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# 41 C

United Nations  
Educational, Scientific and  
Cultural Organization

Organisation  
des Nations Unies  
pour l'éducation,  
la science et la culture

Organización  
de las Naciones Unidas  
para la Educación,  
la Ciencia y la Cultura

Организация  
Объединенных Наций по  
вопросам образования,  
науки и культуры

منظمة الأمم المتحدة  
للتربية والعلم والثقافة

联合国教育、  
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Item 7.1 of the provisional agenda

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8 November 2021  
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### ADMINISTRATIVE TRIBUNAL: EXTENSION OF ITS PERIOD OF JURISDICTION

#### ADDENDUM

#### COMMENTS FROM THE INTERNATIONAL STAFF ASSOCIATION OF UNESCO (ISAU)

##### OUTLINE

Pursuant to item 9.2.7 of the UNESCO Human Resources Manual, the International Staff Association of UNESCO (ISAU) submits its comments on the document entitled: Administrative Tribunal: extension of its period of jurisdiction.

1. ISAU hereby submits its comments on document 41 C/30 concerning the Administrative Tribunal. The issue of the extension of the period of jurisdiction of the Administrative Tribunal is important. It is a body which, in the event of the failure or malfunction of our internal justice system, provides an additional means of appeal, thus constituting a safeguard in the event of a violation of staff rights.

##### Staff remuneration in Geneva

2. ISAU welcomes the decision to extend to UNESCO staff members the benefits recognized by the International Labour Organization Administrative Tribunal (ILOAT) judgements concerning the decision of the International Civil Service Commission (ICSC) to reduce the post adjustment multiplier in Geneva.

3. Nevertheless, as highlighted in document 41 C/30, the problem of the 7.5% gap in monthly staff remuneration in Geneva remains, as not all United Nations organizations in Geneva have implemented the ILOAT judgements.

4. However, as we have already pointed out in our capacity as Vice-President of the United Nations International Civil Servants Federation (UNISERV), the rules and methods of post



adjustment need to be revised in order to make the system fairer, more transparent, simpler and, above all, easier to understand for staff members. In this connection, while welcoming the decision of UNESCO's Administration, ISAU wishes to express its concern about the disparities in purchasing power that remain between professionals in Geneva under the current legal framework.

#### Reform of the Statutes of the Appeals Board

5. With regard to the procedure before the Appeals Board, which was recently modified, the Administration reports that the applicable time limits have been adjusted to ensure fairness. It mentions the introduction of stricter deadlines for the filing of appeals and replies. However, we wish to recall a point raised by ISAU which was not taken into account in the reform of the Statutes of the Appeals Board. Indeed, paragraph 24 of the revised Statutes provides for a 90-day deadline for the Director-General's final reply. This period is far too long and is bound to be detrimental to the staff, which is why ISAU had proposed that the period should be 30 days, an option which seems to us to be far more reasonable and which we continue to demand.

6. ISAU must also reiterate its other concerns regarding the reform of the Statutes of the Appeals Board, in particular the reduction of the composition of the Appeals Board to three members, including a single staff representative. This measure repudiates discussion. In addition, the participation of staff associations in the hearings of the Appeals Board is now "subject to the agreement of the Appellant". While ISAU has no objection to the fact that the Appellant may refuse to be defended individually by the staff associations, we absolutely cannot accept that the associations should be denied the right to participate in hearings of the Appeals Board, where it is for us to represent the staff as a whole and not particular individuals. We have also asked for the associations to be able to take the floor during the debate and we regret that the request was not accepted.

#### Conduct of remote hearings

7. With regard to the possibility of holding hearings remotely, we understand that this possibility is useful for the Organization, especially during a pandemic. Nevertheless, care must be taken to ensure that the right to due process is scrupulously respected when such arrangements are adopted for administering justice.

#### Recognition of the jurisdiction of ILOAT

8. Paragraph 40 of document 41 C/30 states that if UNESCO were to accept the jurisdiction of the United Nations Appeals Tribunal (UNAT) while retaining its jurisdiction at first instance, it would need to abolish its Appeals Board in its current form and establish a first-instance process meeting UNAT's standards of neutrality and independence. Such a remark raises cause for concern, because it tends to imply that the Appeals Board, in its current form, cannot be considered as offering sufficient guarantees of independence and neutrality.

9. In conclusion, ISAU wishes to express its support for the extension of the period of jurisdiction of ILOAT, which is, in our view, the jurisdiction best able to protect the rights, both procedural and substantive, of the Organization's staff members. However, such an extension should not be at the expense of an effective internal justice system.

