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### Administration of justice at the United Nations

## Administration of justice at the United Nations

### Report of the Secretary-General

#### Addendum

#### Amended rules of procedure of the United Nations Dispute Tribunal

1. The amendments to the rules of procedure of the United Nations Dispute Tribunal, adopted by the plenary of the Dispute Tribunal judges on 8 June 2020 and submitted by the Dispute Tribunal to the General Assembly for approval, are set out in the report of the Secretary-General on the administration of justice at the United Nations ([A/75/162](#)) (paras. 104–106 and annex II).
2. In the present addendum to that report, the Secretary-General provides comments on the amended rules of procedure, prepared by the legal offices representing the Secretary-General before the United Nations Appeals Tribunal and the Dispute Tribunal (see annex I (A)) and by the Office of Staff Legal Assistance (see annex I (B)).
3. **The Secretary-General requests the General Assembly to consider these comments before deciding whether to approve the amendments to the rules of procedure adopted by the Dispute Tribunal.**

#### Judicial directions of the United Nations Dispute Tribunal

4. The Secretary-General takes this opportunity to inform the General Assembly that, on 13 May 2020, the Dispute Tribunal revised the judicial directions initially adopted in 2017.<sup>1</sup> As requested by the Assembly in paragraph 31 of resolution [74/258](#), the Secretary-General reports that the judicial directions are available on the website of the internal justice system.<sup>2</sup> The Office of Administration of Justice remains available to provide more information, at the request of the Assembly.

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\* [A/75/150](#).

<sup>1</sup> Possible inconsistencies in the initial judicial directions, and the lack of consultations before adopting them were raised in the report of the Internal Justice Council [A/73/218](#), paragraph 23.

<sup>2</sup> See [www.un.org/en/internaljustice/undt/key-documents.shtml](http://www.un.org/en/internaljustice/undt/key-documents.shtml).



**Annex I (A)****Comments on the amended rules of procedure of the United Nations Dispute Tribunal by the legal offices representing the Secretary-General before the United Nations Appeals Tribunal and the United Nations Dispute Tribunal**

1. Article 7.1 of the statute of the United Nations Dispute Tribunal, as adopted by the General Assembly, provides that “the Dispute Tribunal shall establish its own rules of procedure, which shall be subject to approval by the General Assembly.”
2. The General Assembly first approved the rules of procedure of the Dispute Tribunal in its resolution [64/119](#), following their adoption by the plenary of the Dispute Tribunal judges. Since then, the Dispute Tribunal judges have adopted only one amendment to the rules of procedure. The purpose of that amendment was to increase the number of plenary meetings per year that the Dispute Tribunal judges would hold. The Advisory Committee on Administrative and Budgetary Questions recommended against the approval of that amendment and, in its resolution [67/241](#), the General Assembly endorsed the Advisory Committee’s recommendation. The amendment to the rules of procedures adopted by the judges of the Dispute Tribunal was therefore not approved by the Assembly.
3. The current proposed amendments to the rules of procedure of the Dispute Tribunal, which the judges of the Dispute Tribunal have adopted and submitted to the General Assembly for approval in the report of the Secretary-General ([A/75/162](#), annex II), amend 25 of the 38 articles of the rules of procedure. The legal offices representing the Secretary-General have no comment on the majority of the adopted amendments.
4. The legal offices representing the Secretary-General are, however, concerned that some of the amendments are inconsistent with the statute of the Dispute Tribunal, as adopted by the General Assembly; are inconsistent with the jurisprudence of the United Nations Appeals Tribunal; may make the formal system of administration of justice less efficient, possibly leading to unnecessary litigation and additional expenditures for the Organization; and have implications for the Secretary-General’s role with respect to maintaining the privileges and immunities of the United Nations, which the Appeals Tribunal has already ruled is not a subject properly before the Dispute Tribunal.
5. As a general matter, the legal offices representing the Secretary-General note that in a number of places, the proposed amendments to the rules of procedure of the Dispute Tribunal go beyond the scope of article 7.2 of the statute of the Dispute Tribunal and seek to codify principles of law and other matters that may be better addressed by the development of jurisprudence. Of specific concern to the legal offices representing the Secretary-General are the following amendments:
  - (a) The addition of article 10bis, paragraph 1, could reverse the burden of proof so that instead of a staff member being required to prove his or her claims, the Administration could be required to disprove the staff member’s assertions. Consequently, this amendment would overturn the presumption of regularity as established by the jurisprudence of the Appeals Tribunal, holding that the official acts of the Organization are presumed to be lawful unless proven otherwise. Overturning the presumption of regularity would require the Administration to request additional resources to prove the lawfulness of its administrative decisions in every case brought before the Dispute Tribunal. This would, in addition, give rise to further financial requirements for the Organization because the reversal of the burden of proof could

require the Administration to investigate each and every factual claim made by the staff member, even if such claims are irrelevant;

(b) The amendment to article 18, paragraph 2, is inconsistent with the statute of the Dispute Tribunal and the jurisprudence of the Appeals Tribunal. The amendment confuses the competence of the Dispute Tribunal to conduct judicial review of the disciplinary decisions of the Secretary-General with the functions of a criminal court;

(c) The addition of article 19bis, paragraph 3, which permits referral of counsel to national bar associations, has the potential to infringe on the Secretary-General's role with respect to maintaining the privileges and immunities of the Organization.

6. Where serious concerns have been identified, as explained in the table below, the legal offices representing the Secretary-General would urge the General Assembly not to approve the proposed amendments to articles 7 (3), 7 (4), 10bis (1), 10bis (2), 11, 17 (6), 18 (2), 19bis (3) and 22 (1).

