SEMINAR PAPER

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The ILOAT as a contractually agreed forum for dispute settlement

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Content

1. Introduction

Because international organizations ('IOs') enjoy immunity from the jurisdiction of national courts, IOs have to provide for an alternative judicial mechanism to settle disputes between them and their employees. International administrative tribunals in general and the Administrative Tribunal of the International Labour Organization ('ILOAT') specifically were created exactly for settling such employment disputes. These alternative employment dispute settlement mechanisms are intended to guarantee the right of every person to have access to a court and the uniform application of the internal employment law of IOs.[1]

This paper takes a closer look at the jurisdiction of the ILOAT, more precisely at its jurisdiction on the basis of choice of forum clauses. The following question is posed: How does the ILOAT apply Article II paragraph 4 of its statute and to what extent is this consistent with or does this differ from the case law of the Court of Justice of the European Union ('CJEU') on Article 272 of the Treaty on the Functioning of the European Union ('TFEU')? In other words, the center of attention is on the case law of the ILOAT regarding contractual stipulations conferring jurisdiction on the tribunal. Consequently, this is compared with the CJEU's case law on arbitration clauses according to Article 272 TFEU.

The second chapter (first main chapter) will introduce the ILOAT: its establishment (chapter 2.1.), composition, procedure and judgments (chapter 2.2.). This is followed by a detailed examination of the tribunal's jurisdiction established by Article II of its statute (chapters 2.3. and 2.3.1.) with special focus on paragraph 4 and the corresponding case law (chapter 2.3.2.). Subsequently, selected case law of the CJEU on Article 272 TFEU will be presented (chapter 3). The paper will end with a discussion of the results of the comparison of the application of choice of forum clauses by the ILOAT and the CJEU and a conclusion (chapter 4).

[1] August Reinisch, 'The immunity of international organizations and the jurisdiction of their administrative tribunals' (2008) 7(2) Chinese JIL 285; Chris De Cooker, 'Proliferation of international administrative tribunals' (2022) 12 Asian JIL 232.

2. The Administrative Tribunal of the International Labour Organization

2.1. Establishment of the ILOAT

In 1919, the League of Nations ('LoN') and the International Labour Organization ('ILO') were set up. Within the LoN, the first administrative tribunal was established in 1927. ILO officials also had access to this tribunal. When the LoN was dissolved in 1946, the tribunal continued to exist as ILOAT. The UN created its own tribunal ('UNAdT') in 1949. Of the UN specialized agencies, two recognized the jurisdiction of the UNAdT (ICAO and IMCO), nine accepted the jurisdiction of the ILOAT (FAO, IFAD, ITU, UNESCO, UNIDO, UPU, WHO, WIPO, WMO) and two established their own tribunals more than 40 years later (World Bank and IMF). Some of the 'related' organizations in the 'UN System', such as the IAEA, IOM and WTO, and a number of regional organizations also recognized the ILOAT's jurisdiction.[2] Today around 60 regional and worldwide organizations have accepted the jurisdiction of the ILOAT and it is the labor law court for more than 58,000 international civil servants.[3] A more recent trend is that a number of organizations have withdrawn their consent to the ILOAT's jurisdiction. For example, the WMO withdrew from the ILOAT in 2017, the IFAD in 2020 and the UPU in 2021. There were different reasons for this, which are not always known to the public, but the judgments of the ILOAT against these organizations seem to have played a role, at least most of the time.[4] Chris De Cooker opines in this regard:

> [These examples] show a worrying trend of "forum shopping". Managers who are dissatisfied with judgments against them venture elsewhere, often without properly consulting their staff. Employers should not seek to influence the judicial control of their decisions. This also puts the new jurisdiction in a delicate position, to say the least, since it may be perceived as more favourable to the administration. This trend poses a threat to the rule of law and the independence of the international judiciary.[5]

[2] Chris De Cooker, 'Proliferation of international administrative tribunals' (2022) 12 Asian JIL 232, 234-235.
[3] ibid 234; International Labour Organization, 'Organizations recognizing the jurisdiction' < www.ilo.org/ilo-administrative-tribunal/organizations-recognizing-jurisdiction > accessed 27 December 2024; International Labour Organization, 'ILO Administrative Tribunal' < www.ilo.org/ilo-administrative-tribunal > accessed 2 November 2024.
[4] Chris De Cooker, 'Proliferation of international administrative tribunals' (2022) 12 Asian JIL 232, 239-241.
[5] ibid 241.