10. In this connection, ISAU wishes to point out that it favours, above all, the amicable settlement of disputes and that, as a staff association, it seeks to promote dialogue in order to arrive at mutually satisfactory solutions. When the search for a compromise fails, it is essential that the Appeals Board play its full role in all objectivity and impartiality as the Organization's appeal body. It is important to remember that the number of cases lost before ILOAT entails a significant cost for the Organization and damages its image. What concrete actions does the Administration plan to take to reduce this number? Respecting the rules that it has established would be a good start.



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## General Conference

41st session, Paris, 2021

# 41 C

41 C/30

15 October 2021

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### ADMINISTRATIVE TRIBUNAL: EXTENSION OF ITS PERIOD OF JURISDICTION

#### OUTLINE

**Background:** In accordance with Staff Regulation 11.2, the Director-General submits to the General Conference a draft resolution on the renewal of the jurisdiction of the Administrative Tribunal of the International Labour Organization. The Director-General further communicates the information requested by the General Conference in 40 C/Resolution 80, and reports on the ongoing United Nations review of the jurisdictional set-up of the United Nations Common System.

**Decision required:** paragraph 50.



Job: 2021/02/24

## Background

1. At its 40th session, the General Conference decided to extend the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT) for a period of two years, from 1 January 2020 until 31 December 2021 (40 C/Resolution 80). In the same resolution, the General Conference invited the Director-General to report on the progress of amendments to the ILOAT's Statute that were under consideration at the time with respect to the conditions under which international organizations may revoke their declaration recognizing the jurisdiction of the Tribunal. The General Conference further requested the Director-General to report on "the different means for dispute settlement with UNESCO staff members".<sup>1</sup>

2. The present report provides an overview of the progress of the proposed amendments to the ILOAT's Statute, as well as on developments related to the administration of justice in the United Nations Common System ("UN System") of relevance to UNESCO since the 40th session of the General Conference. The report further describes the different possible means available to UNESCO for the settlement of staff disputes, namely the options of maintaining the *status quo*, of accepting the jurisdiction of the United Nations (UN) administrative tribunals or of establishing an *ad hoc* judicial instance. Lastly, the Secretariat submits to the General Conference a draft resolution on the renewal of the jurisdiction of the ILOAT, which expires on 31 December 2021, recommending the extension of the Tribunal's jurisdiction for a period of 6 years in accordance with prior practice.

## Progress on matters relating to the administration of justice in the United Nations system

3. In line with the General Conference's request, this section sets out the background to the recent approval by the International Labour Conference of new amendments to the ILOAT's Statute. The Secretariat has also deemed it necessary to apprise the General Conference of the ongoing UN-wide consultations on the review of the jurisdictional set-up of the UN System, which were called for by the United Nations General Assembly and may impact the current functioning of UNESCO's internal justice system.

### (i) *Amendments to the ILOAT's Statute on withdrawal of jurisdiction*

4. In March 2018, the ILO Governing Body decided to consider the adoption of rules governing the procedure for withdrawal from the jurisdiction of the ILOAT, following the decision of certain organizations to discontinue their recognition of the Tribunal's jurisdiction.<sup>2</sup> At the time, the ILOAT's Judges had expressed the view that such unilateral decisions by international organizations raised important legal and policy issues and might be perceived as "forum shopping".<sup>3</sup> They argued that any such decision "weakens the appearance of independence and impartiality of both the tribunal from which [the relevant international organization] wishes to withdraw and the one it wishes to join".<sup>4</sup> The Judges further noted that, "for the 'receiving' tribunal, it may create the impression that it was chosen for being more favorable to the Administration".<sup>5</sup>

5. At its 334th session, held in October-November 2018, the ILO's Governing Body considered adopting draft amendments to the ILOAT's Statute on the conditions under which an international organization that has recognized the jurisdiction of the Tribunal may revoke its declaration of acceptance. However, in light of initial consultations that had taken place with the organizations recognizing the ILOAT's jurisdiction, the ILO's Governing Body decided to defer its consideration of the draft amendments to its 335th session.<sup>6</sup>

<sup>1</sup> 40 C/Resolution 80, 26 November 2019, UNESCO General Conference.

<sup>2</sup> Document GB.332/PFA/12/1 (Rev.), Appendix III, ILO Governing Body, 332nd session, 28 February 2018.

<sup>3</sup> Document GB.334/PFA/12/1, ILO Governing Body.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Decision concerning the proposed amendments to the Statute of the Tribunal, ILO Governing Body, 8 November 2018.

6. In November 2018 and February 2019, further rounds of consultations were conducted with the secretariats of the organizations recognizing the ILOAT's jurisdiction. During those consultations, the UNESCO Secretariat expressed the view that the ILO may not unilaterally impose on other organizations conditions on the withdrawal of their acceptance of the Tribunal's jurisdiction and stressed that any agreement on this matter would require the approval of the other organizations' Governing Bodies. Moreover, the UNESCO Secretariat highlighted that the ILOAT's Statute was not the appropriate instrument to set new conditions for withdrawal.

