign investment activities. Simultaneously, more efforts should be made to promote that these foreign investment activities assist in achieving sustainable development in a positive way, by introducing environmentally friendly technology and by being instrumental in reducing patterns of unsustainable production and consumption, rather than foreign investment impeding the efforts toward achieving sustainable development.

In one way or another, the international community has to arrive at a more coherent international investment regime, with not only dispute settlement procedures but also with enhanced monitoring, reporting and inspection procedures for reasons of prevention, transparency and accountability. Some have advocated the establishment of a specialized world investment organization.⁷³ However appealing, this very idea may itself be contradictory to embedding sustainable development concerns in a host of different chapters of international law, economics and politics. Rather, one should pursue a strongly integrative function of sustainable development as a normative concept. Obviously, this should start with the international investment agreements themselves, bilaterally as well as regionally and multilaterally. They serve as the main global norm supplier of the investment governance system and we are in need of a new generation of these treaties. Obviously, the entire specialized system of international investment law should be made more compatible with sustainable development. However, this will not be sufficient. It is of paramount interest that other regimes such as those in the areas of trade, finance, environment and human rights should also be better attuned to sustainable development. This also calls for an active role of all major stakeholders in international investment regulation and an enabling environment conducive toward such a role in a balanced and coordinated way. Apart from states, the business

72 Chaisse and Hamanaka 2014, 12–17.

73 Butler and Subedi 2017, 43–72.

community itself, trade unions, civil society organizations and arbitrators should be allowed and even be encouraged to perform their respective roles. Obviously, this includes development institutions such as the Asian Infrastructure Investment Bank specialized in sustainable green financing.

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2019 AIIB Legal Conference Report

*Yongqing Liu and Graciela Base**

1 Introduction and Overview

On 11 and 12 September 2019, the Asian Infrastructure Investment Bank (AIIB) held its third annual Legal Conference at AIIB Headquarters in Beijing, China. The Legal Conference was organized by AIIB's Office of the General Counsel (OGC) as part of OGC's legal outreach, which also includes the annual AIIB Law Lecture.

The Legal Conference brought together over 40 prominent legal practitioners and academics to examine the role of the law of employment relations of multilateral institutions—known commonly as international administrative law. The panelists comprised senior officials and legal advisers from major international organizations and international financial institutions including the United Nations (UN), the Commonwealth Secretariat, the North Atlantic Treaty Organization (NATO), the European Patent Office (EPO), the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), the Credit Guarantee and Investment Facility (CGIF), the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and the African Development Bank (AfDB). Scholars from the London School of Economics and Political Science, Ritsumeikan University and Kyushu University also joined.

Over two days, the panelists, divided into five panels, with each chaired by a senior lawyer of AIIB's OGC, addressed the following topics: (i) the extent to which international administrative law is inherent to the international legal status of multilateral institutions; (ii) the formal dispute resolution role afforded by international administrative tribunals and the part they play in the successful mandates of multilateral institutions; (iii) the considerations of employment-related dispute resolution and international administrative law in creating an efficient workplace culture for multilateral institutions; (iv) the legal basis and dynamics of international administrative law and (v) the critical

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aspects of international administrative law that go to the heart of the efficiency and effectiveness of multilateral institutions, namely integrity and performance management. Following the panel discussions, the Legal Conference was concluded by a plenary session chaired by AIIB's General Counsel, Gerard J. Sanders.

This report is intended to provide a summary (reflecting the Chatham House Rule) of some of the key discussions and conclusions of the Legal Conference. It is structured by following the order of the Conference sessions, with each session focused on one of the topics outlined above.

2 International Administrative Law and the International Legal Status of Multilateral Institutions

The first panel examined the international legal status of multilateral organizations. In particular, it discussed the tension between jurisdictional immunity of international organizations and the human rights principle of access to justice. It also discussed how international organizations address and reconcile this tension.

International organizations are established by their member States to pursue collective goals. They are not sovereign states, although some international organizations (such as the European Union) may exercise sovereign functions bestowed upon them by their member States. On the one hand, jurisdictional immunity is granted to international organizations to enable them to effectively, independently and efficiently fulfill their mandates. This immunity derives directly from various legal sources, including (i) the constituent instruments of international organizations, such as AIIB's Articles of Agreement and the Charter of the United Nations; (ii) multilateral treaties, such as the Convention on the Privileges and Immunities of the United Nations (UN General Convention) and the Convention on the Privileges and Immunities of the Specialized Agencies; (iii) bilateral treaties between international organizations and their host states and (iv) national legislation, such as the US International Organizations Immunities Act and the UK International Organisations Act 2005.

The right to access to courts, on the other hand, is established in various human rights instruments adopted by international or regional communities, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights. There tends to be an inherent tension between the jurisdictional immunity of international organizations and the right of individuals to access to court.