## Article 7. Time limits for filing applications

~~3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.~~ **a deadline relevant for receivability of an application is triggered by a receipt of communication transmitted by email, absent electronic confirmation of receipt, it will be considered that the communication was delivered at the latest on the next calendar day following the dispatch.**

This amendment effectively extends the deadline for the submission of applications to the Dispute Tribunal in a manner that is not consistent with the statute of the Dispute Tribunal.

The statute of the Dispute Tribunal provides that applications shall only be receivable if filed within specific time limits. By creating a presumption that communications sent by the Administration by email are received on the next calendar day, the amendment effectively extends the time limit for filing applications with the Dispute Tribunal.

Extending the length of time for filing applications beyond the specific time limits set out in the statute of the Dispute Tribunal is inconsistent with the statute.

Disputes that may arise regarding the date documents were received should be resolved through the evaluation of evidence. Reliance on email delivery receipts produced by the email system is not a sound basis on which to determine date of receipt as the transmission of a receipt is controlled by the recipient, who has the ability to turn the receipt function off.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

~~4. Where an application is filed to enforce the implementation of an agreement reached through mediation, the application shall be receivable if filed within 90 calendar days of the last day for implementation as specified in the mediation agreement or, when the mediation agreement is silent on the matter, after 30 calendar days from the date of the signing of the agreement.~~ **A request for suspending or waiving statutory deadlines made under article 8. 3 of the statute may be granted when the below conditions are cumulatively satisfied:**

- (a) The delay was caused by exceptional circumstances;**
- (b) The delay is not attributable to negligence of the applicant;**
- (c) The applicant filed the request at the first reasonable opportunity.**

The Appeals Tribunal has interpreted article 8.3 of the statute of the Dispute Tribunal to require that the filing of a request for the extension of statutory deadlines be made before that deadline had passed (Judgment No. 2017-UNAT-731 (*Nikwigize v. Secretary-General*), para. 20). As this is the Appeals Tribunal's authoritative interpretation of the statute of the Dispute Tribunal, it cannot be overruled by the rules of procedure, which are subordinate to the statute of the Dispute Tribunal.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

**Article 10bis. Pleadings**

**1. The reply shall take a position, in a precise and comprehensive manner, with respect to the facts averred to by the applicant, propose all the defences in fact and in law and specifically indicate facts which are contested and the means of proving them, if known.**

It is a fundamental principle of law that the burden of proving the elements of a claim lies with the applicant. This burden is shifted only when the applicant has successfully made their case and the respondent seeks to assert an affirmative defence. Only in such a case is the respondent then required to bear the burden of proving that the affirmative defence applies. This amendment would reverse the burden of proof.

The amendment introduces pleading requirements that are inconsistent with established jurisprudence of the Appeals Tribunal, which articulates a presumption of regularity for official acts.<sup>a</sup> In accordance with the principle that the claimant must prove his or her claim, the jurisprudence of the Appeals Tribunal places the burden of proof on an applicant to demonstrate the unlawfulness of a contested administrative decision (except for decisions imposing a disciplinary measure).<sup>b</sup> Accordingly, the amendment interferes with the obligation of the Dispute Tribunal to hold an applicant to the burden of proof with respect to each element of his or her claim, even through a general denial. In this context, it is worth noting that the Appeals Tribunal has held that the Dispute Tribunal conducts judicial review and is not an investigative body (Judgment No. 2018-UNAT-873 (*Belkhabbaz v. Secretary-General*), paras. 62 and 63).

The approval of the amendment by the General Assembly would have significant implications for the resources required by the Organization to appropriately represent the Secretary-General before the Dispute Tribunal. The offices representing the Secretary-General across the system are not resourced to investigate and respond to all factual allegations that are raised in an application within a limited 30-day time frame. The Assembly's approval of this amendment will necessitate additional resources, including supplementary legal officer posts. In the same vein, similar staffing measures would be necessary within the offices that provide the respondent's counsel with the factual instructions forming the basis of the contested administrative decisions. These offices do not currently have the resources to review and respond to factual allegations beyond the scope of the contested decision.

In addition, to promote the expediency and efficiency of the judicial process, the Dispute Tribunal has set limits on the page-length of submissions by the parties. This amendment, which would significantly increase the matters respondents would need to address in their reply,

would leave very little space, if any, for respondents to put forward their own legal argumentation in their submissions. Conversely, if as a result of this amendment, the limitations on the length of pleadings were to be lifted, this would adversely affect the ability of the formal system of administration of justice to dispose of cases in an expedient manner. The amendment, may, therefore, result in increased costs being incurred by Member States to fund the system of administration of justice.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

Alternatively, should the General Assembly approve the amendment to article 10bis (1), the statute of the Dispute Tribunal should be amended to allow for the respondent's reply to be filed within 60 calendar days, as opposed to the current time limit of 30 calendar days. Such an amendment would be necessary to mitigate the adverse impact on the Administration's ability to provide a full response to the claims in an application. In this context, it is worth noting that an applicant has 60 calendar days to file a management evaluation request from the notification of an administrative decision and 90 calendar days to file an application before the Dispute Tribunal following receipt of the management evaluation outcome. The statute of the Dispute Tribunal currently does not address the time limit for submitting a reply. The time limit for submitting a reply is currently addressed only in the rules of procedure of the Dispute Tribunal.

**2. The Dispute Tribunal may order that either party submit, within a specified deadline, arguments and means of proof that have become necessary in relation to submissions by the opposing party, with an indication of the specific facts for which the proof is requested, under the sanction of being estopped from advancing these matters later in the proceedings.**

The wording of this amendment is vague and potentially overbroad. While certain national jurisdictions do have rules preventing to differing degrees the use of withheld evidence to pursue claims, such rules carefully define the circumstances in which they apply.

