# THE ASSURANCE OF IMPARTIALITY: DUE PROCESS MECHANISMS AND THE DEVELOPMENT OF GLOBAL ADMINISTRATIVE LAW IN INTERNATIONAL ADMINISTRATIVE TRIBUNALS

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ABSTRACT

*The basic job of administrative tribunals of inter-governmental organizations (IOs) is to settle employment disputes between IOs and staff members. International administrative tribunals (IATs) have proliferated and matured with the creation and development of IOs, global governance, and the global administrative space. Over time, there has been a convergence in the design and practice of IATs around limited due process norms. This Article reviews the due process mechanisms provided by a selection of IATs and analyzes how underlying due process principles have informed the design of certain IAT rules and procedures. At the same time, these IAT rules and procedures have contributed to the development of global administrative law and to the crystallization of underlying normative principles of transparency, accountability, participation, and review.*



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## I. Introduction

It is generally accepted that international organizations have an obligation to provide judicial mechanisms to remedy employment disputes. These mechanisms traditionally take the form of internal administrative tribunals with jurisdiction to adjudicate claims against the organization by its staff members. Creation of these administrative tribunals is often a condition of the organizations' larger privileges and immunities. In practice, international organizations provide their staff with access to private tribunals to handle substantive employment disputes and these tribunals function with certain procedural guarantees. In fact, the procedures of the tribunals are an effort to provide additional due process to staff members with claims against the organization.

The question is then: what due process is provided? Once the general right of access to a court exists, what other traditional elements of due process are afforded to the employees of international organizations? Are there common principles of due process that are recognized and implemented within the internal justice framework of international organizations? If so, are these common principles connected to the larger framework of global administrative law, often defined as principles and practices that affect and promote the accountability of global administrative bodies?

This Article will examine the procedures of five primary international administrative tribunals and their relationship to traditional principles of due process and global administrative law. It will first discuss the general right of staff access to courts within international organizations, followed by a review of global administrative law and its inclusion of normative principles of transparency, participation, accountability, and review. It will then address common principles of international due process, such as access to an independent, impartial judicial tribunal, an opportunity to be heard, and public hearings. With procedures that safeguard these due process principles in mind, the Article will provide a survey of the relevant rules and procedures of five administrative systems: The United Nations Office of Administration of Justice; the European Court of Justice and General Court; the International Monetary Fund Administrative Tribunal; the World Bank Administrative Tribunal; and the International Labour Organization Administrative Tribunal. It will then proceed to a discussion of due process procedures common to these systems, and the principles that underlie those procedures. The common due process rules and procedures of the reviewed international administrative tribunals promote normative concepts of transparency, accountability, participation, and review. In the field of global administrative law, these normative principles inform the rules, mechanisms, and procedures of global governance. Ultimately, due process procedures reflect the expansion of normative principles in the global administrative space and, as international administrative tribunals operate, their procedures contribute to the development of these normative principles. Thus, the design of the tribunals reflects the influence of certain normative principles on global governance, and in turn, the rules and procedures of the tribunals contribute to the international crystallization of those principles.

## II. A Brief History of International Administrative Tribunals

Prior to the establishment of administrative tribunals, employment disputes between international organizations and their staff members were typically settled by some administrative decision of the organization's executive organ.[1] IOs began to establish internal courts to handle staff disputes and employment matters out of a "respect for human rights and the need to eliminate the interference of national courts."[2] To date, many IOs have established their own administrative tribunals

1. C.F. Amerasinghe, Principles of the Institutional Law of International Organizations 489 (Cambridge, 2d ed. 1996).

2. *Id.* at 494-95.

or accepted the jurisdiction of other tribunals to resolve or dispose of staff member disputes.[3] Each tribunal is the result of a separate legislative act or instrument.

The jurisdiction of IATs is generally restricted to actions brought by staff members against their organization for employment related disputes.[4] Most cases concern staff member contracts or service, or their terms of employment. For instance, in 2015, thirty-four percent of the applications received by the United Nations Office of Administration of Justice concerned separation from service, nineteen percent were appointment-related, and twenty-seven percent concerned benefits and entitlements.[5] Many of these cases involve familiar employment disputes: terms of the contract; qualifications for positions and applicant review processes; and the elimination of posts as UN missions wind down.

However, these employment disputes mask dynamic, intricate issues central to the international employer/employee relationship. The substantive matters underlying the disputes may be personal or political, not merely economic. At the core of many disputes is the question of what it means to have a functioning, independent, international civil service. For instance, in 1990, the now-defunct UN Administrative Tribunal rendered a decision in a case involving the denial of permanent UN appointments to three Chinese translators.[6] The translators did not want to return to China because they feared for their safety after speaking out against the Chinese government, and after refusing to accede to government demands for their salaries.[7] The administration refused to extend the appointments due to the wishes of the Chinese government.[8] The Tribunal ruled in favor of the translators, noting that the administration's actions were arbitrary, its reasoning specious,

3. *Id.* at 495.

4. Some IAT statutes are more expansive that others, such as the provision in the International Labour Organization Administrative Tribunal (ILOAT) statute that gives it jurisdiction over contracts involving the ILOAT. The expansive jurisdiction of the General Court and Court of Justice of the European Union is another example, though these courts are not pure "administrative" tribunals. However, the General Court and Court of Justice have taken on the cases of the now dissolved European Civil Service Tribunal, which could be considered purely administrative as it was a specialized court created to handle EU employment disputes.

5. OFFICE OF ADMINISTRATION OF JUSTICE, NINTH ACTIVITY REPORT: 1 JAN. TO 31 DEC. 2015 (2016), http://www.un.org/en/internaljustice/oaj/reports/Ninth%20OAJ%20Activity%20Report%20FINAL%20with%20Rev1.pdf. All activity reports available at: http://www.un.org/en/internaljustice/oaj/activity-reports.shtml.

6. *See* Qiu v. Secretary-General of the United Nations, Judgments U.N. Admin. Trib., No. 482 (1990).

7. *Id.* at 5-7.

8. *Id.* at 11.

and that, by allowing its decision-making to be influenced by the Chinese government, the administration "ignored the basic principles of international civil service."[9] The administration failed to act in accordance with the standards of the UN Charter, putting the political interests of a member state over its obligations under the Charter and UN Staff Rules and Regulations. Without some means of administrative review, the fears of the translators may have been confirmed, and the UN administration would have license to succumb to the whims of member states in employment matters.

Additionally, IO administrative decisions can impact personal rights, with broader implications for human rights and accountability norms. Some cases involve allegations by an IO staff member of sexual harassment and the failure of the administration to investigate or adequately address those claims. For instance, one UN staff member alleged that the UN attempted to prevent a "fair and transparent investigation" into her allegations of harassment by a supervisor, including deliberate intimidating and humiliating acts both inside and outside the office.[10] Other cases involve possible criminal actions by staff members and allegations that the IO failed to follow proper disciplinary procedures, in effect relying on mere allegations of criminal conduct before responding with disciplinary action. The UN Appeals Tribunal routinely reviews cases where employees contest disciplinary decisions of the administration for all manner of misconduct, from sexual exploitation and abuse to bribery and corruption.[11] Other disciplinary matters involve allegations of dismissal and adverse employment actions in retaliation for whistleblowing.[12]

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9. *Id.* at 24.

10. *See* Masylkanova v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 412, U.N. Doc. 2014-UNAT-412 (2014), http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-412.pdf.

11. *See* Diabagate v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 403, U.N. Doc. 2014-UNAT-403 (2014), http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-403.pdf; Massah v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 301, U.N. Doc. 2012-UNAT-301 (2012), http://www.un.org/en/oaj/files/unat/judgments/2012-unat-274.pdf; Masri v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 095, U.N. Doc. 2010-UNAT-095 (2010), http://www.un.org/en/oaj/files/unat/judgments/2010-unat-098.pdf.

12. *See* Lee v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 481, U.N. Doc. 2014-UNAT-481 (2014), http://www.un.org/en/oaj/files/unat/judgments/2014-UNAT-481.pdf; Buscaglia v. Secretary-General of the United Nations, Judgments U.N. Appeals Trib. No. 206, U.N. Doc. 2011-UNAT-206 (2011), http://www.un.org/en/oaj/files/unat/judgments/2012-unat-202.pdf.

While most cases involve an examination of the employment relationship and administrative decisions regarding that relationship, the issues giving rise to the disputes are often sensitive and complex. An employee's right to receive fair compensation for labor, or the right to be free from harassment, or the duty to confront an organization's harmful practices may be at stake. Issues of this nature require a forum for review and resolution, as the judgments of IATs have broad impacts on the rights of IO staff members. Therefore, it is essential that staff members be provided with some guarantees of due process.

Importantly, the IAT is a forum only accessible by the staff member. In most cases, the privileges and immunities of IOs preclude staff members from seeking recourse in national courts. To resolve these disputes, whatever the basis, staff members must navigate the organization's internal system. All cases are brought by staff members (or by beneficiaries with derivative rights) against the organization. The staff member is always the plaintiff and the organization always the defendant. Nearly all actions in IATs are single-tier (with some notable exceptions, discussed *infra*); the judgment of the tribunal is final and there is no opportunity for appeal. Most IATs establish their own rules of procedure in accordance with statutory provisions or guidance. How these rules and statutory provisions incorporate and promote due process safeguards is the subject of this Article.

## III. Global Administrative Law and Operative Principles of Participation, Transparency, Accountability, and Review

The study of the emerging field of global administrative law (GAL), as conceptualized by Kingsbury, Krisch, and Stewart, is an unorganized body of rules and procedures that shapes patterns of global governance.[13] The substantive content of those rules and practices is not the focus of GAL; instead the focus is the operation and application of accountability principles and procedural rules. Viewing much of modern global governance as a form of administrative action, GAL scholars have identified four principles for defining global institutional practices that work to promote administrative legitimacy: participation, transparency, accountability, and review.[14] Global administrative action is regulated by administrative law "principles, rules and mechanisms" that function based on these principles. As global administrative and

13. *See generally* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & Contemp. Prob. 15 (2005).

14. *Id. See also* Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 Int'l Org. L. Rev. 319 (2009).

regulatory systems evolve, demands for participation, transparency, accountability, and review increase. As Kingsbury writes, "[t]he sense that there is some unity of proper principles and practices across these issue areas is of growing importance to the strengthening, or eroding, of legitimacy and effectiveness in these different governance regimes."[15] Across global governance regimes, practices founded on these normative principles develop and crystalize, leading to the emergence of global administrative law.