In respect of the interplay between these conflicting principles, the panel noted that various international organizations, whilst afforded immunity from national jurisdictions, do provide aggrieved parties with alternative dispute resolution mechanisms. For instance, the UN General Convention states that the UN shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the UN is a party and (b) disputes involving any official of the UN who by reason of their official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Drawing on judgments of various international tribunals and national courts, the panel examined the issue of whether the jurisdictional immunity of international organizations is conditional on the availability of alternative dispute resolution mechanisms. In particular, the panel explored the issue of whether existing internal dispute resolution mechanisms, including the proceedings of international administrative tribunals, meet the standards of the various human rights instruments such as article 6(1) of ECHR. In its advisory opinion, on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the International Court of Justice (ICJ) found the Tribunal to be “an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions”.

It was noted that the European Court of Human Rights set a useful standard for upholding the jurisdictional immunity of international organizations in the *Waite and Kennedy v Germany* (1999) case. It formulated the view that the jurisdictional immunity afforded to international organizations served a ‘legitimate objective’, that is, to ensure the proper functioning of such organizations free from unilateral interference from individual governments. In addition, the Court ruled that the extent of jurisdictional immunity must be proportionate to the objective of enabling international organizations to perform their functions efficiently. Over time, this standard has been taken to mean that where there is no alternative dispute resolution mechanism within an international organization, or the alternative mechanism available is considered inadequate, such organization’s jurisdictional immunity may not be upheld. In a number of cases before national courts, the jurisdictional immunity of international organizations was not confirmed due to the inadequacy of their internal dispute resolution mechanisms. Even international administrative tribunals recognized the significance of providing an alternate dispute resolution mechanism to the enjoyment of jurisdictional immunity. The International Labour Organization Administrative Tribunal (ILOAT), whilst dismissing a case for being beyond its competence, nevertheless noted that its judgment created a legal vacuum and considered it highly desirable for the

respondent organization, in this case, the EPO, to seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.

In other cases, however, the panel noted that although the availability of an alternative dispute resolution mechanism is material, its absence or inadequacy does not automatically deprive international organizations of jurisdictional immunity. In a case before the Canadian Supreme Court, for instance, it was decided that the availability of an internal appeals mechanism was not determinative of whether an international organization will be afforded jurisdictional immunity.

Drawing on the example of the Commonwealth Secretariat Arbitral Tribunal (CSAT), the panel discussed the role of the CSAT in upholding the Commonwealth Secretariat's privileges and immunities, and the relationship between international administrative law and international, human rights and domestic laws.

The Commonwealth Secretariat was established by the Commonwealth member countries as an international organization to help them achieve development, democracy and peace. In fulfillment of its obligations under the Agreement Memorandum on the Commonwealth Secretariat, the UK Government passed the Commonwealth Secretariat Act in 1966, which gives the Commonwealth Secretariat legal personality and accords it certain immunities and privileges. In the early years of its operations, however, the Commonwealth Secretariat did not have a dispute resolution mechanism. Disputes were resolved informally. The CSAT was established in 1995 to meet the requirements of the Agreement Memorandum in connection with the institutional immunities and privileges conferred on the Commonwealth Secretariat.

The panel referred to the CSAT's judgment in the *Faruqi* case (CSAT/5(No. 1)) in which the CSAT considered the immunity it enjoys and its relationship with international, human rights and domestic laws. Relying on the reasoning in the *Waite and Kennedy* case and a previous case, the CSAT concluded that, as an international body, it is not subject to those laws, and nor are its decisions subject to appeal to national courts. This notwithstanding, a number of challenges had been made in the UK High Court, attempting to subject CSAT's judgments to judicial review. These challenges led to the revision of the Commonwealth Secretariat Act 1966 by the International Organizations Act 2005, which repeals the section of the Commonwealth Secretariat Act under which the judgments in question were challenged.

The panel then examined the international legal status of the Global Fund, especially through the prisms of the privileges and immunities of the organization and the mechanisms for the resolution of employment-related disputes. A public-private partnership, the Global Fund was originally established in

2002 as a nonprofit foundation under Swiss law, but gradually evolved into an international organization. It entered into a headquarters agreement with the Swiss Government in 2004 to ensure that privileges and immunities are afforded to it as to other international organizations in Switzerland. In 2006, the Global Fund was recognized by the US as an international organization under the US International Organizations Immunities Act. In 2009, the Global Fund Board approved the Global Fund Agreement on Privileges and Immunities (Agreement) and recommended states to consider granting privileges and immunities to the Global Fund. The Agreement entered into force on 17 April 2019 after 10 countries ratified it.

Despite its unique business model and governance feature as a public-private partnership, international administrative law plays a significant role in the evolution and administration of the Global Fund. Like many other international organizations with jurisdictional immunity, the Global Fund has established alternative dispute resolution mechanisms, including by subjecting itself to the jurisdiction of the ILOAT for staff grievances. In addition, it has established a staff association and created an ombudsman to resolve employment-related disputes.