7. At its 335th session, held in March 2019, the ILO's Governing Body considered a new version of the proposed amendments, which were revised to address the points of concern raised by member organizations.<sup>7</sup>

8. At its 337th session, in February 2020, the ILO's Governing Body held further discussions on the proposed amendments, pointing out the need to introduce "a clear and transparent withdrawal procedure which would codify the current practice without creating any new legal obligations for withdrawing organizations".<sup>8</sup>

9. In a further round of consultations with member organizations, in 2020, the UNESCO Secretariat reiterated its prior position. Thirteen other organizations expressed a similar view that the withdrawal procedure should be contained in an instrument separate from the ILOAT's Statute and indicated that they would have to consider carefully whether any possible amendments to the Statute would meet their express agreement.

10. Based on the views received from all stakeholders, the ILO's Governing Body, at its 341st session held in March 2021, examined a further revised version of the proposed amendments,<sup>9</sup> which *inter alia* clarified that the withdrawal from the ILOAT's jurisdiction was not subject to "legally binding requirements".<sup>10</sup> A draft provision was also proposed ensuring that any withdrawal be confirmed by the ILO Governing Body at its session immediately following the relevant notification.

11. On 15 March 2021, the ILO Governing Body approved the draft resolution on the amendments to the ILOAT's Statute, which was submitted to the International Labour Conference for adoption. On 18 June 2021, the International Labour Conference adopted Resolution ILC.109/X, containing the amendments to the ILOAT's Statute.<sup>11</sup> A copy of this Resolution is contained in the Annex to the present document.

(ii) *Review of the jurisdictional set up of the UN System*

12. The Secretariat deems it necessary to report on the ongoing review of the jurisdictional set-up of the UN System mandated by the United Nations General Assembly to the extent that it may have an impact on the current structure and functioning of UNESCO's internal justice system.

13. By way of background, it is recalled that numerous staff members of several United Nations organizations have challenged before the ILOAT and the UN Dispute and Appeals Tribunals the administrative decisions implementing the decision of the International Civil Service Commission (ICSC) to reduce the post adjustment multiplier in Geneva.

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<sup>7</sup> Document GB.335/PFA/12/1, ILO Governing Body.

<sup>8</sup> Document GB.338/PFA/11/1, ILO Governing Body. Current practice reveals that organizations wishing to withdraw from the jurisdiction of the ILOAT are asked to provide the ILO Governing Body of information regarding the reasons for withdrawal and on whether consultations with Staff Associations had been held. The notification of withdrawal is followed by a decision from the Governing Body taking note of the decision and confirming the organization concerned would no longer be subject to the jurisdiction of the Tribunal.

<sup>9</sup> Document GB.341/PFA/15/1, ILO Governing Body.

<sup>10</sup> *Ibid.*, para. 8.

<sup>11</sup> ILC.109/Resolution X.

14. On 3 July 2019, the ILOAT issued five judgments on those complaints, setting aside the relevant administrative decisions of five United Nations organizations based in Geneva (Judgments No. 4134-4138). Given that UNESCO is subject to the ILOAT's jurisdiction, and although it was not a party to these cases, it decided to extend the benefits recognized by these judgments to its staff members based in Geneva.

15. The implementation of the ILOAT's judgments by the organizations concerned resulted in a 7.5% gap in the monthly pay for staff in the professional and above categories compared to the other United Nations organizations based in Geneva, which continued to apply the reduced post adjustment multiplier decided by the ICSC pending the settlement of the cases submitted to the United Nations Dispute and Appeals Tribunals.

16. On 27 December 2019, the United Nations General Assembly adopted resolution 74/255 B in which it expressed concern at "the application of two concurrent post adjustment multipliers" in Geneva. It thus requested "the Secretary-General, in his capacity as Chair of the United Nations System Chief Executives Board for Coordination [CEB], to conduct a review of the jurisdictional setup of the Common System and submit the findings of the review and recommendations to the General Assembly as soon as practicable".

17. For the preparation of the draft report to be submitted to the General Assembly, the United Nations Secretariat engaged consultations with various stakeholders, including the staff federations, the ICSC secretariat, the Internal Justice Council, the United Nations administrative tribunals and the ILOAT, as well as the organizations and agencies that have accepted the jurisdiction of these tribunals. The UNESCO Secretariat participated in these consultations and provided two sets of comments.

18. The Secretary-General's report,<sup>12</sup> as submitted to the General Assembly at its 75th session, presented, *inter alia*, four main options to promote judicial consistency in reviewing the legality of ICSC decisions and recommendations, namely: (a) the maintenance of the *status quo*; (b) measures unrelated to the structure or the jurisdiction of the tribunals; (c) measures involving general changes to the tribunals; and (d) measures involving changes to the adjudication of cases concerning ICSC matters.