GAL is a nebulous concept, especially since it is an attempt to identify disparate procedures as law across governance regimes based on shared accountability principles.[16] Some critiques of GAL focus on its narrow definition and exclusion of substantive content.[17] For instance, B.S. Chimini argues that the strict separation of substance and procedure limits the potential of GAL "to further the cause of democracy and justice in the international justice system."[18] Chimini, beginning from the premise that contemporary international law has an imperial character, suggests that the rule-making conception of GAL stems from a "dualistic understanding of international law" that does not directly address private entities and individuals.[19] It is possible to see the emergence of a nascent global state as nation-states and international institutions behave more like administrative agencies. Chimini argues that the existence of a global state requires consideration of global citizenship and global democratic accountability. Thus, Chimini prefers a broader definition of GAL that does not strictly separate substantive and administrative law because that separation may legitimize and heighten democratic deficits already in place in international institutions.[20]

That said, a more tailored procedural concentration that draws attention to authority and decision-making in the global administrative space can address substantive concerns. Eyal Benvenisti emphasizes in his own discussion of GAL and global governance the importance of "procedural justice": "[p]rocedural regularity enhances effectiveness, increases legitimacy and compliance, and ensures substantive outcomes. Because substantive justice is difficult to ascertain and to agree

15. Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EUR. J. INT'L L. 23, 25 (2009).

16. For a discussion of a "workable concept of law" in GAL, *see* Kingsbury, *supra* note 15.

17. *See, e.g.*, B.S. Chimini, *Cooption and Resistance: Two Faces of Global Administrative Law* (IILJ Global Administrative Law Series, Working Paper 2005/16), http://www.iilj.org/publications/cooption-and-resistance-two-faces-of-global-administrative-law/.

18. *Id.* at 2-3.

19. *Id.* at 5-6.

20. *Id.*

upon, a carefully designated decision-making process that ensures that the decision-makers are impartial and skillful is likely to reach decisions that are substantively just."[21] Thus, procedural law that imposes constraints on the exercise of discretion enhances accountability in global governance and plays an important role in protecting substantive principles.

The focus on procedure is also a helpful method for discerning common normative goals. Procedural rules direct and constrain action while safeguarding normative principles. To date, most GAL scholarship looks at "regulatory" action by intergovernmental bodies and uses the identified normative principles to evaluate that action and associated mechanisms. GAL scholarship also recognizes the potential for the application of the principles of participation, transparency, accountability, and review to the internal structure and functioning of intergovernmental organizations. As Kingsbury and Casini note:

> [S]ome normative demands and procedural principles are sufficiently common across diverse IOs to suggest a unified field may be discernable: transparency in rule-making; due process (in certain cases including notice, hearings, and reason-giving requirements) in decisions that directly affect private parties; review mechanisms to correct errors and ensure rationality and legality; and in addition to review, a variety of other mechanisms to promote accountability. These are among the key ideas in the exploration of a unified field of legal practice and study of global administrative law.[22]

If the GAL field is concerned with the existence and operation of these normative principles through procedural rules and other mechanisms, then, administratively speaking, the internal administration of IOs should provide some insight as to how pervasive these principles are.[23] The practices of international organizations may influence international law, and their adoption of or adherence to certain principles

21. EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 22 (2014).

22. Kingsbury & Casini, *supra* note 14, at 333.

23. Benedict Kingsbury & Richard B. Stewart, *Administrative Tribunals of International Organizations from the Perspective of the Emerging Global Administrative Law*, *in* THE DEVELOPMENT AND EFFECTIVENESS OF INTERNATIONAL ADMINISTRATIVE LAW 69, 80 (Olufemi Elias ed., 2012) ("These procedural elements are the most important elements of the developing global administrative law, although there are preliminary signs that certain common *substantive principles*, such as proportionality, fair and equitable treatment, and legitimate expectations, are emerging in the decisions of reviewing bodies.").

can have implications for other global actors and private persons.[24] More than merely reflecting the law-making practices of states, IOs can draw attention to "widely acknowledged but not well-specified norms" through practice.[25] Though it is generally understood that IOs are not seeking to enforce specific norms, their activities encourage debate and discourse, leading to the crystallization of hard law.[26] The process is not state-driven or the result of state consent, but rather a step removed as member states provide a general mandate for IO activity.

In the case of internal administrative practice, IOs effectively operate in a vacuum. States prefer not to engage directly with international civil servants, who, like their parent organizations, enjoy certain privileges and immunities.[27] If staff disputes were litigated before national courts, a fragmented legal regime would result, with different protections provided to different nationals employed by the same IO.[28] Instead, the employment relationships of these servants are governed by the constituent instruments of their respective IOs, not an overarching legal regime. Only IOs and their constituent IATs operate in this space. At best, the IOs received limited guidance from their member states and other legal authority.

For instance, the International Court of Justice in the *Effect of Awards Case* (upholding the legality of the creation of the UN Administrative Tribunal), stated that it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals . . . that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."[29] Furthermore, national courts, when reviewing claims of immunity of IOs, are often guided by the availability of alternative dispute mechanisms within IOs. The European Court of Human Rights recognized that the right of an individual's access to court may be infringed by IO immunity unless mitigated by the availability of

24. Kingsbury & Casini, *supra* note 14, at 349. *See also* Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT'L L. REV. 87, 87 (2008).

25. *Id.* at 88.

26. *Id.*

27. Kingsbury & Stewart, *supra* note 23, at 90 ("The background threat of review in national courts drives pressure in international organizations for fair, effective and independent mechanisms for addressing employment grievances, lest the immunity from suit of the organization in question be lifted by national courts").

28. *See, e.g.*, August Reinisch, *The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals*, 7 CHINESE J. INT'L L. 285 (2008).

29. Effect of Awards of Compensation Made by the U.N. Administrative Tribunal, Advisory Opinion, 1954 I.C.J. Rep. 47, 57 (Jul. 13, 1954).

some dispute resolution mechanism.[30] While many IOs may provide such mechanisms in the form of IATs to preserve their grants of immunity, the fact remains that it is the IOs and their constituent IATs that decide on the type of mechanism provided and any guarantees of due process.[31]

Thus, the internal operational activities of IOs may be shaping conceptions of international due process and contributing to the hardening of basic due process principles. The IOs, using IATs, operate solely in an international administrative space. The litigants are international actors, international civil servants on the one hand and the IOs themselves on the other. States only request that some process be provided, but it is left undefined *ex ante*. The IOs decide on and construct the machinery for dispute resolution and craft the rules and procedures that guarantee due process. Disputes arise, the employees navigate the systems of their respective IOs, and the judicial machinery of the IATs achieve resolution. The member states may, on rare occasions, review the process provided through their domestic courts, but only when reviewing claims of immunity and only enough to comment on the minimum process required. Regardless, the disparate IATs continue to operate separately within the global administrative space.

Acknowledged due process norms are at the root of this practice. In the context of international law, the activities of IATs shape these norms as the IOs codify rules and procedures to guarantee them. It makes sense to look to IOs to determine whether any conceivable hard law is developing in the larger global administrative space. As Kingsbury and Casini recognized, "An administrative perspective on the work of IOs enables analysis of practices already occurring in IOs (and insufficiently assimilated in international law scholarship) which reflect changing patterns in contemporary management practices and philosophies more generally."[32] An examination of internal IO procedural mechanisms should reveal the extent to which these principles of

30. Waite v. Germany, App. No. 26083/94, 30 Eur. Ct. H.R. Rep. 261 (2000). *See also* August Reinisch & Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 INT'L ORG. L. REV. 59, 59-110 (2004).

31. What is the source of law for IOs and IATs? Arguably, it is general principles of law, recognized in Article 38 of the Statute of the International Court of Justice. For instance, the International Labour Organization Administrative Tribunal held in 1957 that it was bound by general principles of law. Int'l Labour Org., 24 I.L.R. 752 (Int'l Lab. Org. Admin. Trib. 1957). The World Bank Administrative Tribunal has also cited general principles of law in its decisions. Mendaro v. Int'l Bank for Reconstruction & Dev., Decision No. 26, World Bank Admin. Trib. (1985).

32. Kingsbury & Casini, *supra* note 14, at 332.

administrative law have affected the design and function of the internal IO regime.[33] In turn, should IO procedures reflect, promote, or enhance the GAL principles, that may suggest that internal IO mechanisms have impacted the development of GAL principles.

## IV. Defining International Due Process Principles

What constitutes international due process? While a thorough empirical examination of due process standards and their theoretical underpinnings is beyond the scope of this Article, international due process must in some sense be defined in order to move forward with an examination of IAT procedures. Firstly, within the context of this Article, due process "rights" are equated with procedural rights.[34] It is recognized that, while due process rights are a part of most legal systems, the principles underlying those rights are not universal. And just as due process rights differ across legal systems, they differ within systems depending on context (e.g., criminal v. civil v. administrative). If domestic due process is difficult to define, international due process must be more nebulous. Nonetheless, as this Article is concerned with certain operating procedures of IATs, some foundation must be constructed so as to evaluate those procedures. A review of past scholarship identifies a few core principles most often associated with due process and provides a starting point for the review of IAT procedures.

The identification of international due process begins with Article 38 of the Statute of the International Court of Justice. One recognized source of international law therein is "general principles of law recognized by civilized nations."[35] As a source of international law, general principles encompass "the positive, private laws of all national judicial systems, distilled to their base norms by a deductive and then comparative analysis."[36] While the specific procedures employed by various nations differ, the underlying general principles and "customs inherent in international practice" help identify international minimum

33. Kingsbury & Stewart, *supra* note 23, at 103 ("[T]he design, work and future evolution of international administrative tribunals is both subject to, and a creative influence on the development of, global administrative law. In addition to the practical work of helping address and resolve particular staff situations, these tribunals have constructed an ever-growing body of specific jurisprudence on staff issues in international institutions, and they enrich the growing general jurisprudence of global administrative law . . . .").

34. *See generally* Matthieu Waechter, *Due Process Rights at the United Nations: Fairness and Effectiveness in Internal Investigations*, 9 Int'l Org. L. Rev. 339 (2012).