In the ensuing discussion, the panel shared their views on the adequacy of alternative dispute resolution mechanisms available to international civil servants in the context of considering the jurisdictional immunities enjoyed by international organizations. One participant enquired into the adequacy of remedies available to complainants, including their reinstatement, in cases where they were unlawfully dismissed. One of the panelists remarked that the statutes of some international administrative tribunals give them the authority to order reinstatement or grant the employing organizations the option to pay damages as an alternative. In this regard, one participant concurred that although the UN Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT) have the power to order reinstatement, they are also mandated to order financial compensation as a remedy. The tribunals would take account of the practical realities in relation to reinstatement, including the amount of time for a case to be concluded. For instance, reinstatement becomes practically impossible where the peace keeping mission in which the successful complainant served has been closed. With regard to the status of the Global Fund, another participant asked whether the Global Fund would resort to the fact that it has accepted ILOAT's jurisdiction as evidence of its status as an international organization. In response, one of the panelists remarked that the Global Fund's status as an international organization derives from the Agreement and domestic laws which afford it the privileges and immunities required for its operations. The fact that the ILOAT has accepted the Global Fund's application and recognition of its jurisdiction, which requires that the admitted organizations enjoy

jurisdictional immunity from domestic courts, supports the Global Fund's status as an international organization. In addition to sharing their experience on the review mechanism of decisions rendered by CSAT, the panel also exchanged their views with the participants on the substantive laws that local courts would apply in cases in which they are unsatisfied with the adequacy of the alternative mechanisms provided by international organizations and decided to intervene.

3 International Administrative Law and the Formal Resolution of Employment-Related Disputes of Multilateral Institutions

The second session focused on the establishment, evolution and development of formal dispute resolution mechanisms of various international organizations. Panelists from the UN, EBRD and NATO, among others, shared their views on the predominant features of their respective internal justice systems. They also discussed some potential reforms to such systems, incorporating the lessons learned from their application. Finally, they reflected on the contributions of an internal justice system to the efficiency and accountability of international organizations.

The panelists introduced their employing organizations, including their histories, mandates and governance structures. They also discussed the contexts in which the internal justice systems in these organizations were established and reformed. It was commonly recognized that an effective formal dispute resolution mechanism plays a central role in the resolution of staff disputes and the promotion of functional efficiency of international organizations. A panelist reported that the NATO Administrative Tribunal encourages and promotes changes to the rules and policy of the organization. This tribunal's jurisprudence provides guidance to both managers and staff in their decision-making. Counsel could also rely on the tribunal's jurisprudence when providing legal advice. In the case of the UN, the role of its internal justice system is to make the organization more accountable, supporting multicultural staff members and allowing them to effectively discharge their duties. Efficient resolution of staff grievances affects not only the staff members; it also impacts the efficient functioning of the entire organization. Indeed, the jurisprudence of administrative tribunals tends to enhance the predictability and certainty of the legal relations between the organization and their staff, thus encouraging the parties to pursue an informal, amicable resolution of their disputes.

It was further noted that while each organization has the discretion to establish its own internal justice system, all systems have, since their inception, gradually evolved over time to adapt to the changing circumstances and to

improve the efficiency, transparency and fairness of the processes. EBRD, for instance, has gradually reformed its internal dispute resolution mechanism by broadening its scope and enhancing the due process protections afforded to staff. It has maintained a two-tier system for the review and adjudication of staff grievances since 2006. In early 2018, EBRD introduced changes to the first tier of the process to enhance its efficiency without compromising the legitimate interests of both the organization and staff. Similarly, NATO carried out a reform of its internal justice system in 2013, resulting in the creation of its Administrative Tribunal. The reform took account of the interests of various internal stakeholders and the recent external legal developments. In the case of the UN, following extensive consultations and review by a special panel, the UN implemented a new internal system for the administration of justice for its staff in 2009.

Some common features were considered in the reformed internal justice systems in the different international organizations, including, notably, enhanced professionalism, transparency, independence and accountability. In terms of professionalism of the systems, for instance, a minimum amount of national judicial experience is required of judges for the UNDT (10 years) and the UNAT (15 years). The judges' qualifications must also be verified by the newly established Internal Justice Council to ensure the professionalism of the new system. At EBRD, the Administrative Review Committee comprises an independent legal professional as chair and one member elected by staff and one appointed by EBRD's President. The increased professionalism in the NATO internal justice system is manifested in the conversion of the internal Appeals Board to an administrative tribunal with a judicial character.

Increased transparency is another notable feature of the new systems. A panelist pointed out that the selection process of the judges of UNDT and UNAT is transparent. In addition, UNDT has courtrooms in New York, Geneva and Nairobi and may hold public hearings therein, to which all would be allowed access. Furthermore, all resultant judgments are published on the official websites of the tribunals. Similarly, both NATO and EBRD publish judgments of their respective administrative tribunals to promote transparency. Independence was also highlighted by the panel. In the UN, the Office of Administration of Justice (OAJ) was established to safeguard the independence of the entire system. Both UNDT and UNAT, whilst supported by the OAJ, are independent from the UN's Secretariat. The Internal Justice Council was also created to ensure the independence, impartiality and accountability of the new system.