The ILOAT is established by its statute, which in Article X also gives it the competence to draw up its Rules.[6] The Statute and the Rules of the ILOAT are the two legal documents that mainly determine the activities of the ILOAT.

2.2. The tribunal's composition, procedure and judgments

The ILOAT is composed of seven judges of different nationalities.[7] 'The judges shall be persons of high moral character, impartiality and integrity and must have been appointed to, or possess the qualifications required for appointment to, the highest judicial office of their countries.'[8] Moreover, they must have an excellent knowledge of at least one of the working languages of the ILOAT and at least a basic written and oral understanding of the other working language. When appointing judges, the geographical distribution and gender balance should also be taken into account.[9] The judges are appointed for five years, renewable once by the International Labour Conference.[10] They are 'completely independent in the exercise of their functions and shall not receive any instructions or be subject to any constraint.'[11] A meeting of the ILOAT normally consists of three judges, in exceptional circumstances of five or all seven judges.[12] The tribunal elects a President and a Vice-President.[13]

The tribunal holds ordinary sessions and extraordinary sessions, the latter at the request of the Chairperson of the Governing Body of the International Labour Office.[14] Furthermore, the ILOAT may decide or not to hold oral proceedings. Parties can request oral proceedings.[15] A complaint is only receivable if the impugned decision is a final decision, the complainant has exhausted all other open means of redress and it was filed within 90 days after the complainant was notified of the impugned decision.[16] The 90-days-time-limit in Article VII paragraph 2 of the Statute of the ILOAT is a mandatory restriction *ratione temporis* of admissibility or receivability (not of jurisdiction) which means that it must be

[6] Statute of the Administrative Tribunal of the International Labour Organization (adopted 9 October 1946, as amended); Rules of the Administrative Tribunal of the International Labour Organization (adopted 24 November 1993, as amended).
[7] Statute of the Administrative Tribunal of the International Labour Organization (adopted 9 October 1946, as amended) art III para 1 (Statute of the ILOAT).
[8] Statute of the ILOAT, art III para 1.
[9] Statute of the ILOAT art III para 1.
[10] Statute of the ILOAT, art III para 2.
[11] Statute of the ILOAT, art III para 4.
[12] Statute of the ILOAT, art III para 5.
[13] Rules of the Administrative Tribunal of the International Labour Organization (adopted 24 November 1993, as amended) art 1 para 1 (Rules of the ILOAT).
[14] Statute of the ILOAT, art IV.
[15] Statute of the ILOAT, art V.
[16] Statute of the ILOAT, art VII paras 1, 2.

observed and cannot be extended or waived by the tribunal or the parties.[17] A complaint does not cause the suspension of the execution of the decision.[18] The Rules of the ILAOT specify further the procedure before the tribunal: Complaints have to be addressed to the President of the ILOAT through the Registrar.[19] The tribunal can make special arrangements for electronic filing.[20] The complainant can plead his or her own case or appoint a representative.[21] The complaint form available on the website has to be used and a brief stating the facts of the case and the pleas, the items of evidence, a certified translation into English or French of all texts that are not in one of these languages, and five copies of all of these documents must be appended.[22] If these requirements are not met, the Registrar orders the complainant to correct his complaint within 30 days. If the formal requirements are met, the Registrar forwards the complaint to the defendant organization.[23] If the President considers a complaint 'to be clearly outside the Tribunal's competence, clearly irreceivable or clearly devoid of merit', it may be forwarded to the defendant organization for information only.[24] 'When it takes up such a complaint or application, the Tribunal may either dismiss it summarily as being clearly outside its competence, clearly irreceivable or clearly devoid of merit, or decide that the procedure prescribed below shall be followed.'[25]

