

REVISITING THE LEGAL BASIS TO DENY INTERNATIONAL CIVIL SERVANTS ACCESS TO A FUNDAMENTAL HUMAN RIGHT

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This paper focuses on the tensions between the privileges and immunities of intergovernmental organizations (IGOs) and the human rights of IGO staff members, and, more specifically, on the consistency of IGO internal justice systems (IJSs) with the human right to a fair hearing. As some of the more established IGOs enter their seventh decade of existence, more attention is being paid to deficiencies in their IJSs. IGO staff members are required to first litigate staff grievances through an IJS before seeking relief before domestic courts. IGOs are immune from suits in domestic courts, so such courts will typically decline to exercise jurisdiction. This leaves IGO staff members in the lurch. This paper tracks the development of the World Trade Organization (WTO) and United Nations (UN) IJSs. It assesses the consistency of these two IJSs with European court jurisprudence on the right to a fair trial. The paper concludes that WTO and UN IGO staff members are effectively being deprived of their right to have their civil rights and obligations determined before an independent and impartial tribunal. It concludes with a call for domestic courts, states and civil society to join together to pressure IGOs to bring their IJSs into conformity with the contours of the human right to a fair hearing.

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I. INTRODUCTION

Modern-day intergovernmental organizations (IGOs) arose from the post-second world war international legal order. By some accounts, there are currently in excess of 250 IGOs in operation.¹ The major IGOs were formed following the Bretton Woods and Dumbarton Oaks conferences of 1944.² The Bretton Woods Conference concluded with the creation of the International Monetary Fund (IMF) and World Bank (WB), and the signing of the Generalized Agreement on Tariffs and Trade: the precursor to the World Trade Organization (WTO).³ Collectively, the IMF, WB and WTO regulate the international monetary system.⁴ The WB and IMF have progressively had their mandates expanded to cover global poverty alleviation.⁵ Excluding consultants and support staff, these institutions presently employ just under 15,000 staff members.⁶

1. The UK-based Political Studies Association lists sums tabulated from various sources, including notably the Union of International Associations (UIA). See Richard Woodward & Michael Davies, *How Many International Organizations are There? The Yearbook of International Organizations and its Shortcomings*, POL. STUD. ASS'N (Oct. 11, 2015), <https://www.psa.ac.uk/insight-plus/blog/how-many-international-organisations-are-there-yearbook-international>.

2. A topic explored in depth in STEPHEN BUZDUGAN & ANTHONY PAYNE, *THE LONG BATTLE FOR GLOBAL GOVERNANCE* Ch. 1 (2016).

3. MARC AUBOIN, *FULFILLING THE MARRAKECH MANDATE ON COHERENCE: TEN YEARS OF COOPERATION BETWEEN THE WTO, IMF AND WORLD BANK* 4 (2007), https://www.wto.org/english/res_e/booksp_e/discussion_papers13_e.pdf.

4. *Id.*

5. *Fact Sheet: The IMF and the World Bank*, INT'L MONETARY FUND [hereinafter IMF] (Sep. 26, 2016), <http://www.imf.org/external/np/exr/facts/imfwb.htm>. The WTO, in contrast, has struggled to enter the poverty alleviation domain, through

The Dumbarton Oaks conference concluded with the drafting of the United Nations (UN) Charter, which was signed a year later in San Francisco.⁷ The UN, initially designed to maintain international peace and security, has since developed into the world's premier international political organization, mandated to cover diverse issues from sustainable development to good governance to human rights protection to humanitarian aid.⁸ As of 2014, excluding consultants and support staff, the UN employs over 40,000 staff members.⁹ In addition to the 55,000 staff members employed by the Bretton Woods institutions and the UN, there are some 40,000 staff members from other IGOs who are subject to the jurisdiction of the International Labor Organization Appeals Tribunal (ILOAT).¹⁰

Upon their creation, the major IGOs and their officials were vested with the same privileges and immunities enjoyed at the time by sovereign states and their dignitaries under international law. In addition to immunity from suit in domestic courts, these included inviolability of

various "aid for trade" initiatives that have failed to gain traction. See Thomas Dorsey, *IMF Survey: What is Aid for Trade?*, IMF (May 23, 2007), <http://www.imf.org/external/pubs/ft/survey/so/2007/POL0523A.htm>.

6. The World Bank website indicates that it has "more than 10,000 employees." See The World Bank, *What We Do*, THE WORLD BANK, <http://www.worldbank.org/en/about/what-we-do> (last visited Apr. 6, 2017). An IMF fact sheet reports that it employs "approximately 2,700" employees. See *The IMF at a Glance*, IMF, <http://www.imf.org/external/np/exr/facts/glance.htm> (last visited Apr. 6, 2017). The WTO Secretariat, the smallest of the three, employs "634 regular staff." World Trade Org. [hereinafter WTO], *Overview of the WTO Secretariat*, WTO, https://www.wto.org/english/thewto_e/secre_e/intro_e.htm (last visited Apr. 6, 2017).

7. See 1944-1945: *Dumbarton Oaks and Yalta*, U.N., <http://www.un.org/en/sections/history-united-nations-charter/1944-1945-dumbarton-oaks-and-yalta/index.html> (last visited Apr. 6, 2017).

8. *What We Do*, U.N., <http://www.un.org/en/sections/what-we-do/index.html> (last visited Apr. 6, 2017).

9. See U.N. Secretary-General, *Composition of the Secretariat: Gratis Personnel, Retired Staff and Consultants and Individual Contractors*, U.N. Doc. A/69/292 (Aug. 8, 2014).

10. Andras Szalay, *Equal Treatment and the ILO Administrative Tribunal*, TILBURG L. SCH. (Apr. 6, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1804217. The WTO's 634 staff members should be deducted from this estimate, to avoid double counting.

premises and archives, and exemption from taxes.¹¹ In addition, second-generation IGOs have successfully extended their immunities from suit to cover such additional matters as communications, exchanges, and travel arrangements necessary for the efficient conduct of official business.¹² Immunities from suit in particular sought to limit the possibility that IGOs or their officials would face any “danger of prejudice or bad faith” in the hands of domestic courts, or differing interpretations by different states whose courts would review the legal acts of IGOs.¹³

The UN Charter (UNC) contemplated that “[t]he Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.”¹⁴ Its member representatives and officials, further, “shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.”¹⁵ The UNC directed the General Assembly to recommend rules relating to necessary privileges and immunities.¹⁶ These rules were codified a year later in the Convention on the Privileges and Immunities of the United Nations (General P&I Convention), which formulated immunity in absolute terms:

The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.¹⁷

11. See, e.g., Agreement on the Privileges and Immunities of the International Criminal Court, arts 6–7, Sept. 3–10, 2002, ICC-ASP/1/3.

12. For the fruits of their labor, see Headquarters Agreement Between the Organization of American States and the Government of the United States of America, pt. IV, May 14, 1992, S. Treaty Doc. No. 102-40.

13. C. WILFRED JENKS, INTERNATIONAL IMMUNITIES 40 (Stevens & Sons Ltd 1961).

14. U.N. Charter art. 105, ¶ 1, Oct. 24, 1945, 1 U.N.T.S. 16.

15. *Id.* ¶ 2.

16. *Id.* ¶ 3.

17. Convention on the Privileges and Immunities of the United Nations art. 2, Feb. 13, 1946, 1 U.N.T.S. 15 [hereinafter General P&I Convention].

The General P&I Convention clarified that “[p]rivileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.”¹⁸ Accordingly, the UN Secretary-General has to waive the immunity of UN staff members where it would “impede the course of justice and can be waived without prejudice to the interests of the United Nations.”¹⁹

Two years later, the Convention on Privileges and Immunities of Specialized Agencies (Specialized P&I Convention) articulated analogous standards for IGOs²⁰ and their staff members.²¹ Major IGOs, such as the WTO, refer to the terms of the Specialized P&I Convention in their foundational instruments.²² States party to the UNC and other IGO treaties promulgated domestic laws that, in many cases, granted IGOs absolute immunities from suit.²³

Since the P&I Conventions, the international legal order has changed, with the doctrine of absolute immunity ceding to the doctrine of functional or restrictive immunity. In the United States, the 1952 Letter from Acting Legal Advisor Jack Tate to Acting Attorney General Philip Perlman (Tate Letter) ostensibly gave states notice that the Executive Branch would recommend “restrictive” immunity for foreign sovereigns,²⁴ wherein “immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out

18. *Id.* art. 5, § 20.

19. *Id.*

20. Convention on the Privileges and Immunities of the Specialized Agencies art. 3, Nov. 21, 1947, 33 U.N.T.S. 261 [hereinafter Specialized P&I Convention].

21. *Id.* art. 6, § 22.

22. Marrakesh Agreement Establishing the World Trade Organization art. 8, Apr. 15, 1994, 1867 U.N.T.S. 154.

23. The United States International Organizations Immunities Act of 1945 is a prime example of such a law. 22 U.S.C. §§ 288-288I (2007); see also Agreement on Privileges and Immunities of the United Nations Concluded Between the Swiss Federal Council and the Secretary-General of the United Nations, art. 2, Apr. 19, 1946, 1 U.N.T.S. 164. It is suggested in the literature that the immunities of IGOs may have risen to the level of customary international law. Pietro Pustorino, *The Immunity of International Organizations from Civil Jurisdiction in the Recent Italian Case Law*, 19 ITALIAN Y.B. OF INT’L L. 57, 60–61 (2009).

24. Letter from Jack B. Tate, Acting Legal Advisor, US Dep’t of State, to Philip B. Perlman, Acting Attorney General, US Dep’t of Justice (May 19, 1952), in 26 Dep’t of State Bull. 984–85 (1952).

of a foreign state's strictly commercial acts."²⁵ In the United States, the Foreign States Immunities Act of 1976 duly codified the substance of the Tate Letter.²⁶ Globally, the emergence of a human rights paradigm in international law in the second half of the 20th century clashed with the notion of absolute privileges and immunities, based on normatively inferior customary international laws of international comity.²⁷

Sovereign states and their dignitaries, in most jurisdictions, are now subject to restrictive immunities from suit. The absolute immunity of IGOs, in contrast, has proven resilient to change and, as this paper will argue, domestic courts faced with claims against IGOs have exhibited a tendency to engage in various issue avoidance techniques to decline jurisdiction. This paper argues that the refusal by courts to engage in the merits of claims against IGOs creates an accountability gap in the law. For suppliers and contractors holding contractual arrangements with IGOs, this gap is typically remedied through provision of an arbitration waiver contained in the underlying private law instruments.²⁸

For current or prospective IGO staff, as touched upon above, the situation is more nuanced: their only relief lies in recourse to the internal justice system (IJS) of their IGO employer. Complaints lodged pursuant to these IJSs have sought recourse for matters ranging from arbitrary staff evaluations,²⁹ to unfair dismissals,³⁰ to discrimination in promotion

25. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

26. 28 U.S.C. § 1602 (2006).

27. Aaron Young, *Deconstruction International Organization Immunity*, 44 *GEO. J. INT'L L.* 311, 315–30 (2013), <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00113000311.PDF>.

28. Memorandum of Law in Support of the United Nations to Dismiss and Intervene, 4 (Oct. 2, 2007), *Brzak v. United Nations*, 597 F.3d 107 (S.D.N.Y. 2010). Note, further, that the D.C. Circuit court suggested in a case involving the World Bank that the Bank's members only intended to waive its immunity from suit with respect to this latter category of persons, namely: "debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from employees' suits arising out of internal administrative grievances is not necessary for the Bank to perform its functions ... this immunity is preserved by the members' failure expressly to waive it." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983).

29. *See H.G.R. v. FAO, Int'l Lab. Org. Admin. Trib.* [hereinafter *ILOAT*], Judgment No. 3240 (Jul. 4, 2013).

30. *See A. v. WTO, ILOAT, Judgment No. 3602* (Feb. 3, 2016).

decisions,³¹ to sexual harassment,³² to assault and battery,³³ and, in one instance, to the bullying of a UN staff member, leading her to commit suicide in her Geneva residence.³⁴

This paper will critically evaluate the consistency of IGO internal justice mechanisms with the human right to a fair hearing. Part II of this paper will discuss IGO IJSs, focusing specifically on the WTO IJS, of which little is written about, while drawing appropriate comparisons with the UN system. Part III will discuss the right to a fair hearing, with a particular focus on the European Convention of Human Rights (ECHR).³⁵ Part IV will illustrate how European domestic courts and the European Court of Human Rights (ECtHR) have attempted to reconcile the right to a fair hearing with the immunities of IGOs. Part V will conclude with recommendations.

II. INTERNAL JUSTICE MECHANISMS

First, in this Part of the paper, I will discuss judgments of the International Court of Justice (ICJ) and treaty provisions requiring IGOs to establish IJSs. Then, I will summarize material elements of the WTO and UN IJSs. I will also discuss IJS reform initiatives implemented a few

31. C.F. Amerasinghe, *Problems Relating to Promotion in the Law of the International Civil Service*, 51 HEIDELBERG J. INT'L L. 923, 928 (1991).

32. Megan Felter, *Meeting its Immunity Obligations: The United Nations and Employee Sexual Harassment Claims*, 34 B.C. INT'L & COMP. L. REV. 41, 41–51 (2011) (discussing Ms. Cynthia Brzak's failed attempt to sue the United Nations in New York courts).

33. *In re Rombach-Le Guludec*, ILOAT, Judgment No. 1581 (Jan. 30, 1997). The appellant was allegedly battered by the European Patent Office (EPO) President, sustaining serious injuries that required her to be hospitalized. *Id.* The EPO refused to lift the President's immunity to allow the Munich State Prosecutor to launch an investigation. *Id.* The ILOAT on that occasion declined jurisdiction on the basis that the matter affected relations between the EPO and a member state. *Id.*

34. *In re Qin*, ILOAT, Judgment No. 1752 (Jul. 9, 1998). A Chinese national was subjected to constant psychological harassment by ILO work colleagues, some of whom wrote a widely-circulated libelous petition to the Director of Personnel requesting that she be transferred out of her department. *Id.* She took her life on 14 December 1993. *Id.* The ILO Director General's Office (DGO) refused to permit the Swiss Procurer-General to enter the ILO premises to conduct an investigation. *Id.* The ILOAT refused to conduct an investigation to establish causation. *Id.*

35. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR].

years ago in the UN, before critically evaluating ongoing WTO IJS reforms.