The ambiguous wording of the proposed provision could be used to estop the advancement of arguments in cases where the production of evidence by a party is not required (for example, if asked to prove a negative). The provision also ignores the limitations that parties may face in attaining evidence.

While the offices representing the Secretary-General recognize the importance of production of evidence by opposing parties, the severity of the sanction of estoppel, coupled with the imprecision of the wording, would hinder the efficient disposition of cases.

## Article 11. Joining of a party

The Dispute Tribunal may at any time, either on the application of a party or on its own initiative, ~~join another party if it appears to the Dispute Tribunal that that party has a legitimate interest in the outcome of the proceedings.~~ **invite observations from a third person when the Dispute Tribunal considers it to be useful.**

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

A party who is not already part of the proceedings may request leave to make submissions either as an intervening party or as a friend of the court. Under article 2.3 of the statute of the Dispute Tribunal, a friend-of-the-court brief can only be filed by a staff association and not by any third party.

The proposed amendment appears to address the situation of friend-of-the-court briefs and allows any third party deemed useful by the Tribunal to file submissions. As drafted, the proposed amendment exceeds the parameters of the statute of the Dispute Tribunal and any changes along these lines would require a prior change to the statute.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

## Article 17. Oral evidence

6. ~~The Dispute Tribunal shall decide whether the personal appearance of a witness or expert is required at oral proceedings and determine the appropriate means for satisfying the requirement for personal appearance. Evidence may be taken by video link, telephone or other electronic means.,~~ **upon consultation with the parties, may decide to receive expert evidence submitted in writing, without calling the expert to testify.**

It is important for parties to be provided with an opportunity to test the testimony of any witness, expert or otherwise, whether the testimony is oral or written.

The proposed amendment, as drafted, states that an expert may provide evidence in writing without being called to testify. This may be interpreted as enabling the Dispute Tribunal to “waive” cross-examination of expert witnesses by an opposing party, despite that party’s objections and wishes to test the testimony of the expert witness, because the proposed amendment does not contain any provision to require that if expert evidence is submitted in writing, the opposing party shall be provided with an opportunity to test such evidence.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment, as currently drafted.

## Article 18. Evidence

2. ~~The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings. The applicant bears the burden of proving unlawfulness of the impugned decision. In cases involving disciplinary measures, however, the applicant is presumed innocent. In deciding whether the matter before~~

When the Secretary-General makes an administrative decision to impose a disciplinary sanction, that decision is based on a finding that a staff member engaged in misconduct. The determination of whether a staff member has engaged in misconduct, and the decision to impose disciplinary measures, is an administrative process undertaken by the Secretary-General in accordance with the Staff Regulations and Rules of the United Nations and the applicable administrative issuances. The competence of the Dispute Tribunal, as set forth in the statute of the

**it has been proven to the requisite standard, the Dispute Tribunal evaluates evidence in accordance with logic and common experience. Limitation on free evaluation of evidence may only result from the resolutions of the General Assembly.**

Dispute Tribunal, is to review the lawfulness of an administrative decision. In the case of an administrative decision to impose a disciplinary measure, the Appeals Tribunal has held that the Dispute Tribunal must review the decision to determine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, whether the sanction is proportionate to the offence and whether the staff member's due process rights were respected. Neither the Staff Regulations and Rules nor the statute of the Dispute Tribunal confer authority on the Dispute Tribunal to conduct a criminal trial.

Consequently, the proposed amendment, which would require the Organization to prove the "guilt" of a staff member, who is presumed "innocent", instead of requiring the staff member to demonstrate that the administrative decision was flawed, is outside the mandate of the Dispute Tribunal.

Indeed, the Appeals Tribunal has held that it is not the Dispute Tribunal's role to substitute the Secretary-General as the decision maker.<sup>c</sup> The Dispute Tribunal judicially reviews the reasonableness of the decision, such as whether there was sufficient evidence before the decision maker to allow for a finding of misconduct. Allowing the Dispute Tribunal to replace the decision of the Secretary-General would render the disciplinary process nugatory, creating delays and impeding the Organization's efforts to achieve accountability.

The statute of the Dispute Tribunal does not contain provisions on how the Tribunal assesses the evidence before it. While the statute of the Dispute Tribunal does not specifically prohibit the admissibility of certain types of evidence, such limitations on the admissibility of evidence are not set by the General Assembly alone, but also by the interpretation of the statute of the Dispute Tribunal by the Appeals Tribunal. Thus, providing in the rules of procedure that limitations on the evaluation of evidence by the Dispute Tribunal are set only by the General Assembly clearly exceeds the competence of the Dispute Tribunal, which is subject to the interpretation of its mandate by the Appeals Tribunal.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.



**Article 19bis. Abuse of process**

**3. Where manifest or habitual abuse of process is committed by a party's representative, the Dispute Tribunal hearing the case may refuse audience until amends are made to purge this abuse to its satisfaction. It may also refer the matter to a Bar or to the Secretary-General, as appropriate.**

Article 7 of the statute of the Dispute Tribunal does not grant the Dispute Tribunal authority to adopt rules that are adverse to the right of a party to appoint a legal counsel. It is thus not clear whether the Dispute Tribunal may adopt a rule that in substance would compel a party to change counsel if the Dispute Tribunal is of the view that the counsel has habitually abused process.

Counsel that are staff members, whether assigned to the Office of Staff Legal Assistance or acting for the Secretary-General, may only be referred to the Secretary-General. This is because such staff members are under the exclusive authority of the Secretary-General for all actions undertaken during the discharge of their official functions in accordance with the Charter of the United Nations and the Staff Regulations and Rules.

