Managing the ILO Administrative Tribunal's workload

--Current challenges and possible improvements

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Note

The number of ILOAT member organizations continues to increase totalling 60 today as opposed to 25 in 1990 and 40 in 2000 – thus raising concerns about the continued capacity of the Tribunal to carry out its responsibilities effectively. On the occasion of the approval of the acceptance of the ILOAT jurisdiction by two new organizations in March 2015, the ILO Governing Body requested the International Labour Office to prepare for November 2015 a debate and guidance paper highlighting any difficulties encountered by the Tribunal in managing its caseload. In preparing this paper, the Office considers it essential to ensure that the views of all stakeholders are adequately reflected.

1. Do you think that the ILOAT's increasing membership (60 member organizations) and the diversity of member organizations (UN specialized agencies, intergovernmental and non-intergovernmental, regional organizations) has, or might have in the future, an impact on the Tribunal's capacity to manage its case load?

(a) Increasing Membership

Increasing membership of the ILOAT,[1] without a corresponding effort to increase its capacity (through an expansion in the number of judges, support staff and sessions per year), can only lead to a negative impact on the Tribunal's workload, and more importantly, the fundamental rights of all international civil servants whose only recourse for their employment claims is ultimately to the ILOAT.

Not only does SUEPO believe that the ILOAT's increasing membership might in the future have an impact on the Tribunal's capacity to manage its caseload*, it is a fact that it has long already being having such an (adverse) impact*. As of July 2012, the ILOAT had approximately 450 pending cases[2]. According to its own statistics reported on the official ILOAT website, the ILOAT has historically adjudicated approximately 50 cases per session, and generally holds two (2) judgment sessions per year[3] [4]. Even if the current pace of case adjudication per session (approximately 73) is maintained, it

[1] Since 2002, the membership of the ILOAT has increased by about 50% (from around 40 to 60 organization).

[2] See letter from Public Services International (PSI) to the Chair of the Worker's Group of the ILO date 21 February 2013.

[3] Since July 2014, the number of cases adjudicated has increased dramatically (averaging 73 per session), although this has been accomplished in part by the ILOAT's unprecedented use since then of the Article 7 "summary dismissal procedure" provided for in the ILOAT's statutes—prior to July 2014, the summary procedure was used approximately 18 times since the ILOAT's formation in 1945, the last time in 1997; since July 2014, it has been used in some fifty-eight (58) cases. While SUEPO strongly advocates the efficient and

will still take the Tribunal more than six (6) years (some 72 months) to extinguish the current case back log. Such an excessive delay in not only objectively outrageous ("justice delayed is justice denied"), it also runs contrary to the Tribunal's own consistent jurisprudence that holds IO Administrations must provide an "efficient means of internal redress"[5], including adequate staffing to ensure that international civil servants receive a decision within "a reasonable time". [6]

The Tribunal's recent trend of rejecting appeals against decisions of a general nature, deviating from its own established jurisprudence (discussed in detail below), is adversely affecting EPO staff even more. There have been sweeping changes in the EPO internal laws in the past two years which affect all staff members (without the need for an individual decision). The Tribunal's insistence on every staff member filing an appeal when he/she is affected as a consequence of a general measure has led to over 3000 internal appeals, most of which are bound to reach the Tribunal. In view of the fact that appeals from EPO staff members make up approximately 150 of the current 450 case backlog, adding another (potentially) 3000 cases is going to cause an inordinate and undue delay before any of these complainants can obtain justice.

Notwithstanding the foregoing, SUEPO supports the ILOAT's increasing membership, so long as the increased caseload is met with a concomitant increase in the Tribunal's resources. An increase in the Tribunal's resources (including without limitation, an increase of sitting judges, an increase in skilled secretariat staff [administrative and legal], addition of a permanent third or fourth annual judgment session [as expressly contemplated by ILOAT Rule 3.1], etc.), is necessary not just to eliminate the current case backlog but also to address the increased number of appeals from the expansion of the ILOAT's jurisdiction. Such an increase in resources should presumably already have been brought to bear on the backlog as the ILOAT's operations are directly financed by fees that it charges to inscribed defendant organisations.[7] An alternative would be to have a permanent first instance Tribunal with full-time, sitting judges (similar to the UN Dispute Tribunal), with an expanded second instance, appellate Tribunal that sits often enough to address the current caseload, and to avoid any backlog.

(b) Diversity of Member Organisations

The impact of this increase in membership is exacerbated by the ad-hoc nature of international civil service law as administered by the Tribunal. Notwithstanding the diversity of rules and regulations between different organizations, there are fundamental principles which are common to the international civil service (equality of arms, acquired rights, *nemo iudex in re sua* [no one shall judge his own cause], respect of dignity, duty of care, etc.). A consistent upholding of these principles by the Tribunal, along with an obligatory conformity with precedents in cases similar in fact

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expeditious treatment of all pending appeals, it abhors the apparent sole reliance by the Tribunal on the Article 7 procedure to address the backlog (which will be addressed in more detail below) which on it faces seems to be a bold-face denial of justice to those complainants whose complaints were summarily dismissed under Article 7.

[4] The ILOAT held an extraordinary, third Judgment Session in January 2014 at which it adjudicated some 25 cases.

[5] ILOAT Judgment N°. 3168 at consideration 13.

[6] In ILOAT Judgment N° 3092, the Tribunal considered a delay of forty-two (42) months manifestly unreasonable!