The panel also discussed the role of lawyers in the functioning of the internal justice systems. EBRD proceedings are conducted in an inquisitorial

manner and staff are not allowed representation by external counsel in the administrative proceedings (though they are free to seek legal advice). Likewise, the legal counsel of EBRD does not appear in these proceedings on behalf of EBRD. NATO, on the other hand, does not prohibit or restrict participation by external counsel in the proceedings. In the case of UN, the Office of Staff Legal Assistance was established in 2009 to provide legal advice and representation to staff in relation to the organization's formal internal justice system. Legal advisers of the Secretariat also play an active role in the process, including by advising, negotiating and litigating on behalf of the employing organization. In addition, other stakeholders, such as the Human Resources Department, Ethics Office and Staff Union, contribute to the efficient functioning of the system.

It was emphasized that the internal justice system must resolve staff grievances not only effectively, but also in a timely and efficient way, since justice delayed is justice denied. In this regard, a panelist noted that EBRD has considerably shortened the process of the Administrative Review Committee from one and a half year to 90 working days, whilst also simplifying the process for claims that are manifestly inadmissible or unrelated to an administrative decision.

While the formal means of redress ensures that effective and efficient remedies are provided in case of disputes, it was noted that the use of informal dispute resolution mechanisms, including mediation and ombudsman services, are constantly encouraged. EBRD has lifted the restrictions on the use of mediation, previously limited to pre-administrative review and now available at any time. NATO has also been trying to make greater use of mediation in resolving staff disputes. Likewise, the UN places great emphasis on the informal resolution mechanism, including by establishing the Office of the UN Ombudsman and Mediation Services, to assist staff to resolve their disputes through informal means.

In the resultant discussion, the panel exchanged their views and experience with the participants on multiple issues associated with the reformed administration of justice systems. One participant asked the panel whether their respective tribunals have established a code of conduct for their judges, including standards for the disqualification and recusal of judges from a particular case. It was remarked that the UN General Assembly has adopted an extensive Code of Conduct for the Judges of the UNDT and the UNAT to preserve the independence, impartiality, integrity and propriety of the judges' conduct. In addition, the UN General Assembly has also adopted a Mechanism for Addressing Complaints Regarding Alleged Misconduct or Incapacity of the Judges of

the UNDT and the UNAT. In respect of the administrative tribunals of NATO and EBRD, it was noted that while a code of conduct has yet to be established for judges, the code of conduct for staff members of the organizations is equally applicable to them. Another participant asked the panel whether there had been any concerns that the revised internal justice systems, which seem to be ‘very staff-friendly’, could lead to an increase of unfounded claims by staff or a chilling effect on managers. It was remarked that the UN has yet to measure, but is conscious of, the chilling effects of the revised system on managers’ actions and decisions. As regards envisaged frivolous claims, it was noted that staff members have full access to the internal justice system and that there is no limit on the number of cases a complainant may file. However, each case will turn on its merit, and matters that have already been adjudicated will be considered inadmissible. In addition, the conference extensively discussed the settlement culture within their organizations, the breakthrough in the UN case law attributed to the reformed administration of justice system, the variation in the costs awarded by different tribunals and their relations with the equality of arms, as well as the percentage of cases ruled by international administrative tribunals in favor of their organization, among others.

4 International Administrative Law and the Creation of Efficient Workplace Cultures of Multilateral Institutions

The third session related to other means—alternative to international administrative tribunals—of resolving employment-related disputes within international organizations, including resorting to arbitration, as well as informal procedures to supplement formal dispute resolution mechanisms. In terms of arbitration, a panelist elaborated on such questions as why there is a need to arbitrate, what disputes to arbitrate and how to arbitrate such disputes within multilateral institutions. It was noted that arbitration provides the parties with a flexible, neutral and independent avenue for the resolution of their disputes, and that arbitration has increasingly assumed a judicial character, with the resultant arbitral decisions being final and binding on the parties. In terms of enforceability, arbitration awards are enforceable in the state parties to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Arbitration Convention’). In light of these advantages, and in order to stay out of the jurisdiction of national courts, international organizations with functional immunity are motivated to choose arbitration as an alternate dispute resolution mechanism. The question remains, however, whether

arbitration constitutes a reasonable, impartial, alternative means of resolution, as prescribed in the *Waite and Kennedy* case, for jurisdictional immunity afforded to international organizations to be upheld.

In terms of how to arbitrate disputes, the panel highlighted the importance of ensuring the independence and impartiality, and thereby fairness, of the arbitration process. Independence entails that, structurally, there exists a 'separation of powers' between an arbitral tribunal and the employing organization, whereas impartiality, albeit related, requires individual arbitrators to be neutral vis-à-vis the parties in dispute. Related to these is the selection and appointment of arbitrators, and the allocation of associated costs. Arbitration of employment-related disputes of international organizations could be costly, given the limited availability of the right expertise required of arbitrators in the field of international administrative law. The challenge of ensuring equality of recourse to courts, including determining who should be granted access to arbitration, was also discussed. It was commonly recognized that consultants and contractors of international organizations are granted such access by the arbitration clauses in their contracts. Where arbitration clauses are available, arbitration should be conducted by an international organization in good faith to avoid putting the jurisdictional immunity afforded to them at risk.