> If the dispute regards only a question (or questions) of law, identified by agreement of both parties, and the main facts are uncontested, the parties may agree, at any time prior to the assignment of the complaint to a Tribunal session, to apply to the President of the Tribunal for a fast-track procedure. [...][26]

If the complaint is not dismissed summarily, as explained above, and if there is no fast-track procedure, the defendant organization shall submit a reply within 30 days of the date of receipt of the complaint.[27] If it does not, the written pleadings are closed.[28] The reply has to comply with the same formal requirements as the complaint as mentioned above.[29] There can

[17] Chittharanjan F Amerasinghe, *Jurisdiction of specific international tribunals* (Martinus Nijhoff 2009) 326-27; Judgment No 739 *Hunt v EPO* (ILOAT, 17 March 1986).
[18] Statute of the ILOAT, art VII para 4.
[19] Rules of the ILOAT, art 4 para 1.
[20] Rules of the ILOAT, art 4 para 4.
[21] Rules of the ILOAT, art 5 para 1.
[22] Rules of the ILOAT, art 6 para 1.
[23] Rules of the ILOAT, art 6 paras 2, 3.
[24] Rules of the ILOAT, art 7 para 1.
[25] Rules of the ILOAT, art 7 para 3.
[26] Rules of the ILOAT, art 7A.
[27] Rules of the ILOAT, art 8 para 1.
[28] Rules of the ILOAT, art 8 para 4.
[29] Rules of the ILOAT, art 8 para 3.

then be a rejoinder and surrejoinder, each with a 30-day time limit.[30] When the pleadings are sufficient, the complaint is put on the list of a session of the ILOAT.[31] Furthermore, complainants can request anonymity and can withdraw their complaint.[32] The President of the ILOAT may order measures of investigation, for example the filing of an *amicus curiae* brief, and may make provisional orders.[33] Parties can apply for hearings of witnesses.[34] In addition,

> [a]nyone to whom the Tribunal is open under Article II of the Statute may apply to intervene in a complaint requesting that the Tribunal's ruling on the complaint apply to them. The application must set out the basis on which the intervener considers that she or he is in a situation in fact and in law similar to that of the complainant [and] shall be sent to the Registry no later than sixty days [after the receipt of the reply by the complainant].[35]

Judgments are passed by a majority vote, are final and without appeal.[36] They have to include the reasons for the judgment and shall be sent written to the Director-General of the International Labour Office and to the complainant.[37] One copy of the judgments shall be filed in the archives of the International Labour Office where it is available for every affected person.[38] The judgments are also published on the website *Triblex* of the tribunal.[39]

2.3. Jurisdiction of the tribunal

The ILOAT is a tribunal of limited jurisdiction, meaning that it has jurisdictional competence only to the extent that its statute grants it. The international organizations accepting its jurisdiction consent to its jurisdiction to the extent attributed by the statute, whereas staff members or associations consent to jurisdiction when it is invoked by the staff member or association. Sovereignty of states and arguments derived therefrom could be used to justify a restrictive interpretation of the provisions on jurisdiction, however this is not possible when officials bring complaints against international organizations before the tribunal.[40] Hence, ‘a fairly liberal approach may be taken to the interpretation of the provisions governing their