A. The Quid Pro Quo for Immunity.

As touched upon in the introduction, IGOs are immune from suits in domestic courts.³⁶ An IGO staff member's only official recourse to justice is buried deep within the complex code of internal IGO law laid out in staff regulations, staff rules, and the staff member's employment contract. In some instances, an IGO may not provide for any meaningful access to internal justice.³⁷ The ICJ considered as early as 1954 that the creation of an IJS was essential towards remedying potentially grave injustices towards IGO staff:

The Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them. In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter.³⁸

The ICJ was not asked to look beyond the UNC in its Advisory Opinion. Had it been asked to, it would surely have pointed out that the General P&I Convention directs the UN to:

36. See text at *supra* note 23.

37. For an example, which I discuss below in more detail, see *Siegler v. Western European Union, Brussels Lab. Court of App.*, JT 617 (2004), ILDC 53 (2003). As I discuss below in more detail, the Labour Court found that the WEU IJS provided no mechanism for compelling the IGO to comply with adverse rulings. See *infra* pp. 385–92.

38. *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion*, 1954 I.C.J. Rep. 13, at 57, (July 13).

make provisions for appropriate modes of settlement of: (a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party; (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.³⁹

Indeed, in a later Advisory Opinion, the ICJ noted, on this provision, that:

the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity. The United Nations may be required to bear responsibility for the damage arising from such acts. However, as is clear from Article VIII, Section 29, of the General Convention, any such claims against the United Nations shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that “[t]he United Nations shall make provisions for” pursuant to Section 29.⁴⁰

The Court thus drew a link between the obligation of the UN to establish an alternative mode of dispute settlement, and preservation of its privileges and immunities. The Specialized P&I Convention contains an analogous dispute resolution provision.⁴¹ These treaty provisions underscore that the obligation of IGOs to provide staff with meaningful access to justice is not hortatory in nature. Rather, this represents the *quid pro quo* for the immunities enjoyed by IGOs.⁴² While the Court does not go as far as articulating that the absence of a dispute resolution procedure pursuant to Art. VIII, Section 29 of the General P&I Convention (or Art. IX, Section 31 of the Specialized P&I Convention) may result in an IGO being stripped of its immunity from suit in

39. General P&I Convention, *supra* note 17, art. VIII, § 29.

40. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 16, ¶66 (Apr. 29).

41. Specialized P&I Convention, *supra* note 20, art. IX, § 31.

42. As I will discuss below, the absence of such access to justice should allow domestic courts to accept jurisdiction in a staff member’s challenge against an IGO.

domestic courts for ensuing damage claims, the academic literature has interpreted the Court's findings in this manner.⁴³

The UN responded to the ICJ's 1954 Advisory Opinion by creating its IJS.⁴⁴ Staff appeals submitted through the IJS could be appealed up to the UN Administrative Tribunal (now the UN Appeals Tribunal (UNAT)), established earlier in 1949.⁴⁵ Before discussing the WTO IJS below, it bears highlighting that many IGO IJSs, including that of the WTO, are generally modeled after this first iteration of the UN IJS, probably due to first mover effects.⁴⁶ Typically, an IGO's IJS will recognize the appellate jurisdiction of either the UNAT or the ILOAT,⁴⁷ the latter having been established in 1946 as heir to the Administrative Tribunal of the League of Nations (ATLN).⁴⁸

For all practical purposes, UNAT and ILOAT are courts of last resort: although the ILOAT Statute allows an IGO to appeal an ILOAT ruling to the ICJ for a binding "Advisory" Opinion, where the IGO considered the ruling to be "vitiated by a fundamental fault in the procedure followed."⁴⁹ The ICJ has previously interpreted this restricted ground of appeal as

43. August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 INT'L ORG. L. REV. 59, 69 (2004).

44. G.A. Res. 957(X), at 30–31 (Nov. 8, 1955). For an excellent account of the early history of the UN's IJS, see ABDELAZIZ MEGZARI, *THE INTERNAL JUSTICE OF THE UNITED NATIONS: A CRITICAL HISTORY 1945-2015* (2015).

45. G.A. Res. 351(IV), at 49 (Dec. 9, 1949). The UNAT website can be accessed here: Off. of Admin. of Jus., *About UNAT*, UN APPEALS TRIB. (last visited Apr. 30, 2017), <http://www.un.org/en/oaj/appeals/>.

46. It is interesting to note that the WB, IMF, Inter-American Development Bank, Asian Development Bank, African Development Bank, and Pan-American Union have all established roughly equivalent administrative tribunals. See Arnold Zack, *Developing Standards of Workplace Justice Within International Organizations*, AM. SOC'Y OF INT'L L. INT'L ORG. INT. GROUP REV. 44, 45 (Summer 2010) <https://www.asil.org/sites/default/files/documents/International%20Organizations%20Interst%20Group%20Review%20-%202010%20Issue.p.pdf>.

47. See Off. of Admin. of Jus., *Jurisdiction*, UN APPEALS TRIB. <http://www.un.org/en/oaj/appeals/jurisdiction.shtml> [hereinafter UNAT Jurisdiction]; see also *ILO Administrative Tribunal: Membership*, ILO, <http://www.ilo.org/tribunal/membership/lang--en/index.htm> [ILOAT Jurisdiction].

48. *ILO Administrative Tribunal*, ILO (last visited Apr. 30, 2017), <http://www.ilo.org/tribunal/lang--en/index.htm>.

49. Statute of the Administrative Tribunal of the International Labor Organization art. XII, Oct. 9, 1946 (adopted and amended by the International Labour Conference) [hereinafter ILOAT Statute].

limited to errors of jurisdiction.⁵⁰ Such appeals have seldom been lodged by IGOs. The UNAT, in contrast, had initially recognized the *locus standi* of any appellant, IGO and interested UN member state to challenge a UNAT ruling before the ICJ on grounds of excess of jurisdiction, failure to exercise jurisdiction, any question of law relating to a UNC provision, or commission of a fundamental error in procedure.⁵¹ These grounds of appeal were, however, subsequently deleted following a Report of the Secretary General issued in October 1994.⁵²

B. Internal Justice Systems.

1. *The WTO IJS*

This section introduces the WTO IJS. I focus on the WTO IJS for two reasons: first, precious little is publicly known about it. There is no good or principled reason for this aura of secrecy; there is nothing confidential or sensitive about the structure or organization of the WTO's IJS, which emanates from WTO staff rules and regulations,⁵³ and is based on the UN staff rules and regulations.⁵⁴ The WTO is one of only two IGOs that

50. Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against the UNESCO, Advisory Opinion, 1956 I.C.J. Rep. 156, 25 (Oct. 23). It bears mentioning that literature notes the ICJ as not being thrilled with its appellate jurisdiction vis-à-vis the UNAT and ILOAT, considering it anathematic to its otherwise inter-state character. See generally Rudolf Ostrihansky, *Advisory Opinions of the International Court of Justice as Reviews of Judgments of International Administrative Tribunals*, 17 POL. Y.B. INT'L L. 101-21 (1988).

51. ILOAT Statute, art. XII (subsequently removed by amendment).

52. U.N. Secretary-General, *Review of the Procedure Provided for Under Article 11 of the Statute of the Administrative Tribunal of the United Nations*, at 1, U.N. Doc. A/C.6/49/2 (Jan. 29, 1996).

53. *Conditions of Service Applicable to the WTO Secretariat*, WTO, Annex 2 (Oct. 21, 1998) <https://webcache.googleusercontent.com/search?q=cache:QokEXTk1rKgJ:https://docsonline.wto.org/dol2fe/Pages/SS/DirectDoc.aspx%3Ffilename%3Dt%253A%252Fwt%252F1%252F282.doc%26+&cd=1&hl=en&ct=clnk&gl=us> (URL cached).

54. *Staff Regulations*, U.N. Doc. ST/SGB/2014/2 (Jan. 1, 2014), http://webcache.googleusercontent.com/search?q=cache:7J4Q-ghcmAAJ:www.un.org/hr_handbook/English/sourcedocuments_/03staffregulati_/fulltext/fulltext.doc+&cd=1&hl=en&ct=clnk&gl=us (URL cached); U.N. Secretary-General,

systematically refuse to provide relevant data about its IJS.⁵⁵ This is noted by the International Administrative Law Center for Excellence (IALCE), which compiles IGO data for publication on an annual Legitimacy Index hosted on the Council of Europe's website.⁵⁶ By introducing the WTO IJS, this paper seeks to fill an acknowledged gap in IGO accountability.

Second, as mentioned above, the WTO IJS was based on a prior iteration of the UN IJS, and not on its restructured version. The UN IJS was comprehensively revised in 2008 after the UN General Assembly implemented some of the recommendations of the Panel on the Redesign of the UN system of administration of justice.⁵⁷ The Redesign Panel had been established following widespread user dissatisfaction with the UN IJS.⁵⁸ In an interesting parallel, the WTO IJS was itself the subject of a recent internal review by WTO staff in the framework of the WTO's introspective "Strategic Review" evaluation.⁵⁹ It will be interesting (but difficult⁶⁰) to see how many of the Strategic Review Group's recommendations the WTO adopts in the coming years.

The WTO IJS is governed by specific chapters of the WTO Staff Regulations,⁶¹ Staff Rules⁶² and internal staff memoranda. The Staff Regulations contemplate that "[t]he paramount objective in the determination of conditions of service shall be to secure staff members of

Staff Rules and Staff Regulations of the United Nations, U.N. Doc. ST/SGB/2014/1 (Jan. 1, 2014).

55. The other IGO is the IAEA. INT'L ADMIN. LAW CTR. OF EXCELLENCE, INTERNATIONAL JUSTICE SYSTEMS OF INTERNATIONAL ORGANIZATIONS: LEGITIMACY INDEX 2015 6, n. 12, http://www.coe.int/T/AdministrativeTribunal/Source/IJS_LegitimacyIndex2015_BrettonWoodsLaw.pdf [hereinafter IALCE Legitimacy Index].

56. *Id.*

57. Rep. of the Redesign Panel on the U.N. System of Administration of Justice, ¶¶ 5–6, U.N. Doc. A/61/205 (July 28, 2006) [hereinafter Rep. of the Redesign Panel].

58. See Press Release, Expert Panel on United Nations Internal Justice Submits Report to Secretary-General, Says Fundamental Overhaul Essential for Management Reform Success, U.N. Press Release ORG/1470 (July 20, 2006).

59. Working Group on Rules, *Final Report*, World Trade Organization (June 2014).

60. Due to the organization's culture of secrecy.

61. WTO Staff Regulations, issued pursuant to the Marrakesh Agreement Establishing the World Trade Organization art. VI, Apr. 15, 1994, 1867 U.N.T.S. 154.

62. WTO Staff Rules, WTO Doc. OFFICE(11)/(54) (Nov. 18, 2011).

the highest standards of competence, efficiency and integrity and to meet the requirements of the WTO taking into account the needs and aspirations of the staff members.”⁶³ Chapter 12 (Grievances and Appeals) of the Staff Regulations provides that “[t]he WTO shall provide for a conciliation procedure in an endeavor to resolve grievances submitted by staff members relating to their conditions of employment.”⁶⁴ In ensuing disputes, “staff members have the right to due process, as set out in the Staff Rules.”⁶⁵

The Staff Rules contain more detailed provisions on the WTO IJS.⁶⁶ A staff member seeking recourse to the system can only challenge two types of measures: performance-related disciplinary measures imposed upon him or her by the Director-General, or an “administrative decision.” Disciplinary measures, the first type of measure, can be appealed directly to the ILOAT.⁶⁷ Administrative decisions, however, are subject to a more convoluted internal appeal process. While the term “administrative decision” is undefined, it is typically understood to relate to tangible action or inaction by or on behalf of the Administration that has some discernible legal consequences for the aggrieved staff member.⁶⁸ Such

63. WTO Staff Regulations, *supra* note 61, at “Purpose and Scope.”

64. *Id.* at 12.1.

65. *Id.* at 12.2 (emphasis omitted).

66. WTO Staff Rules, *supra* note 62, at r. 114.

67. *Id.* at r. 114.5(b).

68. The UNAT, whose findings are not directly relevant to the WTO, determined that “an ‘administrative decision’ is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities.” *Andronov v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 1157, ¶ V., U.N. Doc. AT/DEC/1157 (2004).

Five years later, the United Nations Dispute Tribunal (UNDT), created following 2007 reforms, opted for a more amorphous interpretation: “[g]iven the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken.” *Teferra v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. UNDT/2009/090, ¶ 9, U.N. Doc. UNDT/NBI/2009/018 (2009). While UNAT jurisprudence is not directly relevant to the

decisions should ideally be in writing, to better insulate complainants from having their requests denied for want of a cause of action.⁶⁹

While data on the number or the nature of administrative decisions made by WTO staff members that have been challenged resides solely within the Director-General's Office (DGO), a review of those IJS appeals leading to ILOAT judgments reveals that these administrative decisions have previously related to alleged wrongful termination,⁷⁰ arbitrary reassignments,⁷¹ retaliatory performance evaluations,⁷² disciplinary measures,⁷³ failure to give notice of non-renewal of employment,⁷⁴ denial of benefits,⁷⁵ and harassment.⁷⁶ It bears emphasizing, however, that only a few IJS appeals are appealed to the ILOAT.⁷⁷ The examples cited in this paragraph thus contain a snapshot, at best, of the range of complaints lodged with the DGO since the WTO's establishment in 1995.

To challenge an administrative decision, a staff member must formally request that the Director-General "review" the contested decision within 40 working days of being notified of it.⁷⁸ The system thus opens with an administrative review conducted by the DGO. If the DGO determines that the decision violates WTO rules, corrective action is

WTO, appeals from the WTO are heard by the ILOAT, and the ILOAT considers UNAT decisions as persuasive authority.

69. The WTO does not maintain a record of IJS-related statistics. However, WTO Staff Council volunteers familiar with the IJS process have indicated to me in private conversations that the lack of written evidence of an "administrative decision" often leads to the DGO's rejection of a staff member's grievance.

70. *A.P. v. WTO*, Judgment No. 3010 (ILOAT July 6, 2011); *R.K. v. WTO*, Judgment No. 3122 (ILOAT July 4, 2012); *C.A. v. WTO*, Judgment No. 3602 (ILOAT Feb. 3, 2016).

71. *J.M. v. WTO*, Judgment No. 2226 (ILOAT July 16, 2003).

72. *A.P. v. WTO*, Judgment No. 3171 (ILOAT Feb. 6, 2013); *V.L. v. WTO*, Judgment No. 3486 (ILOAT June 30, 2015).

73. *F.S. v. WTO*, Judgment No. 2254 (ILOAT July 16, 2003).

74. *M.G. v. WTO*, Judgment No. 2531 (ILOAT July 12, 2006).

75. *C.H. v. WTO*, Judgment No. 2637 (ILOAT July 11, 2007); *J.D. v. WTO*, Judgment No. 2638 (ILOAT July 11, 2007); *S.R.M. v. WTO*, Judgment No. 2639 (ILOAT July 11, 2007).