35. Statute of the International Court of Justice, art. 38 (April 18, 1946).

36. Charles T. Kotuby, Jr., *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, 23 Duke J. Comp. & Int'l L. 411, 421 (2013).

standards of due process.[37] Early twentieth century conceptions of international due process focused on principles designed to prevent the "denial of justice."[38] Characterized in terms of rights, these principles take the following form: "Everyone has the right to have his criminal and civil liabilities and his rights determined without undue delay by fair public trial and by a competent tribunal before which he has had the opportunity for a full hearing."[39]

Later scholarship attempted to parse and refine these general principles as modern international law matured. In Wolfgang Friedmann's analysis of general principles and the development of international law, he concluded that due process consists of "certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become international legal standards."[40] He determined that the basic procedural principles of due process at least consisted of access to a judicial tribunal and an opportunity to be heard.[41]

Likewise, Charles Kotuby, in a more recent analysis of general principles of law, examined how general principles may coalesce around one minimum standard of treatment. For instance, U.S. courts, addressing issues of comity, have noted several elements "that undergird the 'international concept of due process.'"[42] These include the opportunity for a fair trial before a competent court; regular, not ad hoc, procedures; due notice to the defendant (or voluntary appearance); a system of impartial administration of justice; assurances against fraud in the proceedings; access to counsel, evidence, and witnesses; and access to appeal or review.[43] These basic elements of due process, based in positive domestic systems, may be considered "core concepts of international due process . . . directly traced to the general principles of law."[44]

However, the application of these basic principles is not limited to domestic courts. Even in Friedmann's time, new branches of international law were developing in non-traditional fora like the practices of

37. *See* Quincy Wright, *Due Process and International Law*, 40 AJIL 398 (1946).

38. *Id.*

39. *Id.*, quoting *Statement of Essential Human Rights by a Committee Representing Principal Cultures of the World Appointed by the American Law Institute*, art. 7 (1945).

40. Wolfgang Friedmann, *The Uses of 'General Principles' in the Development of International Law*, 57 AJIL 279, 290 (1963).

41. *Id.* at 291. ("[T]hese minimum standards of due process enjoy a degree of, at least, theoretical universal support among the nations . . . .").

42. Kotuby, *supra* note 36, at 426.

43. *Id.* at 426-27 (citations omitted).

44. *Id.* at 427.

international administrative agencies and organizational tribunals.[45] International practice as evidenced by awards of arbitral tribunals and treaties "usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against denial of justice."[46]

Common principles of access to an impartial tribunal, and general fairness, evidenced by an opportunity to be heard and examine evidence, have clearly emerged. At the very least, international due process seems to require access to an independent, impartial judicial (i.e., professional) tribunal, an opportunity to be heard, and public proceedings. Each principle, and the actual procedures that guarantee them, appear essential to ensuring access to fair proceedings, which in turn acts as a "safeguard against denial of justice." Rules and procedures that promote these core principles will serve as the starting point for an analysis of IAT due process. In addition, reasoned decisions, a right to additional review or appeal, and access to legal representation will also be examined within the context of IAT procedures. These principles have some basis in domestic and international due process procedures independent of the core principles listed above but are undoubtedly related to those core principles (for instance, a requirement of reasoned decisions and the right to appeal may serve as additional safeguards of judicial impartiality while access to counsel is related to the opportunity to be heard).[47] Thus, as a starting point, this Article will examine what IAT mechanisms and procedures exist to guarantee an aggrieved staff member's access to an impartial judicial tribunal that provides him or her an opportunity for a public hearing. This includes rules and procedures

45. *See* Friedmann, *supra* note 40, at 281.

46. Wright, *supra* note 37, at 403, quoting EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 100 (1915).

47. Access to evidence and witnesses, while of paramount importance, is such an integral part of modern trial and dispute resolution procedure that an entire body of law and discovery practice has developed domestically, and perhaps internationally (a question for another day). In order to narrow the scope of this Article, discovery procedures regarding access to evidence and the questioning of witnesses will not be addressed. Thus, the overall fairness of the proceedings, measured by the equality of the parties before the court, will not be studied. The focus remains on the access of a single party, specifically an IO staff member, to an independent, impartial tribunal, for purposes of challenging an adverse administrative act or decision. This aligns nicely with an examination of GAL accountability and transparency principles.

ensuring the impartiality of tribunal judges, the independence and qualifications of judges (a professional tribunal), the allowance and conduct of public hearings, the issuance and publication of tribunal decisions, the potential for review of judicial decisions, and access to legal representation.

## V. Identifying Current IAT Due Process Mechanisms, Common Due Process Principles, and their Relationship to Global Administrative Law

To date, most GAL scholarship relating to IATs has focused on standards for the design of tribunals. It is prescriptive in nature, e.g., tribunals should be designed to function with independence and impartiality, or to promote legitimacy. For instance, Novak and Reinisch, after reviewing domestic case law, argue that certain "desirable standards" should guide IOs in the design of their administrative tribunals. Those desirable standards are closely related to GAL principles: independence and impartiality, which depend on the "mode of appointment or the duration of the mandate of the tribunal's members" and the "possibility to challenge the individual members of an administrative tribunal;" an employee complaints mechanism that "guarantees a judicial, organized procedure" – something established by law that guarantees access and the competence of the tribunal with public hearings and published decisions.[48] These standards must be maintained in order to uphold an IO's immunity from domestic judicial review.

Likewise, Kingsbury and Stewart suggest that GAL principles "can help to define, and to specify the criteria for securing institutional practices that can serve to promote legitimacy, such as participation, transparency, due process, reason-giving, review mechanisms, accountability, and respect for basic public law values including rule of law."[49] In arguing that the design and operation of IATs should be considered by references to issues of accountability, administration, publicness, and legal theory, Kingsbury and Stewart discussed the reformed appointment procedures for judges of the UNAT. They correctly identified procedures for appointment and concluded that those procedures progressed GAL

48. Novak & Reinisch, *Desirable Standards for Administrative Tribunals*, The Development and Effectiveness of International Administrative Law, 273-302, 301-02 (Olufemi Elias, ed,, 2012).

49. Kingsbury & Stewart, *supra* note 23, at 103.

aims by raising standards of transparency and accountability.[50] These procedures for appointment, such as judicial qualifications, also act as due process guarantees of judicial independence and impartiality.

Of note is Kingsbury and Stewart's inclusion of "due process," not specifically identified as a GAL principle but certainly a concept related to transparency, accountability, participation, and review. The phrase "due process" weaves in and out of GAL scholarship with some frequency, particularly in discussions about institutional mechanisms and human rights.[51] It is often left undefined in GAL literature though it seems to be cited as a collection of procedural principles affecting private parties.[52] Given the difficulty of actually defining "due process" or an international or universal conception thereof, coupled with the incorporation of the more basic GAL principles in the most common understandings of "due process," this loose usage is understandable. But, legally speaking, "due process" is more than procedures that ensure transparency, promote accountability, or encourage participation. Due process rights involve procedures that prevent the denial of justice and are nearly always invoked when action that will affect an individual's rights has or will be taken. It is best then to view due process as legally guaranteed procedures that safeguard certain normative principles in cases of adverse action affecting the rights of another. This conforms to Kingsbury and Stewart's liberal and rights-oriented normative conception of global administrative law: "administrative law protects the rights of individuals and other civil society actors, mainly through their participation in administrative procedures and through the availability of review to ensure legality of a decision."[53]

While a discussion of how IATs should be designed is important, the state of the law, or the robustness of GAL principles, can only be discerned by examining how the IATs are actually designed. In particular, a focus on due process procedures and mechanisms within various IAT regimes should reveal what institutional practices and procedures are provided to guarantee GAL principles. Thus, it is necessary to identify IAT rules and procedures that protect the due process rights of IO staff members, note common rules and key differences between the

50. *Id.* at 91-93.

51. *See, e.g.*, Kingsbury, *supra* note 14, at 444; Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EJIL 187, 190-195 (2006).

52. *See, e.g.*, Harlow, *supra* note 51, at 204-07; Kingsbury & Casini, *supra* note 14, at 332-34; Kingsbury, *supra* note 15, at 33-37.

53. Kingsbury & Stewart, *supra* note 23, at 87. Other normative conceptions are internal administrative accountability, focused on securing accountability of the subordinate/peripheral components of a regime to its legitimating center, and the promotion of democracy. *Id.* at 86-87.

tribunals, and analyze the relationship between those rules and GAL principles.

The IAT due process procedures identified below all guarantee in some fashion access to an impartial judicial tribunal and the opportunity for a public hearing. These rules and procedures include professional judicial qualifications, judicial oaths of office and codes of conduct, fixed term lengths, rules governing conflicts of interest, the requirement of reasoned decisions, public proceedings, open hearings, the publication of decisions and judgments, access to legal representation, and the opportunity for the appeal or review of judicial decisions. Once relevant rules and procedures are identified in the individual IATs, commonalities emerge and provide the foundation for a constructive analysis of IAT due process and GAL principles of transparency, participation, accountability, and review.

## VI. United Nations Office of Administration of Justice

Prior to 2009, the United Nations operated with an internal justice system that was inherited from the League of Nations. That system remained in place and unchanged for approximately sixty years. The system was based on "a protracted peer review system to produce non-binding recommendations subject to appeal to the United Nations Administrative Tribunal whose members did not need to be judges or even legally qualified."[54] In 1995, the Secretary-General proposed that the system be overhauled and transformed into a fully professional system. In 2005, the General Assembly instructed the Secretary-General to form a panel of external experts to consider a redesign of the internal justice system so that the new system would be "independent, transparent, effective, efficient, and adequately resourced and ensure managerial accountability."[55] In 2006, the panel submitted its report describing the old system as "outmoded, dysfunctional, ineffective and lacking in independence."[56] As a result, the General Assembly decided

> to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to

54. Internal Justice Council, Rep. of the Internal Justice Council on the Administration of Justice at the United Nations, A/65/304 (Aug. 16, 2010), at para. 1.

55. *Id.* at para. 8.

56. *Id.* at para. 1.

> ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.[57]

In 2008, the General Assembly approved the framework of a new, two-tiered, professional internal justice system composed of trial and appellate chambers (The United Nations Dispute Tribunal and Appeals Tribunal, respectively). The new system for handling internal disputes and disciplinary matters, which emphasizes the resolution of disputes through informal means before resorting to formal litigation, became operational on July 1, 2009.