[7] ILOAT Statute, Article IX, at paragraph 2.

and law, is likely to reduce the negative impact of the diversity of member organisations. This is addressed further below in the footnote 13 to paragraph 4.

2. Do you think that the average time for judgment delivery (interval between the completion of written submissions and the publication of the judgment) is satisfactory?

SUEPO finds the average time for judgment delivery is egregiously delayed, and needs to be remedied forthwith (see response to 1. above).

3. In your view, what are the principal reasons for current judgment delivery timelines and are there any practical measures which could improve the situation? Please specify

In SUEPO's view, the principle reasons for the current judgment delivery timelines are set out below, followed by suggested practical measures to improve the situation:

- Lack of adequate resources brought to bear on the current caseload and its backlog.

  Solution: Increase assessment to defendant organisations to support expeditious treatment of current cases, and existing backlog[8]).

- Insufficient number of judges.

  Solution: consider increasing permanent membership to 9 or 10.

- Insufficient number of judgment sessions.

  Solution: consider increasing to four [4] permanent sessions per year, or creating a two tier system similar to the UN Dispute Tribunal, with a full-time, sitting first instance Tribunal, and a second tier, appellate instance that meets as many times a year as necessary to expeditiously address all pending cases without the creation of a backlog.

[8] An ancillary benefit of such an increase is the fact that it will likely lead to a decrease in appeals to the ILOAT as the defendant organisations will need to weigh the increased cost of litigation versus the cost of reaching a mutually agreed resolution with a complainant—it is SUEPO's belief and experience that many legitimate staff appeals are litigated to conclusion by the EPO Administration simply out of principle, and not on the basis of economic considerations—such a practice is facilitated by the often derisory judgment amounts awarded to individual complainants. For example, in the last ILOAT Judgment session (July 2015), the Tribunal dismissed under the summary procedure of Article 7 a number of complaints brought by EPO staff members, but awarded several of them damages and costs on account of the EPO's unreasonable delays in processing the appeals internally. However, the amounts awarded, €250 in moral damages, and €200 in costs, a total of €450, were simply ludicrous. In order for EPO to speed up its internal appeal process, it will obviously need to hire additional personnel to do so. The ILOAT, with such derisory judgment amounts, have incentivized the EPO to do nothing to alleviate the outrageous delay in completion of internal appeals—as the annual cost of an administrative clerk might cost the EPO on average €150,000 or more (including salary, benefits and other emoluments), it will need to suffer another 333 judgment awards (which at the current average rate of 5 EPO cases per session with two sessions per year, will take some 33 years) for delay of €450 before it makes economic sense for EPO to hire one single new staff member to address the impugned delay!

- Inadequate or unprofessional adjudication of appeals at the internal organisation level, or lack of serious effort or motivation to resolve appeals at the internal level.

  Solution: a significant increase in the amount of awards against defendant organisations [including full reimbursement of actual legal fees expended by successful complainants] when a complaint succeeds, particularly when the fact patterns of subsequent cases are similar to previous adverse judgments against the defendant organisations, so that a real financial incentive exists for defendant organisations to take internal steps to change its internal practices that lead to appeals, or to settle an appeal by mutual agreement.

- Insufficient secretariat personnel supporting the judges.

  Solution: increase of skilled support personnel financed through increased assessments to defendant organisations--see i. above).

- Use of the Article 7 Summary Procedure as a means to reduce the current case backlog: as international civil servants are generally prevented by the immunity of defendant organisations from bringing their employment and other civil action claims to national courts, the summary dismissal of complainant's claims denies them access to justice and is a gross violation of a fundamental aspect of natural justice, and could well lead to the unintended consequence that a national court finds such denial of a staff member's fundamental rights invalidates an organisation's immunity, subjecting the organisation to the requirements of national law.

  Solution: limit the application of the Article 7 procedure to the most extreme cases (as was the practice of the Tribunal prior to 2014)].

- Failure to permit staff committee/associations and unions to bring complaints on behalf of the staff members they represent, thereby resulting in a substantial increase in the number of individual cases that are brought to the Tribunal, and the workload of the Tribunal.

  Solution: permitting staff committees and registered trade unions/associations to bring cases on behalf and in respect of the staff members' common interests and rights [as the Tribunal did in the past – in Judgment Nos. 1618, 2919].

- The Tribunal's sudden, recent change in its approach to complaints contesting decisions of general application, rejecting them as being inadmissible and ignoring a wealth of its own jurisprudence (see Judgment Nos. 1451, 1616, 1786, 1852, 2244, 2279 and 2300), resulting eventually in a splurge of complaints against specific individual decisions.

  This, combined with the lack of *stare decisis* in the Tribunal's jurisprudence, results in multiple parallel actions. Staff members, in the belief that the Tribunal will not be bound by its prior jurisprudence, continue to bring their claims based on a general decision to it – even though prior similar cases have not succeeded. However, to abide by the present jurisprudence, they are also forced to appeal against individual decisions through the internal

appeals mechanisms – which cases eventually end up before the Tribunal, doubling its case load.[9]

4. In your view, are there other weaknesses in the ILOAT operation, and if so, how could these weaknesses be redressed? Please specify

SUEPO believes that there are a number of other weaknesses in the ILOAT operation. In addition to these, there are numerous other fundamental deficiencies in the way the current Tribunal is organized and operates that must be addressed in order for the Tribunal to live up to the noble and high purpose or which it was originally organised,[10] as well as to fulfil the criteria laid down by customary international human rights law[11]. It must also be remembered that the Tribunal is the

[9] It must be noted that the failure of the ILOAT to allow complaints filed in the name of SUEPO and against general decisions has been considered by a Dutch Court (the Hague Court of Appeal) to be a "manifest deficiency" in the protection of the rights guaranteed under the ECHR, warranting the lifting of immunity granted to the EPO (VEOB *et al.* v. EPO, Appeal Court of the Hague, Case No. 200.141.812/01, Decision dated 17 February 2015.