76. *A.P. v. WTO*, Judgment No. 3170 (ILOAT Feb. 6, 2013).

77. This observation is based on the author's personal experiences.

78. Framed as an "administrative decision." WTO Staff Rules, *supra* note 62, at r. 114.3(a).

taken and the matter is closed.⁷⁹ This rarely occurs. In theory, the DGO is meant to engage in an independent fact-finding exercise to assess the complainant's review request. In practice, the DGO legal counsel, usually a senior lawyer reassigned from the Legal Affairs Division, conducts this exercise by discussing the matter directly with the complainant's divisional director—an individual who may be motivated to play down the matter for fear of being perceived as an ineffective manager or, worse still, be the very person whose actions the complainant is challenging.⁸⁰ After the legal counsel has concluded his investigation, within the 40-day period, the DGO notifies the complainant, in writing, of its decision in the matter.⁸¹ No evidence from the DGO legal counsel's investigation is shared with the staff member, nor is the staff member entitled to any disclosure under the IJS.⁸²

If the DGO deems the challenged action *intra vires*, the DGO endorses the action as its own, and stands behind it for the remainder of the process. The staff member can appeal the DGO decision, as a designated complainant, within 20 days, to the Joint Appeals Board (JAB),⁸³ a specially convened three-member panel of senior staff members appointed, in essence, by the DGO.⁸⁴ JAB proceedings should normally last no longer than 40 days, and are adversarial in nature.⁸⁵ The

79. Arguably, in such instances, the Director-General would be free to initiate disciplinary proceedings against the manager or supervisor concerned pursuant to the Disciplinary Measures provisions of Regulation 11. WTO Staff Regulations; WTO Staff Rules, *supra* note 62, r. 113. However, the link is not explicitly drawn between these two sets of rules.

80. This is corroborated by the assessment of the Working Group on Rules. *See* Final Report of the Working Group on Rules, *supra* note 59, at r. 4.7.

81. WTO Staff Rules, *supra* note 62, r. 114.3(a).

82. The Staff Rules do not address the possibility of information-sharing or disclosure to the staff member concerned. In practice, the staff member is merely informed of the DGO's final decision—often times affirming the contested decision. *See id.*

83. WTO Staff Rules, *supra* note 62, r. 114.5.

84. Staff Admin. Memorandum from the Joint Appeals Board of the WTO, art. 2, WTO Doc. OFFICE(00)/5 (Jan. 24, 2000) [hereinafter Staff Admin. Memo]. The JAB makes decisions on a majority basis. Two of the JAB members are appointed by the DGO. One is appointed by the Staff Council. In situations where the two DGO-appointed JAB members are leaning in a given direction, it goes without saying that the Staff Council-appointed JAB member will remember on which side his bread is buttered. Likely for this reason, no JAB member has ever been known to dissent.

85. WTO Staff Rules, *supra* note 62, r. 114.8(e).

DGO legal counsel represents the DGO.⁸⁶ The complainant, on the other hand, will normally represent him or herself, unless the WTO Staff Association secures a staff volunteer willing and able to act on his or her behalf.⁸⁷ It bears mentioning that, prior to an ILOAT ruling on the matter,⁸⁸ successive DG Administrations have been reportedly disinclined to allow for such assistance.⁸⁹ While the JAB rules contemplate the possibility of oral hearings,⁹⁰ by convention proceedings are conducted exclusively in writing. The JAB receives a submission and rebuttal statement each from the disputants,⁹¹ and issues its recommendations to the DGO.⁹²

The JAB has no formal powers to compel witnesses or order discovery.⁹³ Only the DGO wields such authority.⁹⁴ If the DGO fails to

86. Peter Milthorp, *The Meat in the Sandwich*, in *A HISTORY OF LAW AND LAWYERS IN THE GATT/WTO: THE DEVELOPMENT OF THE RULE OF LAW IN THE MULTILATERAL TRADING SYSTEM* 291, 297 (Gabrielle Marceau ed., 2015).

87. Staff Rule 114.8(b) contemplates that “Staff members may arrange to have their appeal presented to the Joint Appeals Board on their behalf by a staff member of the WTO or of another international organization in Geneva.” *Id.* at r. 114.8(b). To the author’s knowledge, this provision is very much a dead letter: there is no standing list of volunteer IGO lawyers based in Geneva. Further, soliciting their assistance would arguably amount to a violation of Organizational Secrecy Undertakings (an internal document declaration that employees will not disclose sensitive organizational material to the public). Accordingly, a volunteer provided by the Staff Association is a complainant’s best and only option of representation.

88. *A.P. v. WTO*, Judgment No. 3170, ¶ 38 (ILOAT Feb. 6, 2013).

89. Milthorp, *supra* note 86, at 297.

90. Staff Admin. Memo, *supra* note 84, arts. 9 and 13.

91. *Id.* art. 9.

92. *See generally id.* art. 19.

93. Staff Rule 114.8(c) provides, somewhat ambiguously, that “[t]he Joint Appeals Board may call members of the staff who may be able to provide relevant information, and shall have access to all documents pertinent to the case.” *See* WTO Staff Rules, *supra* note 62, at r. 114.8(c). This provision does not articulate what consequences, if any, flow from a failure to answer the JAB’s “call.”

94. The Director-General of the World Trade Organization is responsible for supervising the administrative functions of the WTO. Because WTO decisions are made by member states (through either a Ministerial Conference or through the General Council), the Director-General has little power over matters of policy—his role is primarily advisory and managerial. The WTO DG and, by extension, the WTO Secretariat, do not have any official institutional role in shaping the WTO’s agenda or policies under the WTO Agreement. Except to the extent that the Director-General is the repository of all powers and duties vested in the secretariat, there has no clear and explicit

exercise this authority in the course of its initial review, it may be less inclined to engage in fact-finding in parallel with JAB proceedings. While the JAB may pose questions and seek written responses from any member of staff following the exchange of rebuttal statements between the complainant and DGO, cooperation informally depends on the acquiescence of the staff member's divisional director, and there are no penalties for non-compliance.⁹⁵ The JAB may draw adverse inferences where the complainant does not candidly respond to questions.⁹⁶ However, the JAB is known to be far less inclined to draw adverse inferences from the DGO's refusal to provide information.⁹⁷ Formally, the JAB's mandate is limited to issuing "high quality" recommendations to the DGO, which the latter, acting on the advice of its legal counsel, is free to ignore.⁹⁸

Once the JAB has issued its recommendations, proceedings are closed. The JAB keeps a record of proceedings,⁹⁹ but these are sealed off and stored as confidential. The IJS closes with a second level of administrative review, whereupon the Director-General essentially has

listing or consolidation of his powers and functions, whether by the Ministerial Conference or by the General Council. These powers and functions remain scattered in various WTO legal texts and decisions of either the Ministerial Conference or the General Council, as do the rules that govern the exercise of such powers and functions. This situation leads to much ambiguity and vagueness with respect to the exercise by the WTO DG of his powers and functions. KAREN KAISER ET AL., *WTO – INSTITUTIONS AND DISPUTE SETTLEMENT* 81–83 (2006). It follows that, while there are no explicit rules on the issue, any authority not conferred to a designated entity within the WTO, including authority to direct staff to give testimonies or depositions, reverts to the Director-General. See, for instance, *Selection of the WTO Director-General: Some Points to Consider*, SOUTH CENTRE (Jan. 2005), https://www.southcentre.int/wp-content/uploads/2013/07/AN_IG8_Selection-of-WTO-Director-General_EN.pdf.

95. Staff Admin. Memo, *supra* note 84, art. 14.

96. I base this on private conversations with colleagues at the WTO Secretariat who acted as Staff Council volunteers.

97. *Id.*

98. See Staff Admin. Memo, *supra* note 84, art. 4(1). Given the confidential nature of the WTO IJS, further, the frequency by which the Director-General stands by the JAB's recommendations is unknown to anyone outside of the Administration.

99. WTO Staff Rules, *supra* note 62, at r. 114.8(f). Note that Rule 114.9(a) contemplates that the Staff Council is only entitled to receive a copy of the JAB report and the DGO's final decision where both parties consent. *Id.* at r. 114.9(a). These documents are, in any event, heavily redacted, and do not allow the reader to get a real sense of the issues that arose in proceedings.

twenty working days to reconsider his previous decision.¹⁰⁰ Where the DGO fails to communicate a final decision to the complainant, the Director-General is presumed to have affirmed his prior decision.¹⁰¹ It may come as no surprise that the DGO rarely, if ever, revisits its decisions, even on those rare occasions where the JAB may recommend that the DGO finds for the complainant or expresses reservations about specific aspects of the impugned administration action.¹⁰² The staff member can appeal the DGO's final decision, on issues of law, to the ILOAT.¹⁰³ The entire process, from the first challenge to the underlying administrative decision to the Director-General's final decision, can take up to several years.

2. *The ILOAT*

The ILOAT was initially redesigned to serve exclusively as an appellate court for ILO staff complaints.¹⁰⁴ Its judgments are publicly available on its website,¹⁰⁵ and are, for the most part,¹⁰⁶ final and binding on the parties. Since 1990, its jurisdiction has gradually expanded to cover over 60 international organizations today.¹⁰⁷ As mentioned in the introduction, by some estimates, the ILOAT's jurisdiction covers upwards of 40,000 international civil servants.¹⁰⁸ Applicable law, under the ILOAT Statute, is limited to the terms of appointment and conditions

100. *Id.* at r. 114.9(a).

101. *Id.* at r. 114.9(b). It bears mentioning that this is an improvement over the UN system, where non-responses by the Secretary-General were not deemed implied decisions for some years, until the UNAT remedied this gap in *Andronov v. Secretary-General of the United Nations*, Judgments U.N. Admin. Trib., No. 1157, ¶ V., U.N. Doc. AT/DEC/1157 (2004). Prior to this point, complainants were left in the lurch until the Secretary-General positively adopted a decision.

102. I base this on private conversations with colleagues at the WTO Secretariat who acted as Staff Council volunteers.

103. *See* ILOAT Statute, art. VII(1).

104. Off. Of Admin. of Jus., *supra* note 45.

105. After the names and identities of persons implicated are redacted.

106. Article XII of the ILOAT Statute provides very limited recourse to the International Court of Justice.

107. Sixty-two, to be precise. *See* ILO, *Membership*, <http://www.ilo.org/tribunal/membership/lang--en/index.htm>.

108. Szalay, *supra* note 10.

of service relevant to the respondent organization concerned.¹⁰⁹ Formally, this would seem to exclude other sources of law, although the ILOAT's case law on this point has been inconsistent, at times alluding to its adherence to general principles of law¹¹⁰ and human rights,¹¹¹ and at other times disavowing these sources of law.¹¹²

Whether the ILOAT is truly independent is the subject of some debate. Skeptics highlight the fact that the ILOAT is financed through fees paid by its "client" organizations, on a per dispute basis.¹¹³ Reportedly, six organizations account for over 61% of the ILOAT's caseload, of which 20% feature the European Patent Office (EPO), and 16% involve the World Health Organization (WHO).¹¹⁴ Defendant organizations thus "pay to play," creating questions over whether or to what extent the judges who hear appeals against them function as their agents, or independent trustees.¹¹⁵ ILOAT judges, whose appointments are formally confirmed by the ILO Conference, are presented in the Conference by the ILO Director-General, who also advises the Conference on whether to renew judicial contracts for subsequent three-year terms.¹¹⁶ This arguably renders such judges "contract judges," whose renewal depends on the goodwill of the very organizations that

109. ILOAT Statute, art. II(1).

110. *J.M.W. v. European Patent Org.*, Judgment No. 2292, ¶ 11 (ILOAT Feb. 4, 2004) (equality before the law; *see In re Bajaj*, Judgment No. 2023, ¶ 10 (ILOAT Jan. 31, 2001) ("equal pay for work of equal value").

111. *In re Awoyemi v. UNESCO*, Judgment No. 1756, ¶ 3 (ILOAT July 9, 1988).

112. *See In re Zhu*, Judgment No. 1509, ¶¶ 14–16 (ILOAT July 11, 1996).

113. *See* ILOAT Statute, art. IX(2).

114. The other four IGOs are EUROCONTROL, the Food and Agriculture Organization, the International Labor Organization, and the European Southern Observatory. Reinisch & Weber, *supra* note 43, at 105.

115. For more on the distinction between agents and principals in the international adjudicatory context, *see generally* Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14(1) *EUR. J. OF INT'L REL.* 33 (2008). Arguably, ILOAT judges would function closer to somewhat constrained agents under Alter's framework.

116. ILOAT Statute, art. III(2). *See* Rep. by the Director-General on the Procedures of the Administrative Tribunal of the International Labor Organization (ILOAT) in Particular those Relating to the Review of Judgments, ¶ 13, UNESCO Doc. 152 EX/35 (Aug. 27, 1997) (on the role of the ILO DG *vis a vis* the appointment of judges); *see also* Staff Union of the EPO, *Managing the ILO Administrative Tribunal's Workload – Current Challenges and Possible Improvements*, *EUR. PATENT ORG.* 7 (2015), <https://www.suepo.org/documents/42591/53727.pdf>.

appear from time to time before them as respondents.¹¹⁷ Last, but not least, it is of some note that, whereas the ILOAT Registry is independent from the ILO's legal service, its staff is nevertheless selected by and report to the ILO Director-General.¹¹⁸ The Registry is tasked with providing technical, factual and legal support to the judges, thus requiring its staff in effect to draft judgments.¹¹⁹

Leaving aside the very real possibility of bias in the above description, the ILOAT's staffing and other resources have not grown at a pace commensurate with its expanded jurisdiction. By some measure, it would take the ILOAT over 6 years to clear its backlog.¹²⁰ As a result, the ILOAT struggles to meet its caseload.¹²¹ ILOAT proceedings, due to case backlog, further delays an already slow IJS process.¹²² During this time, ILOAT staff rush through records of pending cases, and draft hundreds of judgments, dismissing as many cases as possible on technicalities, and glossing over the finer points of those appellant submissions that it accepts.¹²³ It is a common gripe among appellants that the judgments finally rendered contain anomalies, mischaracterizations and factual errors, and fail to address key claims and legal arguments.¹²⁴

117. Geoffrey Robertson, *ILOAT Reform*, ILO ¶ 6, <http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm> (last updated Nov. 22, 2002).

118. August Reinisch & Christina Knahr, *From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal – Reform of the Administration of Justice System within the United Nations*, 12 MAX PLANCK Y.B. OF U.N. L. 453 (2008). See also the Rules of the Administrative Tribunal of the International Labour Organization, November 24, 1993 (as amended), Art. 2.