### A. *United Nations Dispute Tribunal*

The Statute of the United Nations Dispute Tribunal (UNDT) comprehensively defines the qualifications for appointment to UNDT judicial office. All judges are appointed by the General Assembly on the recommendation of the Internal Justice Council (IJC).[58] To be eligible for appointment, candidates must be "of high moral character and impartial."[59] UNDT judges must have at least ten years of judicial experience and may be appointed to one non-renewable seven-year term.[60] Former judges of the United Nations Appeals Tribunal are ineligible for appointment to the UNDT.[61] Following the expiration of their term, UNDT judges are ineligible for any United Nations appointment other than a judicial post for a period of five years.[62] While in office, UNDT judges enjoy full independence and may only be removed by the General Assembly due to misconduct or incapacity.[63] Appointed judges must avoid conflicts of interest, and any judge that has, or appears to have a conflict, must recuse him or herself from relevant

57. G. A. Res. 61/261 (April 30, 2007).

58. G.A. Res. 63/253, Statute of the United Nations Dispute Tribunal, art. 4.2 (Dec. 24, 2008) [hereinafter UNDT Statute]. The Internal Justice Council, established by the General Assembly on March 1, 2008, consists of five members, including one staff representative, one management representative, and two external jurists, and is chaired by a distinguished jurist chosen by consensus of the four other members. The IJC provides its views and recommendations to the General Assembly for UNDT and UNAT vacancies, drafts the judicial code of conduct, and provides its views on the implementation of the UN system of justice. *See* G.A. Res. 62/228 (Feb. 6 2008).

59. UNDT Statute, *supra* note 58, art. 4.3. The UNDT Statute employs the term "judge" of the tribunal, not member.

60. *Id.* arts. 4.3, 4.4.

61. *Id.* art. 4.4.

62. *Id.* art. 4.6.

63. *Id.* arts. 4.8, 4.10.

cases.[64] The UNDT Rules of Procedure also address judicial conflicts of interest and recusal.[65]

Appointed judges must adhere to a judicial code of conduct drafted by the IJC and adopted by the General Assembly.[66] The code of conduct is based on principles of independence, impartiality, integrity, propriety, transparency, fairness in proceedings, and competence and diligence. Judges must uphold the independence and integrity of the internal justice system and "must act independently in the performance of their duties, free from any inappropriate influence, indictments, pressures, or threats, from any party or quarter."[67] Judges also have the positive obligation to "take all reasonable steps" to ensure that no person or party interferes with the Tribunals.[68] Furthermore, judicial independence must be accompanied by impartiality, meaning that the judges must act without "fear, favor, or prejudice" and avoid conflicts of interest and the appearance thereof.[69] Judges are also required to disclose "any matter that could reasonably be perceived to give rise to an application for recusal in a particular matter."[70] The code of conduct also underscores the importance of open proceedings, reasoned decisions, and a professional, engaged, and accountable tribunal.[71]

UNDT procedure provides for oral hearings that are open to the public unless exceptional circumstances require closure.[72] All judgments of the UNDT must be in writing and state the facts and law on which they are based.[73] Judgments are sent to the parties and published.[74] Parties may apply to the UNDT for revision or interpretation of a judgment, and judgments of the UNDT are reviewable by the United Nations Appeals Tribunal (UNAT).[75]

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64. *Id.* art. 4.9. A party to the case may also request recusal, and the decision is made by the President of the Dispute Tribunal.

65. G.A. Res. 64/119, Rules of Procedure of the United Nations Dispute Tribunal, arts. 27-28 (Dec. 16 2009) [hereinafter UNDT Rules of Procedure].

66. *See* G.A. Res. 66/106 (Dec. 9, 2011).

67. *Id.* at 1(a).

68. *Id.* at 1(b).

69. *Id.* at 2(a).

70. *Id.* at 2(e).

71. *See, e.g.*, *id.* at 5-7.

72. UNDT Statute, *supra* note 58, art. 9.3.

73. *Id.* art. 11.1.

74. *Id.* arts. 11.5, 11.6.

75. *Id.* arts 11.3, 12.1. *See also* UNDT Rules of Procedure, *supra* note 65, arts. 29-31; G.A. Res. 63/253, Statute of the United Nations Appeals Tribunal, art. 2 (March 17, 2009) [hereinafter UNAT Statute].

### B. *United Nations Appeals Tribunal*

Like UNDT judges, judges of the UNAT are appointed by the General Assembly on the recommendation of the IJC.[76] According to the provisions of the Statute of the UNAT, candidates must be "of high moral character and impartial," must have fifteen years of judicial experience, and are appointed to one, non-renewable, seven-year term.[77] A current or former judge of the UNDT is not eligible to serve on the UNAT.[78] After leaving office, a judge of the UNAT is not eligible for any UN appointment, except another judicial post, for a period of five years.[79] Like UNDT judges, UNAT judges enjoy full independence and may only be removed by the General Assembly in the case of misconduct or incapacity.[80] UNAT judges must recuse themselves from cases where there is a conflict of interest or the appearance of a conflict.[81] Finally, UNAT judges are subject to the same code of judicial conduct as UNDT judges.

The UNAT has competence to "hear and pass judgment on" judgments of the UNDT in cases where the UNDT has: exceeded its jurisdiction or competence; failed to exercise jurisdiction vested in it; erred on a question of law; committed an error in procedure, such as to affect the decision of the case; or erred on a question of fact, resulting in a manifestly unreasonable decision.[82] Oral hearings are not required and UNAT judges have discretion to determine their necessity.[83] If held, oral proceedings are public unless "exceptional circumstances" require privacy.[84] All judgments must be in writing and state the reasons, facts, and law on which they are based.[85] UNAT judgments are archived,

76. UNAT Statute, *supra* note 75, art. 3.2. The UNAT Statute also employs the term "judge."

77. *Id.* arts. 3.3, 3.4.

78. *Id.* art. 3.4.

79. *Id.* art. 3.6.

80. *Id.* art. 3.10.

81. *Id.* art. 3.9. A party to the case may also request recusal, and the decision is made by the President of the Appeals Tribunal. *Id. See, also,* Rules of Procedure of the United Nations Appeals Tribunal arts. 22, 23 (Dec. 16, 2009) [hereinafter UNAT Rules].

82. UNAT Statute, *supra* note 75, art. 3.9; UNDT Statute, *supra* note 58, art. 2.1. The UNAT may also review decisions of the United Nations Joint Staff Pension Board Standing Committee. *Id.* art. 2.5. In addition, it may review decisions of specialized agencies "brought into relationship with the United Nations" in accordance with Articles 57 and 63 of the Charter, or any other international organization or entity "established by treaty and participating in the common system of conditions of service" where a special agreement has been concluded between the organization and the Secretary-General accepting the jurisdiction of the UNAT. *Id.* art. 2.10.

83. *Id.* art. 8.3.

84. *Id.* art. 8.4.

85. *Id.* art. 10.3.

published to the parties, and generally made available for inspection and review.[86] While the UNAT is a tribunal of last resort, parties may make applications for the revision and interpretation of judgments per the Statute and Rules of Procedure.[87]

### C. *Office of Staff Legal Assistance*

The General Assembly determined that "professional legal assistance is critical for the effective and appropriate utilization of the available mechanism within the system of administration of justice."[88] As such, the General Assembly created the Office of Staff Legal Assistance (OSLA) as a professional legal staff tasked with assisting "staff members and their volunteer representatives in processing claims through the formal system of administration of justice."[89] UN staff members involved in litigation before the UNDT or UNAT have access to free legal assistance via OSLA. While part of the OAJ, OSLA functions independently and is staffed by qualified legal officers who provide confidential legal advice and may represent staff members before the OAJ tribunals. The OSLA code of conduct provides guidance to OSLA legal officers when dealing with client staff and contains provisions assuring the OSLA legal officer's competence and independence. The duty of OSLA counsel is primarily to the client staff member "within the framework of the Charter of the United Nations, and of its existing laws, the principles of justice, and legal ethics."[90] While all staff members (present and former) are entitled to the assistance of counsel, OSLA counsel may "decline to advise or act in any matter . . . ."[91] However, once counsel has agreed to act in a matter, he or she may only withdraw for "good cause."[92] Thus, all staff members have access to free, confidential legal advice with respect to their administrative employment claims. Should the legal officers in OSLA determine that the staff member has an actionable case, that staff member also has access to professional legal representation before the tribunals, free of charge.

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86. *Id.* arts. 8.7, 10.9.

87. *Id.* arts. 11.1, 11.3. *See also* UNAT Rules, *supra* note 81, arts. 24-26.

88. G.A. Res. 62/228 (6 February 2008), ¶ 12.

89. G.A. Res. 63/253, ¶ 12.

90. Office of Staff Legal Assistance, Guiding Principles of Conduct for Office of Staff Legal Assistance (OSLA) Affiliated Counsel in the United Nations 2 (2010) [hereinafter OSLA Guiding Principles], http://www.un.org/en/internaljustice/pdfs/osla_consel_code_of_conduct.pdf.

91. *Id.* at 10.

92. *Id.* at 11. "Good cause" includes, but is not limited to, a course of action inconsistent with counsel's duties under UN staff rules and regulations, the law and legal ethics, as well as failure of the client to cooperate and a breach of confidentiality or trust between client and counsel.

## VII. European Union Tribunals with Jurisdiction over Staff Member Claims

EU administrative law, with respect to staff claims, may be in a state of flux. The Civil Service Tribunal (CST), originally established in November 2004[93] with jurisdiction to hear EU staff member claims as the court of first instance, was dissolved in September 2016.[94] The EU General Court now has jurisdiction over pending CST cases and will act as the court of first instance for staff claims going forward. The restructuring seems to result from an increase in litigation and the length of CST proceedings, and the preferred solution was to expand the number of judges on the General Court instead of retaining a specialized tribunal dedicated to staff claims.[95] In fact, the primary impetus may have been the desire to remedy perceived problems with the General Court rather than modify the CST.[96] Given the transition, this article will examine the former procedures of the CST for indicia of international due process standards, and review the similar General Court rules and procedures to the extent that new GC staff claim procedures have been proposed or codified.

### A. *Rules of Civil Service Tribunal*

Judges of the CST were appointed by unanimous decision of the European Council after consultation of a committee of seven independent persons. The committee was to give its "opinion on the candidates' suitability" to perform the duties of a judge.[97] Criteria for judges was found in Article 225a of the Treaty of the European Community, requiring judges "whose independence is beyond doubt and who possess the ability required for appointment to judicial office."[98]

93. Council Decision 2004/752/EC, 2004 O.J. (L333/7).

94. Commission Regulation 2016/1192, 2016 O.J. (L 200/137).

95. *See History of the European Civil Service Tribunal*, Eur. Court of Justice, http://curia.europa.eu/jcms/jcms/T5_5230/en/ (last visited Sept. 23, 2018). A more substantive analysis of IATs and whether the due process guarantees function as intended should investigate and examine the reasons for the dissolution of the CST.