19. In February 2021, the Secretary-General's report was examined by the Advisory Committee on Administrative and Budgetary Questions (ACABQ) of the United Nations General Assembly, which considered "that at this stage, the report is too preliminary to enable the provision of guidance on the further development of any of the options" proposed therein.<sup>13</sup>

20. Meanwhile, on 19 March 2021, the United Nations Appeals Tribunal (UNAT) issued a series of judgments dismissing the appeals before it, on the basis that it had no jurisdiction to review ICSC decisions or recommendations on the post adjustment multiplier. The UNAT highlighted *inter alia* the considerable difference between "the fundamental structures under which each of the United Nations and International Labour Organisation judicial bodies operate", noting that, in contrast to the ILOAT, it was constrained by "significant jurisdictional characteristics" contained in its Statutes and General Assembly resolutions which limit its scope of judicial review.

21. Having considered the Secretary-General's report, the United Nations General Assembly adopted, on 16 April 2021, resolution 75/245 B, in which it requested "the Secretary-General to submit a further report with detailed proposals and thorough analysis on practical options [to ensure consistency across the United Nations common system], giving priority to measures involving changes to the adjudication of cases involving International Civil Service Commission matters, as set out under option D, and measures under option B, limited to the review of tribunal judgments and issuance of guidance by the Commission, as well as increased exchanges between the tribunals, as

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<sup>12</sup> Document A/75/690, Initial review of the jurisdictional set-up of the United Nations common system, Report of the Secretary General, 15 January 2021.

<sup>13</sup> Document A/75/797, ACABQ, 4 March 2021.

set out in section IV of the report of the Secretary-General, and to present it for the consideration of the General Assembly no later than the seventy-seventh session”.

22. The preparation of the further Secretary-General’s report requested by the General Assembly is currently underway.

### **Different options for settlement of staff disputes**

23. This section describes the different possible means available to UNESCO for the settlement of staff disputes, as requested by the General Conference.

24. It should be preliminarily recalled that international organizations enjoy privileges and immunities designed to ensure their independent and effective functioning.<sup>14</sup> Amongst the recognized immunities is the immunity from jurisdiction, which *inter alia* prevents national courts from hearing disputes to which international organizations are parties, including employment disputes. Notwithstanding those privileges and immunities, international organizations are required under international law to establish an appeals mechanism for staff members. In this regard, the International Court of Justice held that depriving staff members from a dispute settlement mechanism would be “*hardly consistent*” with the Charter of the United Nations.<sup>15</sup> Likewise, the ILOAT has held that it is a general principle of international law “*that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure*”.<sup>16</sup>

25. International organizations have established different mechanisms for the settlement of employment disputes. The present section will describe the three main models of internal justice, as implemented in the UN System, which may be available to UNESCO for the settlement of such disputes, namely the ILOAT system, the United Nations two-tier judicial system and the *ad hoc* administrative tribunal’s option.

#### **(i) The ILOAT system**

26. The internal justice system currently implemented by UNESCO, as well as most United Nations specialized agencies, consists in recognizing the jurisdiction of the ILOAT for the adjudication of staff disputes.

27. The ILOAT was established by the International Labour Conference on 9 October 1946. As of 23 August 2021, the jurisdiction of the ILOAT has been accepted by 57 international organizations, of which 54 are intergovernmental international organizations, including 10 organizations of the

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<sup>14</sup> In the case of UNESCO, such immunities derive from Article XII of the Constitution, which reads: “*The provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that Organization, its privileges and immunities, shall apply in the same way to this Organization*”; Article III of the Convention on the Privileges and Immunities of the Specialized Agency, which reads: “*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. It is, however, understood that no waiver of immunity shall extend to any measure of execution*”; as well as from other bilateral agreements that UNESCO may conclude with Member States.

<sup>15</sup> International Court of Justice, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*: “*It would [...] hardly be consistent with the expressed aim of the [United Nations] Charter to promote freedom and justice for individuals [...] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them*”.

<sup>16</sup> ILOAT, Judgment 122: “*While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognised so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure*”. More recently, the ILOAT, in Judgment 4313, reaffirmed that 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*”.

UN System<sup>17</sup> and three organizations that voluntarily apply the UN System.<sup>18</sup> The Tribunal is composed of seven judges appointed by the International Labour Conference upon recommendation by the Governing Body for a renewable period of three years. Judges of the ILOAT shall be of a high moral character and must possess the qualifications required for appointment to the highest judicial office of their countries. In practice, the Tribunal usually holds two to three sessions per year.

28. Since 1947, the ILOAT has held 132 sessions and delivered 4,564 judgments, of which 268 involving UNESCO. The Tribunal has been particularly active in the last 30 years, with 75% of all judgments having been delivered after the year 1990, and 55% after the year 2000. During the period 2015-2019, the Tribunal issued 51 judgments involving UNESCO with an average cost of \$18,000 for administrative expenses per case. As per the approved budget for the 2020-2021 biennium, the provision for the Tribunal was set by the General Conference at \$450,000.