119. MEGZARI, *supra* note 44, at 69–70 (referencing ILO Proposed Budget for the Biennium 1986-1987, Supplement No. 6 (A/40/6), Vol. II, § 26).

120. Staff Union of the EPO, *supra* note 116, at 2.

121. Governing Body Report, *Workload and Effectiveness of the Tribunal*, ¶ 8, ILO Doc. GB.325/PFA/9/1(Rev.) (Oct. 15, 2015).

122. *Id.*

123. A point forcefully made in an open letter by the Geneva-based firm of Schwab, Flaherty & Associés. Letter from Edward Patrick Flaherty, External Counsel to Staff of the Eur. Patent Office, Schwab, Flaherty & Associés, to Guy Ryder, Dir.-Gen. of the ILO (Feb. 23, 2016), <http://techrighs.org/2016/03/19/ilo-surge-in-cases/>.

124. See Edward Patrick Flaherty, *Legal Protection in International Organizations – A Practitioner's View*, THE LAW OFFS. OF EDWARD FLAHERTY AND SCHWAB FLAHERTY ET ASSOCIÉS (Feb. 7, 2012), <http://flahertylawgroup.com/legal-protections/>.

Applicable rules governing procedures before the ILOAT are threadbare. There are no provisions on discovery¹²⁵ nor do procedures exist for submission of subpoenas.¹²⁶ As a result, points of law on discovery cannot be raised before the ILOAT; nor can the Tribunal order interim relief. While witnesses are permitted to give written statements, cross-examination of these witnesses is not allowed.¹²⁷ It is of some note that, since 1989, the ILOAT has declined to hold any oral hearings.¹²⁸ It is also noted in the literature that the ILOAT applies a permissive standard of review to internal appeal board determinations.¹²⁹ In light of these apparent shortcomings of the ILOAT system, the ILO Staff Union spearheaded reform efforts to drastically overhaul the ILOAT in 2002.¹³⁰ Though the ILO Staff Union pushed to include ILOAT reforms in the June 2003 Session of the ILO Government Body, its efforts were evidently rebuffed by the ILO DGO, with the result that, eventually, reform efforts were placed on the backburner.¹³¹ Parallel calls to reform the UN IJS, however, succeeded.

Given the similarities between the ILOAT and UNAT,¹³² it is curious to note that UN efforts succeeded where ILOAT efforts failed. One key factor seems to be that, with the exception of the International Seabed Authority, stakeholders of the UN system are more “centralized” and, accordingly, better organized within the UN organizational framework.¹³³ Stakeholders of the ILOAT, in contrast, are dispersed across a diverse

125. Staff Union of the EPO, *supra* note 116, at 10.

126. Edward Patrick Flaherty & Sarah Hunt, *Rule Without Law: Injustice at the United Nations?* IO WATCH 1, 6 <http://www.iowatch.org/FlahertyHuntGPQ.pdf>.

127. *Id.* at 7.

128. *See* Flaherty, *supra* note 124.

129. *Id.*

130. *See ILOAT Reform: London Resolution*, ILO (adopted Sept. 28, 2002), <http://www.ilo.org/public/english/staffun/info/iloat/londonres.htm>.

131. *See* the Staff Union’s Summary Note, proposing a schedule for amending the ILOAT in 2003: *Reform of the ILO Administrative Tribunal*, ILO (2003), http://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf.

132. A UN study identified only three notable differences between the UNAT and ILOAT, relating to: (i) the selection and appointment of judges; (ii) the authority to order specific performance by unit heads; and (iii) compensation limitations. Rep. of the Joint Inspection Unit, *Administration of Justice: Harmonization of the Statutes of the United Nations Administrative Tribunal and the International Labor Organization Administrative Tribunal*, 1-4, U.N. Doc. JIU/REP/2004/3 (2004).

133. *Compare* UNAT Jurisdiction with ILOAT Jurisdiction, *supra* note 47.

range of 60+ international organizations, with the influential defendant IGOs likely to have a vested interest in an inefficient appellate process.

3. *The UN IJS Reforms*

As noted above, the WTO IJS largely mirrored the old UN IJS,¹³⁴ with the only notable structural distinctions being that the (WTO) DGO legal counsel's corresponding role in the UN IJS was shared by various individuals across the Administrative Law Unit of the Office of Human Resources Management; disciplinary measures under the UN were first appealed to a Joint Disciplinary Committee (JDC); and all final appeals from the JDC and JAB were lodged to the UNAT.¹³⁵ One notable feature of the UNAT, distinguishing it from the ILOAT, is that the UNAT, in any order directing specific performance in favor the appellant, is required at the same time to fix a measure of compensation not exceeding two years' net base salary, which the Secretary-General can pay as an alternative to specific performance. This latter feature survived UN IJS reforms.¹³⁶

The Redesign Panel expressed concerns with a lack of equality of arms in the IJS, with staff members either representing themselves, or resigning themselves to sub-par representation from a staff volunteer.¹³⁷ The Panel noted, with further concern, that JAB members were, for the most part, appointed by the Secretary-General.¹³⁸ The Panel found that these individuals generally lacked the requisite qualifications and were

134. For an excellent summary, featuring references to the Old Staff Rules see Rishi Gulati, *The Internal Dispute Resolution Regime of the United Nations: Has the Creation of the United Nations Dispute Tribunal and United Nations Appeals Tribunal Remedied the Flaws of the United Nations Administrative Tribunal?*, 15 MAX PLANCK Y.B. OF U.N. L. 490, 498–99 (2011).

135. The timelines also differed. Review requests, for instance, took 60 working days for the Secretary-General's Office to process, as opposed to the 40 working days specified in the WTO Staff Rules. See WTO Staff Rules, *supra* note 62, at r. 114.3.

136. Compare Art. 10(1) of the UNAT Statute with Art. 9(1), which now allows the Tribunal to “order one or both” of the remedies, with damages in excess of two years' salary contemplated in the most egregious of cases. G.A. Res. 59/283, Statute of the Administrative Tribunal of the United Nations (Apr. 15, 2005) [hereinafter UNAT Statute].

137. See Rep. of the Redesign Panel, *supra* note 57, ¶¶ 100–06.

138. *Id.* ¶ 63.

dilatory in the execution of their duties.¹³⁹ Further, because the JAB shared a secretariat with the JDC, which handled comparatively more pressing matters, JAB proceedings took much longer to process.¹⁴⁰ The Panel noted that the Secretary-General paid scant attention to the JAB's recommendations, ignoring even those rare recommendations unanimously finding in favor of complainants.¹⁴¹ The process, from challenge of the underlying administrative decision to the Secretary-General's final decision, typically lasted up to three years.¹⁴²

UNAT proceedings added an extra two years to this timetable.¹⁴³ The Panel expressed grave concerns with the lack of oral hearings held by the UNAT.¹⁴⁴ The Panel also questioned the impartiality of judges selected from a pool of Member State-proposed candidates,¹⁴⁵ and observed a systemic lack of quality or internal coherence in those reports ultimately issued by the UNAT.¹⁴⁶ The Panel recommended that the JDC and JAB be scrapped altogether, and that the UNAT be fundamentally overhauled.¹⁴⁷ The Panel recommended that these two bodies be replaced with a two-tiered system comprised of a first-instance decentralized tribunal composed of professionally qualified judges, from which appeals on issues of law could be lodged to a standing appellate tribunal.¹⁴⁸

139. *Id.* ¶ 68.

140. *Id.* ¶ 66.

141. *Id.* ¶ 68.

142. *See id.* ¶¶ 65–68. The Panel did not specifically address the Secretary-General's compliance with JDC reports, nor did it indicate average length of disciplinary appeals.

143. Rep. of the Redesign Panel, *supra* note 57, ¶ 69.

144. *Id.* ¶ 10.

145. *Id.* ¶ 128.

146. *Id.* ¶¶ 62–72.

147. *Id.* ¶¶ 74, 87.

148. It is of note that the Redesign Panel acknowledged, *id.* ¶ 96, that the creation of this two-tier system would, at least formally, render harmonization between the ILOAT and UNAT more difficult, given that the UNAT would function as an appeal court whereas the ILOAT would remain (at least in label) an administrative tribunal. The Panel nevertheless considered that the UNAT would have the same powers to make orders as UNDT, which would function closer to the ILOAT equivalent under the proposed revisions. *See also* G.A. Res. 59/283, ¶ 49(c)(vii) (June 2, 2005) (requiring the Redesign Panel to “[r]eview the functioning of the United Nations Administrative Tribunal and examine the further harmonization of its statute and that of the International

The Panel further recommended that the first-instance tribunal be empowered to exercise jurisdiction over: complaints alleging non-compliance with the terms of appointment; conditions of employment or the duties of the IGO towards its staff; disciplinary matters; applications by IGOs, or the funds and programs thereof, to enforce relevant financial accountability rules; and actions by a staff association on behalf of its members to enforce staff rules and regulations on behalf of a class of its members.¹⁴⁹ In so doing, the Panel seemed to recommend broadening the scope of the IJS beyond challenges to disciplinary measures and administrative decisions. Unfortunately, this particular recommendation was not adopted.¹⁵⁰

Many of the Panel's recommendations were endorsed by the Secretary-General in a report proposing IJS changes to the General Assembly,¹⁵¹ and the General Assembly duly passed a resolution operationalizing these proposed changes in 2008.¹⁵² While these changes did not fully capture all of the Panel's recommendations, they were certainly more than cosmetic. The JAB was scrapped and replaced at the first instance with the United Nations Dispute Tribunal (UNDT).¹⁵³ Parties may now appeal UNDT decisions to the UNAT where parties allege that the UNDT either failed to exercise or exceeded its jurisdiction or competence, erred on a question of law, committed an error in procedure, or erred on a question of fact, resulting in a manifestly unreasonable decision.¹⁵⁴ Challenges to administrative decisions are no

Labour Organization Administrative Tribunal with a view to further professionalizing the United Nations Administrative Tribunal.”)

149. Rep. of the Redesign Panel, *supra* note 57, ¶¶ 74–77.

150. Art. 2(1) of the UNDT Statute empowers the Tribunal to hear applications: “(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance; (b) To appeal an administrative decision imposing a disciplinary measure.” G.A. Res. 63/253, annex, Statute of the United Nations Dispute Tribunal, art. 2(1)(a), (b) (Dec. 24, 2008) [hereinafter UNDT Statute].

151. U.N. Secretary-General, *Report of the Redesign Panel on the United Nations System of Administration of Justice*, U.N. Doc. A/61/758 (Feb. 23, 2007).

152. G.A. Res. 61/261, ¶ 4 (Apr. 30, 2007), later aff'd by G.A. Res 62/228 (Feb. 6, 2008) and G.A. Res. 63/253 (Mar. 17 2009).

153. See generally UNDT Statute.

154. UNAT Statute, art. 2(1).

longer lodged with the Secretary-General's Office (SGO), nor does the SGO retain the right to revisit any final decision at the close of internal administrative proceedings.¹⁵⁵ Complaints are instead lodged as requests for a management evaluation to an independent organizational entity operating within the Management Evaluation Unit.¹⁵⁶ To remedy the "equality of arms"¹⁵⁷ concern expressed by the Panel, the General Assembly created the Office of Staff Legal Assistance to provide legal advisory services to staff members throughout the entirety of proceedings.¹⁵⁸ Timetables were otherwise shortened, and complaint procedures streamlined for staff operating in or away from headquarters.

Judicial independence was significantly bolstered. An Internal Justice Council composed of distinguished lawyers was established to, *inter alia*, source suitable judicial candidates for the UNDT and UNAT.¹⁵⁹ Eligible candidates must be of high moral character, and have at least 10 years of relevant work experience for appointment to the UNDT and 15 years for the UNAT.¹⁶⁰ Appointments are all offered on non-renewable terms of seven years.¹⁶¹ Rules of procedure have also been improved. The UNDT Rules contemplate that oral hearings "shall normally be held" in appeals against disciplinary measures.¹⁶² The UNDT and UNAT Rules otherwise remain more nuanced regarding oral hearings in appeals against administrative decisions.¹⁶³ In terms of remedies, it is worth noting that the Tribunals can award costs against a party that has abused

155. U.N. Secretariat, *Secretary-General's Bulletin: Transitional Measures Related to the Introduction of the New System of Administration of Justice*, ¶ 1.3, U.N. Doc. ST/SGB/2009/11 (June 24, 2009).

156. *Id.*

157. The Redesign Panel considered, in this respect, that the theoretical right to be represented by a lawyer does not remedy the practical difficulties of actually obtaining effective legal representation in IJS proceedings. See U.N. Secretary General, *supra* note 151, at 5.

158. See G.A. Res. 62/228, *supra* note 152, ¶ 13.

159. *Id.* ¶ 37.

160. UNDT Statute, art. 4(3); UNAT Statute, art. 3(3).

161. UNDT Statute, art. 4(4); UNAT Statute, art. 3(4).

162. See G.A. Res. 64/119, art. 16, ¶ 2 (Jan. 15, 2010).

163. See *id.* art. 16, ¶ 1 and see also *id.* annex, Rules of Procedure of the United Nations Appeals Tribunal, art. 18, which consider that the Tribunals "may hold oral hearings."

proceedings.¹⁶⁴ As mentioned above, the option of compensation in lieu of specific performance has been retained.¹⁶⁵

4. *A Note on WTO Reforms*

In the summer of 2014, the WTO Director-General announced the start of an internal review of various staff-related functions of the WTO.¹⁶⁶ This so-called “Strategic Review” focused, broadly, on Management, Mobility, Promotions, and Rules. The Rules Working Group, composed of various mid to high-level WTO staff members, focused specifically on “the need to restore the ‘rule of law’ in the management and administration of the secretariat.”¹⁶⁷ Curiously, this document makes no mention of the Redesign Panel’s findings and recommendations, let alone the UN IJS reforms.

The lack of reference to the UN IJS reforms efforts is odd, given that the reforms sought to remedy important gaps in the system that the WTO essentially copied, with little to no modifications of note. Recommendations of the Rules Working Group focused on: (i) circumscribing the role of the DGO legal counsel, by dividing his role between at least two individuals, both subordinated to the Legal Affairs Division, the equivalent to the UN Administrative Law Unit;¹⁶⁸ (ii) remedying the inequality of arms apparent in the system by guaranteeing a right to staff assistance;¹⁶⁹ (iii) requiring the administration to provide a statement of reason where it makes an administrative decision, setting out all relevant findings, including material questions of fact, relevant evidence, and applicable rules and policies;¹⁷⁰ (iv) creating an independent role for the conduct of the first level of administrative review, with the officer so charged being bound to “objectively assess” the administrative decision, notably, by reviewing the factual basis for

164. UNDT Statute, art. 10(6); UNAT Statute, art. 9(2).

165. UNDT Statute, art. 10(5); UNAT Statute, art. 9(1). The argument is made, however, that Courts normally refrain from ordering specific performance in the case of contracts for personal services. *See* Gulati, *supra* note 134, at 522.