[30] Rules of the ILOAT, art 9.
[31] Rules of the ILOAT, art 10.
[32] Rules of the ILOAT, art 7B, 16.
[33] Rules of the ILOAT, art 11, 15.
[34] Rules of the ILOAT, art 12.
[35] Rules of the ILOAT, art 13 para 1.
[36] Statute of the ILOAT, art VI para 1.
[37] Statute of the ILOAT, art VI para 2.
[38] Statute of the ILOAT, art VI para 3.
[39] ILO Administrative Tribunal, ‘Triblex: Case-law database’ < webapps.ilo.org/dyn/triblex/triblexmain.bySession > accessed 4 January 2025.
[40] Chittharanjan F Amerasinghe, *Jurisdiction of specific international tribunals* (Martinus Nijhoff 2009) 299-300.

jurisdiction of the basic instruments of tribunals'[41], although the limitations on jurisdictional competence must be observed. The latter point was also emphasized by the ILOAT when it pronounced that even though the 'complainant is thereby regrettably deprived of any means of judicial redress, [...] being a Court of limited jurisdiction, [it] is bound to apply the mandatory provisions governing its competence'.[42]

An implied restriction on the jurisdictional competence of international administrative tribunals that is generally accepted is that they only exercise jurisdiction over administrative decisions of organizations in respect of staff members. Furthermore, competence has usually been limited referring to time (*ratione temporis* – This is rather a restriction of admissibility or receivability, see p. 3), person (*ratione personae*) or subject matter (*ratione materiae*).[43] Reference will also be made to these limitations, when the jurisdictional provisions of the statute of the ILOAT are examined in more detail below.

2.3.1. Article II paragraphs 1, 2, 5, 6 and 7 of the statute

Article II is the relevant provision of the ILOAT's statute that establishes its jurisdiction. The ILOAT has jurisdiction not only over staff of the ILO, but it is also competent to consider disputes between any international organization that has accepted its jurisdiction and their staffs. Additionally, the tribunal can be tasked with the settlement of conflicts arising from contracts concluded by the ILO.[44] The latter ground for jurisdiction, namely that on the basis of choice of forum clauses, is the focus of interest in this paper and in the next sub-chapter, nevertheless firstly there will be an overview of the other provisions of Article II of the statute.

Article II paragraph 1 states:

> The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.[45]

[41] ibid 300.
[42] Judgment No 67 *Darricades v UNESCO* (ILOAT, 26 October 1962) con 3.
[43] Chittharanjan F Amerasinghe, *Jurisdiction of specific international tribunals* (Martinus Nijhoff 2009) 301-02.
[44] Kamal Uddin and Siraj Uddin, 'The contractual rights of international civil servants: Administrative tribunals of the United Nations and International Labour Organization Perspective' (2012) 3(11) MJSS 667, 669.
[45] Statute of the Administrative Tribunal of the International Labour Organization (adopted 9 October 1946, as amended) art II para 1 (Statute of the ILOAT).

This paragraph limits the ILOAT's competence *ratione personae* to officials of the International Labour Office. However, paragraph 5 extends its jurisdiction to officials of

> any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules, and which is approved by the Governing Body. Any such organization may withdraw its declaration recognizing the jurisdiction of the Tribunal under the procedure set out in the Annex.[46]

The interpretation of 'official' is crucial in this regard. The ILOAT does not exercise jurisdiction over non-staff members under these paragraphs.[47] Applicants for new appointments who do not obtain these appointments are usually not regarded as staff members, nevertheless this also largely depends on the interpretation.[48] Paragraph 6 of the same article further clarifies and extends the group of people who can bring claims before the ILOAT:

> The Tribunal shall be open:
> (a) to the official, even if her or his employment has ceased, and to any person on whom the official's rights have devolved on her or his death;
> (b) to any other person who can show that she or he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.[49]

Therefore, on the one hand paragraph 6 makes clear that also former officials have standing to litigate before the tribunal. Former fixed-term contract holders whose contracts have not been renewed also fall under this category according to the ILOAT and the ICJ.[50] On the other hand, it extends the group of legitimate claimants to people on whom rights of an official have devolved on the official's death and other people who are entitled to some right under the terms of appointment or Staff Regulations of a deceased official.