29. The ILOAT acts as a final court of appeal and considers cases only after exhaustion of internal remedies available within each organization. Under the ILOAT's system, an internal appeals body, the composition of which may vary depending on the internal rules of each organization, carries out an initial review of the case. The review conducted by internal appeals bodies is often quasi-judicial in nature. However, in contrast to a first-instance tribunal, these bodies do not have the authority to adopt binding decisions, but rather issue recommendations which are subject to subsequent review and decision by the Executive Head of the Organization. The decision by the Executive Head is regarded as the "final decision" and constitutes what is termed as the exhaustion by the staff member of all internal remedies.<sup>19</sup>

30. Under UNESCO's legal framework, the final decision is taken by the Director-General following a two-stage process of internal remedies. The first stage consists of an administrative review whereby a staff member who wishes to contest an administrative decision submits an application requesting that the decision be reconsidered by the Director-General. Upon receipt of a ruling from the Director-General on the request, or in the absence of any ruling within a prescribed time-limit, the staff member may pursue his or her claim to the second stage of the review process by lodging an appeal with the Appeals Board.

31. To seize the Appeals Board of his or her case, the staff member must address a notice of appeal to the Appeals Board, followed by an appeal outlining his or her arguments.<sup>20</sup> The Administration then submits a reply to the appeal. Upon receipt of the parties' submissions, the Appeals Board may convene an oral hearing. Thereafter, the Appeals Board produces a report containing its recommendations to the Director-General, who makes a final decision on the appeal.

32. It is worth recalling that UNESCO has a longstanding practice of appointing an eminent jurist, often a senior national judge, as Chairperson of the Appeals Board. The Chairperson and his or her Alternate are appointed by the Executive Board. When examining any given appeal, the Appeals Board is composed, in addition to the Chairperson, of two members appointed by him or her from a list of staff members elected by all UNESCO staff and of two other staff members appointed by the

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<sup>17</sup> The International Labour Organization (ILO), the World Health Organization (WHO), the Food and Agriculture Organization of the United Nations (FAO), the World Tourism Organization (UNWTO), the United Nations Industrial Development Organization (UNIDO), the International Atomic Energy Agency (IAEA), the World Intellectual Property Organization (WIPO), the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom), the International Telecommunication Union (ITU), UNESCO.

<sup>18</sup> The International Criminal Court (ICC), the International Organization for Migration (IOM), and the Organization for the Prohibition of Chemical Weapons (OPCW).

<sup>19</sup> In July 2021, the Joint Inspection Unit of the United Nations System (JIU) has launched a review process for "the internal pre-tribunal stage appeal mechanisms available to staff members in the United Nations system organizations". The purpose of the review is to assess the adequacy and capacity of internal pre-tribunal stage appeal mechanisms to deliver on the objectives set out in the applicable regulatory frameworks. The review is expected to be concluded following consultations and input from all stakeholders by Spring 2023.

<sup>20</sup> It should be noted, however, that the case law of the ILOAT allows former staff members who do not have access to the internal appeals procedures to file a complaint directly with the Tribunal (Judgment 4222, consideration 21).

Administration. All members of the Appeals Board act independently and impartially, and they shall receive no instructions from the parties to the proceedings.

33. As concerns financial and operating costs, the annual honoraria for the Chairperson amount to \$12,500 and those for the Alternate Chairperson to \$2,500. When the Chairperson or the Alternate Chairperson are called upon to sit *in praesentia*, the Organization reimburses travel expenses to Paris and awards a daily subsistence allowance at a rate corresponding to that of an Assistant Director-General (ADG).

34. It is worth noting that the procedure before the Appeals Board has been the subject of recent modifications. On 25 November 2019, the General Conference amended Staff Regulation 11.1 and the Statutes of the Appeals Board, with a view to streamlining and simplifying the procedure (40 C/Resolution 74). The applicable time limits have been adjusted to ensure the fairness and expeditiousness of the Appeals Board's proceedings and have been harmonized between the different categories of staff (staff stationed at Headquarters and staff stationed at field offices). Stricter deadlines for the filing of appeals and replies as well as for the holding of an oral hearing were introduced. Moreover, hearings may now be held remotely as well as in person, to facilitate the process, in particular for field duty stations. The Chairperson and the Board members may attend the hearing either in person or remotely.