[10] It is important to recall for the purposes of this questionnaire that the ILOAT is the successor to the League of Nations Administrative Tribunal (LNT), the latter of which was taken over by the International Labour Conference, acting at the request of the League of Nations Assembly in 1946 and reconstituted as the ILOAT with some modifications to its Statutes.

The LNT arose from a report of the Rapporteur of the Supervisory Commission of the League of Nations in 1925, which proposed that it be a judicial tribunal which would ensure to officials the firm conviction of safety and security emanating from justice, provide a judge for every dispute, and preclude the possibility of one of the parties being a judge in his own cause. The Rapporteur also found that such an administrative tribunal would increase rather than reduce the authority and position of the administration, that justice was above all men, and that all men were subject to justice, no matter what their function or position. After its creation, the 10th League of Nations Assembly in 1929 noted with approval that the existence of the LNT was one of the safeguards enjoyed by the League staff for the proper application of their terms of appointment and the regulations to which they were subject.

It is SUEPO's view that were the Rapporteurs to review the operation and functioning of the ILOAT today, they would be sadly disappointed by the way in which the Tribunal appears in many cases to have become the rubber-stamp for rogue administrations, not least that of the EPO.

[11] International organisations must provide its staff members with an internal justice system that operates, and is seen to operate to the highest standards of transparency and fair play. In particular, such an internal justice system must exhibit basic judicial guarantees of independence and impartiality, and afford to complainants fair and public hearings consistent with the concepts of natural justice (or "due process") under domestic legal systems. These principles are fundamental and universal, mandated by international human rights law enshrined in the Universal Declaration of Human Rights (Articles 10 and 23), the International Covenant on Civil and Political Rights (Article 14(1)), and regional treaties such as the European Convention on Human Rights (Article 6).

There are a number of other reasons why ILOAT procedures and practices should fully conform to these human rights standards. They include:

only legal remedy available to staff members of 60 international organizations, several of which are hosted by Member States subject to the European Convention on Human Rights, on account of the immunity from local/national laws and tribunals enjoyed by most defendant organisations. These Host States have an obligation to ensure that the staff members of the organizations to whom they grant immunity from legal process, have reasonable, alternative means to protect effectively their rights under the Convention, and that such alternative means have no manifest deficiencies.[12] The responsibility of a State Party to the ECHR will be engaged where an applicant establishes manifest deficiencies in the human rights protection accorded by the international organisation to which it grants immunity. In this context, where such a State Party grants immunity to an international organisation which subscribes to the jurisdiction of the ILOAT, the applicant can establish that the following weaknesses which will qualify as manifest deficiencies. This would eventually result in engaging the responsibility of the said Member State under the ECHR.

These further weaknesses and suggested solutions are listed below; given the short time given to SUEPO and other staff associations/unions to reply to this questionnaire (a great portion of which was during the traditional summer holiday period making consultation and consideration difficult if not impossible), such suggested solutions are by no means intended to be definitive or comprehensive. They nonetheless form a propitious starting point for further discussion between representatives of the affected staff associations/unions and the ILO about the long-overdue and needed reform of the ILOAT, which need is expressly evidenced by the unacceptable and shameful delays which gave rise to this questionnaire. SUEPO and its colleagues in other affected staff associations/unions stand ready to engage in a detailed and serious discussion about practical and pragmatic reforms to the current configuration of the ILOAT, and exhort the tripartite delegates of the ILO to accept this offer at their earliest convenience, and to convene a conference of all interested parties to set a course for proceeding with reform[13]:

(a) The ILO is immune from suit in the country where it is headquartered (see agreement between Switzerland and the ILO, 11 March 1946) and so are most if not all of ILOAT's client organisations. It follows that international civil servants, deprived of a right of access to domestic employment law guaranteed to other workers, must in lieu be afforded comparable rights by ILOAT if unjust discrimination is to be avoided.

(b) The international organisations which patronise ILOAT are all committed, in one way or another, to uphold international law, which includes the international law of human rights. It would be indefensible hypocrisy to deny their own employees the protections required by that law.

(c) The mission of the ILO is to ensure respect for the basic rights of workers, including the right to a fair system of adjudicating disputes with employees. It behoves the organisation to ensure that its system of adjudicating disputes with its own workers is beyond reproach.

[12] Waite and Kennedy, Application No. 26083/94, European Court of Human Rights, 18 February 1999; Bosphorus v. Ireland (Application No. 45036/98), European Court of Human Rights, 30 June 2005; Gasparini v. Belgium v. Italy.

[13] The suggested additions are attached hereto as ANNEX 1 due to their volume.