Referral to "a Bar" is also not an appropriate solution from the perspective of the Organization's privileges and immunities. Such a referral may be considered an implicit waiver of the Organization's privileges and immunities, as Dispute Tribunal judges and/or other United Nations staff members would be required to participate as witnesses in disciplinary or other proceedings before a bar association. Furthermore, such a referral is under the authority of the Secretary-General and should not be undertaken directly by the judges of the Dispute Tribunal. Rather, in accordance with the statute of the Dispute Tribunal, the judges of the Dispute Tribunal may refer the matter to the Secretary-General for possible action to enforce accountability.

The legal offices representing the Secretary-General have serious concerns about this proposed amendment.

**Article 22. Intervention by persons not party to the case**

~~1. Any person for whom recourse to the Dispute Tribunal is available under article 2.4 of the statute~~ **A staff member, a former staff member or a person representing the estate of a former staff member** may apply, on an application form to be prescribed by the Registrar, to intervene in a case at any stage thereof on the grounds that he or she has a ~~right that may be affected by the judgement to be issued by the Dispute Tribunal.~~ **legitimate interest in the proceedings. The Tribunal may also, on its own motion, invite such person to intervene.**

As drafted, it is not clear whether the amendment relates to intervention under article 2.4 or article 7.2 (d), or both, of the statute of the Dispute Tribunal. Both articles use the term "intervention" to refer to distinct procedural processes.

The amendment may be read to expand the grounds upon which an individual may intervene in proceedings beyond what is foreseen by the statute of the Dispute Tribunal under article 2.4, since having a "legitimate interest in the proceedings" may be read to be broader than an entitlement to "appeal the same administrative decision".

On the other hand, the amendment may restrict the ability of an individual not a party to a case to intervene in proceedings under article 7.2 (d) of the statute if their rights may be affected by a judgment but they are not a “staff member, former staff member or person representing the estate of a former staff member”.

The rules of procedure of the Dispute Tribunal on intervention must be drafted in a manner that is consistent with the parameters set out in the statute of the Dispute Tribunal.

Accordingly, the legal offices representing the Secretary-General have serious concerns about this proposed amendment.

The legal offices representing the Secretary-General are not opposed, per se, to broadening the entitlement to intervene in a process before the Dispute Tribunal to individuals who have a legitimate interest in the proceedings. Such an amendment, however, would need to be addressed by the General Assembly in the way of an amendment to the statute of the Dispute Tribunal, not to its subordinate rules of procedure.

<sup>a</sup> See, for example, Judgment No. 2011-UNAT-122 (*Rolland v. Secretary-General*), para. 26, which provides that “[t]here is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one.” Judgment No. 2017-UNAT-747 (*Ngokeng v. Secretary-General*), paras. 33 and 34, held that “[a] candidate challenging the denial of promotion therefore must prove that proper grounds of review exist to rebut the presumption of regularity and set aside the decision. ... once the presumption arises the rebuttal of it should occur only where clear and convincing evidence establishes that an irregularity was highly probable.”

<sup>b</sup> See, for example, Judgment No. 2018-UNAT-821 (*Haydar v. Secretary-General*), paras. 12 and 13, which states that “a statutory burden is placed upon an applicant to establish that the administrative decision in issue was in non-compliance with the terms of his or her appointment or contract of employment.”; Judgment No. 2010-UNAT-021 (*Asaad v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*), para. 10, stating that “[t]he burden of proving improper motivation lies with the staff member contesting the decision.”; Judgment No. 2010-UNAT-081 (*Azzouni v. Secretary-General*), para. 35, holding that “[w]hen a staff member alleges discrimination, he or she bears the burden of proving on a preponderance of evidence that discrimination occurred.”; and Judgment No. 2015-UNAT-506 (*Nwuke v. Secretary-General*), paras. 48 and 49, holding that “[t]he burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation.”

<sup>c</sup> See, for example, Judgment No. 2010-UNAT-022 (*Abu Hamda v. Commissioner-General of UNRWA*).

## Annex I (B)

### **Comments on the amended rules of procedure of the United Nations Dispute Tribunal by the Office of Staff Legal Assistance**

1. The Office of Staff Legal Assistance shares the General Assembly's concern with the number of pending applications to the United Nations Dispute Tribunal (resolution [73/276](#), para. 21) and welcomes measures to expedite case handling that are consistent with the principles on which administration of justice at the United Nations are founded, namely access to the internal system of administration of justice for all staff members, including self-represented applicants (resolution [73/276](#), paras. 4 and 27); increased transparency in decision-making and increased accountability of managers (resolution [61/261](#), para. 6); and consistency with the principles of the rule of law and due process (resolution [73/276](#), para. 6). The rule of law and due process encompass the core requirements of natural justice, including adequate notice and a fair hearing, and ancillary principles such as equality of arms and the right to effective representation.
2. Against that backdrop, the Office is concerned that the proposed amendments to the rules of procedure of the Dispute Tribunal are particularly restrictive to applicants (i.e., staff) and will thus alter the balance of power intended by the General Assembly in setting parameters for the internal justice system (resolution [73/276](#), para. 5). If approved, the amended rules of procedure will have a detrimental effect on access to justice and the overall effectiveness of the Dispute Tribunal as a potential source of remedy to staff who cannot otherwise challenge unlawful decisions affecting their terms and conditions of employment.
3. Furthermore, while the Office shares the General Assembly's commitment to greater staff utilization of its services, as an advocate for staff in the internal justice system, it is particularly concerned that the restrictive amendments and new provisions will particularly affect self-represented litigants. The majority of applicants before the Dispute Tribunal remain self-represented (see the report of the Internal Justice Council on the administration of justice at the United Nations ([A/72/210](#)), para. 34). While the Assembly has expressed concern over this high proportion, it has also welcomed measures to make the internal justice system more accessible to self-represented litigants, including through the creation of toolkits for self-represented applicants. Most recently, the Assembly has "encourage[d] the Secretary-General to continue to provide assistance to self-represented applicants and enhance their understanding and ability to utilize the system" (resolution [74/258](#), para. 25). In the Office's estimation, many of the proposed amendments cut in precisely the opposite direction.
4. The Office appreciates that the General Assembly, in line with the recommendations of the Internal Justice Council, has stressed that the Dispute Tribunal must improve administrative efficiency, including by streamlining and harmonizing its approach to case management. However, as illustrated in the Office's comments below, the consequences of the proposed amendments fall disproportionately on applicants. In the Office's estimation, some of the proposals have no basis in the statute of the Dispute Tribunal and thus exceed the Tribunal's competences. Certain other proposals would give the Dispute Tribunal nearly unfettered discretion to summarily dismiss cases or to declare cases ready for adjudication with little or no production of evidence. In this regard, the Office would underscore the unique nature of the two-tiered United Nations tribunal system established in resolution [61/261](#) relative to other international administrative tribunals, and the inherent responsibility of the Dispute Tribunal, as the first-instance tribunal in such a system, to allow for adequate evidence gathering and to ensure full and complete fact-finding.