166. *See* WTO Comm. on Budget, Fin. & Admin., *Report of the Meeting Held on 2 July 2014*, ¶¶ 2.1–2.4, WTO Doc. WT/BFA/143 (July 15, 2014).

167. Working Group on Rules, *supra* note 59, ¶ 1.1.

168. *Id.* ¶¶ 4.7–4.8.

169. *Id.* ¶ 4.19.

170. *Id.* ¶ 4.50.

the decision, the applicable rules and policies, the motivations, authority and interpretations for/of the decision, and the relevant procedural requirements, including an assessment of whether due process was respected in making the decision;¹⁷¹ (v) loosening time limits for staff members seeking to challenge an administrative decision;¹⁷² (vi) creating a formal right for the JAB to compel witnesses or order discovery;¹⁷³ (vii) publishing JAB reports in a WTO Gazette;¹⁷⁴ (viii) establishing the *locus standi* for the staff council to file an amicus brief in an appeal;¹⁷⁵ and (ix) creating a Joint Disciplinary Body (JDB) to handle internal appeals against disciplinary measures.¹⁷⁶

The WTO Working Group's proposals are more modest than the UN Redesign Panel's recommendations, though there are some clear overlapping concerns: both the Redesign Panel and the Working Group expressed concerns relating to delays; inequality of arms; the partiality of the DGO legal counsel/UN Administrative Law Unit; and the need for stronger rules for discovery and depositions.¹⁷⁷ The similarities, however, end there.

The Working Group report falls considerably short of the Redesign Panel's recommendations in two important respects. First, the Working Group would have the DGO retain residual control of the IJS.¹⁷⁸ The UN, in contrast, delegated oversight of its IJS to an entity operating within the Department of Management.¹⁷⁹ Until the DGO divests itself of its role in the IJS, staff members will continue to hesitate to lodge a request for review that will, in all likelihood, be defended by the DGO.¹⁸⁰

171. *Id.* ¶ 4.60.

172. *Id.* ¶ 4.61.

173. Working Group on Rules, *supra* note 59, ¶ 4.70

174. *Id.* ¶¶ 4.85, 6.26.

175. *Id.* ¶¶ 4.87–4.89.

176. *Id.* ¶ 4.130.

177. Though the Working Group report is otherwise silent on the issue of oral hearings. *See generally id.*

178. Inasmuch as the Report does not address the need for the need for a Ministerial Declaration clarifying the scope of these powers. For more on this issue, *see supra* note 94.

179. U.N. Secretariat, *supra* note 155, § 1.3.

180. Following which the staff member concerned may be subjected to retaliatory evaluations and, possibly, dismissal.

Second, the Working Group falls well short of the Redesign Panel in taking a far more favorable view of the JAB, thereby further allowing the DGO to continue operating in the background. This is unfortunate, but unsurprising, given the strong representation of former and current JAB members in the Rules Working Group.¹⁸¹ The Working Group's recommendation to retain the JAB and create a JDB to oversee disciplinary measures is a significant departure from the Redesign Panel's recommendation that such bodies be scrapped in favor of an independent first-instance tribunal akin to that of the UNDT. The JAB and JDB will continue to operate under allegations of bias and partiality for as long as the DGO retains the power to appoint a majority of appointees to each body. It bears mentioning, in this respect, that inasmuch as the Redesign Panel expressed concerns with the independence and impartiality of JAB and JDC members in the context of an IGO composed of some 40,000 employees,¹⁸² such concerns should surely be amplified in the context of the WTO's 634 staff members,¹⁸³ where JAB and JDC members are more likely to fraternize outside the office with fellow divisional directors and managers.

Deficiencies notwithstanding, the status of the Working Group report is itself uncertain. As an internal document distributed to WTO staff members within the framework of the Director-General's Strategic Review, it has no binding force of law. Nor is the report, as an internal work product, to be shared with WTO Member States. The DGO is free to disregard it, or cherry-pick among those recommendations to retain only those that it deems palatable. Whenever the DGO opts to amend the IJS, it will likely have to present these amendments to the WTO General Council for adoption in the form of revised Staff Rules and Regulations. If none are adopted in the coming years, it can be presumed that the DGO opted to ignore the Working Group's recommendations.

III. THE RIGHT TO A FAIR HEARING

Below, I discuss the treaty and customary international law elements of the right to a fair hearing. I then summarize how the ECtHR has

181. Working Group on Rules, *supra* note 59, at 3, n. 2.

182. U.N. Secretary-General, *supra* note 9.

183. WTO, *supra* note 6.

interpreted the right to a fair hearing over the past four decades, before critically evaluating the consistency of the WTO and UN IJSs with the relevant ECtHR jurisprudence.

A. General Instruments.

The right to a fair hearing encompasses procedural elements that require trials to be conducted fairly, publicly, and in an expedient manner. While this paper focuses on the civil context of the right to a fair hearing, it bears noting that, in the criminal context, the right is understood to codify certain minimum guarantees, including the right of the accused to be intelligibly informed of the nature and causes of the charges against him or her, the right to have adequate time and facilities to prepare his or her defense, the right to legal counsel, the right to call and cross-examine witnesses, and the right to an interpreter.¹⁸⁴

The right to a fair hearing, in its post-World War manifestation, can be traced back to the Universal Declaration of Human Rights (UDHR).¹⁸⁵ One provision, in particular, considers that: “[e]veryone 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.”¹⁸⁶ The UDHR, while formally a non-binding declaration, has potentially acquired the status of customary international law.¹⁸⁷ Furthermore, its provisions have been incorporated into various national constitutions and regional human rights instruments.¹⁸⁸

The International Covenant on Civil and Political Rights (ICCPR), a binding instrument, provides in part that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at

184. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, WHAT IS A FAIR TRIAL? A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE (Mar. 2000), https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair_trial.pdf.

185. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 5, 9, 10, 11 (Dec. 10, 1948).

186. *Id.* art. 10.

187. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995-1996).

188. *Id.* at 292–312.

law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁸⁹

This provision has been frequently cited before and interpreted by the UN Human Rights Committee (HRC).¹⁹⁰ A draft protocol to the ICCPR proposed that this provision be included in the list of non-derogable rights specified in the ICCPR.¹⁹¹ That this proposal failed to gain necessary traction does not detract from the fundamental nature of this right. In a General Comment, the HRC stated the following in this regard:

While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14. Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.

189. International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

190. For a good (but dated) overview, see LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 184, at 12.

191. Subcomm. on Prevention of Discrimination and Protection of Minorities, Rep. on the Work of its Forty-Sixth Session, *The Administration of Justice and the Human Rights of Detainees*, U.N. Doc. E/CN.4/Sub.2/1994/24, annex I, Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy (June 3, 1994).

Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.¹⁹²

B. ECHR

1. *The European Context*

In addition to the above two general instruments, the right to a fair hearing has been codified in various regional human rights instruments.¹⁹³ Below, I discuss its application in the European context. I focus on Europe for two reasons: first, the practice of regional treaty bodies on the scope of the right to a fair hearing has been relatively uniform.¹⁹⁴ Accordingly, much of what is discussed in the context of the ECHR applies in a broader context. Regional treaty bodies do not operate in isolation from one another, and sometimes consult ECtHR decisions when adjudicating upon analogous claims.¹⁹⁵

Second, Europe is host to a large number of IGOs. As I will discuss in the following part of this paper, this has prompted a number of IGO staff members to appeal to the ECtHR pursuant to the theory that transgressions committed by IGOs towards their staff ultimately implicates the host state's human rights obligations. Such appeals have prompted the ECtHR to develop case law specific to the fair hearing rights of IGO staff. Before discussing this case law in the following section, it is useful to first discuss the scope of the right to a fair hearing under the ECHR.

192. Human Rights Comm., *General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, ¶ 6, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) (citations omitted).

193. See, notably, Organization of American States, American Convention on Human Rights arts. 8(1), 27(2) Nov. 22, 1969, O.A.S.T.S No. 36, 1144 U.N.T.S. 123 [hereinafter American Convntion]; see also Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights arts. 7(1), 26, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter].

194. See IALCE Legitimacy Index, *supra* note 55, at 7–9.

195. While these bodies may seldom explicitly refer to each other, there is something of a “muted dialogue” between them. For a more in depth discussion of the phenomenon of muted dialogue between supranational courts, see generally Marco Bronckers, *From 'Direct Effect' to 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond*, 11 J. INT'L ECON. L. 885 (2008).

2. *Elements of the Right to a Fair Hearing*

The right to a fair hearing, in the ECHR, is drafted in near-identical terms to the corresponding provision of the ICCPR. The relevant provision contemplates, in part, that “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”¹⁹⁶ The concept of “civil rights and obligations” is not to be interpreted solely in relation to the respondent state’s domestic laws. Rather, it is an autonomous concept derived from the Convention.¹⁹⁷

The Convention does not further define the applicable “civil rights and obligations.” These rights should generally be recognized in domestic law.¹⁹⁸ “Whether a person has an actionable domestic claim depends not only on substantive [rights]” or obligations at issue, as defined in domestic law, but extends to “the existence [or absence] of procedural bars preventing or limiting the possibilities of” obtaining relief before domestic courts.¹⁹⁹ The ECtHR established years ago that employment disputes implicate civil rights and obligations, regardless of whether the employer concerned is a private entity²⁰⁰ or a public body.²⁰¹ Further, the nature of such disputes need not concern purely pecuniary matters. The ECHR has previously recognized that such disputes may seek to preserve the appellant’s right to life, health, or a healthy work environment.²⁰² The ECtHR has established limited categories of disputes that are excluded from the scope of the right to a fair hearing.²⁰³ None of these are relevant to IGO staff disputes.

196. ECHR, art. 6(1).

197. *Georgiadis v. Greece*, 1997-III Eur. Ct. H.R. 9.

198. *Masson v. Netherlands*, App. No. 30/1994, 22 E.H.R.Rep. 491, 504 (1995).

199. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 15.

200. *Buchholz v. Germany*, 42 Eur. Ct. H.R. (ser. A) at 3 (1981).

201. *Pellegrin v. France*, 31 E.H.R.Rep. 26, 651–52 (2001).

202. *Taşkın v. Turkey*, 2004-X Eur. Ct. H.R. ¶ 26.

203. These exclusions include tax and immigration proceedings, in addition to political rights. Further, the ECtHR has previously recognized that disputes relating to certain classes of public servants can fall outside Art. 6(1) of the ECHR where national law explicitly excludes access to a court for these classes of public servants, and such exclusion can be justified on objective grounds in the state’s interests. *Eskelinen v. Finland*, 2007-II Eur. Ct. H.R. 20.

Where the right to a fair hearing applies, litigants must have an effective judicial remedy to enable them to assert their underlying rights.²⁰⁴ This implicates a right of access to a court or tribunal.²⁰⁵ This right of access, which extends beyond the right to initiate proceedings to seek a determination, must be practical and effective.²⁰⁶ This notably requires that individuals have “a clear, practical opportunity to challenge an act that is an interference with [their] rights.”²⁰⁷ While the right of access may be subject to reasonable limitations, these limitations cannot operate to impair the very essence of the right.²⁰⁸ Such impairment could result from prohibitively high costs of proceedings, unreasonably short time limits, or the existence of any other procedural bar preventing or limiting the possibilities of seeking judicial relief.²⁰⁹

The court or tribunal must be one “established by law.”²¹⁰ The ECtHR has interpreted this requirement to apply beyond the formal legal basis for the existence of judicial organs, to matters relating to judicial composition.²¹¹ The Court previously considered that the practice of tacitly renewing judges’ terms of office following expiration of their terms of office, and pending reappointments, ran counter to the spirit of the right to a fair hearing.²¹²

Judicial organs must be “independent and impartial.”²¹³ Independence implicates the notion of separation of powers, and requires that the organs in question operate outside of other branches of government.²¹⁴ Independence further requires that courts and their officers operate free from the influence of the litigants.²¹⁵ Impartiality, which the ECtHR

204. *Beles v. Czech Republic*, 2002-IX Eur. Ct. H.R. ¶ 49.

205. *Golder v. United Kingdom*, 1 Eur. Ct. H.R. (ser. A) 524, 14 (1975).

206. *Bellet v. France*, 333-B Eur. Ct. H.R. (ser. A) at 16 (1995).

207. *Id.* at 15.

208. *Philis v. Greece*, 209 Eur. Ct. H.R. (ser. A) at 17 (1991).

209. EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14–15 (2013) [hereinafter GUIDE ON ARTICLE 6].

210. ECHR, art. 6(1).

211. *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) ¶ 55 (1981).

212. *Volkov v. Ukraine*, 2013 Eur. Ct. H.R. 37–38.

213. ECHR, art. 6(1).

214. *Beaumartin v. France*, 296-B Eur. Ct. H.R. (ser. A) ¶ 38 (1994).