35. Recent amendments to the legal framework and to the Statutes of the Appeals Board have been supplemented by additional institutional adjustments. Following a recommendation by IOS in its audit report dated 22 June 2018, the responsibility of representing the Organization in litigation before the Appeals Board was transferred from the Bureau of Human Resources Management (HRM) to the Office of International Standards and Legal Affairs (LA). It is expected that the new distribution of functions would ensure consistency and efficiency in the management of all the phases of litigation, minimize the legal risks for the Organization and result in a reduction of cases before the ILOAT. The new arrangement also enables HRM to focus on its management review role in respect of administrative decisions.

(ii) *The United Nations two-tier judicial system*

36. Another option consists in the possibility for an international organization to join the UN fully judicial two-tier system. This system was established in 2009 pursuant to UN General Assembly resolution 63/253 of 24 December 2008, in replacement of the former joint appeals boards, joint disciplinary boards and UN Administrative Tribunal (UNAdT) in operation since 1949 (the structure of which closely resembled the current ILOAT system). This two-tier system comprises the UN Dispute Tribunal (UNDT), composed of three full-time judges and six half-time judges, and the UN Appeals Tribunal (UNAT), composed of seven judges. The UNDT acts as a first-instance tribunal, while the UNAT hears and passes judgments on appeals against judgements rendered by the UNDT or any other equivalent first-instance tribunal designated by an organization which has accepted the UNAT's jurisdiction.<sup>21</sup> In contrast to the UNDT, the UNAT's jurisdiction is corrective in nature and limited to reviewing possible errors vitiating judgments by lower tribunals.<sup>22</sup> Both UNAT and UNDT judges are appointed by the General Assembly upon recommendation from an independent body, the Internal Justice Council.<sup>23</sup> Judges are required to have previous judicial experience.<sup>24</sup> The UNAT is located in New York, while the UNDT has registries in New York, Nairobi and Geneva.

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<sup>21</sup> It should be noted that appeals challenging decisions of the Standing Committee of the United Nations Joint Staff Pension Fund (UNJSPF) follow a one-instance procedure, directly before UNAT.

<sup>22</sup> Judgment No. 2013-UNAT-321.

<sup>23</sup> The Internal Justice Council is charged, *inter alia*, of providing its views and recommendation to the General Assembly on two or three candidates for each vacancy in the UNAT/UNDT, as well as on the implementation of the system of administration of justice. It is composed of five members, as follows: a staff representative, a management representative, two external jurists (one nominated by staff, and one by management), and a jurist chosen by the other members.

<sup>24</sup> 10 years of judicial experience for UNDT judges, and 15 years of judicial experience for UNAT judges.

37. Although the UNDT/UNAT system was mainly conceived for the United Nations, the Statutes permit other organizations to accept the jurisdiction of both Tribunals. An organization may accept the jurisdiction of the UNDT and the UNAT through a special agreement concluded with the Secretary-General of the United Nations, which shall include provisions concerning the organization's participation in the administrative arrangements for the functioning of the Tribunals and its sharing of expenses of the Tribunals.<sup>25</sup>

38. International organizations may also accept the UNAT's jurisdiction without adhering to the UNDT. This possibility appears to be favored by a number of United Nations organizations which had formerly accepted the jurisdiction of the UNAT,<sup>26</sup> as well as other organizations which have withdrawn from the ILOAT, while maintaining their internal appeals board system. This has nonetheless recently given rise to issues of compliance with the UNAT's Statute, as a result of the developing UNAT's case-law.<sup>27</sup> Indeed, the UNAT has held in several recent cases that the procedure before internal appeals boards did not meet the requirement for a "neutral first instance process", which it saw as a precondition to the exercise of its jurisdiction, as those boards were only mandated to make recommendations to the Executive Head of the organization, who makes a final decision.<sup>28</sup> Following these judgements, the organizations concerned had to engage in a thorough reform of their internal appeals mechanisms to abide by these judgements. For example, the World Meteorological Organization has decided to abolish its Joint Appeals Board and accept the jurisdiction of the UNDT as a first instance tribunal (it is noteworthy that the UNDT has a permanent seat in Geneva, where the Headquarters of this organization are located).

39. As of 2021, the full two-tier UNDT/UNAT system has jurisdiction over the United Nations Organization (including the UN Secretariat, the Funds and Programmes, UN Tribunals, UN research and training entities, other United Nations entities and the International Court of Justice) and the World Meteorological Organization. Six organizations recognize the jurisdiction of the UNAT only, while retaining their own first instance mechanisms.<sup>29</sup> Acceptance of the UNDT's and UNAT's jurisdiction by an organization requires participation in the funding of the UNDT full-time and part-time judges. It is expected that the average participation cost for UNESCO would amount to \$15,000 per UNDT case and to \$17,000 per UNAT case. Such costs are significantly higher than the financial resources currently allocated for UNESCO's Appeals Board and the ILOAT.<sup>30</sup>

40. Relying on the past experience of other organizations, it appears that if UNESCO were to accept the UNAT's jurisdiction, it would need to abolish its Appeals Board in its current form and either (i) establish a first-instance process meeting UNAT's standards of neutrality and independence, or (ii) recognize the jurisdiction of the UNDT. This would necessarily entail changes to the applicable legal framework and to the current structure of UNESCO's internal justice system. Should this option be further explored, a more detailed analysis of the financial implications would be needed.<sup>31</sup> In addition to the expected increase in administrative costs, a considerable

<sup>25</sup> UNAT's Statute, Article 2(10); UNDT's Statute, Article 2(5).