## Article 4. Venue

1. The judges of the Dispute Tribunal shall exercise their functions in New York, Geneva and Nairobi ~~respectively~~. **The Dispute Tribunal shall determine the venue for the filing of applications in a practice direction.** However, the Dispute Tribunal may decide to hold sessions at other duty stations as required.

2. **A party may apply for a change of venue where the interest of justice so requires.**

3. **A change of venue may be determined by the President of the Dispute Tribunal where so required in the interest of justice on a case-by-case basis or by the need to balance the caseload across the seats of the Tribunal. A change of venue regarding a case already assigned to a judge requires his/her consent.**

With regard to article 4 (3), the Office believes that procedural fairness requires that the parties – and in particular the applicant – have notice and an opportunity to raise objections prior to a change of venue made upon the determination of the President of the Dispute Tribunal.

The Office submits that allowing for changes of venue proprio motu, without affording the parties a prior opportunity to be heard, is per se incompatible with the interests of justice. Such a practice might particularly affect applicants who have retained external counsel based at or near the original venue.

## Article 6. Filing of cases

~~1. An application shall be filed at a Registry of the Dispute Tribunal, taking into account geographical proximity and any other relevant material considerations, in accordance with the venue determined in the practice direction. Erroneous filing in a seat of the Tribunal other than determined in the practice direction does not affect receivability of the application.~~

~~2. The Dispute Tribunal shall assign cases to the appropriate Registry. A party may apply for a change of venue. [Deleted]~~

The added language (“Erroneous filing ... does not affect receivability of the application”) is ambiguous. “Does not affect” could be understood to mean that a timely application is receivable notwithstanding that it was filed in the wrong venue, or it could mean that such an application is a legal nullity which does not toll the relevant deadline.

Assuming the latter interpretation is intended, the added language is contrary to considerations of access to justice. This addition and the deletion of article 6 (2) combine to shift responsibility to applicants for filing with the appropriate Registry, and thereby increase the potential for procedural defaults.

In Case No. UNDT/NY/2018/037, Order No. 177 (NY/2018) (*Cox v. Secretary-General*), the Dispute Tribunal recognized that the imperative of “proper access to justice” warranted its consideration of an application for suspension of action that was filed with the New York Registry after working hours at the proper venue, the Nairobi Registry. As the Tribunal noted, such access-to-justice considerations are particularly acute where the applicant seeks Villamoran-type relief (suspension of decision pending the Tribunal’s ruling on an application for suspension of action; see Judgment No. 2011-UNAT-160 (*Villamoran v. Secretary-General*)).

The Office urges that the added language in article 6 be replaced with language codifying the decision in Order No. 177 (NY/2018).

Article 7. Time limits ~~for filing applications~~

3. ~~Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.~~ **a deadline relevant for receivability of an application is triggered by a receipt of communication transmitted by email, absent electronic confirmation of receipt, it will be considered that the communication was delivered at the latest on the next calendar day following the dispatch.**

The Office urges the deletion of new article 7 (3). A presumption of receipt one calendar day after sending is simply inconsistent with the realities of United Nations service, particularly away from Headquarters. The job duties of many staff members do not require daily email use. In certain cases, regular email use may not be possible, as in the case of staff working in remote field missions. Furthermore, the rules of procedure should not penalize, through the establishment of inflexible, bright-line standards, staff members who appropriately do not attend to work-related matters, including email (whether addressed to their United Nations or private accounts), while on leave. In this regard, the rule stated in article 7 (3) is incongruent with established United Nations practices such as the designation of officers-in-charge while staff members are on leave. It is also incongruent with the Tribunal's past practice. For example, in Case No. UNDT/NY/2018/026, Order No. 113 (NY/2018) (*Pena Correa v. Secretary-General*), the Tribunal found that the applicant had demonstrated urgency notwithstanding that he only read the notice of non-renewal of his contract three weeks after it was sent, upon returning from annual leave and following a migration of email systems.

Furthermore, the phrase "at the latest" would undermine the amendment's stated purpose of greater certainty, while unnecessarily and unwisely limiting the Tribunal's discretion to make exceptions from the rule (if adopted) as the interests of justice require.