96. *See* Steve Peers, *Reform of the EU's Court System: Why a more accountable – not a larger – Court is the way forward*, EU Law Analysis (June 16, 2015), http://eulawanalysis.blogspot.com/2015/06/reform-of-eus-court-system-why-more.html.

97. The committee was comprised of seven former members of the Court of Justice, the Court of First Instance, and "lawyers of recognized competence." Council Decision 2005/49/EC, 2005 O.J. (L 21).

98. Consolidated Version of the Treaty Establishing the European Community, art. 225a, 2002 O.J. (OJ C 325) 33.

CST judges were appointed for six-year terms.[99]

The principle of judicial impartiality was confirmed by the oath of office and accompanying signed declaration required by the CST Rules of Procedure: "I swear that I will perform my duties impartially and conscientiously, I swear that I will preserve the secrecy of the deliberations of the Court."[100] Though deliberations were secret, each CST judge taking part in deliberations was required to state his opinion and the reasons for it.[101] Each judgment of the CST was delivered in open court, contained the names of the participating judges, a summary of the facts of the case, and the grounds for the decision of the Tribunal.[102] All parties were required to be served with certified copies of the judgment by the CST Registrar.[103] Likewise, copies of all orders were served on all parties and "reasoned" orders were required to contain a summary of the underlying facts and grounds for the decision.[104]

CST parties, while required to have legal representatives, were entitled to legal aid to cover, "in whole or in part, the costs involved in legal assistance and representation by a lawyer in proceedings before the Tribunal."[105] CST procedure required oral hearings, with opportunity for the parties (through their representatives) to be heard and engage the Tribunal.[106] Minutes were kept for each hearing and the parties were provided access.[107] Rights of appeal to the General Court on points of law were guaranteed by the Statute of the Court of Justice of the European Union.[108]

### B. *Rules of the General Court in Staff Proceedings*

Similar procedures have been preserved in current practice before the General Court, which now acts as the court of first instance in

99. Paul Mahoney, *Activity of the Civil Service Tribunal in 2005*, at 159, (citing arts. 2(2) and (3) of Annex I to the Statute of the Court of Justice), https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/fp2005_2008-09-29_11-48-37_2.pdf.

100. Rules of Procedure of the European Civil Service Tribunal, art. 3, 2007 O.J. (L 225) 1 (amendments omitted).

101. *Id.* art. 27.4.

102. *Id.* arts. 79-80.

103. *Id.* art. 80.2.

104. *Id.* arts. 81.

105. *Id.* art. 95-98.

106. *Id.* arts. 48.1, 53.

107. *Id.* art. 53.

108. Consolidated Version of the Statute of the Court of Justice of the European Union, Annex I, arts. 9-12 (2016), https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf.

employment proceedings.[109] The Treaty on the Functioning of the European Union requires judicial independence, mandating that judges of the General Court "shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office."[110] Each judge is appointed for a three-year term and an independent panel is employed "to give an opinion on candidates' suitability to perform the duties . . . ."[111] Appointed judges must abide by the Code of Conduct adopted by the Court of Justice of the European Union.[112] Judges must conduct themselves with independence, impartiality, and integrity, and the provisions of the code require the disclosure of personal interests and conflicts of interest.[113] A judge may be removed from office "if, in the unanimous opinion of the Judges and Advocates General of the Court of Justice, he no longer fulfills the requisite conditions or meets the obligations arising from his office."[114]

Judges, once appointed, must provide reasoned decisions pursuant to the Rules of the General Court; each judgment and order must include a summary of the facts and the grounds for the decision.[115] The reasoned decisions of General Court judges may be challenged or reviewed according to certain procedures. The Rules of Procedure provide that parties may move for the rectification, interpretation, or revision of judgments and orders.[116] These rules constitute written procedures for international institutional review of orders and judgments by the General Court itself. For instance, Article 164 provides the General Court with the opportunity to rectify clerical errors or "obvious mistakes" with input from the parties.[117] Furthermore, these procedures reduce the potential for ambiguity or confusion when interpreting a judgment or order. If the "meaning or scope of a judgment or order is in doubt," the General Court is required to "construe" it on the

109. Consolidated Version of the Treaty on the Functioning of the European Union, art. 256, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

110. *Id.* art. 254. Again, the term "judges" is employed.

111. *Id.* art. 255. The panel consists of former members of the Court of Justice and the General Court, as well as members of national supreme courts and qualified lawyers.

112. Court of Justice of the European Union, Code of Conduct for Members and Former Members of the Court of Justice of the European Union, 2016 O.J. (C 483) 1.

113. *Id.*

114. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 6.

115. Rules of Procedure of the General Court, arts. 117, 119, 2015 O.J. (L 105) 1.

116. *Id.* arts. 164, 168, 169.

117. *Id.* art. 164.

application of any party or institution of the Union establishing an interest in the judgment or order, while also providing an opportunity for each party to submit written observations regarding the proper interpretation.[118] Finally, the Rules of Procedure provide that a decision of the court may be revised "on discovery of a fact which is of such a nature as to be a decisive factor, and which . . . was unknown to the General Court and to the party claiming revision."[119] All parties to the decision are also provided with the opportunity to submit written observations regarding the substance of the application for revision.[120] Finally, as the current court of first instance for staff decisions, final decisions of the General Court are appealable to the Court of Justice on points of law.[121]

General Court procedure requires oral hearings, provided for by rule.[122] Parties are only allowed to address the tribunal through their representative.[123] Like the parties before the former CST, parties before the General Court have access to legal aid. Article 146 of the Rules of Procedure provides that any person "who, because of his financial situation is wholly or partly unable to meet the costs of proceedings shall be entitled to legal aid."[124] The rules address both the application process for legal aid, and the court's decision to grant or deny aid.[125]

### C. *Rules of the Court of Justice in Staff Proceedings*

Pursuant to the Treaty on the Functioning of the European Union, judges of the Court of Justice shall be "chosen from persons whose independence is beyond doubt and who possess the qualifications for appointment to highest judicial office in their respective countries or who are juriconsuls of recognized competence" and are appointed to six-year terms.[126] Again, an Article 255 independent panel is employed "to give an opinion on candidates' suitability to perform the duties" of office.[127] The judges are also required to take an oath to perform the duties of office impartially and conscientiously and must adhere to the

118. *Id.* art. 168.1, 168.4, 168.5.

119. *Id.* art. 169.1.

120. *Id.* art. 169.4, 169.5.

121. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 56 (2016). *See* TFEU arts. 256 and 270 for staff decision jurisdiction.

122. Rules of Procedure of the General Court of 4 March 2015, *supra* note 115, art. 106.1.

123. *Id.* art. 110.2.

124. *Id.* art. 146.1

125. *Id.* arts. 147, 148.

126. TFEU art. 253.

127. *Id.* art. 255.

Code of Conduct for Members and former Members of the Court of Justice of the European Union.[128]

The Court of Justice reviews final decisions of the General Court in staff litigation cases for errors of law.[129] Statutorily, Court of Justice procedure consists of two parts, written and oral.[130] Oral proceedings involve a public hearing (unless the court decides otherwise for "serious reasons"), while written procedures require the communication of case documents and pleadings to the parties.[131] In cases involving an appeal against a decision of the General Court (such as staff member employment cases), the court may dispense with the oral hearing if it feels the written pleadings are sufficient to render a decision.[132] Judgments of the court must "state the reasons on which they are based" and must contain the names of the judges who took part in the deliberations.[133] If the meaning or scope of a judgment is in doubt, the Court of Justice may construe or interpret the judgment on application of any party to the judgment or institution of the EU establishing an interest.[134] Applications for the revision of judgments are allowed "only on discovery of a fact which is of such a nature as to be a decisive factor" which was unknown to the applicant and the court at the time the judgment was given.[135]

## VIII. World Bank Administrative Tribunal

The World Bank Administrative Tribunal (WBAT) was established by the World Bank Board of Governors in 1980 and was designed to settle disputes involving World Bank staff matters. Prior to the creation of the tribunal, World Bank employees were provided with an elementary

128. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 2; Code of Conduct for Members and Former Members of the Court of Justice of the European Union, *supra* note 112.

129. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 56; TFEU art. 270.

130. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 20.

131. *Id.* arts. 20, 31.

132. *Id.* art. 59; Consolidated Version of the Rules of Procedure of the Court of Justice, 2012 O.J. (L 265), as amended on 18 June 2013, 2013 O.J. (L 173) 65, and on 19 July 2016, 2016 O.J. (L 217) 69.

133. Consolidated Version of the Rules of Procedure of the Court of Justice, *supra* note 132, art. 36; Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 36.

134. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, arts. 43, 158

135. *Id.* art. 159.

appeals procedure within the Bank that gave staff members the right to challenge management decisions before an Appeal Committee.[136] Committee members were not professional jurists and were instead chosen from among the staff. The committee had no authority to overturn decisions—its competence was limited to making recommendations in cases of discriminatory action to certain Bank officers with the sole right to render a final decision.[137] Under this system, there was little recourse available to staff members adversely affected by administrative decisions. This situation was remedied in 1980 with the creation of the WBAT, which undoubtedly improves Bank staff members' access to an independent, impartial tribunal.

The WBAT is a statutory judicial body that functions independently of the World Bank management.[138] According to the WBAT Statute, the "independence of the Tribunal shall be guaranteed and respected" at all times.[139] Tribunal members must be "of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence in relevant fields such as employment relations, international civil service and international organization administration."[140] Thus a candidate need not be a judge to be qualified to sit on the tribunal. However, if not qualified for appointment to high judicial office, an eligible candidate must be a legal expert with relevant professional experience. Members are appointed to five-year terms with the possibility of one renewal, and current and former World Bank staff are ineligible.[141] The WBAT Statute and Rules do not address judicial conflicts of interest or recusal.

The Statute and Rules of the WBAT provide for oral hearings and reasoned decisions. Oral hearings are at the discretion of the tribunal but, if held, the hearings must be public unless "exceptional circumstances" require private hearings.[142] Litigants may address the tribunal directly or through a representative, but access to counsel is not

136. C.F. Amerasinghe, THE WORLD BANK ADMINISTRATIVE TRIBUNAL, 31 INT'L & COMP. L. Q. 748, 749 (1982).

137. *Id.*

138. Statute of the World Bank Administrative Tribunal, art. I.2. (as amended 18, June, 2009), https://webapps.worldbank.org/sites/wbat/Pages/Statute.aspx/.

139. *Id.*

140. *Id.* art. IV.1. The WBAT Statute employs the term "members" not judges, though candidates must have professional legal backgrounds.