The question of what disputes to arbitrate pertains to the arbitrability of the subject matter in dispute. It was considered that nothing prevents arbitral tribunals from arbitrating international administrative law disputes, except for the costs that the arbitration may entail relative to the monetary value of the matters in dispute. A panelist related the experience of an international organization in the arbitration of employment-related disputes with the assistance of the Hong Kong International Arbitration Centre. To create a workable arbitration regime, it was further suggested that consideration be given to the establishment of an appeal mechanism for arbitral awards on limited grounds.

In addition to arbitration as an alternate mechanism of dispute resolution, informal means of redress, including ombudsman and mediation services, were also considered as an important way of addressing employment-related grievances within international organizations. As an example, the Office of the United Nations Ombudsman and Mediation Services (Ombudsman Office) was established in 2002 to assist in the informal resolution of employment-related concerns and conflicts within the UN. Guided by the key principles of evenhandedness, neutrality, confidentiality and informality, the Ombudsman Office is unique in adopting an informal and collaborative approach to resolving workplace disputes. In addition to assisting in resolving workplace conflicts, the Ombudsman Office identifies and addresses systemic issues, thus improving the management of the organization. Since its establishment, the

Ombudsman Office has addressed approximately 20,000 cases, ranging from non-extension of employment to performance management. It was recognized that informal dispute resolution is complementary to the formal mechanism, since not all cases are suitable or admissible to the UN's administrative tribunals, the UNDT and UNAT. By resolving disputes informally, the Ombudsman Office reduces the number of cases that are brought before the administrative tribunals. The tribunals' judgments, on the other hand, provide the Ombudsman Office with guidance in addressing workplace disputes informally, including through mediation. The panel concluded that, given the diversity of backgrounds of the UN staff, potential conflicts may inevitably arise and the value of the Ombudsman Office in properly managing them cannot be overemphasized.

In the ensuing discussion, the conference exchanged views on the informal and alternative means of redress available to international civil servants. For instance, one participant expressed concerns with the transparency and fairness of arbitration processes (*vis-à-vis* international administrative tribunals) and the role of arbitration in filling jurisdictional gap. One of the panelists remarked that none of the systems is perfect. While they advocated an enhanced degree of transparency in arbitration and the publication of arbitral awards, this must be subject to the agreement of both parties involved. Another participant enquired which organizations, in addition to the Permanent Court of Arbitration (PCA), have opted for arbitration (to the exclusion of administrative tribunals) in resolving employment disputes. While the number of international organizations (in addition to PCA) opting for arbitration was unknown to the panel, it was proposed that international organizations with a geographic or thematic commonality may consider working together to establish a joint entity, with personnel of different backgrounds, to adjudicate on their employment disputes. In addition, drawing on their experiences, the conference also shared views on the selection and appointment of arbitrators and how to entice people to choose arbitration to resolve staff disputes. Lastly, the panel also shared their experience in the use of mediation to settle personnel conflicts, including through developing a code of conduct for mediators and establishing standard operating procedures and other guidance.

5 International Administrative Law and the Internal Legal Framework of Multilateral Institutions

At the fourth session, the panel discussed the international legal framework of multilateral institutions, including the concepts and origins of international

administrative law, as well as the terms and conditions of employment of staff of international organizations. The panel also analyzed the role of the jurisdictional immunity of international institutions in shaping the development of international administrative law by, for instance, bridging the gaps between national and international norms governing employment matters.

Drawing on their experience as a judge of an international administrative tribunal, one panelist discussed their understanding of the concepts and origins of international administrative law. In the panelist's view, international administrative law is a body of law applied by international administrative tribunals in adjudicating the cases before them. However, it remains to be answered what constitutes this specific body of law. While the notion of international administrative law was referenced by many on multiple occasions, international administrative tribunals have been silent on this concept and its origins in their constituent statutes. Consideration was given to whether public international law should be the source of international administrative law, but it does not seem to be the case. Scholarly studies undertaken by some experts (including C.F. Amerasinghe) seem to suggest that international administrative law is a body of law comprising the internal rules (such as staff regulations and rules) of international organizations, the general principles of law (such as non-discrimination), equity and judicial precedent. However, the panelist noted that, distinct from what is commonly understood, their understanding of international administrative law is closer to the concept of Global Administrative Law adopted by some scholars in New York University, which comprises a whole system of administrative procedure to regulate the activities of international organizations, rather than substantive law. Referring to the rules by the World Trade Organization on international trade disputes and the labor standards established by the International Labour Organization, the panelist considered that, like international economic law or international labor law, international administrative law is a *sui generis*, 'self-contained' system of law. This system of law, as applied by international administrative tribunals, includes terms of contract of employment, general principles of law and case law developed by each administrative tribunal.