(i) Lack of Hearings since 1989— The ILOAT has not held oral argument or heard witnesses in any case (despite repeated requests for witness examination and oral argument in numerous cases) since 1989, even though its Statutes expressly contemplate hearings as the norm rather than an exception (or in the case of the ILOAT today, non-existent)[14]. Article 10 of the Universal Declaration of Human Rights provides:

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*[15]

Article 6(1) of the ECHR similarly provides for "*a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* In *Stefanelli v San Marino*[16]*,* the European Court of Human Rights held:

> *"...it is a fundamental principle enshrined in Article 6(1) that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained."*

The Redesign Panel on the United Nations system of Administration of Justice stated, in listing the international standards on the right of access to justice, as follows: "Hearings, too, are a clear requirement in international standards whenever there are disputed issues of fact."

In view of the foregoing, absent some well-articulated, reasoned exception particular to the case at bar, all complainants seeking oral argument and examination of critical witnesses before the Tribunal should be accommodated, irrespective of the challenge to resources that such a change in practice will likely cause; the Tribunal's resources should be increased to meet its fundamental obligations articulated by the UDHR and ECHR, rather than as it the current practice, denying complainants such rights by the universal violation of the right to a public hearing.

(ii) Independence and Impartiality of the Tribunal:

(a) Appointment of Judges

There is no transparency in the process of appointing the Tribunal's judges. The involvement of the ILOAT DG (in the first instance), upon whose recommendation the Governing Body appoints the Judges is apparently a "long standing practice" – which seems to have no basis in the Tribunal's Statute.

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[14] .ILOAT Statute Article V provides: *"The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be public or **in camera**."*

[15] This right is also contained in Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 25 of the American Convention on Human Rights, African Charter on Human and Peoples' Rights.

[16] [2000] European Court of Human Rights Application No. 35396/97

There is an apparent lack of guarantees ensuring independence from the executive. Further, the ILOAT Statute lacks meaningful requirements for the minimum professional qualifications of its judges.

Solution - The initial appointment of the judges and Registrar should be by mutual agreement between the ILO and Staff Association/Union representatives of the defendant organisations. It would be beneficial to the preservation of independence with regard to appointment if the qualifications were incorporated in the ILOAT Statute.

(b) Tenure and Reappointment: The Tribunal statute has this basic defect: Article III (2) provides that the seven judges "shall be appointed for a period of three years by the Conference of the ILO", and there is no prohibition on re-appointment for further three-year terms. In effect, the Tribunals' judges are "contract judges" whose well-paid appointments are dependent upon the repeated authorization of the very body (ILO) which is often a defendant organisation in litigation before them. Furthermore, the honorarium of the judges are paid by the defendant organisations against which they may be obliged to enter adverse judgments. This state of affairs is clearly incongruent with the well-settled rule that judges be independent and beyond any reproach in the form of real or perceived conflicts of interest. "Contract judges" violate the UN's own standard of independence of the judiciary.

Dr. CF Amerasinghe in his seminal textbook, "*Principles of the Institutional Law of International Organisations*" (Cambridge University Press, 1996), at page 455 opines on the reappointment process:

"Judges could be influenced to give biased decisions in favour of the organisation concerned in the hope of being re-appointed, particularly considering that their terms are rather short. Hence, the possibility of re-appointment may not be entirely conducive to independence and impartiality. For this reason, a limitation on the power to re-appoint to one additional term may work to some extent in favour of independence and impartiality, at least during the second term."

Solution - As the UNDT/UNAT recently adopted, ILOAT judges should be appointed to a single, non-renewable seven (7) year term.

(c) Conflict of Interest

The ILOAT Statute contains no provision prohibiting participation or requiring disclosure in cases where a judge has had previous experience with a party or issue before the Tribunal. Nor is there a procedure available to parties to prevent a judge from presiding over a case where there exists a conflict of interest. Moreover, a complainant does not know which judges will sit on his/her case until the judgment is rendered and therefore would be impossible for a

complainant to raise a conflict of interest concern because final and binding judgment would already have been given.

Solution - Parties must be notified of the judges handling their case prior to the panel's consideration of the same. Likewise, it must be mandatory for judges to disclose a real or apparent conflict of interest with a party or a matter before him/her.

(d) Financial Independence

There is very little transparency with regard to how the Tribunal is funded, how those funds are paid out to judges and used for ensuring the proper functioning of the Tribunal. Cases are financed by the defendant organisations on a per case basis. This means that all cases are financed by the international organization at bar. These concerns are increased when one considers the grossly insufficient success rates of complainants before the Tribunal.[17]

(e) Improper Influence

Not only does the ILOAT Statute contain any provisions guarding against improper influence, no public documents contain the practices of the Tribunal with regard to this issue. To SUEPO's knowledge, the Tribunal (the Registrar) has refused to invite staff representatives for any discussion on its progress (except for one meeting in 2014). However, some authorities in the Tribunal have, in the past (documented, for instance, in 2009) attended the yearly meeting of legal advisors from subscribing member organizations. While it is neither alleged nor concluded that defendant-international organizations engage in improper influence of the Tribunal, it is our contention that an amendment to the ILOAT Statute to include safeguards against outside pressures would likely inspire confidence that such occurrences are in fact accounted for by the Tribunal, and are expressly prevented.

Solution: All aspects of the financing, funding and compensation of the Tribunal and the judges should be completely transparent and made public, in detail.