<sup>26</sup> For instance, the International Civil Aviation Organization and the International Tribunal for the Law of the Sea.

<sup>27</sup> Article 2(10) of the UNAT's Statute.

<sup>28</sup> The UNAT made these findings in judgments concerning the World Meteorological Organization (Judgment 2020-UNAT-1031), the International Civil Aviation Organization (Judgment 2020-UNAT-1012), the International Maritime Organization (Judgment 2019-UNAT-957) and the International Seabed Authority (Judgment 2021-UNAT-1089).

<sup>29</sup> The International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the International Seabed Authority (ISA), the International Fund for Agriculture and Development (IFAD), and the International Tribunal for the Law of the Sea (ITLOS), and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). It should be noted that UNRWA presents a specificity, in that it established its own first-instance Tribunal (the UNRWA Dispute Tribunal) concomitantly with its acceptance of UNAT's jurisdiction.

<sup>30</sup> See *supra*, paras. 28 and 33. Participation in the UN two-tier justice system may also require additional arrangements to be concluded with the Office of the UN Ombudsman and Mediation Services and the Office of Staff Legal Assistance (OSLA). Such arrangements have separate financial costs and will require changes to be made to UNESCO's legal framework.

<sup>31</sup> In this regard, it is noted that the UNAT usually meets in New York (occasionally in other UN duty stations) and that the UNDT – which often holds hearings – only has a presence in Geneva, Nairobi and New York, which may have an impact in the associated costs of operation for UNESCO.

strengthening of the existing human resources in LA and HRM would be necessary to cope with the heavy requirements of a two-tier judicial system.

(iii) *The ad hoc tribunal's option*

41. Finally, a third model of internal justice consists in establishing an *ad hoc* tribunal to act as a court of last resort. This model is currently implemented by the International Monetary Fund (IMF) and the World Bank Group, which have established their own administrative tribunals. Both organizations follow the ILOAT model in that their respective tribunals function as one-tier judicial organs. Prior to seizing those Tribunals, the complainant must exhaust all non-judicial means of redress, including recourse to internal appeals bodies.<sup>32</sup>

42. The World Bank Administrative Tribunal (WBAT) was established in 1980. It is composed of seven judges, appointed by the Executive Directors from a list of candidates nominated by the President of the Bank after appropriate consultation. The judges must be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. Since 2010, the WBAT has issued 216 judgments and, in 2020, the budget provision for the Tribunal was set to \$2.5 million.

43. As regards the IMF Administrative Tribunal, it was established in 1994. It is composed of five judges, including its President. The President is appointed by the Managing Director, after consultation with the Staff Association and with the approval of the Executive Board, whereas the rest of the members are appointed by the Managing Director “after appropriate consultation”. All judges are required to possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. Since its creation, the IMF Administrative Tribunal has made 82 pronouncements (judgments and orders comprised).

44. It is worth noting that, notwithstanding their status as United Nations specialized agencies, neither the IMF nor the World Bank Group are part of the UN System, *i.e.*, they do not incorporate into their rules the common standards, methods and arrangements recommended by the ICSC regarding the staff's working conditions. Given the different legal framework under which both organizations operate, the establishment of an *ad hoc* administrative tribunal does not give rise to a risk of inconsistent or divergent application of ICSC's recommendations. This is not however the case for other United Nations organizations, such as UNESCO, which have accepted to apply the ICSC's decisions and recommendations, and for which there exists an overarching policy objective to ensure harmony and consistency across the UN System.

### **Renewal of the recognition of the ILOAT's jurisdiction**

45. The Secretariat hereby submits to the General Conference a draft resolution on the renewal of the recognition of the ILOAT's jurisdiction. Taking into account the developments above, the Secretariat recommends the renewal of UNESCO's recognition of such jurisdiction for a period of six years, in line with the established practice.

46. It is recalled that the Secretariat had made a similar recommendation at the 40th session of the General Conference. Upon consideration of the Secretariat's report, however, the General Conference decided to extend the ILOAT's jurisdiction period only for a period of two years, expiring on 31 December 2021, and requested the Director-General to submit the present report.