Related to the concept and origins of international administrative law, another panelist focused their discussion more specifically on the terms and conditions of appointment that define the employment relationship between staff of an international organization and the employing international organization. The basic question is what constitutes the terms and conditions of employment, beyond those expressly provided in the staff's contract of employment. The panelist analyzed the jurisdiction of the Asian Development Bank Administrative Tribunal (ADBAT), as provided in its Statute, to hear claims of

“nonobservance of the contract of employment or terms of appointment” of a staff member. The Statute then defines the expressions “contract of employment” and “terms of appointment” to include all pertinent regulations and rules in force at the time of alleged nonobservance, including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff. This statutory jurisdiction is mostly identical to that of the World Bank Administrative Tribunal (WBAT), whereas the IMF Administrative Tribunal possesses a slightly different and more expansive jurisdiction over staff grievances.

The ADBAT’s jurisdiction is limited to contractual relations between ADB and its staff. In order to sustain a claim before the ADBAT, therefore, a claimant’s application must relate to the non-observance of their contract of employment and terms of appointment, otherwise such application will be dismissed as inadmissible. The panelist referred to three cases before the ADBAT to elaborate on the latter’s approach in interpreting the terms and conditions of a staff member’s employment. The first case arose from the homicide of a staff member, committed on the Bank’s premises by a security guard employed by a contractor to the Bank. Following the death of the staff member, their spouse filed legal proceedings against ADB, claiming damages in respect of ADB’s alleged liability for the tort committed against the staff member, as well as other damages and costs. The ADBAT held that it may deal only with an application which “alleges non-observance of the contract of employment or terms of appointment” of a staff member and its proceedings “are limited to claims in contract”. The ADBAT then turned to the issue of whether ADB had failed to fulfill an obligation expressly or impliedly laid down in the contract of employment. While ADBAT considered that as a matter of the general principles of the law of employment, ADB owes to its staff a contractual duty to exercise reasonable care to ensure their safety whilst on ADB’s premises, it found no evidence to establish that the staff member’s death was caused by any failure on the part of ADB to exercise reasonable care. ADBAT thus dismissed the application.

The second case arose from the failure by an external medical service provider contracted by ADB to diagnose lung cancer of a staff member, who died afterwards. The staff member and, following their death, their family, filed legal proceedings against ADB, claiming that ADB breached its duty of care in the selection and supervision of the service provider. The ADBAT considered that ADB had a duty to exercise reasonable care in selecting the service provider and supervising its operation. However, it was not persuaded that there had been a breach of such duty by ADB and thus dismissed the case accordingly.

The third case was filed by an applicant against the restrictions imposed by ADB on their eligibility to be engaged as an ADB consultant or staff subsequent

to the non-confirmation of her appointment as a staff member due to performance issues. ADB contended that the applicant had no standing before ADBAT since their claim did not relate to non-observance of their “contract of employment or terms of appointment” as a former staff member and, in any event, that the internal policy whereby the restrictions were imposed did not form part of the applicant’s terms of employment or appointment. The ADBAT found that the contract of employment or terms of appointment under its Statute include “pertinent regulations and rules in force at the time of the alleged nonobservance”. Cross-referring to the WBAT’s decision in the *de Merode et al. v International Bank for Reconstruction and Development* (1981) case, ADBAT concluded that it had jurisdiction over the applicant since the contested policy formed part of the ‘ensemble of conditions’ that comprise the relationship between ADB and the applicant.

The panelist discerned from these three cases an expansive approach by ADBAT in considering the terms of appointment of a staff member. They considered that this expansive approach, including the implied contractual duty of care identified by ADBAT, would expose the institution to potential legal action by third parties. This approach also raises a question regarding the scope of the institution’s financial liability in case of a breach of its contractual duties. This issue has yet to be clearly addressed by ADBAT.

Another area of discussion focused on the role of international organizations’ jurisdictional immunities in shaping the development of international administrative law. It was noted that jurisdictional immunities play a dual role in this regard: not only do they serve as boundaries within which a separate body of law has flourished, they also provide bridges between national and international norms.

The panelist first discussed how jurisdictional immunities, as a boundary, contribute to the development of international administrative law. As elaborated by other panelists, jurisdictional immunities do not simply create a jurisdictional void. International organizations and member states have established internal accountability mechanisms. The most highly developed of these accountability mechanisms are international administrative tribunals. These tribunals, as judicial bodies, provide a forum for the application and development of a unique international legal system governing the employment relationship between international organizations and their staff. Resorting to this mechanism is not only about a choice of forum, but a choice of law. As an example, the CSAT Statute provides that the tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries. Similarly, under the ILOAT Statute, an international organization which accepts ILOAT’s jurisdiction

shall not be required to apply any national law in its relations with its officials. The boundary created by jurisdictional immunities of international organization thereby nurtures the growth of international administrative law.