141. *Id.* art. IV.1, IV.3.

142. *Id.* art. IX. *See also* Rules of the World Bank Administrative Tribunal, Rule 17, https://webapps.worldbank.org/sites/wbat/Pages/Rules.aspx/ (last visited Sept. 25, 2018).

guaranteed in cases of indigence.[143] While all WBAT judgments are final and no right of appeal to another independent tribunal exists, all judgments must state the reasons on which they are based.[144] Requests to revise a judgment are permitted "in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal" so long as the fact was unknown to the requesting party and the Tribunal at the time the judgment was delivered.[145] All judgments must be archived, delivered to the parties, and made available to interested persons.[146]

## IX. International Monetary Fund Administrative Tribunal

The International Monetary Fund Administrative Tribunal (IMFAT) was established in 1994 and serves as an independent judicial forum with jurisdiction to hear IMF staff challenges against legality of any individual or regulatory decision of the IMF affecting the staff member.[147] Members of the IMFAT must possess qualifications for appointment to high judicial office or be juriconsultants of recognized competence.[148] Like the WBAT, IMFAT candidates need not be judges but must be recognized legal experts. Members are appointed to four-year terms with the option for renewal for two additional terms.[149] Members are completely independent in the exercise of their duties and may not have any prior or present employment relationship with IMF.[150] Serving judges are not eligible for IMF employment at the end of their terms.[151] Any member of the IMFAT with a conflict of interest in the case before the tribunal must recuse him or herself.[152] Members of the tribunal must also adhere to the IMFAT's Code of Judicial Conduct and its provisions on independence, impartiality, integrity, propriety, and competence and diligence.[153] The code requires members to act with independence and "take all reasonable steps" to ensure no one

143. Rules of the World Bank Administrative Tribunal, *supra* note 142, Rule 16.1.

144. Statute of the World Bank Administrative Tribunal, *supra* note 138, art. XI.

145. *Id.* art. XIII.

146. *Id.* art. XIV; Rules of the World Bank Administrative Tribunal, *supra* note 142, Rule 30.

147. Statute of the Administrative Tribunal of the International Monetary Fund, art. II, https://www.imf.org/external/imfat/statute.htm/ (last visited Sept. 25, 2018).

148. *Id.* art. VII. Again, the Statute uses the term "member" not "judge."

149. *Id.*

150. *Id.* art. VII.

151. *Id.* art. VIII.

152. *Id.* art. VII.3.

153. *See* International Monetary Fund Administrative Tribunal, *Code of Judicial Conduct* (2012), https://www.imf.org/external/imfat/pdf/IMFATConduct.pdf.

interferes with the work of the IMFAT.[154] Other provisions require that members act without bias, conduct themselves in a professional manner, avoid conflicts of interest (or the appearance of favoritism or partiality), and observe and uphold the law.[155]

The tribunal decides in each case whether oral proceedings are warranted.[156] However, all oral proceedings must be public and open to interested persons unless the tribunal "decides exceptional circumstances require that they be held in private."[157] Judgments of the IMFAT must be made in writing and state the reasons on which they are based.[158] In addition, judgments must be published and made available to all interested parties.[159] IMFAT judgments are final and without appeal, but the statute and rules allow for applications for revision and interpretation.[160] In addition, the tribunal "may interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error."[161] The commentary to the IMFAT rules make clear that the tribunal may correct judgments on its own initiative or by application of the parties.[162] Furthermore, the commentary indicates that the IMFAT should be able to interpret its own judgments upon request of the party if the terms were in some respect unclear or incomplete.[163]

With respect to access to counsel, the Statute of the IMFAT provides that any party "may be assisted in the proceedings by counsel of his choice . . . ."[164] However, staff members are responsible for the costs of legal representation.[165] In certain cases, the tribunal may award costs to

154. *Id.*

155. *Id.*

156. Statute of the Administrative Tribunal of the International Monetary Fund, *supra* note 147, art. XII.

157. *Id.*

158. *Id.* art. XIII.3.

159. *Id.* art. XVIII; Rules of Procedure of the Administrative Tribunal of the International Monetary Fund, art. XVIII, https://www.imf.org/external/imfat/rules.htm/ (last visited Sept. 25, 2018).

160. Rules of Procedure of the Administrative Tribunal of the International Monetary Fund, *supra* note 159, arts. XIX, XX.

161. Statute of the Administrative Tribunal of the International Monetary Fund, *supra* note 147, art. XVII.

162. Commentary on the Statute of the Administrative Tribunal of the International Monetary Fund, art. XVII, https://www.imf.org/external/imfat/report.htm#commentary_XVIII/ (last visited Sept. 25, 2018). IMFAT Rules of Procedure, art. XVII comment.

163. *Id.* The commentary refers to similar codified powers of the European Court of Justice.

164. Statute of the Administrative Tribunal of the International Monetary Fund, *supra* note 147, art. X.3.

165. *Id.*

a prevailing staff member, including the cost of counsel.[166] However, in cases where the staff member does not prevail and certain circumstances are present (e.g., the claim was brought in bad faith or with the intent to harass the IMF, its officers, or employees) the tribunal may assess costs against the staff member, requiring him or her to reimburse the IMF for the costs of defending the action.[167] There is no provision in the IMFAT Statute or Rules that provides for legal aid to staff members, indigent or otherwise.

## X. International Labour Organization Administrative Tribunal

The International Labour Organization Administrative Tribunal (ILOAT) was established on October 9, 1946, "in the frame of the International Labour Conference" and replaced the Administrative Tribunal of the League of Nations. With the winding up of the League of Nations, its administrative tribunal was transferred to the International Labour Organization when the ILO became a specialized agency of the UN (becoming the ILO Administrative Tribunal).[168]

International organization staff complaints are receivable by the ILOAT if the IO meets certain conditions. First, the IO must be "intergovernmental in character."[169] If not intergovernmental in character, the IO must fulfill the following conditions: be clearly international in character; not be required to apply national law in its relations with its officials; enjoy immunity from legal process as evidenced in a headquarters agreement with the host country; be "endowed with functions of a permanent nature at the international level"; and be offered "sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments."[170]

ILOAT judges are appointed by the International Labour Conference to three-year terms.[171] Unlike the other primary administrative tribunals, the ILOAT Statute and Rules are silent on judicial

166. *Id.* art. XIV.4.

167. *Id.* art. XV.

168. For additional history of the ILOAT, see https://www.ilo.org/tribunal/about-us/lang–en/index.htm. *See also* Frank Gutteridge, "The ILO Administrative Tribunal," International Administration: Law and Mangement Practices in International Organisations (Chris De Cooker, ed., 1990).

169. Statute and Rules of the Administrative Tribunal of the International Labour Organization, as amended, "Annex to the Statute of the Administrative Tribunal" (Oct. 9, 1946).

170. *Id.*

171. *Id.* art. III, ¶ 2 (the Statute uses the term "judge").

qualifications, conflicts of interest, and recusal.[172] With respect to hearings, the ILOAT decides whether to hold an oral hearing in any given case and whether that hearing will be public or *in camera*.[173] ILOAT judgments are final and without appeal, though the reasons for a judgment must be stated.[174] Judgments must be published, communicated to the parties, archived, and made available for inspection by any "person concerned."[175] Parties may apply to the tribunal for review, interpretation, or execution of a judgment.[176] Parties before the tribunal may plead their own case or employ a representative.[177] No accommodations are made for those that cannot afford legal representation.

## XI. Identifying Common Due Process Procedures, and Key Differences, in International Administrative Tribunals[178]

The due process afforded to IO staff members begins with access to the tribunal as a dispute settlement mechanism.[179] Each IO has established a professional tribunal with specific jurisdiction to review staff complaints. The IATs themselves are due process mechanisms, created independently from the administrative bodies of their respective IOs, and used to safeguard the rights of employees by providing an independent check on adverse administrative decisions. More telling are the accompanying rules and procedures. While access to a court is a principle of due process, the quality of the court is equally important. Therefore, procedures that ensure the right to be heard by an impartial tribunal, one that gives reasoned decisions with an opportunity for

172. For a general discussion of the ILOAT and standards of an independent and impartial judiciary, see Ian Seiderman, *ILOAT Reform: Does the ILO Administrative Tribunal Meet the Standards of an Independent and Impartial Judiciary?* International Labour Organization (Nov. 12, 2002), http://www.ilo.org/public/english/staffun/info/iloat/seiderman.htm.

173. Statute and Rules of the Administrative Tribunal of the International Labour Organization, *supra* note 169, art. V.

174. *Id.* art. VI, ¶ 1-2.

175. *Id.* art. VI, ¶ 3.

176. *Id.* art. VI, ¶ 1.

177. Statute and Rules of the Administrative Tribunal of the International Labour Organization, art. V.

178. See Chart 1 on page 44 for a quick visual reference to common due process procedures across IATs.

179. It is important to note that all the reviewed IOs may be considered "Western" and are arguably dominated and influenced by Western states and their interests. Expanding the scope of this review beyond these core Western IOs and including organizations such as the Administrative Tribunal of the African Development Bank, African Union and the Asian Development Bank, is a recommendation for further research.

review, function as the true guarantees of due process in the IAT system.

### A. *Procedures Guaranteeing an Independent, Impartial Tribunal*

An impartial tribunal is a core principle of due process. Several procedures in the statutes and rules of the IATs above work to safeguard the impartiality of the tribunal and its members. Judicial oaths and rules requiring that tribunal members behave impartially, as well as terms of fixed length, are obvious and basic methods of guaranteeing adherence to the principle of impartiality. These methods, at the very least, pay lip service to the principle of impartiality, with a promise to review cases without favor or prejudice, and an opportunity to remove a biased or compromised member at the end of the term. However, these are minimal procedural guarantees. These methods may be heightened by the imposition of a code of judicial conduct. The UN, EU, and IMFAT have implemented such codes, which go beyond promises of independence and impartiality and require tribunal members to disclose conflicts of interest and, in some cases, recuse themselves. These codes, particularly the EU code, are real procedural safeguards that seek to guarantee judicial independence and impartiality.