## Article 8. Applications

2. The application ~~should~~ **shall** include the following information:

- (a) The applicant's full name, date of birth and nationality;
- (b) The applicant's employment status (including United Nations index number and department, office and section) or relationship to the staff member if the applicant is relying on the staff member's rights;
- (c) Name of the applicant's legal representative (with authorization attached);
- (d) The address to which documents should be sent;

The Office urges removal of the proposed amendment to article 8 (2) (e). The Office strenuously disagrees with the suggestion of the Dispute Tribunal that the more stringent pleading requirements proposed herein are "of a rudimentary nature", and that owing to "generous" time limits for filing management evaluation requests and Dispute Tribunal applications, these pleading requirements are easily satisfied "whether or not the applicant is assisted by counsel".

The Dispute Tribunal has often observed the difficulties faced by unrepresented litigants in representing the contested decision, as in Judgment No. UNDT/2020/031 (*Teklie v. Secretary General*), para. 35 ("[t]he Tribunal observes that the Applicant, who is self-represented, exhibits difficulty in articulating her case in the prescribed standardized forms."). It is for good reason that article 8 of the statute of the Dispute

- (e) **Specific indication of the contested decision, including** when and where the contested decision ~~if any~~ was taken (with the contested decision, **if in writing**, attached);
- (f) Action and remedies sought;
- (g) Any supporting documentation (annexed and numbered, including, if translated, an indication thereof).

Tribunal does not establish a pleading standard among the requirements for receivability: the General Assembly intended for staff members, whether represented or not, to have free access to a judicial remedy. Crucially, as long as there is no mechanism for recovery of costs, the internal justice system will continue to feature a significant number of unrepresented litigants.

The Office considers the tribunals' jurisprudence, which is replete with opaque procedural pitfalls regarding what constitutes a reviewable administrative decision, to be inconsistent with the plain language of the statute of the Dispute Tribunal. Enshrining the requirement of a "specific indication" of the contested decision into the rules of procedure departs further yet from what the General Assembly intended in designing the internal justice system.

The concerns that the Tribunal raises – that the identification of contested decisions is time-consuming and often gives rise to appeals – could just as effectively be addressed by adopting a more liberal pleading standard for applications. Such a standard would better serve procedural fairness considerations, including equality of arms in the light of the balance of power between the Administration and individual staff members. The need to ensure equality of arms is precisely what drove the General Assembly to reform the internal justice system (see resolution [61/261](#), preamble.)

**5. The applicant may not request a remedy not articulated in the original application unless facts forming the basis of such a request occurred after the filing of the original application.**

The Office urges the removal of new article 8 (5). As previously observed, this provision will be especially prejudicial to litigants who engage counsel after filing the original application *pro se*.

The Office does not subscribe to the view that the current rules governing amendment of applications are being exploited to prolong litigation even after the applicant has been made whole. In fact, the jurisprudence leaves little room for the amendment of applications, particularly in cases where management evaluation is required under article 8.1 (c) of the statute of the Dispute Tribunal. For example, the applicant in Judgment No. UNDT/2019/135 (*Fosse v. Secretary-General*) sought return to her former post (i.e., specific performance) in her management evaluation request, which she filed before seeking the assistance of the Office, and in her original Dispute Tribunal application. After taking a new position with the Organization, she sought leave to amend the application so as to plead constructive dismissal and seek compensation in lieu of specific

performance. The Dispute Tribunal ruled the claim of constructive dismissal not receivable *ratione materiae* because it was not raised in her management evaluation request, and denied the request for leave to amend. While a divided panel of the Appeals Tribunal affirmed the decision of the Dispute Tribunal in Judgment No. 2020-UNAT-1008, Judge Colgan, dissenting, objected to the idea that the applicant was required to undertake “a time-wasting and very probably a futile exercise” of management evaluation on the new claim and request for damages, for them to be receivable (Judgment No. 2020-UNAT-1008, Judge Colgan’s dissenting opinion, para. 6). The Office considers new article 8 (5), which further tightens the grounds for amendment, a solution to a non-existent problem.

Regarding administrative decisions subject to article 8.1 (c) of the statute, Judge Colgan stated that “I would conclude that Article 8 of the Dispute Tribunal Statute and Staff Rule 11.2 are satisfied if the staff member identifies for management evaluation the administrative decision objected to, states his or her view about what is wrong with it, and *indicates the desired outcome* to the complaint” (Judgment No. 2020-UNAT-1008, Judge Colgan’s dissenting opinion, para. 11, emphasis added.) The Office submits that this is an appropriate pleading standard for Dispute Tribunal applications, including damages claims.

If anything, a more liberal standard should govern original applications to the Dispute Tribunal in cases where management evaluation is not required, as such applications will not have the benefit of the “filtering and correction mechanism that is management evaluation” (ibid, para. 10).

#### **Article 9bis. Judgments based on documents**

**The Judge may proceed to judgment wherever submissions by parties suffice for the determination of the case.**

The Office urges removal of the new article 9bis, by which the Dispute Tribunal would seem to arrogate to itself the competence to summarily resolve meritorious cases involving disputed questions of fact.

The Office contends that the article, which supplements rather than replaces article 16 (1), might well make oral hearings the exception rather than the rule in non-disciplinary cases. It might be invoked to deny the parties the opportunity to file closing submissions, and thereby render the Respondent’s Reply the last word in a case. Furthermore, summary dismissal in a system without discovery provisions is disproportionately prejudicial to applicants, who will lack access to evidence at the time of the application. Because of the due process implications, summary

dismissals under this article would give rise to more appeals and a less efficient internal justice system.

At a minimum, procedural fairness requires that the Dispute Tribunal notify the parties of its intent to decide the case based on documents and give them an opportunity to show cause why the interests of justice require a hearing.

To the extent article 9bis is motivated by considerations of judicial economy, article 18 (5) of the existing rules of procedure authorizes the Dispute Tribunal to limit or exclude evidence, including oral testimony, which it considers irrelevant, frivolous or lacking in probative value.