47. The extension of the ILOAT's jurisdiction is required in accordance with Staff Regulation 11.2, which provides that “[t]he Administrative Tribunal approved from time to time by the General

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<sup>32</sup> The IMF non-judicial means of redress include the request for administrative review by the staff member, which can be followed by a consideration of the case by a Grievance Committee. At the World Bank, three internal appeals bodies exist: The Peer Review Services, the Pensions Benefits Administrative Committee, and the Workers' Compensation Administrative Review Panel.

Conference shall be the final court of appeal for staff members against a decision of the Director-General alleged to conflict with their terms of appointment, or with any relevant regulation”.

48. As indicated above, as well as in previous reports,<sup>33</sup> most organizations of the UN System with headquarters in Europe have recognized the jurisdiction of the ILOAT. The General Conference of UNESCO first recognized the Tribunal’s jurisdiction in 1953 and has since regularly renewed its recognition mostly for periods of six years, and exceptionally for periods of two years.<sup>34</sup>

49. It should be noted that any change of jurisdiction in respect of staff litigation under Regulation 11.2 is likely to result in significant quantitative and qualitative changes, irrespective of the new justice model chosen by the Organization. These changes must be carefully considered and assessed prior to any decision.

### **Draft resolution**

50. In light of the above, the General Conference may wish to adopt the following resolution:

*The General Conference,*

*Having taken note of document 41 C/30,*

*Decides to renew, for the period from 1 January 2022 to 31 December 2027, UNESCO’s recognition of the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT) for cases arising under Staff Regulation 11.2.*

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<sup>33</sup> Document [40 C/30](#), Report by the Director-General, Administrative Tribunal of the International Labour Organization, Extension of its period of jurisdiction, 7 November 2019.

<sup>34</sup> Two-year renewals were granted from 1996 until 2001 ([28 C/Resolution 32](#), [29 C/Resolution 79](#), and [30 C/Resolution 75](#)) and from 2020 until 2021 ([40 C/Resolution 80](#)).

ANNEX

International Labour Conference - 109th Session, 2021

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## Resolution concerning the statute of the Administrative Tribunal of the International Labour Organization

(18 June 2021)

The General Conference of the International Labour Organization,

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

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

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

Noting that the Governing Body of the International Labour Office has reviewed and endorsed the text of the draft amendments to the Tribunal's Statute and to the Annex as well as the transitional measures;

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

### STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

Adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998, 11 June 2008, ~~and~~ 7 June 2016 and ... June 2021.

...

## ARTICLE II

...

5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body. Any such organization may withdraw its declaration recognizing the jurisdiction of the Tribunal under the procedure set out in the Annex.

...

## ARTICLE III

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

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

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

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

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

...

## ANNEX TO THE STATUTE OF THE ADMINISTRATIVE TRIBUNAL OF THE INTERNATIONAL LABOUR ORGANIZATION

1. To be entitled to recognize the jurisdiction of the Administrative Tribunal of the International Labour Organization in accordance with paragraph 5 of article II of its

Statute, an international organization must either be intergovernmental in character, or fulfil the following conditions:

- (a) it shall be clearly international in character, having regard to its membership, structure and scope of activity;
- (b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and
- (c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.

2. The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions which, in cases affecting any one of these organizations, are applicable as follows:

*Article VI, paragraph 2*

The reasons for a judgment shall be stated. The judgment shall be communicated in writing to the Director-General of the International Labour Office, to the executive head of the international organization against which the complaint is filed, and to the complainant.

*Article VI, paragraph 3*

Judgments shall be drawn up in two copies, of which one shall be filed in the archives of the International Labour Office and the other in the archives of the international organization against which the complaint is filed, where they shall be available for consultation by any person concerned.

*Article IX, paragraph 2*

Expenses occasioned by the sessions or hearings of the Tribunal shall be borne by the international organization against which the complaint is filed.

*Article IX, paragraph 3*

Any compensation awarded by the Tribunal shall be chargeable to the budget of the international organization against which the complaint is filed.

3. An international organization may withdraw its declaration recognizing the jurisdiction of the Tribunal in keeping with the principles of good faith and transparency. The organization shall address to the Director-General an official communication notifying the relevant decision which should emanate from the same organ which decided to recognize the Tribunal's jurisdiction or the organ currently competent to take such a decision, reaffirming its commitment to faithfully execute judgments on any pending cases and indicating, as appropriate, the reasons for withdrawing the recognition of the Tribunal's jurisdiction, the alternative means of employment dispute settlement envisaged and any consultations with the staff representative bodies prior to the withdrawal decision.

4. At its next session following the notification of withdrawal, the Governing Body, after consultation with the Tribunal, shall take note of the withdrawal of the organization concerned, and shall confirm that as of that date, or any other later date as may be agreed upon with the organization concerned, the organization shall no longer be subject to the competence of the Tribunal. No new complaint filed against the

organization after the effective date of the withdrawal shall be entertained by the Tribunal.

\* \* \*

#### Transitional measures

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