A more thorough procedural safeguard is to require specific qualifications for service on the tribunal and develop procedures for the evaluation of those qualifications. Qualifications may be both positive and negative: for instance, an applicant must have a certain number of years of judicial experience, or be a qualified lawyer in his or her place of nationality, and must not be a former tribunal member or IO staff member. Particular professional requirements narrow the field of applicants and enhance the probability that the tribunal will be composed of experienced professionals who value impartiality and can act independently. This was a primary motivation for the UN's move away from the old administrative tribunal and to the reformed OAJ tribunals. To guarantee impartiality, the UN tribunal statutes impose strict professional qualifications, require impartiality, and impose term limits. In addition, those qualifications are reviewed by two separate bodies, the IJC (which reviews all applicants and makes recommendations), and the General Assembly (which makes the final appointment decision). Furthermore, OAJ tribunal members are removable during their terms by the General Assembly in cases of misconduct or incapacity.

Similar procedural safeguards are present in the EU tribunals (defined qualifications, defined terms, use of an independent panel to

review applicants' qualifications), the WBAT (defined qualifications and terms, term limits), and the IMFAT (defined qualifications and terms, term limits). Only the ILOAT, the oldest tribunal, does not have defined qualifications. While ILOAT judges serve three-year terms, its statute and rules are silent on additional term limits and whether former judges may be employed by the ILOAT in some other capacity following the expiration of their term.

Guarantees of judicial impartiality do not end with judicial qualifications. These safeguards operate in the absence of pending litigation. However, tribunal rules of procedure may also promote impartiality by addressing conflicts of interest and judicial recusal (much like judicial codes of conduct). In any given case, some tribunal judges are required by rule to disclose conflicts of interest, and, in certain circumstances, recuse themselves from the case.[180] Other procedural rules allow for litigants to move for recusal based on a disclosed or apparent conflict.[181] Overall, procedures designed to ensure impartiality are common to all IATs reviewed. Some procedures may be more robust, or more developed than others. Regardless, access to an impartial, independent tribunal is a core component of due process, particularly in the context of IO employment disputes.

### B. *Procedures Requiring Tribunals to Issue Reasoned Decisions*

Reasoned decisions function as a mechanism for preserving judicial impartiality and independence. When judges are required to state in writing both the facts and law that support their decisions, they are required to commit to a reasoning that is open to interpretation, attack, revision, and often, review. A statement of reasons underlying a judgment also curbs arbitrary decision-making by the tribunal. Some rationale must serve as the basis for tribunal decisions. That rationale must be communicated to the affected parties, thus creating the opportunity to question those decisions. If those decisions are based on a biased interpretation of the facts or a reading of the law that cannot withstand scrutiny, it suggests that the tribunal may have been improperly influenced or its impartiality compromised. The statute of every reviewed IAT requires its respective tribunal to issue reasoned decisions. If

180. *See* Code of Conduct for Members and Former Members of the Court of Justice of the European Union, *supra* note 112, art. 5; G.A. Res. 64/119, Rules of Procedure of the United Nations Dispute Tribunal, arts. 22-23 (Dec. 16, 2009); G.A. Res. 63/253, Statute of the U.N. Appeals Tribunal, art. 3, ¶ 9 (Dec. 24, 2008).

181. *See* Rules of Procedure of the United Nations Dispute Tribunal, *supra* note 180, arts. 27-28.

international due process is made up of procedures that promote fairness and prevent the denial of justice, the procedural requirement of reasoned decisions may very well be a core component.

### C. *Procedures Allowing for Public Proceedings*

Each IAT has some procedure or rule that preserves the public nature of the proceedings. This does not mean that each IAT will hold public hearings or that its decision-making is open to the public. Instead, final decisions of the tribunal are published, archived, and may be accessed by the public (or at least "interested" persons), but the deliberations that lead to those decisions remain confidential. When it comes to public proceedings, due process principles are not the only concern. Ensuring the confidentiality of deliberations is a means of preserving judicial independence— judges can review and consider the evidence in private (after the parties have had the opportunity to be heard, either orally or in writing), free from external influence, and need not worry that statements made during deliberations will be used against them or their colleagues in the future.[182] Of course, when a decision is made, it should be reasoned and well-founded, and that decision should be subject to public review. The balancing of competing due process principles leads to a system of confidential deliberations and publicly-accessible, reasoned decisions.

The other dimension of public proceedings is open hearings. Here all reviewed IATs defer to the discretion of the tribunal. Only the European Court of Justice statute lists oral hearings as part of the court's procedure.[183] However, when the matter involves an appeal against a decision of the General Court, the court may dispense with the oral procedure in accordance with the Rules of Procedure if it considers the written pleadings sufficient for it to give a ruling.[184] Those oral hearings must be public unless the Court decides that "serious reasons" require confidentiality.[185] Thus, in staff member employment cases, which, by necessity, are appeals from decisions of the General

182. Statute of the Administrative Tribunal of the International Monetary Fund, *supra* note 147, art. XIIII (4); Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 2.

183. Court procedure consists of two parts, written and oral. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 20.

184. *Id.* art. 59; Consolidated Version of the Rules of Procedure of the Court of Justice, *supra* note 132, art. 69.

185. Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 31.

Court, the Court of Justice has the discretion to dispense with the otherwise procedurally required oral hearing.

All other tribunals may hold oral hearings at the discretion of the tribunal. However, apart from the ILOAT, those oral hearings must be public unless, in view of the tribunal, exceptional circumstances require closure. Thus, the discretion of the tribunals to close the hearings is statutorily limited and requires a specific finding necessitating closure. Only the ILOAT operates with unlimited judicial discretion, deciding both whether to hold oral hearings and whether those hearings should be public.

Based on this evidence, it is questionable whether oral hearings are a core component of due process. IAT procedures do not provide for or protect any absolute right to oral hearings. At best, if oral hearings are warranted, IAT procedure presumes that those hearings should be public. However, that presumption is rebuttable and subject to the decision of the tribunal, with an evidentiary threshold that moves from absolute discretion to exceptional circumstances.

### D. *Procedures Allowing for Legal Representation*

Access to legal representation, while important, is not a foundational due process principle evident across IATs. While the right to counsel before the tribunals exists, it is not guaranteed. All reviewed tribunals allow the staff members to employ a legal representative during the proceedings, and the EU tribunals require counsel (litigants may not appear *pro se*). In cases where staff members wish to have legal representation but cannot afford it, some may be entitled to assistance or legal aid in the event of a determination of indigence. Other tribunals, like the ILOAT and the IMFAT, provide no legal aid at all. The UN OAJ, the most recent and well-developed system, does provide for access to professional legal advice. It remains the only IO that ensures free access to counsel (via OSLA) both before and during litigation and without a determination of indigence. Staff members may receive legal advice in assessing, planning, and preparing their case free of charge. However, even OSLA may refuse representation, particularly if the staff member's case lacks merit.[186]

A distinction arises between a staff member's right to counsel and the obligation of the IO or IAT to ensure that counsel is provided. In

186. This is a good thing. Lawyers should not be forced to accept and argue claims that lack a meritorious foundation or are brought by the staff member in bad faith or with the intent to harass. The ultimate point is that, when lawyers' own ethical obligations are considered, the employee does not have an absolute right to counsel in any case.

each case, the staff member has the right to obtain counsel. This is as close to absolute as the right to representation comes; an aggrieved employee may be represented by a lawyer before the tribunal if he or she so chooses. But, the obligation is on the employee to obtain counsel; the tribunal will not necessarily provide one, because lawyers cannot be forced to represent clients with fraudulent or bad faith claims. Thus, the due process consideration is allowing the staff member to obtain counsel, not obliging the tribunal to secure counsel on the staff member's behalf. This limited principle of the right to legal representation, while perhaps not considered a core principle in international due process, is nonetheless a principle common to all reviewed IATs.

### E. *Procedures Allowing for Additional Review or Right of Appeal*

When evaluating the relationship between due process principles and the review of judicial decisions, the right of appeal cannot be the sole consideration. There necessarily must be a court of last resort, otherwise no decision would ever be final. However, due process principles of impartiality, access, and fairness may be promoted by introducing additional procedures that provide staff members with the right to be heard after a decision is rendered. While two-tiered systems employed by the UN (the UNDT and the UNAT) and the EU (formerly the CST, now the General Court and Court of Justice), are structured around this fundamental principle, other procedures may be introduced in courts of last instance to provide some measure of judicial review. Here the procedures regarding the interpretation, review, and revision of judgments function as a due process mechanism.

The procedural rules of each reviewed tribunal (and in some cases the statutes themselves) provide for the revision of decisions. Revision differs from interpretation because, procedurally, it requires the discovery of a new dispositive fact that was unknown to the tribunal and the moving party at the time of the decision.[187] Thus parties have the opportunity to present tribunals with new evidence that may alter the

187. *See* Statute of the World Bank Administrative Tribunal, *supra* note 138, art. XIII, ¶ 1; Rules of Procedure of the Administrative Tribunal of the International Monetary Fund, *supra* note 159, art. XIX; UNDT Rules of Procedure, *supra* note 65, art. 29; UNAT Rules, *supra* note 81, art. 24; Rules of Procedure of the General Court of 4 March 2015, *supra* note 115, art. 169; Consolidated Version of the Rules of Procedure of the Court of Justice, *supra* note 132, art. 159; Consolidated Version of the Statute of the Court of Justice of the European Union, *supra* note 108, art. 44.

| | UN | EU | WB | IMF | ILO |
|---|---|---|---|---|---|
| *Independent/Impartial Tribunal Procedures* | ✓ | ✓ | ✓ | ✓ | X |
| *Reasoned Decisions* | ✓ | ✓ | ✓ | ✓ | ✓ |
| *Public Proceedings* | ✓ | ✓ | ✓ | ✓ | X |
| *Legal Representation* | ✓ | ✓ | X | X | X |
| *Right of Review* | ✓ | ✓ | ✓ | ✓ | ✓ |
| *Right of Appeal* | ✓ | ✓ | X | X | X |

This chart should really follow the section (preceding Section XII) and not come two paragraphs before its conclusion. It also appears that the bottom border is cut off.

decision or its reasoning, and the tribunal can review and revise its own decisions considering new evidence. This limited judicial review safeguards access to the tribunal, as well as principles of fairness and the opportunity to be heard.

Interpretation, on the other hand, requires the ruling court to construe its own decision due to questions or doubt about the meaning and scope of the judgment. The rules of procedure of the UN tribunals, the EU tribunals, the IMFAT, and the ILOAT all provide for applications for interpretation of judgments and decisions. Again, this safeguards access, fairness, and the opportunity to be heard. In the event of confusing decisions or conflicting interpretation, parties are provided

with one final procedural opportunity to raise limited issues about the scope and content of the tribunal's decision.[188]

## XII. IAT Due Process and Global Administrative Law Principles

The governing statutes and rules of procedure of the administrative tribunals of the UN, EU, IMF, WB, and ILO contain provisions that promote and guarantee the GAL principles of transparency, accountability, participation, and review. The creation of the tribunals themselves suggest that accountability, participation, and review are important operating principles within international organizations. These global organizations, each one an actor in global governance, have taken affirmative measures to provide a mechanism of administrative review and dispute resolution to their staff members, and the design of these mechanisms is informed by certain normative principles.