(iii) Inequality of arms: Many of the deficiencies of the current ILOAT result from a gross inequality of arms between complainants and defendant organisations. Equality of arms arises out of natural justice, and is a jurisprudential principle of the European Court of Human Rights. This principle is a part of the right to fair trial, regulated by Art. 6 of the ECHR, and Article 14(1) of the ICCPR (as interpreted by the Human Rights Committee).

[17] In the years 2000-2014, complainants have prevailed (i.e., winning some measure of compensation, no matter how small—few complainants are ever awarded their full measure of requested redress) in 30% of the cases or less. Moreover, in some years, the complainants prevailed in less than 15% of the cases. This is based on a Chart that was calculated and created on a website maintained by SEUPO (containing information on ILOAT case law) – restricted access.

Equality of arms involves giving each party the reasonable possibility to present its cause, in conditions that will not put a party at a disadvantage against its opponent. Therefore, the principle of equality of arms forbids all inequalities in a trial and requires, *inter alia,* disclosure by a party of relevant documents or evidence to the other party and access to legal services. Unfortunately, these inequalities are evidenced throughout the current ILOAT proceedings, for example: failure to reimburse successful complainants for the full measure of legal fees incurred in bringing their appeal,[18] lack of formal discovery procedures or obligations, or a mechanism to examine witnesses, lack of a legitimate two tier appeal system, etc.

Solution: see footnote 13.

(iv) Discovery: The current ILOAT Statute and Rules have no formal mechanism for discovery by a complainant of critical documentation or information in the hands of the defendant organisation, substantially hampering a complainant's ability to meet his/her burden of proof in their appeal (or severely impairing their right of defence when accused of misconduct).

Solution: see suggested modification to Article 7 of the Tribunal's Rules in footnote 13; failure to comply with discovery orders should result in default judgment being entered against the defendant organisation, and an award to the complainant of all requested redress.

(v) Stare decisis and Applicable law*:* The ILOAT Statute and Rules impose no obligation that the Tribunal follow its prior announced jurisprudence in cases similar in fact and law, resulting in a divergence of outcomes for cases similar in fact and law. This undermines the confidence of both litigants and counsel in any judicial system, as well as predictability. It also may secondarily contribute to the increase in cases before the Tribunal as some complainants may still insist on bringing their claims to the ILOAT even though prior similar cases have not succeeded in the hope that the ILOAT will not be bound by its prior jurisprudence in a similar case.

The Tribunal's Statute does not have a specific provision on the applicable law (unlike, for instance, that of the Statute of the International Monetary Fund Administrative Tribunal). Although the Tribunal applies the internal law of an organization to a great extent, it also applies certain "general principles of law" as well as "general principles of international civil service law." However, it continuously refuses to apply established principles of international human rights law derived from various conventions and covenants, on the ground that an organization is not party to such convention, despite several of those principles having risen to the status of customary international human rights law. The lack of explanation in applying a set of general principles, and rejecting another, is a substantial concern for claimants, their counsel and staff representatives.

[18] The latter element was identified by the Redesign Panel on the United Nations Administration of Justice as being required to guarantee equality before courts and tribunals, as well as the Report of the External Panel on the Review of the International Monetary Fund's Dispute Resolution System dated 27 November 2001.

Solution: An express amendment to the Tribunal's statute listing the applicable law and its sources, including binding human rights law, would lessen the confusion surrounding this issue.

(vi) Lack of provisional or interim measures: There are no procedures for obtaining emergency judicial intervention e.g. for suspending the execution of an unlawful act or to order the administration to take specific measures to protect the rights or interests of a staff member.

Solution: Article 15 of the Tribunal's Rules can be amended to include these in the category of provisional orders (but not merely in between sessions or by the President alone).

(vii) Lack of investigation or inquiry by the Tribunal: There is an absence or near absence of inquiries, beyond the exchange of filings, between the Tribunal and the parties. The Tribunal's apparent over reliance on the fact finding by internal appeals bodies, which are not judicial instances, places a heavy burden of proof on the staff members.

Solution: The Tribunal must be able to take investigative measures without waiting for the examination of cases in a judgment session. A case should be assigned, from the introduction of a complaint, to a judge who would take timely and useful measures of inquiry, and for which purpose the parties could submit applications.

(viii) Lack of jurisdiction over external candidates to vacancies: External job applicants who have been subjected to improper and unlawful recruitment procedures or to discriminatory practices have no access to any form of legal remedy whatsoever.

Solution: There is a legal vacuum, which can be rectified by amending the Tribunal's Statute and extending its jurisdiction to any person who has participated in a selection procedure for a vacancy in a Member Organization.

5. Are you in favour of the repeal/ deletion of Article XII of the Annex to the ILOAT Statute providing for a possible recourse to the International Court of Justice, especially in the light of the Court's critical remarks in the 2012 IFAD advisory opinion?

Should Article XII of the Annex to the ILOAT Statute not be revised to extend the right contained therein to organizations and staff members (in their sole discretion and without permission from the defendant in the case) alike, SUEPO is in favour of the said Article being repealed. It is a matter of fairness and equality of arms. However, SUEPO advocates the replacement of Article XII with a provision establishing an acceptable second instance of appeal, as discussed below. SUEPO is in favour of the repeal/deletion of Article XII of the Annex to the ILOAT Statute providing for a reasonable recourse to the ICJ, but only in the event the Statute is revised to allow a staff member, in its sole discretion, to appeal a final judgment of the ILOAT to the ICJ, without the permission or participation of the defendant organisation in the subject case. SUEPO advocates the modification of the said Article to provide a fair and second level of appeal to complainants, but If the Article is not

so modified and revised, then the natural justice principle of equality of arms demands that the said Article in its present form be repealed, and replaced with an acceptable 2nd level, meaningful and effective appellate instance, as discussed below.