215. *Sramek v. Austria*, 84-I Eur. Ct. H.R. (ser. A) at 16 (1984).

assesses through a subjective and objective assessment, denotes the absence of prejudice or bias.²¹⁶

Judicial organs must be capable of issuing binding decisions. Such decisions must compel compliance in full,²¹⁷ and may not be altered by a non-judicial authority, particularly where such alteration operates to the detriment of an individual party (as distinct from a state entity).²¹⁸ The power to issue advisory opinions, further, is insufficient, irrespective of whether such opinions are followed most of the time.²¹⁹ These organs must have “full jurisdiction”²²⁰ to examine all relevant questions of fact and law.²²¹ Accordingly, the refusal by such bodies to rule independently on factual matters that are critical to the settlement of a dispute falls short of the “full jurisdiction” threshold.²²²

The ECtHR has repeatedly emphasized the importance of ensuring a fair balance between the parties, wherein each party is afforded a reasonable opportunity to present its case.²²³ The denial of legal representation can result in the deprivation of a party’s fair hearing rights, particularly against an opponent with deeper pockets.²²⁴ It should be noted that the ECtHR’s assessment of fairness applies to the proceedings as a whole. Accordingly, shortcomings at an earlier level can be rectified at a later stage.²²⁵

The right to a fair hearing requires judicial organs “to conduct a proper examination of the submissions, arguments and evidence” produced by the litigants.²²⁶ In proceedings between an appellant and an administrative authority the judicial organ must ensure that the appellant has access to all relevant documents in the possession of the authority by compelling disclosure where necessary.²²⁷ Further, trials should generally

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216. *Micallef v. Malta*, 2009 Eur. Ct. H.R. ¶ 93.
 217. *Hornsby v. Greece*, 1997-II Eur. Ct. H.R. 15.
 218. *Van de Hurk v. Netherlands*, 288 Eur. Ct. H.R. (ser. A) at 12 (1994).
 219. *Bentham v. Netherlands*, 97 Eur. Ct. H.R. (ser. A) ¶ 40 (1985).
 220. *Beaumartin v. France*, 296-B Eur. Ct. H.R. (ser. A) ¶ 38 (1994).
 221. *Woningen v. Netherlands*, 1996-VI Eur. Ct. H.R. 16.
 222. *See id.*
 223. *Beheer v. Netherlands*, 274 Eur. Ct. H.R. (ser. A) at 14 (1993).
 224. *Steel v. United Kingdom*, 2005-II Eur. Ct. H.R. 26.
 225. *Helle v. Finland*, 1997-VIII Eur. Ct. H.R. ¶ 54.
 226. *Perez v. France*, 2004-I Eur. Ct. H.R. 21.
 227. *McGinley v. United Kingdom*, 1998-III Eur. Ct. H.R. 26, 27.

be open to the public.²²⁸ This is to protect litigants against the administration of justice behind closed doors, absent public scrutiny.²²⁹ At a minimum this implies a right to an oral hearing before at least one instance, and requires that judgments, insofar as they are not publicly delivered, are nevertheless publicly accessible.²³⁰ Last, but not least, while the ECtHR allows litigants to waive the right to a public hearing, such waiver must be clear and unequivocal.²³¹

3. *Assessing the IJSs*

It is clear that the WTO IJS, whether or not it fully incorporates the Working Group's recommendations, falls short of providing its staff an ECHR-compliant right to a fair hearing. WTO staff may only challenge disciplinary measures or administrative decisions. They are thus procedurally barred from seeking judicial determination of a wide range of civil rights and obligations. For instance, they have no right of access to seek remedies in relation to matters such as the DGO's non-compliance with the terms of their appointment, or general issues relating to the conditions of their employment. Nor can they otherwise compel the DGO to abide by its duties and responsibilities towards its staff. Such challenges have previously been considered to fall outside the scope of an "administrative decision"²³² for want of being of "individual applicability." These challenges would thus seem to fall into a legal void.

In addition, strict time limits of 40 days²³³ do not allow a prospective complainant much time to seek out a staff volunteer and prepare a request for review. For those measures and decisions that can be litigated in a timely manner through the IJS, it is difficult to identify where in the process a complainant is granted access to an independent and impartial tribunal. The DGO is clearly not such a body. Neither is the JAB, which

228. Unless the circumstances of the case warrant a private hearing. *Martinie v. France*, 2006-VI Eur. Ct. H.R. 21.

229. GUIDE ON ARTICLE 6, *supra* note 209, at 46.

230. *Fischer v. Austria*, 312 Eur. Ct. H.R. (ser. A) at 16 (1995).

231. *See Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) at 21 (1981).

232. *See* the discussion of the *Andronov* judgment, *supra* notes 68-69.

233. *See supra* note 78. The Working Group recommended that this be extended. The Working Group recommended that this be extended. Working Group on Rules, *supra* note 59, ¶ 4.61.

cannot issue binding decisions.²³⁴ Leaving this important limitation aside for a moment, even if we assume that JAB members are well-intentioned in the execution of their duty, the JAB is nevertheless not vested with “full jurisdiction” to review all pertinent issues of fact and law.²³⁵ Notably, the JAB has no formal powers to compel discovery or depose witnesses.²³⁶ Nor do complainants have the right to be heard by the JAB.²³⁷ The JAB can only issue recommendations to the DGO, which can act on them, but will be disinclined to do so in an adversarial setting.²³⁸ Finally, the disparity in the form of legal assistance available to staff relative to the professional lawyers staffed in the DGO reveals a glaring inequality of arms.²³⁹ Even if we assess fairness in relation to the process as a whole, the ILOAT does not rebalance the inequities in the system.

The fact that ILOAT judges seeking reappointments serve as contract judges arguably falls short of the requirement that the ILOAT be “established by law.”²⁴⁰ Assuming, *arguendo*, that this flaw is not fatal to such a determination, the fact remains that the ILOAT is funded by respondent IGOs on a per-dispute basis.²⁴¹ In addition, its Registry, tasked with briefing the judges and drafting judgments, reports directly to the ILO DGO,²⁴² a frequent respondent.²⁴³ In sum, the structure of the ILOAT raises doubts as to its independence and impartiality. Moreover, it is unlikely that the ILOAT is itself vested with full jurisdiction to resolve a complainant’s appeal, given that it is typically not in the business of seeking out evidence or deposing witnesses.²⁴⁴ That it has not

234. *See generally* Van de Hurk v. Netherlands, 288 Eur. Ct. H.R. (ser. A) at 12 (1994).

235. *See generally* Woningen v. Netherlands, 1996-VI Eur. Ct. H.R. at 16.

236. *See* WTO Staff Rules, *supra* note 62. The Working Group recommended that the JAB be given such powers. *See* Working Group on Rules, *supra* note 59.

237. *See* Staff Admin. Memo, *supra* note 84, art. 13.

238. *Id.* arts. 17–18.

239. *See generally* Steel v. United Kingdom, 2005-II Eur. Ct. H.R. The Working Group recommended that the staff be “guaranteed” assistance, although this presumably will remain assistance by staff volunteers. *See* Working Group on Rules, *supra* note 59, ¶ 4.19.

240. *See* Reinisch & Knahr, *supra* note 118, at 462.

241. *See* ILOAT Statute, art. IX(2).

242. Flaherty, *supra* note 124; *see* Robertson, *supra* note 117.

243. *See* text accompanying *supra* note 114.

244. *See supra* sec. II, “The ILOAT.”

held oral hearings in almost 30 years, notwithstanding any clear and unequivocal waivers from complainants,²⁴⁵ further deprives such complainants of an important fair hearing element.²⁴⁶

The reformed UN IJS comes closer to meeting the ECHR's fair hearing requirements. Two developments in particular have led to more fairness in the proceedings: divestment of the Secretary-General's role to the independent entity operating within the Department of Management,²⁴⁷ and the creation of the Office of Staff Legal Assistance.²⁴⁸ That the SGO no longer intervenes in the IJS in an adversarial capacity may encourage staff to more candidly pursue complaints with the entity housed by the Department of Management. Further, legal assistance provided by the Office of Staff Legal Assistance should, hopefully, be at least on par with that of the Administrative Law Unit.

The UNDT, which replaced the discredited JDC and JAB peer review system, seems more likely to exercise "full jurisdiction."²⁴⁹ Further, the process of judicial selection for UNDT and UNAT judges has been vastly improved.²⁵⁰ In addition, that the UNDT and UNAT, at least in disciplinary measures, have signaled a greater disposition towards conducting oral hearings is a welcome development.²⁵¹ Whether or not these tribunals actually engage with their fact-finding powers by ordering discovery and deposing witnesses to plug whatever factual gaps remain on appeal remains to be seen.

The UN IJS still contains some important flaws. Like the WTO IJS, access to the UN IJS remains limited to challenges against disciplinary measures and administrative decisions. For UN staff, all of those civil rights and obligations that cannot be pigeonholed into these two categories of measures thereby also fall into a legal void. The Redesign Panel recommended that actionable measures be broadened, but its calls were ignored.²⁵² Further, one could conceivably make the argument that

245. *Le Compte v. Belgium*, 43 Eur. Ct. H.R. (ser. A) (1981).

246. *Id.*; Flaherty, *supra* note 124.

247. U.N. Secretariat, *supra* note 155, § 1.3.

248. *See* G.A. Res. 61/261, *supra* note 138.

249. *See generally* *Woning v. Netherlands*, 1996-VI Eur. Ct. H.R.

250. *See* G.A. Res. 62/228, *supra* note 152.

251. *See* text accompanying *supra* notes 162–163.

252. *See* text accompanying *supra* notes 149–150.

neither the UNDT nor the UNAT arguably issue truly “binding” decisions, in light of the Secretary-General’s continued ability to pay compensation in lieu of specific performance.²⁵³

IV. APPLICATION OF THE RIGHT TO A FAIR HEARING TO IGO STAFF

Below, I discuss previous efforts by IGO staff members to seek access to European domestic courts and the ECtHR, almost always in the context of an unfair dismissal. These staff members all argued that the courts’ failure to exercise jurisdiction would deprive them of their right to a fair hearing. As access to the ECtHR is conditional upon a complainant’s exhaustion of local remedies, I first discuss why this requirement is inapposite in the context of an appeal from an IGO IJS, before discussing how European domestic courts have dealt with the exercise of their jurisdiction. I then turn to the seminal decisions of the ECtHR on IGO staff members’ right of access to a fair hearing in the ECHR context, before critically evaluating how European courts have since implemented these decisions.

A. The Requirement to Exhaust Local Remedies.

The ECHR requires applicants to exhaust all domestic remedies before the ECtHR can hear an appeal: “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.”²⁵⁴ The reference to the rules of international law alludes to the customary international law nature of the obligation to exhaust local remedies.²⁵⁵ Pursuant to this requirement, applicants must exhaust all legal remedies at the domestic level before they can submit an appeal to the ECtHR.

The requirement to exhaust local remedies pursues both a substantive and practical objective. Substantively, the ECtHR is intended to operate as a subsidiary to European domestic courts. It is thus appropriate that

253. See *supra* note 165. Although, as noted above, specific performance of contracts for personal services tends to be frowned upon, even in domestic jurisdictions.

254. ECHR, art. 35(1).

255. See ICCPR, art. 41(1)(c); see also American Convention, art. 46(1)(a); see also African Charter, art. 50, 56(5); see also Request for the Indication of Interim Measures of Protection (*Switz. v. U.S.*), Order, 1957 I.J.C. 105 (Oct. 24).

domestic courts initially determine the extent to which an individual's rights have been infringed at the domestic law level.²⁵⁶ Practically, the requirement helps the Court deal with a backlog of cases, which have ranged between 65,000 to 160,000 over the past few years.²⁵⁷ Due to these two objectives, thousands of applications are handily rejected every year for want of local exhaustion of remedies.²⁵⁸

The requirement to exhaust local remedies, however, also puts IGO staff members in a quandary vis-à-vis domestic courts. On the one hand, these courts recognize that they are under a positive obligation to ensure that human rights are respected on their territory. On the other hand, adjudicating such disputes would run counter to the terms of the host nation agreements, many of which are enacted into law, that confer immunities to IGOs.²⁵⁹ The resulting case law at the European level has yielded many inconsistencies, all the while requiring IGO staff to invest large sums of money to fund oft-futile litigation costs.²⁶⁰

B. Lack of a Common European Position.

The ECtHR tends to track the views of European domestic courts when determining the standard of review to apply to a given appeal. Accordingly, ECtHR case law on the consistency of immunities from suit with fair hearing rights has developed over time, as Member States' attitudes towards immunities have themselves transitioned from supporting absolute immunities to preferring a more functional or restrictive variation.²⁶¹ European domestic courts were initially

256. *A v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. ¶ 142 (2010).

257. Marie-Bénédicte Dembour, *Migrants' Avoidance of the European Court of Human Rights Concerns Us All*, STRASBOURG OBSERVERS (Feb. 10, 2016), <https://strasbourgobservers.com/2016/02/10/migrants-avoidance-of-the-european-court-of-human-rights-concerns-us-all/>.

258. Cesare P. R. Romano, *The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOR OF TULLIO TREVES 561, 569 (N. Boschiero et al. eds., 2013).

259. See Letter from Jack B. Tate, *supra* note 24, at 984.

260. A point made by the appellant, to little avail, in *Perez v. Germany*, App. No. 15521/08 Eur. Ct. H.R. ¶ 74 (2015).

261. See generally Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L. J. 1730 (2011), where this theme is explored in detail.

disinclined to exercise jurisdiction over claims against immune entities, dismissing the application of human rights treaties to such entities or denying that they are territorially seized of jurisdiction in the first place.

The *Mandelier* case litigated in Belgian courts in the 1960s is an example of this initial approach.²⁶² This litigation featured claims against the UN for operations conducted in the Congo.²⁶³ The claimant challenged the consistency of the sovereign immunities cited by the UN with the right to a fair hearing contained in the UDHR and ECHR.²⁶⁴ The first instance tribunal dismissed the UDHR as a non-binding instrument, and considered that the terms of the ECHR, concluded between 14 European states at the time, could not be foisted upon the UN.²⁶⁵ The Appeals Court affirmed on appeal, but recognized that “in the present state of international institutions there is no court to which the appellant can submit his dispute with the United Nations . . . which does not seem to be in keeping with the principles proclaimed in the [UDHR].”²⁶⁶

The *Holland v. Lampen-Wolfe* case, litigated in the United Kingdom, is an example of a state denying that it was seized of jurisdiction.²⁶⁷ In its ruling, the House of Lords considered that the ECHR’s right to a fair hearing could only be infringed where a Member State possessed jurisdiction in the first place.²⁶⁸ Where such jurisdiction was prohibited under international law, the ECHR could not operate to provide a basis for such jurisdiction.²⁶⁹ Lying at the opposite end of the spectrum from *Holland v. Lampen-Wolfe* is a French appellate court decision, *UNESCO v. Boulois*, which invoked the ECHR to find that granting immunity in a dispute between an individual and UNESCO would result in a denial of justice to the former that would be contrary to French public policy.²⁷⁰

262. *Manderlier v. United Nations*, [CA][Court of Appeals Brussels], Sept. 15, 1969 (Belg.). For a discussion of this case see *Decisions of National Tribunals*, 1969 U.N. Jurid. Y.B. 235, 236, U.N. Doc. ST/LEG/SER.C/7.

263. *Decisions of National Tribunals*, *supra* note 262, at 236.

264. *Id.*

265. *Id.*

266. *Id.* at 237.

267. *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573 (Eng.).

268. *Id.* at 1588.