The panelist then examined how jurisdictional immunities create bridges between international and national norms. Because international organizations' immunities exist by the consent of States, and are accordingly vulnerable to withdrawal, the dialogue across the boundary of immunities also shapes the content of international organizations' internal law. For instance, international organizations often incorporate into their standards of staff conduct that noncompliance with local laws may result in disciplinary action. While this does not mean that local laws shall apply to the employment relations of international organizations, there are instances where public policies of the host state were transformed into the internal policies of an international organization. In this way, the host state communicates powerfully the norms of its own community across the boundary of immunities.

Subsequently, the conference discussed the case law and jurisdiction of various international administrative tribunals. One participant asked whether ADBAT or IMFAT, like ILOAT, accept the recognition by other international organizations of their jurisdiction and which organizations have done that. The panel responded that the current statute of ADBAT does not contain a provision that enables other international organizations to accept their jurisdiction. It was enquired whether the implied contractual duty of care under ADBAT's jurisdiction would encompass all potential tortious claims by ADB staff members and, if not, what other remedies they may have in respect of those tortious claims. It was noted that ADB's contractual duty of care towards its staff only covers a limited aspect of tort law and, since the organization does not have jurisdiction to examine tortious claims, there is indeed a jurisdictional gap. In those cases, the organization may need to provide the complainants with alternative, external means of redress. In addition, the conference exchanged views on the relevance of third party's liability towards claimants to that of the employing organization under its contractual duty of care, and the tendency of judges of an international administrative tribunal to cite the jurisprudence of other tribunals, among others.

6 International Administrative Law and the Integrity and Performance Management of Multilateral Institutions

The fifth session related to essential characteristics of the international civil service, governed by international administrative law, namely the integrity and

performance management of international organizations. Ensuring high standards of integrity of international civil servants is important to the efficient and effective functioning of international organizations. A panelist introduced the most recent revision of the IMF's code of staff conduct and whistleblower protection policy. While it is commonly required by all international organizations that their staff have a duty to report suspected misconduct, the question remains what standards of evidence may trigger this duty. For instance, would hearsay information or subjective suspicions suffice? The standards adopted by international organizations vary from one to another. IMF adopts a relatively low standard, as staff are required to report any ethical concerns that came to their attention. The International Telecommunication Union, in contrast, adopts a relatively high standard, as it requires that the staff member reporting misconduct should have information or evidence to support a reasonable belief. The panelist also discussed the consequences of failure to report misconduct; it may not only be considered as a performance issue, but as a violation of the code of conduct for which the staff may be subject to disciplinary procedures.

Associated with the staff's duty to report suspected misconduct is the organization's obligation to protect them from retaliation. Retaliation against staff for having reported suspected misconduct is commonly prohibited in all organizations, as it amounts to misconduct for which disciplinary sanctions may be imposed. The panel also discussed the burden and standard of proof of retaliation. At the IMF, when a staff member reports retaliation, it is for the organization to prove, on clear and convincing evidence, that retaliation has been committed. Given the significance of integrity, the panelist highlighted that the organization shall establish clear and enforceable rules to foster a culture of accountability.

The panel turned to the discussion of procedural requirements in staff misconduct cases. Drawing on the case law of the African Development Bank Administrative Tribunal (AfDBAT), a panelist discussed how allegations of procedural irregularities and violation of due process in disciplinary cases are addressed under international administrative law. In a disciplinary case resulting in the summary dismissal of a staff member, AfDBAT held that the staff member must be notified unequivocally of the charges against them and be provided with an opportunity to respond to those charges. In a similar case, AfDBAT emphasized that the right to due process is essential to the staff member's right of defense and that it must be respected. On the extent to which a procedural irregularity, if proven, may vitiate the resultant disciplinary decision and lead to the award of damages, AfDBAT takes into account such

elements as the prejudice sustained by an applicant, the fairness of the process and the gravity of the misconduct. In a case where a shorter notice was given than prescribed, AfDBAT was not convinced that this compromised the fairness of the procedure, since the applicant did not request additional time and, in any event, responded to the allegations against them prior to the expiration of the given time. In another case where an applicant contested the non-confirmation of their appointment, AfDBAT found that due process was violated. However, in light of the gravity of the misconduct by the applicant, AfDBAT limited the award to moral damages, without an order of reinstatement. It was noted that, in this way, AfDBAT takes a flexible approach in addressing due process violations.

The panel's discussion subsequently moved to the examination of the prominent performance trends within international organizations and the evaluation of their legal implications. A panelist noted that the new macro-trends increasingly focused on promoting meritocracy (the 'what'), continuous feedback (the 'how') and people manager (the 'who') of the performance of a staff member.

On the 'what', it was highlighted that there has been a shift from seniority-based progression to merit-based performance management and, as a consequence, the advancement of a staff member's career is now based more on the merit of their performance than on their time spent serving the organization. This shift raises the question whether privileging merit over seniority conflicts with the generally recognized principles of international administrative law, including the notion of 'acquired rights'—in other words, a right that staff may legitimately expect to survive all amendment to the international legal framework of the employing international organization. In this regard, the ILOAT considers the nature, the reasons and the consequences of shifting to meritocracy as basis of performance assessment to determine whether there was a breach of acquired rights. WBAT takes a similar approach. UNAT, however, takes a different approach, assessing whether the new merit-based policy is applied retroactively.