6. Are you in favour of setting up an appeals mechanism open to member organizations and complainants within the existing structure of the Tribunal to replace the recourse mechanism provided for in Article XII of the ILOAT Statute and Article XII of the Annex to the Statute?

In addition to the modification to the Annex to Article XII of the Statute suggested in 5. above, SUEPO is in favour of setting up an appeals mechanism open to complainants alone, as a prerequisite to the exercise of and not as a replacement for the modified recourse mechanism provided for in the said Annex to Article XII. One such alternative is a two tier, professionalized system, similar to that currently utilized in the UNDT/UNAT.

Replies to be sent at JUR@ilo.org not later than 15 September 2015 –

ANNEX 1

OVERRIDING PROVISIONS

The following provisions are deemed fundamental to the fair and equitable administration and functioning of the ILOAT, and should be conveyed to the ILO Governing Body with the request that such provisions, upon invitation to the ILOAT, be affirmatively incorporated into the ILOAT Statutes and/or Rules as appropriate, and that each such provision shall be assigned new, separate article designations.

DRAFT AMENDMENTS TO STATUTES

STANDARDS OF JUSTICE

All complaints brought before the ILOAT are to be heard in accordance with the principles of due process, fair procedures, *audi alteram partem* (the right to a hearing and defense)*, nemo iudex in re sua* (no one shall judge his own cause), and international law, including without limitation, relevant labour standards, and the ILO Declaration of Fundamental Principles and Rights at Work (and for defendant organisations domiciled within the jurisdiction of the Council of Europe, the European Convention on Human Rights).

STARE DECISIS

In any decision rendered by the ILOAT, it shall strictly adhere to all prior legal precedents set out in its previously decided cases unless it clearly demonstrates in its written judgment that the prior precedent is distinguishable in law or in fact from the present case and therefore not applicable, or that the prior precedent was patently incorrect, or is now contrary to the generally accepted principles of international law.

JUDGMENTS

In any decision rendered by the ILOAT, it shall expressly address all legal issues or claims raised in the complaint (as well as those raised in any *amicus curiae* briefs), and shall explain and incorporate same in its written judgment.

In the event a complaint before the ILOAT may be equally adjudicated on the basis both substantive and/or procedural grounds, the Tribunal whenever possible shall base its judgment on the substantive rather than the procedural grounds.

STANDARDS OF PROOF

In any complaint brought before the ILOAT involving allegations of wrongdoing, misconduct, or inappropriate behavior on the part of a "protected person"*, such protected person for the purposes of the ILOAT proceeding shall be presumed innocent for all intents and purposes, and the defendant organization shall bear the burden of demonstrating to the Tribunal beyond a reasonable doubt that the protected was culpable for the alleged wrongdoing, misconduct, or inappropriate behavior.

In any other claims brought before the ILOAT by a protected person, including class actions, upon the showing by the protected person of a *prima facie* case, the burden of proof shifts to the defendant organization to show that, based on the available evidence, the conclusions supporting the claims of the protected person are unreasonable. In the event such evidence either supports the claimant's

position, or otherwise equally supports the conclusions of the protected person and of the defendant organization, the conclusions of the protected person shall be adopted by the Tribunal.

* The expression "protected person" means any person affiliated with any organisation subscribing to the jurisdiction and protection of ILOAT, and includes without limitation:

(a) staff members;
(b) external collaborators;
(c) daily contract workers;
(d) interns (both paid and unpaid);
(e) persons on secondment to the organisation;
(f) staff members on special leave;
(g) national project personnel;
(h) other persons working under the control of the organisation;
(i) any person who was covered by paragraphs (a) to (h) above and whose relationship with the organisation (via resignation, dismissal, or otherwise) had come to an end, and who invokes this procedure within six (6) months of the end date of the relationship with the organisation;
(j) formal job applicants; and
(k) such other persons as may be agreed by the parties.

STAFF ASSOCIATIONS/UNIONS AS AMICUS CURIAE

The Staff Associations and or Unions of defendant organisations shall have the right in their sole unfettered discretion to submit a written opinion to the ILOAT, or to intervene and be heard at the time of oral argument, if any, in the matter of any complaint brought before the Tribunal by a protected person, when, in the opinion of the Staff Association/Union, such complaint raises a matter of policy or of general applicability. The ILOAT shall consider this opinion or oral intervention in its deliberations prior to rendering its judgment on a complaint, and shall give express reasons in its decision why it did or did not follow the *amicus* opinion.

PRIVILEGES AND IMMUNITIES

When a protected person has brought a grievance and received a final judgment from the ILOAT, such protected person shall have the right to request that the defendant organization lift the privileges and immunities either of the defendant organization and/or one or more of its officials so that such staff member may continue to pursue his claims in a competent national court of his or her own choosing, and the defendant organization shall be obligated to and shall promptly lift the privileges and immunities either of the defendant organization and/or one or more of its officials, but only in the event the defendant organization or such officials were implicated in the complaint filed with the ILOAT.