269. *Id.*

270. Cour d’appel [CA] [regional court of appeal] Paris, 14e ch., June 19, 1998 (Fr.). For a summary of this case see 24 Y.B. COMMERCIAL ARB. 294, 294-95 (Albert Jan van den Berg, ed., 1999). In Greece and Switzerland, the Crete Court of Appeals and

German courts pursued yet another approach, distinct from the three discussed above, in *Hetzel v. EUROCONTROL*. The German Federal Constitutional Court, in an appeal lodged by a former staff member against EUROCONTROL in the 1980s, declined jurisdiction on the basis that the ILOAT, the competent authority under EUROCONTROL's IJS, provided an alternative remedy that satisfied the minimum requirements contained in the German Constitution.²⁷¹

C. The ECHR Treaty Bodies' Approaches.

1. *The European Commission on Human Rights (EComHR)*

The EComHR operated from 1954 to 1998.²⁷² It received applications from individuals seeking a referral, where appropriate, to the ECHR.²⁷³ The EComHR ceased to exist following adoption of Protocol 11 of the ECHR, which granted individuals direct access to the ECtHR.²⁷⁴ The EComHR received some of the earliest ECHR-based challenges to IGO immunities.²⁷⁵ In one such decision, it dismissed an appeal against the Netherlands for actions taken by the Iran-United States Claims Tribunal on the basis that “the administrative decisions of the Tribunal are not acts which occur within the jurisdiction of the Netherlands within the

Swiss Federal Tribunal, respectively, accepted jurisdiction for similar considerations. See Reinisch & Weber, *supra* note 43, at n. 94 (citing to *International Centre for Superior Mediterranean Agricultural Studies*, Court of Appeals of Crete, 191/1991); and Anne-Marie Thévenot-Werner, *The Right of Staff Members to a Tribunal as a Limit to the Jurisdictional Immunity of International Organisations in Europe*, in 35 ACTORS IN THE AGE OF GLOBAL CONSTITUTIONALISM n. 18 (A. Peters, et al. eds. Society of Comparative Legislation 2014) (citing to League of Arab States, Tribunal Fédéral [TF][Federal Tribunal] Jan. 25, 1999 (Switz.)).

271. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1981, 2 BvR 1058/79 (Ger.).

272. *Council of Europe: European Commission on Human Rights*, REF WORLD, <http://www.refworld.org/publisher/COECOMMHR.html> (last accessed Apr. 24, 2017).

273. Rudolf Bernhardt, *Reform of the Control Machinery Under the European Convention on Human Rights: Protocol No. 11*, 89 AM. J. INT'L L. 145 (1995).

274. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, E.T.S. 155. For a detailed account of the background leading up to Protocol 11, see generally Bernhardt, *supra* note 273.

275. Bernhardt, *supra* note 273.

meaning of Article 1 [] of the Convention.²⁷⁶ In so doing, the EComHR seemed to adopt the House of Lord's position in *Holland v. Lampen-Wolfe*.

In one of its last decisions, the EComHR shifted gears somewhat. In a challenge against NATO, the Commission found that the applicant's fair hearing right was not infringed, on the basis that the NATO Appeals Board was recognized as established by law in Italy.²⁷⁷ A year later, the Grand Chamber of the ECtHR issued two judgments relating to appeals against staff dismissals issued by the European Space Agency (ESA), discussed immediately below. In these judgments, the Grand Chamber seemed to adopt the German Constitutional Court's position.

2. ECtHR

The Grand Chamber heard and decided *Waite & Kennedy v. Germany*²⁷⁸ and *Beer & Regan v. Germany*²⁷⁹ together. The applicants had worked for the ESA over a number of years on reassignment from employers based, respectively, in Britain, Ireland, France, and Italy.²⁸⁰ When their assignments with the ESA terminated or expired, they sought recognition from the German Labor Court that they had acquired rights under the German Provision of Labor (Temporary Staff) Act, which would operate to deem the applicants staff members of the ESA.²⁸¹ The Labor Court declined jurisdiction in all four cases, deeming the actions inadmissible on account of ESA's immunity from suit.²⁸² The applicants appealed these decisions of the Labor Court, arguing that they amounted to a violation of their right of access to court.²⁸³

276. *Spaans v. Netherlands*, App. No. 12516/86, Eur. Comm'n H.R. Dec. & Rep. 122, 124 (1988).

277. *Failla v. Italy*, App. No. 40720/98, Eur. Comm'n H.R. Dec. & Rep. (1998).

278. *Waite v. Germany*, App. No. 26083/94, Eur. Comm'n H.R. Dec. & Rep. (1999).

279. *Beer v. Germany*, App. No. 28934/95, Eur. Comm'n H.R. Dec. & Rep. (1999).

280. *Waite*, ¶¶ 17–18; *Beer*, ¶ 11.

281. *Waite*, ¶ 13; *Beer*, ¶ 20.

282. *Waite*, ¶ 17; *Beer*, ¶ 15. In so doing, the Labor Court gave effect to Art. IV(a) of Annex I to the Convention for the Establishment of a European Space Agency, 30 May 1975, 1297 U.N.T.S. 161.

283. *Waite*, ¶ 47; *Beer*, ¶ 37.

The ECtHR held that neither immunity from suit nor the right of access to courts were absolute.²⁸⁴ In balancing both, the Court considered that “a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”²⁸⁵ The Court determined that ESA’s IJS constituted an effective alternative means.²⁸⁶ The Court added that, in assessing the conformity of an IJS with the Convention, the right to a fair hearing should not turn on domestic law, but rather on its autonomous nature as enshrined in the ECHR.²⁸⁷

The Court’s ruling was well received at the time, particularly as it stood in contrast to the unwavering position taken by the United States DC Circuit since the 1980s that, notwithstanding the question of whether IGOs are subject to absolute or restrictive immunity, staff challenges against IGOs do not implicate the latter’s strictly commercial acts.²⁸⁸ The European Court’s position better reflected the fundamental character of the right to a fair hearing. Lost in the euphoria, however, were concerns that the Court had failed to address an important aspect of the applicants’ claim: that, as former employees, they were time-barred from accessing the ESA IJS.²⁸⁹ The Court’s hesitation to engage in any rigorous assessment of what constitutes an ECHR-compliant IGO IJS would come to a head in two of its more recent decisions.

The Court, in *Klausecker v. Germany*²⁹⁰ and *Perez v. Germany*²⁹¹, declared two challenges to German courts’ refusals to hear employment

284. *Waite*, ¶¶ 59, 67; *Beer*, ¶¶ 49, 57.

285. *Waite v. Germany*, App. No. 26083/94, Eur. Comm’n H.R. Dec. & Rep. ¶ 68 (1999); *Beer v. Germany*, App. No. 28934/95, Eur. Comm’n H.R. Dec. & Rep. ¶ 58 (1999).

286. *Waite*, ¶¶ 69–70; *Beer*, ¶ 58.

287. *Waite*, ¶¶ 54, 66, 69–70; *Beer*, ¶¶ 44, 56, 58.

288. *Broadbent v. Org. of Am. States*, 628 F.2d 27, 35 (D.C. Cir. 1980). *See also*, in the state court context, *Hunter v. United Nations*, No. 106796/04, slip op. at 3 (N.Y. Misc. Nov. 15, 2004).

289. *See August Reinisch, Right of Access to Courts-Labor Dispute With International Organization-Immunity From Jurisdiction of Municipal Courts-Alternative Remedies for Employees of International Organization*, 93 AM. J. INT’L L. 933, 934 (1999).

290. *Klausecker v. Germany*, App. No. 415/07, Eur. Ct. H.R. (2015).

291. *Perez v. Germany*, App. No. 15521/08 Eur. Ct. H.R. ¶ 98 (2015).

disputes inadmissible. These challenges concerned, respectively, the European Patent Office (EPO) and the UN. Klaussecker was refused employment with the EPO after he was declared medically unfit for duties.²⁹² He sought to challenge the decision under the EPO's IJS.²⁹³ The EPO contended that he could not do so, as an external candidate not subject to EPO rules and regulations.²⁹⁴ The ILOAT, echoing the concerns expressed by the Belgian Appeals Court in *Mandelier*, declined jurisdiction, while acknowledging that its judgment created a legal vacuum.²⁹⁵

The ILOAT urged the EPO to waive immunity or submit to arbitration.²⁹⁶ EPO offered to submit to arbitration, but Klaussecker sought instead to pursue an action in domestic courts.²⁹⁷ The ECtHR, without analyzing the terms of arbitration in any detail, considered that the very possibility of arbitration was an effective alternative means to safeguard Klaussecker's right to a fair hearing.²⁹⁸ In the Court's view,

Having regard to the importance in a democratic society of the right to a fair trial, of which the right of access to court is an essential aspect, the Court therefore considers it decisive whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention.²⁹⁹

The Court thus declared Klaussecker's appeal inadmissible.

Having followed Klaussecker's struggles to obtain relief in German courts, and the travails of Waite, Kennedy, Beer, and Regan before him, Perez, challenging a decision to make her post redundant, brought suit directly to the ECtHR, arguing that bringing "futile proceedings" before the German courts would surely have rendered her impecunious.³⁰⁰ Perez submitted extracts of the Redesign Panel's report to support her

292. *Klaussecker*, ¶ 8.

293. *Id.* ¶¶ 8–10.

294. *Id.* ¶ 11.

295. *R.K. v. EPO*, Judgment No. 2657, Opinion of Judge Rouiller, ¶ 6 (July 11, 2007 ILOAT).

296. *Klaussecker*, ¶¶ 17–20.

297. *Id.* at ¶¶ 21–28.

298. *Id.* at ¶¶ 69–71.

299. *Id.* at ¶ 69.

300. *Perez v. Germany*, App. No. 15521/08 Eur. Ct. H.R. ¶ 74 (2015).

arguments that the UN IJS was, essentially, broken.³⁰¹ The Court disagreed that proceedings in German courts would have yielded nothing:

the Court takes note of the applicant’s argument that there was no example of any successful complaint having been brought before the Federal Constitutional Court in respect of deficiencies in the protection of fundamental rights within international organisations. The Court observes that in the three decisions of the Federal Constitutional Court relied upon by both parties, that court had indeed not considered the respective complaints well-founded. However, the facts of these complaints differed from those at issue in the present case. Some complainants had not shown [*sic.*] to complain about an act of a “public authority.” . . . Other complainants failed to demonstrate that the level of fundamental rights protection guaranteed by the (different) international organisation in question had, in substance, been generally and manifestly below the level required by the Constitution.³⁰²

In a bizarre passage that displayed a willful ignorance of the need for (and cost of) legal counsel in complex appeals involving IGO immunities from suit, the Court also considered that “the applicant . . . failed to substantiate in any way that the proceedings before the Federal Constitutional Court, which were exempt from court costs, would have had such an effect.”³⁰³ The Court thus declared Perez’s appeal inadmissible.³⁰⁴ These two decisions by the Court signal a preference for declining jurisdiction over engaging in too rigorous an evaluation of the ECHR-consistency of an IGO’s IJS.³⁰⁵

301. These extracts are discussed in paragraphs 31–32 of the Court’s Decision. *See id.*

302. *Id.* ¶ 87.

303. *Id.* ¶ 89.

304. *Id.* ¶ 98.

305. It bears mentioning that the Court’s reluctance to meaningfully evaluate the ECHR-consistency of an IGO’s IJS parallels its reluctance to hold Member States responsible for the inadequacies of the legal remedies provided by the IGOs to which they are members. In one decision, the Court considered that “the member states [of an international organization and who are a party to the European Convention on Human Rights] are obliged, at the moment when they transfer some of their sovereign powers to an international organization to which they adhere, to make sure that the rights guaranteed by the Convention benefit in the framework of this organization a protection

3. Assessment

European domestic court practice has largely tracked the ECtHR's approach.³⁰⁶ In a number of proceedings brought before Belgian,³⁰⁷ French,³⁰⁸ Italian,³⁰⁹ and Swiss³¹⁰ courts following the Grand Chamber's deliberations in *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*, we see that European courts have exhibited a willingness to examine whether an IJS exists. Where such IJS exists, these courts have tended to assume that they are ECHR-compliant. Where an IJS is lacking, however, some of these courts have found a violation of the right to a fair hearing.³¹¹

One notable exception relates to a Belgian judgment finding that the IJS of the Western European Union (WEU) failed to provide staff members with an ECHR-compliant right to a fair hearing.³¹² In *Siedler v.*

equivalent to the one provided by the mechanism of the Convention.” *Gasparini v. Italy*, App. No. 10750/03, Eur. Ct. H.R. (2009).

306. One possible exception relates to the Dutch action lodged by survivors of the victims of Srebrenica against the Netherlands and the UN. In that dispute, the Dutch courts did not undertake any meaningful analysis of the UN's obligation to establish an alternative complaints mechanism under the General P&I Convention. The Hague Appeals Court instead considered that the UN enjoyed immunity from suit. This did not, however, impact the claimants' fair trial right, given that they could still initiate proceedings against the Dutch government and the perpetrators themselves. Hof's-Gravenhage [Court of Appeals] 30 mart 2010 (Association of Mothers of Srebrenica/the Netherlands & United Nations) (Neth.).

307. *Energies nouvelles et environnement v. Agence spatiale europeenne [ESA]*, Civ. Bruxelles (e. ch.), JOURNAL DES TRIBUNAUX 171 (2006) (Belg.).

308. August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285, 297 (2008) (citing to *Cultier v. Organisation Européenne de télécommunications par satellite (Eutelsat)*, [Cass.][supreme court for judicial matters] soc., June 5, 2001, (Fr.)).

309. *Id.* (citing to *Paola Pistelli v. European University Institute*, Cass., 28 ottobre 2005, n. 20995, Guida al Diritto 40 (3/2006), ILDC 297 (It.)).

310. *Consortium X. v. Swiss Federal Government (Conseil federal)*, Swiss Federal Supreme Court, 1st Civil Law Chamber (2 July 2004), partly published as BGE 130 I 312, International Law in Domestic Courts (ILDC) 344 (CH 2004) (Switz.).

311. Reinisch, *supra* note 308, at 295–300 (citing to *Drago v. International Plant Genetic Resources Institute (IPGRI)*, Cass., 19 febbraio 2007, No. 3718, ILDC 827 (It.)). See *Banque africaine de Développement v. M.A. Degboe*, Cour de Cassation, Chambre Sociale, 04-41012, 132 J. DU DROIT INT'L 1142 (2005) (Fr.).

312. *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), J. TRIBUNAUX 617 (2004), ILDC 53 (BE 2003).

WEU, the Belgian court found that there were no provisions for executing judgments of the WEU Appeals Commission, hearings were not public, and decisions rendered were not always published.³¹³ Further Appeals Commission members were employed under short-term renewable contracts, raising concerns about their purported independence and impartiality.³¹⁴

The Belgian precedent, in my view, best reflects the spirit of the ECtHR's holding in *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*. A reviewing court's enquiry should not stop at the moment that an existing IJS has been identified. Rather, such a court should carefully analyze whether the IJS is one capable of providing users with a meaningful right to a fair hearing. The enquiry should not end once some evidence of a right of access to a tribunal is found. Rather, in keeping with *Waite & Kennedy v. Germany*, all aspects of the right to a fair hearing should be assessed for compliance with the ECHR. A reviewing court, in this regard, should be mindful of the extreme prejudice that an applicant will suffer should it refuse to exercise jurisdiction. Such refusals effectively deprive the applicant of a judicial remedy for breach of his or her civil rights or obligations.