At first glance, article 9bis might seem to bring the Dispute Tribunal into line with the other international administrative tribunals, which “list” a case for decision when the tribunal president deems it sufficiently briefed (Rules of the Administrative Tribunal of the International Labour Organization, article 10 (1); World Bank Administrative Tribunal Rules, rule 14 (1)). Analogies of this sort, however, overlook clear structural differences between these single-tier tribunals, whose judgments are final and which accordingly play a more inquisitorial role in fact-finding, and the two-tier United Nations internal justice system, wherein fact-finding is more adversarial in nature (and is moving further in that direction, as evidenced by the new article 10bis) and the Appeals Tribunal accords deference to the Dispute Tribunal’s determinations on fact and “mixed” questions.

#### Article 10. Reply

### **3. The Dispute Tribunal may decide that a reply not be requested where the application is manifestly not receivable or unfounded.**

The Office suggests removal of new article 10 (3). Like article 9bis, article 10 (3) would give the Dispute Tribunal a “gatekeeper” function which is familiar to other international administrative tribunals but is inconsistent with the unique architecture of the United Nations internal justice system and with the interests espoused by the General Assembly in reforming the system (see comment on article 9bis, above).

#### Article 12. Representation

### **3. Where a party has representation, service of documents is effected on the representative only. The submissions made by the representative are considered as made by the party.**

The Office urges removal of new article 12 (3). Service to a represented staff member, as well as to her/his counsel, places no meaningful additional burden on the Registry (since the applicant’s email address is listed on the application), whereas the proposed amendment creates the risk that that staff member will be irreparably prejudiced by an administrative oversight by counsel, appreciating that the system does not



## Article 13. Suspension of action during a management evaluation

1. The Dispute Tribunal shall order a suspension of action ~~on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.~~ **where conditions set out in article 2 of the Dispute Tribunal statute are met.**

2. The Registrar shall transmit the application to the respondent **who may file a reply.**

3. The Dispute Tribunal shall consider an application ~~for interim measures~~ **for suspension of action** within five working days of the service of the application on the respondent.

4. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

allow a staff member to seek damages against the Office or a fellow staff member representative for negligence.

The Office requests that article 13 codify the current procedure for a Villamoran-type order whereby implementation of the decision may be suspended for the period it takes for the request for suspension of action to be decided (see comment on article 6, above). Currently, staff members have no obvious indication that such a process is available.

The Office notes that the Dispute Tribunal has proposed to codify in the rules of procedure several measures which the jurisprudence has recognized as within the tribunals' inherent judicial authority (e.g., proposed article 19bis). These measures by and large favour the Administration and are particularly injurious to self-represented applicants. Following this general pattern and in the interest of fairness, the rules should recognize a type of relief that would otherwise be unknown to most self-represented litigants.

## Article 16. Hearing

1. The judge ~~hearing~~ **presiding** over a case may hold ~~an~~ oral hearings.

4. The parties or their duly designated representatives must be present at the hearing either in person or, where unavailable, by video link, telephone or other electronic means. **The Tribunal may, however, decide to proceed with a hearing in the absence of a party or a representative, provided they have been properly notified.**

The Office recommends that article 16 (1) be amended to clarify that, where a case is heard by a three-judge panel pursuant to article 5 (3), the decision to hold a hearing is taken by majority vote.

The Office urges removal of the proposed addition to article 16 (4). While the Office does not object in principle to the placement here of the former article 17 (2), article 16 (4) does not merely restate former article 17 (2). Rather, the added phrase represents a thumb on the scale in determining the interests of justice – essentially, a presumption that a duly-noticed hearing should proceed without a party's presence unless the party shows exceptional circumstances. A rule that establishes such a presumption is unduly prejudicial to applicants and not in line with the interests of justice.

The Office submits that the Dispute Tribunal has less draconian and prejudicial measures at its disposal to prevent "stalling of the process" by a litigant than convening a hearing without his or her presence (cf. the

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## Article 18. Evidence

2. ~~The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings. The~~ **applicant bears the burden of proving unlawfulness of the impugned decision. In cases involving disciplinary measures, however, the applicant is presumed innocent. In deciding whether the matter before it has been proven to the requisite standard, the Dispute Tribunal evaluates evidence in accordance with logic and common experience. Limitation on free evaluation of evidence may only result from the resolutions of the General Assembly.**

potential for estoppel under proposed article 10bis and to draw adverse inferences from non-production of evidence under revised article 18 (4)).

The Office has serious misgivings with the proposed amendment to article 18 (2) and finds the Dispute Tribunal's explanatory comments unavailing.

The Tribunal's rationale for codifying burdens of proof is that "so far [they] may only be found in [the] jurisprudence". The same is true of standards of proof. If it is feasible, in rules of procedure, to codify judicially created burdens of proof, it is equally feasible to codify settled, judicially created standards of proof, in particular the well-established principle that "when termination is a possible outcome, misconduct must be established by clear and convincing evidence" (Judgment No. 2011-UNAT-164, *Molari v. Secretary-General*, para. 30).

The Office submits that, to a self-represented litigant, asserting burdens of proof but not standards of proof may be a source of confusion. For example, a litigant challenging a termination decision might understand that being "presumed innocent", in the language of criminal law, translates into a "beyond reasonable doubt" standard of proof.

For that reason, and mindful of the Appeals Tribunal's statement in *Molari v. Secretary-General* that "[d]isciplinary cases are not criminal" (para. 30), the Office recommends that "presumed innocent" be replaced by language not associated with criminal law that better conveys the notion of a distribution of proof (and thus better corresponds to the preceding sentence, regarding the burden of proving unlawfulness in non-disciplinary cases) and accurately reflects settled jurisprudence: "[t]he Administration bears the burden of establishing that the alleged misconduct for which a disciplinary measure has been taken against a staff member occurred" (Judgment No. 2013-UNAT-364, *Nyambuza v. Secretary-General*, para. 31).