In the event such grievance mentioned above of the protected person was brought against a person who enjoys privileges and immunities as a result of his or her position with an organization other than the defendant organization, the defendant organization shall diligently do its utmost and make all representations necessary to effect the lifting of the privileges and immunities of such person.

INTERLOCUTORY REDRESS

In the event an impugned decision of the defendant organization will cause a protected person irreparable harm, and if the impugned decision is likely to be quashed, the protected person may, no matter what the status of his or her grievance, immediately petition the ILOAT for an order to

maintain the parties in *status quo ante* (the relative positions each was in prior to the impugned decision) pending final adjudication of the grievance or complaint. Within ten days of its receipt of such petition, the ILOAT shall take a decision on same (in the event the Tribunal is not in session, such decision shall be made by the President of the Tribunal). If the Tribunal finds that the protected person is likely to suffer irreparable harm from such impugned decision, and if such impugned decision is reasonably likely to be quashed after full consideration by the Tribunal, the Tribunal shall issue such interlocutory orders as it deems necessary to maintain the parties in such *status quo ante.*

DISCLOSURE

When a complaint is lodged with the ILOAT, the defendant organization shall produce all documents or information (which shall include without limitation any and all informal documents such as e-mail messages, correspondence retained in electronic form only, handwritten notes, and oral recordings) at the request of the claimant or may object to such request, subject to the following paragraph of this Article.

Where a claimant's request for disclosure of documents or information has been ignored or resisted by the defendant organization, the claimant seeking disclosure may file an application with the ILOAT to compel disclosure. The parties thereto shall demonstrate before the Tribunal the reasons for the requested documents or information to be disclosed or not disclosed, after which the Tribunal shall expeditiously render its decision on such request.

Any objections to a claimant's request for disclosure of documents or information must be based on a legally recognized privilege or right, and shall not be denied upon the perfunctory claim of "confidentiality".

Where the defendant organization withholds the requested documents or information in contravention of an order from the ILOAT ordering its disclosure to the claimant, the defendant organization shall have judgment entered against it, and the claimant shall be awarded its full requested redress.

The burden of proof shall be upon the defendant organization requested to produce documents or information to show that it has fully complied with any and all discovery requests.

WITNESSES AND TESTIMONY

All witnesses called upon to testify shall be obligated to do so unless expressly excused for good cause by the Tribunal, and must do so fully and truthfully to the best of his or her ability.

Upon the request of any claimant, the ILOAT shall hold oral hearings in which the claimant and/or his or her counsel may make arguments and/or question witnesses in the presence of the Tribunal. Failure to grant such a requested hearing shall entitle the claimant to invoke the appellate process of the ILOAT's judgment set out below, by right.

CLASS ACTION

Any grievance which has been brought as a class or collective action in an internal appeal procedure, and which is appealed to the ILOAT by two or more claimants who were party to the original grievance/action shall be treated as a "class action" by the ILOAT as provided for herein.

In the event two or more claimants who have the right individually to depose a complaint with the ILOAT pursuant to Article II of its Statutes, at their election, where their individual complaints concern the same or very similar issues or facts, the ILOAT shall treat such individual complaints as a single class action.

As soon as practicable after the filing of a complaint as a class action, the Tribunal shall effect notification of all potential members of the class, by means deemed most likely to reach as many potential members of the class affected by the complaint as possible, which notice shall include a statement that any individual claimant who is part of the class, personally or through his or her legal representative, may argue his or her position before the Tribunal at the same time that the Tribunal is considering the class action. Such notice shall also include a statement that any judgment entered in the class action shall be binding upon such recipient.

Individual members of a class action, in addition to their class action claims, shall also have the right to have any individual claims related to the class action claims considered and adjudicated by the Tribunal at the same time it considers the class action claims.

Any member notified of his or her inclusion in the class, in the event they believe they have no issue of fact or law common to the other claimants as set out in the complaint, may petition the Tribunal to remove them from the class. The Tribunal shall rule on any such petition in a timely manner.

Any judgment of the ILOAT in a class action shall be binding upon all members of the class who were notified of the class action, whether they personally appeared to argue their position or not.

For the purposes of class actions, the Staff Association/Union of a defendant organisation may act as a claimant/complainant in a class action upon its certification in writing to the Tribunal that the claim or claims affect two or more protected persons, in which event, the Tribunal shall treat such claim as a class action even if no other person joins as a complainant.

TIME LIMITS AND SANCTIONS

Where the defendant organization fails to comply with the time limits governing responses or to co-operate in discovery, the claimant may request sanctions against the defendant organization and such request shall be granted by the Tribunal, to the extent deemed appropriate, unless the defendant organization shows good cause or unavoidable delay. Such sanctions may include without limitation imposition of fines, closing of the pleadings, or entering of judgment in favour of the claimant.

Where the defendant organisation requests an extension of a time limit set out in the ILOAT Statutes or Rules, such extensions shall only be granted upon good cause shown. The claimant shall be promptly notified of such request, and shall be granted the right to object to such request in writing.

MODIFICATION OF ILOAT PROCEDURES BY AGREEMENT

Notwithstanding the present or future provisions of the Statutes and other constituent documents of the ILOAT, in the event the parties to any complaint before it have entered a valid and binding agreement in advance concerning the manner or method of adjudication of such complaint, the ILOAT shall adjudicate such complaint in accordance with the terms of such agreement, even if such manner or method is in variance from the then existing provisions of said constituent documents.