It is important to note, in this respect, that careful scrutiny of an IGO's IJS will often fail to reveal important deficiencies therein. The Rules Working Group cautioned that, while aspects of the WTO IJS might seem compliant with the right to a fair hearing on paper, the application of the rules by the DGO rendered them less so:

Staff expressed concern about the systematic failure of the Organization to conform to its own staff rules, regulations and policies, particularly during the period 2005-2013, as described below. The lack of consistency, transparency and accountability in the application of rules – and the arbitrary way in which decisions were made and resources were managed – served to undermine the efficiency, professionalism and morale of the secretariat. However, it was widely felt that the main problem was not the rules themselves - which were

313. *Id.*

314. *Id.* ¶¶ 60–62.

generally sound and sufficient – but rather the inconsistent, unpredictable and arbitrary way in which they were applied.³¹⁵

V. CONCLUSION

Countries such as the United States were initially hesitant to extend diplomatic immunities to officials of the League of Nations.³¹⁶ Such immunities were conferred exclusively to foreign dignitaries.³¹⁷ Prior to conclusion of the Bretton Woods and Dumbarton Oaks conferences, IGO officials regularly had tax exemption demands turned down.³¹⁸ Yet, today United States courts hesitate to even rule on whether IGOs hold absolute or restrictive immunities from suit. The disparate treatment by domestic courts of immunities from suit of IGOs relative to foreign sovereigns defies logic. Domestic courts, particularly in the domain of investment arbitration, sometimes exhibit little hesitation before overriding foreign sovereign immunity. Yet, these same courts appear unwilling to do the same against IGOs. This is particularly odd as IGO immunities are derived from, and presumably subordinated to, foreign sovereign immunity.

The P&I Conventions specify requirements that apply to the maintenance of immunities enjoyed by IGOs. One such requirement is that IGOs “make provisions for appropriate modes of” dispute settlement.³¹⁹ The failure by an IGO to provide a system of alternative justice may result in the loss of its immunities. IGOs have thus complied with this obligation by promulgating an IJS. Such an IJS will normally recognize the appellate jurisdiction of the UNAT or ILOAT. There are significant shortcomings in the administration of justice pursuant to these

315. Working Group on Rules, *supra* note 59, ¶¶ 1.1–1.2.

316. U.S. Dept. of State, *Opinion of the Department of State on Status of League of Nations Officials in the United States*, in 1 FOREIGN RELATIONS OF THE U.S. 413–14 (1927).

317. *Schooner Exch. v. McFaddon*, 11 U.S. 116, 138 (1812).

318. Lawrence Preuss, *The International Organizations Immunities Act*, 40 AM. J. INT'L L. 332, 334 (1946). Today, while tax exemptions are not formally recognized, staff members of IGOs to which the United States is a party will typically be reimbursed their tax dues—a practice approved by the United States following conclusion of the Bretton Woods and Dumbarton Oaks conferences.

319. General P&I Convention, art. VIII, § 29; Specialized P&I Convention, art. IX, § 31.

IJSs. IJS rules are either deficient on their face, or selectively applied by IGO Administrations. As a result, IGO staff members are deprived of their right to have most of their employment-related civil rights and obligations litigated before an impartial and independent judicial body. Such rights and obligations fall into a legal void. Recourse to the ILOAT and, to a far lesser extent following reforms, the UNAT, provides little counterweight to the resulting accountability gap.

It is encouraging that certain IGOs have initiated reforms to improve their IJSs. The UN, in particular, undertook extensive reforms to its IJS. The WTO is, hopefully, in the process of doing the same. As well-intentioned as these reform initiatives might be, however, IGO administrations will be naturally disinclined to cede too much power in the framework of introspective internal reforms. This being the case, it is important that domestic courts exercise some level of external review over IJSs. Domestic courts have hesitated to exercise jurisdiction over disputes between an IGO and its staff member, owing to the terms of host country immunity agreements. This hesitation clashes with courts' duties to ensure that human rights are being respected in their territories.

Promoters of IGOs were probably right to worry, in the mid-20th century, that governments might seek to influence IGO policies through judicial proceedings. Today's context is quite different from that of the post-war reconstruction period. The Bretton Woods and Dumbarton Oaks institutions have grown in ways arguably unanticipated by their foundational treaties. If anything, the lack of external judicial checks on IGOs has, over time, allowed them to run roughshod over their rules and regulations. Sometimes, the consequences have been grave. The lack of accountability for IGOs towards their staff, in a day and age of universal respect for human rights is, quite simply, inexcusable: particularly as many such IGOs pursue the promotion of human rights as part of their growing mandates.

Appellants are required to exhaust domestic court proceedings before they can access the ECtHR. European domestic courts have proven fertile venues for appeals against IGOs as of late. This is due in large part to the heavy concentration of IGOs in Europe. These courts have progressively demonstrated a willingness to look beyond an IGO's immunities, particularly where an appellant's right to a fair hearing risks being violated. This is in line with the ECtHR's direction to European domestic courts to assess whether the respondent IGOs in such actions are providing their staff a reasonable alternative means to protect

effectively their rights under the Convention. In decisions following this ruling, however, the ECtHR has hesitated to follow through on its own direction. The resulting uncertainty leaves IGO staff members treading into European domestic courts with much trepidation, all while incurring significant legal fees.

A. The Way Forward.

Much coordination is needed between courts, states, civil society, and IGOs to alter the status quo. I will discuss each in turn.

Courts. It is important for courts in Europe and abroad to critically assess the compatibility of IGO IJSs with the right to a fair hearing. It may be instructive, in this respect, for these courts to more fully embrace the German Federal Constitutional Court's *Solange* ("as long as") trilogy of jurisprudence, developed in relation to constitutionally protected fundamental rights and EU law.³²⁰ Pursuant to the first and second installment of this trilogy, the German Court signaled that it would accept the splitting of competences between national law and EU law, and decline jurisdiction in favor of EU law only insofar as Community law afforded an equal level of protection for fundamental rights.³²¹ In the third and final installment, the German Court clarified that actions of EU institutions were not free from judicial scrutiny:

Acts done under a special power, separate from national powers of the member-States, exercised by a supra-national organization also affect the holders of basic rights in Germany. They therefore affect the guarantees of the Constitution and the duties of the Constitutional

320. See Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 29, 1974, 2 BvL 52/71 2 [C.M.L.R.] 540 (Ger.) (*Solange I*); Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 22, 1986, 2 BvR 197/83 [3 C.M.L.R.] 225 (Ger.) (*Solange II*); see also Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 12, 1993, 2 BvR 2134/92 & 2159.92 [1 C.M.L.R.] 57 (Ger.) (*Solange III*).

321. The German Court initially expressed this right in positive terms—that it would assert jurisdiction unless EU law provided equivalent protection for fundamental rights. See 2 C.M.L.R. 540 (540–42) (Ger.) (*Solange I*). The Court subsequently softened its approach, indicating that it would decline jurisdiction unless EU law failed to provide equivalent protection for fundamental rights. See 3 C.M.L.R. 225 (227) (Ger.) (*Solange II*).

Court, the object of which is the protection of constitutional rights in Germany – in this respect not merely as against German state bodies.³²²

One would have expected, in light of the *Solange* trilogy, that the German Constitutional Court would have exercised a more stringent review of EUROCONTROL's IJS in the above-cited summary of national court decisions on IJSs.³²³ Yet, in each of the *Solange* decisions, the Court ceded jurisdiction to EU law. The Court was not engaging in a game of chicken with the European Court of Justice (ECJ). Rather, it was engaging in a form of muted dialogue with the ECJ, which the ECJ seemed to acknowledge when it accepted, a few years after *Solange I*, that Community law (as it was then) could be challenged on the basis that it violated fundamental rights.³²⁴

Elements of *Solange* can be drawn from the ECtHR's rulings in *Waite & Kennedy v. Germany* and *Beer & Regan v. Germany*.³²⁵ I would submit that the European Court, in these two cases, initiated a muted dialogue with EU-based IGOs and/or the ILOAT and UNAT. Held in its best light possible, accordingly, it may be that the European Court in *Klausecker v. Germany* and *Perez v. Germany* was not yet ready to condemn an IJS, in the hope that corrective action would be taken on the IGO front. The revised UN IJS would seem to have vindicated the Court's decision to some degree—indeed, while these revisions could not have formed part of the record of proceedings, the Court was surely aware of the UN reforms implementing the same Redesign Panel recommendations Perez had submitted into evidence, when the Court declined admissibility.

The problem with European Court's approach, however, is that other IGOs do not face the same level of scrutiny as the UN. Smaller IGOs are more likely to keep operating deficient IJSs in the shadows, until such time as the Court strikes one down as falling short of guaranteeing the right to a fair hearing. Until the European Court does so, domestic courts

322. 1 C.M.L.R. 57 (79) (Ger.) (*Solange III*).

323. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1981, 2 BvR 1058/79 (Ger.).

324. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419; Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 2 BvL 5271 [2 C.M.L.R.] 540, (Ger.); Case 4/73, *Nold v. Comm'n*, 1974 E.C.R. 491.

325. See Reinisch & Weber, *supra* note 43, at 78.

should exercise jurisdiction in IGO staff members' appeals, and scrutinize the IJSs at issue. These courts would be well advised to follow the above-cited Belgian example, and assess whether or to what extent each material element of an IGO's IJS measures up to ECHR-mandated standards.

The tendency of courts to decline jurisdiction in matters pertaining to the human rights of IGO staff members, using one issue avoidance technique after another, is regrettable and by no means unimpeachable. In appropriate cases, it may be deemed a denial of justice, forcing one specific category of litigants to operate in a no-man's land in terms of access to protection from violation of their human rights.

States. States are, generally speaking, blissfully unaware of IJS-related transgressions. Perhaps owing in part to confidentiality undertakings signed by IGO staff members with their IGO, staff grievances go largely unreported. States should push IGOs to amend their confidentiality undertakings to allow such staff to transmit copies of any grievances they have submitted pursuant to an IJS to their diplomatic missions. It bears emphasizing that there are presently no suitable proxy indicators reported in IGO yearly reports for staff grievances. Staff turnover figures come close, but such turnovers can (and often do) relate to reasons unconnected to a grievance or disciplinary measures. State missions should be pressured by national legislatures to raise more searching questions with IGOs on IJS-related issues, whether by written request, or in plenary or sessional meetings.

If IGOs are not forthcoming in their responses, states should tie funding to increased IJS-related transparency. Indeed, states should more broadly engage with their role as custodians of IGOs by holding them accountable for staff grievances. States created IGOs largely for reasons of efficacy, notably to reduce coordination problems and transaction costs. As a consequence, states typically evaluate IGOs by scrutinizing their yearly activity reports, and annual financial audits.³²⁶ No IGO publishes data, aggregated or otherwise, on its IJS in either publication. Until such time as they are explicitly asked to provide this information, IGOs will tend to follow the WTO in sweeping this data under the carpet.

326. See C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* 352 (2d ed., Cambridge University Press 2005).

States should thus tie IGO funding commitments to increased transparency with respect to IJS-related performance indicators.

Until such time as IJS-specific data is conveyed to states by IGOs, states should actively monitor publicly reported cases. States should do so by keeping track of the latest judgments released by UNAT or ILOAT on their websites, in addition to any litigation launched in their domestic courts. Inasmuch as patterns in allegations develop in these judgments and litigation, states should ask IGOs to account for these, notwithstanding the final underlying outcomes. The fact that a tribunal finds for an IGO for want of sufficient evidence on the record, or a court declines jurisdiction, as I have set out above, does not necessarily indicate that the complaints lodged were without merit.

Civil Society. Civil society, in turn, should support the work of entities such as the IALCE to evaluate the degree to which IGO IJSs rank against human rights norms. There are important human rights elements at play when individuals are unable to have their civil rights and obligations determined before an independent and impartial tribunal. In many instances where IGO staff members are seeking relief in local courts, for example, they are likely doing so challenging a wrongful termination. Their right to work is a fundamental economic and social right, codified in the UDHR³²⁷ and the International Covenant on Economic, Social and Cultural Rights.³²⁸

Problematically enough, not many NGOs view IJS deficiencies as a hot ticket item. Even those NGOs focused on the right to a fair trial typically support or publicize fair hearing issues as they arise in criminal proceedings, normally featuring egregious violations of natural justice in countries with weak rules of law.³²⁹ Victims represented or supported in these proceedings lend themselves easily to public sympathy. IGO staff members aggrieved or disciplined by an IGO, in contrast, may be perceived as well-remunerated victims seeking access to courts in

327. Universal Declaration of Human Rights, *supra* note 185, art. 23.

328. International Covenant on Economic, Social & Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 6.

329. See, e.g., *Defending the Human Right to a Fair Trial*, FAIR TRIALS, <https://www.fairtrials.org> (last visited Apr. 24, 2017); *The International Council Supporting Fair Trial and Human Rights*, ICSFT, <http://www.icsft.net/> (last visited Apr. 24, 2017); HUM. RTS. MONITORING INST., <https://www.hrmi.lt/en/research/right-to-fair-trial/> (last visited Apr. 24, 2017), which all focus on the right to a fair trial.

developed countries. Such individuals may not, as such, fit the standard “victim profile” that NGOs will seek out.

I would submit, however, that focusing on the optics of the victims misses the point. Rather, the focus should be on the implications of the accountability gap created by the immunities of IGOs. Those victims that thematic NGOs prefer to support will, in many cases, be protected by national laws that are misapplied or ignored. Reprehensible as this is, IGO staff members, in contrast, are arguably not properly subject to any laws at all. In other words, whereas a victim in the former case will have suffered a miscarriage of some form of justice, positive or natural, the law of international organizations has developed over the past century to erase a large swath of IGO staff members’ civil rights and obligations. This runs squarely counter to the above-referenced human rights paradigm.

Over time, the external pressures exerted by these three actors, namely courts, states, and civil society, should generate sufficient pressure on IGOs to transition away from resisting adoption of even those cosmetic IJS amendments proposed by the WTO Rules Working Group, and towards embracing comprehensive IJS reform of the type embodied in the UN Redesign Panel’s recommendations, most of which were adopted by the UN.³³⁰ More importantly, these pressures might even obviate the need for IJS reforms: if national courts are willing and able to scrutinize an IGO’s IJS, staff members may ultimately prefer litigating in domestic courts rather than engaging an internal mechanism that takes between 4-5 years to reach an unsatisfactory conclusion.

330. Subject, as I mentioned above, to at least the broadening of the measures that can be challenged in the IJS. Ideally, also with the removal of the SGO’s right to compensate in lieu of specific performance.