The Office also urges the removal of the final sentence of new article 18 (2), namely "Limitation on free evaluation of evidence may only result from the resolutions of the General Assembly."

Any such statement of policy would seem misplaced in rules of procedure. Moreover, the Dispute Tribunal in its comments has not identified a basis in the statute of the Dispute Tribunal – that is, in the

4. ~~The Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances. A party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence. the first procedural opportunity, request the Dispute Tribunal to order directing the production of this evidence. The Dispute Tribunal may draw adverse inferences from refusal to disclose a~~

expressed will of the General Assembly – for such an assertion. The Tribunal’s authority under article 9 of its statute to order production of evidence “as it deems necessary” does not translate into limitless discretion in evaluating evidence. That discretion is necessarily bounded by the requirements of fairness and natural justice, which finds expression inter alia in the Tribunal’s obligation under article 11 of the statute to give reasoned opinions for its judgments. See Judgment No. 2014-UNAT-443 (*Hunt-Matthes v. Secretary-General*), paras. 49 and 50, holding the Tribunal’s refusal to allow the Administration to call a witness “a clear violation of due process”, remanding the case for hearing *de novo* before a new judge, and adding that “the Dispute Tribunal improperly exercised its discretion by giving the timetable of the case priority over the fair trial rights of the Secretary-General. While expeditious disposal of a case is important, it can never supersede the parties’ right to a fair hearing”.

Moreover, while the Dispute Tribunal in its comments acknowledges that the Appeals Tribunal has competence to determine whether the former’s evidentiary rulings were appropriate in a given case, the proposed language would seemingly deny that the Appeals Tribunal can establish evidentiary principles of general application, at least insofar as they would limit the Dispute Tribunal’s “free evaluation of evidence”. In a system of hierarchical tribunals and binding precedent, that simply cannot be the case. The Appeals Tribunal’s traditional deference to the Dispute Tribunal on evidentiary matters is not limitless (see Judgment No. 2016-UNAT-668, *Onifade v. Secretary-General*, para. 41). Notwithstanding that deference, the Appeals Tribunal’s express competence to correct material errors in procedure (article 2 (d) of the statute of the Appeals Tribunal) necessarily implies the right to set evidentiary standards, adherence to which is a requirement of procedural due process.

With regard to article 18 (4), the Office urges that “at any stage in the proceedings” be reinstated and its replacement, “at the first procedural opportunity”, be removed.

As documentary evidence is nearly always in the possession of the Administration rather than the applicant, limiting the availability of document production is almost exclusively to the detriment of applicants, and will particularly impact self-represented litigants, who often are entirely unaware of the Tribunal’s power to order disclosure and may be

**document, including that, in the totality of the circumstances, it may consider the facts alleged by the opposing party as proven.**

unaware of documents in the Respondent's possession which are integral to the case.

The Dispute Tribunal offers no comments in justification for this change. While the rationale offered for several of the proposed rule changes is to avoid disputes over procedural matters, the change to article 18 (4) creates a new procedural pitfall for applicants and will surely invite litigation – and with it delay – over when the “first procedural opportunity” arises with respect to a particular request for production of documents. This potential is acute considering the Administration's often broad invocation of confidentiality.

Any efficiency gains from the proposed change are clearly outweighed by its harm to the principles of transparency and equality of arms.

#### **Article 19bis. Abuse of process**

**1. Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party as set out in article 10.6 of the statute.**

**2. The Dispute Tribunal may disregard submissions which are late, irrelevant, frivolous, repetitious or exceed the allotted page limit.**

**3. Where manifest or habitual abuse of process is committed by a party's representative, the Dispute Tribunal hearing the case may refuse audience until amends are made to purge this abuse to its satisfaction. It may also refer the matter to a Bar or to the Secretary-General, as appropriate.**

The Office urges the deletion of new article 19bis in its entirety.

Article 19bis (1) and (2) are yet more additions that uniquely target self-represented litigants and are likely to chill their access to justice. They constitute an unnecessary restatement of the inherent power of the Dispute Tribunal, like any judicial authority, to control its docket. While counsel might find these provisions unremarkable, the General Assembly has instructed the Secretary-General to make the internal justice system more accessible to self-represented litigants (see comment on article 8, above). Hanging the threat of liability for the Administration's costs in the rules of procedure, while leaving that liability to be determined based on judicially created standards, is not in line with the Assembly's instruction.

Additionally, a submission in excess of the allotted page limit by a self-represented litigant (or a representative not experienced in United Nations tribunal practice) would more likely be the result of inadvertence rather than abuse of process. While overlong submissions may validly not be considered, lumping them in with vexatious litigation tactics as abuses of process is also likely to chill access to justice.

The Office considers article 19bis (3) to exceed the powers conferred in the statute of the Dispute Tribunal. Article 10.6 of the statute authorizes the Tribunal to award costs for abuse of proceedings against parties only. While the Dispute Tribunal in its comments invokes inherent judicial powers, it cites no precedent where costs have been awarded against counsel. The Office is only aware of a single Dispute Tribunal judgment

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*Text of the rule, as amended*

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awarding costs against counsel for abuse of process, Judgment No. UNDT/2013/084 (*Hunt-Matthes v. Secretary-General*). The Dispute Tribunal therein cited no authority, statutory or judicial, for its power to assess costs against counsel, and the Appeals Tribunal set aside the judgment in its entirety in Judgment No. 2014-UNAT-443. Beyond the question of the Dispute Tribunal's authority, awarding costs against counsel would be particularly chilling of outside counsel and undermines the principle of effective representation.

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