SPECIFIC AMENDMENTS TO THE ILOAT STATUTES

After these proposed modifications have been transmitted to the Governing Body as detailed above, and the Governing Body has invited the Tribunal to address the provisions of this Agreement, the following amendments shall be forthwith incorporated into the existing Statutes of the ILOAT.

Article II: The following paragraph shall be inserted as a separate, stand-alone paragraph immediately after paragraph 4., Article II of the Statutes--"The Tribunal shall be competent to hear any complaint impugning any final decision of a defendant organisation. The Tribunal shall consider any such complaint *de novo,* except in the event the claimant is denied the opportunity, after express written request, to present witnesses and/or make oral arguments to the Tribunal, in which event the Tribunal shall be conclusively bound and strictly abide by the factual findings of the report of the defendant organisation's advisory report".

Article III: The following paragraph shall be inserted as paragraph 2. to Article III of the Statutes, replacing in its entirety the existing paragraph 2.--"2. The judges shall be appointed for a term of three years, and may serve a maximum of two (2) three-year terms. The slate of names submitted by the ILO Director-General to the Conference of the ILO as candidates for judges must be agreed upon by the defendant organizations and representatives of the Staff Associations/Unions of all organisations subscribing to the jurisdiction of the ILOAT in advance, including the candidates who are sitting judges proposed for a second three year term".

Article IX: The following paragraph shall be inserted as paragraph 2. to Article IX of the Statutes, replacing in its entirety the existing paragraph 2.--"2. All costs and/or expenses occasioned by a complaint filed with the ILOAT shall be borne by the defendant organization in its entirety."

SPECIFIC AMENDMENTS TO THE ILOAT RULES

After these proposals have been transmitted to the Governing Body as detailed above, and the Governing Body has invited the Tribunal to address the provisions of this Agreement, the following amendments shall be forthwith incorporated into the existing Rules of the ILOAT.

Article 2: The following paragraph shall be inserted as Article 2 of the Rules, replacing in its entirety the existing Article 2.--" The posts of ILOAT Registrar and Assistant Registrar shall be filled in accordance with the selection competition procedures as provided for in the ILO Staff Rules. Successful candidates for the posts may be appointed to a maximum of two (2) four year terms."

Article 5: The following paragraph shall be inserted as paragraph 1. to Article 5 of the Rules, replacing in its entirety the existing paragraph 1.--"1. The Complainant may plead his or her own case or appoint for the purpose of representation any agent of his or her choosing."

Article 7: The following paragraph shall be inserted as paragraph 3. to Article 7 of the Rules--"3. The ILOAT shall promptly notify the complainant of any correspondence or application made to it by the defendant organization or any other party including the Tribunal itself as contemplated in paragraphs 1. & 2. above, and shall provide the complainant at the same time with a copy of any document submitted to the Tribunal by the defendant organization or other party. The complainant shall also be given a reasonable period of time of no less than twenty-one days from receipt in which to submit a reply to any such application or correspondence, including without limitation, a claim of irreceivability."

Article 11: The following paragraph shall be inserted as paragraph 3. to Article 11 of the Rules--"3. Upon written application of the complainant, the Tribunal without fail shall hear the oral arguments of the complainant or his or her agent (in which event the defendant organization shall be afforded an equal opportunity to make its case orally to the Tribunal should it so choose), shall allow the complainant and his agent to be present during any such oral argument, shall allow the complainant to question in the presence of the Tribunal such witnesses as he or she deems necessary to the presentation of the case, shall grant the complainant or his agent the right to cross-examine any and all witnesses called by the defendant organization to give testimony, and, shall provide the complainant with a written transcript of any such foregoing oral argument or witness testimony.

ESTABLISHMENT OF A PROCEDURE FOR APPELLATE REVIEW OF ILOAT DECISIONS

It being the desire of Staff Associations/Union on whose behalf these proposals are submitted that the ILOAT maintain and strengthen its original foundations, and in keeping with the principle of *nemo iudex in re sua,* any claimant before the ILOAT shall be allowed to appeal any judgment of the Tribunal to the ILOAT sitting *en banc*, in which all seven (7) judges shall hear the complaint before it *de novo.* The ILOAT sitting *en banc* shall consider and rule, in writing, upon all issues of fact and law put before it by a claimant or the Union, and upon request of such claimant or Union, shall hold oral arguments and allow for the examination of witnesses, prior to rendering judgment on any such appeal.

Any such appeal to the ILOAT sitting *en banc* must be filed within 180 days of the dated of the impugned judgment.

The Tribunal shall be obliged to promulgate or otherwise adopt rules of procedure for the hearing of such appeals *en banc* which shall become applicable and binding upon all parties to a complaint filed subsequently to their promulgation.

RELATED ISSUES

RULES OF EVIDENCE

The Tribunal shall be obliged to promulgate or otherwise adopt rules of evidence within one year which shall become applicable and binding upon all parties to a complaint filed subsequently to the promulgation of such rules of evidence.

CODE OF CONDUCT FOR LEGAL REPRESENTATIVES/AGENTS

The Tribunal shall be obliged to promulgate or otherwise adopt within one year a code of ethical conduct which shall binding upon all representatives/agents appearing before the Tribunal representing either a staff member or a defendant organisations, whether such representatives are licensed lawyers or not.