Transparency serves as the foundation for rules and procedures relating to judicial qualifications and appointments by ensuring IAT judges are able to act independently and impartially. Normative principles of transparency, accountability, and review are at work when judges issue published, reasoned decisions that are publicly accessible. Transparency, accountability, and participation encourage the use of public hearings, allowing direct, real-time engagement with judicial decision-making and the administrative process. Likewise, participation and accountability are encouraged and protected by rules promoting access to legal representation, thus ensuring that litigants have the means to effectively participate in tribunal matters while introducing experienced, professional counsel into the proceedings. Finally, principles of accountability and review animate rules that provide a mechanism for some review of final decisions, or even an appeal to a second-tier chamber.

Simply because existing mechanisms within IATs promote these normative principles does not mean those mechanisms evidence some uniform international law or support the existence of GAL. That said, common procedures based on common norms across disparate judicial mechanisms suggest the existence of some shared legal premise. Here, due process procedures provide that collective foundation. It is generally agreed that due process is a legal concept, though what constitutes due process is not clearly defined. Based on the earlier review of general principles of law and the procedures common to the reviewed

188. The argument is easily made that a right of revision and interpretation is an inherent power of any court. However, this paper is concerned with codified rules and procedures that reflect the operation of certain principles, not inherent powers.

IATs, any definition of due process should include access to an impartial, independent tribunal that issues reasoned decisions, and the right to obtain counsel at the party's expense. Depending upon the context, i.e., civil, criminal, or administrative, the definition may expand to public hearings or legal representation. However, in the administrative regime, public proceedings, the provision of legal representation, and appellate review are not essential components. Granted, there is mounting evidence of the importance of public proceedings given that the statutes of all reviewed IATs provide for public oral hearings in some fashion, though by and large, those hearings occurred within the limited discretion of the tribunal.[189] Likewise, all tribunals recognize the right of access to counsel, but not the obligation to see that counsel is provided. Thus, at a minimum, the administrative law of due process is comprised of the rules and procedures that ensure access, impartiality, independence, and reasoned decisions. So, due process, being context dependent, is not uniform. Then how should international lawyers characterize these collective procedures and norms?

Perhaps the field of GAL provides the answer. If global administrative law is a combination of methods, principles, and practices that "promote or otherwise affect the accountability of global administrative bodies," it seems that due process is an integral part of that legal framework. In fact, if GAL is composed of administrative rules and procedures whose function is to ensure adequate standards of transparency, accountability, participation, and review, GAL sounds like an administrative characterization of due process. However, this is too narrow a view of GAL, its normative principles, and the operation of IATs in the global administrative space.

However, GAL is concerned with widespread global governance. It operates in the global administrative space between international law and domestic administrative law and applies to the actions of intergovernmental regulatory bodies, informal intergovernmental regulatory networks, regulatory networks of certain national governments, and public-private or private transnational bodies. Through an examination of rules, procedures, and mechanisms, the GAL project hopes to identify common principles that regulate and direct action between global actors and international policymakers. To imply that GAL boils down

189. While many of the pleadings in some IATs, i.e., the written record before the tribunal, may be publicly accessible, there is a difference in substance and kind between having access to the evidence and arguments before the tribunal and having the ability to publicly and dynamically engage the tribunal in real time while evidence and arguments are examined and considered.

to due process rules minimizes the actual scope of the GAL project and untethers due process from its judicial context.

That said, due process is clearly a foundational component of GAL principles—perhaps a seed that has taken root in the soil of the global administrative space. Actors operating within the global administrative space are decision-makers and subject to decision-making (or their constituents may be). Where there is decision-making, there exists the potential for adverse effects on the rights of others. In particular, when this decision-making is divorced from democratic accountability, due process mechanisms, administratively applied, are a means of ensuring accountability. At the very least, due process drives the machinery used to check arbitrary or adverse decisions. The normative concepts of transparency, accountability, participation, and review are operative characteristics of due process, and these concepts inform and encourage the development of due process rules and procedures. Just as importantly, the rules and procedures of due process promote and encourage the evolution of these norms. The field of GAL is advanced, and to a degree crystalized, as due process procedures increasingly occupy the global administrative space. Note how the procedural guarantees of the ILOAT are the least robust of the reviewed IATs. More modern regimes, particularly the UN OAJ tribunals, sport comprehensive due process guarantees. These newer procedures were instituted with the benefit of hindsight; the limitations of past tribunals were evident and corrective measures were instituted. As IAT litigation has increased and IOs have matured, more concrete due process assurances have been introduced through the expansion and clarification of procedural protections aimed at promoting participation, transparency, accountability, and review.

While it is true that these normative principles have affected the design and function of the tribunals, the existence and practice of the tribunals give real content to global administrative law. The proliferation of IATs over the past several decades has provided opportunity for these normative principles to harden into practice within the global administrative space, and within international law more broadly. Each IO that created an IAT, with attendant statutes and rules of procedures, did so autonomously. The IAT statutes operate independently of one another, and yet there are similarities in design and operation. This is partly due to the fact that the independent IATs are intended to deal with the same problem, IO staff member challenges against adverse administrative decisions. Nonetheless, these IATs, with their common purpose, similar design, and overlapping procedures, create an international administrative judicial structure in which IOs, international civil

servants, and member states operate. For IOs and staff, the IATs are a means of dispute resolution. In addition, the IATs help IOs preserve their privileges and immunities in the domestic courts of member states. In turn, staff members enjoy judicial machinery dedicated to protecting their employment rights. Finally, member states and their domestic courts are not obligated to protect the employment rights of their nationals in international civil service, or to defend the administrative decisions of the IOs they created. If IO employees are provided with sufficient due process via IATs, domestic courts need not concern themselves with international employment disputes.[190]

Due process procedures and normative principles of global administrative law have emerged through the creation and practice of IATs. Undoubtedly, some of these procedures and norms have existed for some time; others have developed with practice. While the rules of the ILOAT, the oldest tribunal reviewed, do not include robust due process safeguards, it is descended from an even earlier attempt to produce an independent and impartial tribunal for international civil servant claims—an attempt to provide access and review and to create an accountability mechanism for IO administrative action. As new IATs have been created, the due process procedures included in their constituent statutes and rules have continued to cement underlying normative principles of transparency, accountability, participation, and review. The most modern of the regimes, the two-tiered UN OAJ system, contains detailed rules and expansive procedures to safeguard traditional due process norms, introducing procedures to ensure judicial independence, impartiality, and accountability, while providing for access to legal advice and representation.

As judicial mechanisms that protect the rights of nationals of IO member states in international civil service, IATs must provide some form of due process. While each tribunal approaches the problem somewhat differently, each has developed a set of rules and procedures designed to guarantee due process rights. Those common procedures, and the underlying normative basis, suggest that IATs are useful forums for the introduction and incubation of administrative law principles in global governance.

190. For a greater discussion of national case law regarding IATs, due process, and domestic court review of IO staff member claims, see Reinisch, *supra* note 28; Reinisch & Weber, *supra* note 30.

## XIII. Conclusion

By acting as a check on arbitrary executive or administrative decision-making, administrative law has the ability to "both check and steer the exercise of government power."[191] International administrative tribunals are important international machinery designed to act as such a check for the benefit of individuals. "*Procedural participation* constitutes, in the domestic setting at least, one of the classical elements of administrative law; and some aspects of it are being steadily transposed to the realm of global governance."[192] The rules and procedures of IATs suggest this is true. In fact, the due process mechanisms within IATs suggest the possibility of a growing collective understanding of due process rights, at least administratively, and that IATs may be responsible for shaping and developing the underlying normative principles.

Further research is necessary to fully develop this relationship. This article examines the procedures of only a small number of existing IATs. A review of statutes, rules, and procedures of other IATs is recommended (with attention to be paid to IATs not traditionally dominated by western states, such as the Administrative Tribunals of the Asian and African Development Banks).[193] In addition, this article looks nominally at the due process provided by the rules and does not investigate the quality of the process actually provided. A study of the actual operation of these rules within the functioning IATs is necessary to determine whether the due process guaranteed to IO staff members is respected in practice.[194] Finally, given the breadth of the GAL field, additional research should examine similar due process procedures and principles in a global administrative context divorced from judicial

191. Kingsbury & Stewart, *supra* note 23, at 76.

192. *Id.* at 77.

193. The Rules of Procedure of the Asian Development Bank Administrative Tribunal address oral proceedings, legal representation, and the publication of tribunal decisions. The Rules of Procedure of the Administrative Tribunal of the African Development Bank contain provisions governing the recusal of judges, the assistance of counsel, the necessity of oral proceedings, and the availability, revision, and interpretation of judgments. *See* Rules of the Asian Development Bank Administrative Tribunal, https://www.adb.org/sites/default/files/institutional-document/33395/administrative-tribunal-rules.pdf; Rules of Procedure of the Administrative Tribunal of the African Development Bank (2011), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Rules%20of%20Procedure%20of%20the%20Administrative%20Tribunal%20as%20amended%20on%204%20November%202010_1312.pdf.

194. In fact, there has been increasing criticism of IAT practice, particularly that of the ILOAT. *See, e.g.*, Staff Union of the European Patent Office Central Executive Committee, *ILOAT: 90 Years Old and in Need of Repair* (May 3, 2017), https://suepo.org/documents/44077/56254.pdf; Edward Patrick Flaherty, *Legal Protection in International Organizations—A Practitioner's View*, Flaherty Law Group (February 7, 2012), http://flahertylawgroup.com/legal-protections/.

mechanisms and litigation. Due process and the underlying norms are expected in adversarial court proceedings. If similar procedures are effectively implemented in other areas of the global administrative space (perhaps in response to adverse regulatory decisions that are not judicially reviewed, such as WHO travel advisories and responses to pandemics, International Telecommunication Union recommendations, or World Bank operational policies), it may suggest whether any universal principles underlying due process are taking shape in global governance.

In the context of the field of global administrative law, the evolution and practice of IATs have helped its normative principles take shape. Whether the procedures promoting those norms in the GAL field can ever rise to the level of unified law remains to be seen. However, these IAT due process procedures evidence a dynamic, constructivist process where norms inform practices and practices affect norms.