On the 'how', international organizations have changed the way in which they manage their staff's performance. A year-end evaluation has been replaced or supplemented by continuous feedback. It was noted that continuous feedback provides better data for informed personnel decisions, encourages conversation and allows for a focus on the content rather than the outcome of performance. A panelist opined that, from a legal perspective, continuous feedback does not qualify as an administrative decision that can be appealed, otherwise the organization may face endless litigation. However, in some

cases, the final evaluation outcomes (such as formal findings of unsatisfactory performance in UN) may be open to challenge. In those cases, it has been widely accepted by international administrative tribunals that performance evaluation is a value judgment and thus is subject to only limited review.

On the 'who', the trend of performance management is to involve more stakeholders in the process. Feedback from peers, supervisors and colleagues in client departments, for instance, are taken into consideration in the assessment of the merits of a staff member's performance. This would also put a checks and balances mechanism in place and provide safeguards against potential flaws in the evaluation process.

The panel noted a conflict between the organizations' need to adapt to the changing circumstances in pursuit of operational efficiency and the staff's legitimate rights and interests in the stability of employment relations. It was concluded that a balance needs to be struck between the legal features specific to managing the performance of employees of international organizations on the one hand, and the demands for accountability and sustainability in the delivery of their public service mission, on the other.

In the ensuing discussion, the conference shared views and analysis on the management of staff relations and due process in disciplinary cases. One participant asked whether and how the jurisdictional immunities enjoyed by international organizations may affect their employment relations with their staff. One panelist remarked that jurisdictional immunities only set boundaries between international organizations and their member states and do not define the employment relations with their staff. Another panelist added that the immunity enjoyed by their organization does not create an antagonistic relationship with their staff and that, in their practice, they have always consulted with the staff union before taking a systemic decision that affects the staff as a whole. In relation to whistle-blower protection, one participant asked whether such policy extends to witnesses who are obliged to cooperate with disciplinary investigations. One panelist noted that while witnesses are not whistle-blowers who proactively report misconduct, they are equally protected under the whistle-blower protection regime. In addition, the conference exchanged views on such issues as whether and how the grievance systems contribute to international organizations as attractive employers in both recruiting new staff and retaining existing staff, the burden and standard of proof of due process violations allegedly committed by employing organizations in disciplinary cases, and whether different standards of proof adopted by various tribunals would lead to a forum-shopping by the organizations.

7 Conclusion

The third annual AIIB Legal Conference covered important aspects of the law of employment relations of multilateral institutions—international administrative law. Firstly, international organizations are established by their member States to achieve common objectives. Vested with international legal personality, they function on the international plane independently from their member States and are usually afforded jurisdictional immunities. The tension between the jurisdictional immunities afforded to international organizations and individuals' fundamental rights of access to court was a central issue for discussion and deliberation.

Second, in the light of the jurisdictional immunities afforded to international organizations, alternative dispute resolution mechanisms, whether formal or informal, have been widely established by international organizations. As part of the formal mechanisms, most international organizations have either established their own international administrative tribunal or accepted the jurisdiction of a tribunal already established by their peer institutions (such as the ILOAT and UNAT). The feasibility of recourse to arbitration as an alternative to the use of an international administrative tribunal warrants examination. In addition to formal dispute settlement mechanisms, international organizations also encourage and establish informal dispute resolution procedures to facilitate amicable settlement of staff disputes. Both formal and informal dispute resolution mechanisms play a vital role in resolving the conflicts and grievances arising in the workplace of international organizations, ensuring the fair treatment of staff and improving the accountability, efficiency and effectiveness of the organizations.

Third, international administrative law is considered as a *sui generis* legal system beyond the realm of national jurisdiction. While it is generally recognized as the law of employment relations of international organizations, the concept, content and origins of international administrative law remain inchoate. In practical terms, international administrative law is derived from and comprises the internal law of international organizations, general principles of law, equity and the case law of international administrative tribunals. It is not a static system but evolves as any of its components change over time. The development of international administrative law is inevitably shaped by the jurisdictional immunities of international organizations.

Finally, the rule of law plays an integral role in the effective, transparent and efficient management of international organizations. To ensure that high ethical standards of conduct are respected, international organizations have

codified the duties of their staff members to report suspected misconduct on the one hand, and the obligation of organizations to protect staff against retaliation, on the other. Effective investigative and disciplinary procedures are also essential to safeguard the integrity of the organization, whilst safeguarding the due process rights of staff. In addition to protecting the integrity of international organizations, an effective performance management system is imperative to the efficient operations of international organizations. Performance management systems must ensure a balance between the respect for the rights of staff in accordance with established rules and the need of international organizations for accountability and sustainability in the delivery of their vital mandates.