[46] Statute of the ILOAT, art II para 5.
[47] Judgment No 171 *Silow v ILO* (ILOAT, 17 November 1970).
[48] Judgment No 547 *Chen v WHO* (ILOAT, 30 March 1983); Judgment No 868 *Zayed v UPU* (ILOAT, 10 December 1987).
[49] Statute of the ILOAT, art II para 6.
[50] Chittharanjan F Amerasinghe, *Jurisdiction of specific international tribunals* (Martinus Nijhoff 2009) 318.

Regarding the organizations entitled to recognize the jurisdiction of the ILOAT according to paragraph 5, the annex of the statute states the following conditions: An international organization empowered to accept the tribunal's jurisdiction

> must either be intergovernmental in character, or fulfil the following conditions:
>
> (a) it shall be clearly international in character, having regard to its membership, structure and scope of activity;
> (b) it shall not be required to apply any national law in its relations with its officials, and shall enjoy immunity from legal process as evidenced by a headquarters agreement concluded with the host country; and
> (c) it shall be endowed with functions of a permanent nature at the international level and offer, in the opinion of the Governing Body, sufficient guarantees as to its institutional capacity to carry out such functions as well as guarantees of compliance with the Tribunal's judgments.
>
> 2. The Statute of the Tribunal applies in its entirety to such international organizations subject to the following provisions […][51]

Since the establishment of the ILOAT around 60 worldwide and regional organizations have recognized its jurisdiction.[52]

Article II paragraphs 1 and 5 of the ILOAT statute define the tribunal's competence *ratione materiae* by reference to 'complaints alleging non-observance, in substance or in form, of the terms of appointment of officials [and of] provisions of the Staff Regulations'.[53] This usually also includes cases concerning the refusal to renew fixed-term contracts[54] and appeals against decisions of the governing body of the respondent organization[55], but not complaints against general legislation without allegation of a violation of the applicant's particular rights.[56] Legislative acts and abstract rules are within the ILOAT's competence if there is a challenge to an actual decision affecting the applicant and not merely a request of

[51] Statute of the ILOAT, annex paras 1-2.
[52] Chris De Cooker, 'Proliferation of international administrative tribunals' (2022) 12 Asian JIL 232, 234; International Labour Organization, 'Organizations recognizing the jurisdiction' < www.ilo.org/ilo-administrative-tribunal/organizations-recognizing-jurisdiction > accessed 27 December 2024.
[53] Statute of the ILOAT, art II paras 1, 5.
[54] Judgment No 56 *Robert v WHO* (ILOAT, 6 October 1961).
[55] Judgment No 580 *Tévoédjrè v ILO* (ILOAT, 20 December 1983).
[56] Judgment No 103 *Jurado v ILO* (ILOAT, 9 May 1967).

annulment of the legislative act[57] – Also in other cases there must be a 'final decision'[58] affecting the staff member.[59]

Other grounds for the jurisdiction of the ILOAT are provided by Article II paragraphs 2 and 7: Paragraph 2 regards

> any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of her or his employment and to fix finally the amount of compensation, if any, which is to be paid.[60]

Finally, Article II paragraph 7 of the statute of the ILOAT establishes the tribunal's competence for conflicts over its jurisdiction.

2.3.2. Article II paragraph 4 of the statute: choice of forum

Article II paragraph 4 of the statute of the ILOAT stipulates the tribunal's jurisdiction on the basis of choice of forum clauses. It reads: 'The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution'.[61] Hence, under this paragraph the ILOAT can rule on complaints from non-officials (competence *ratione personae*). Its competence *ratione materiae* is limited under this paragraph to disputes regarding the execution of a contract with the ILO. Nevertheless, the annex states that '[t]he statute […] applies in its entirety to such international organizations […]'[62], so contracts with all organizations that have recognized the ILOAT's jurisdiction are included. Of the relevant ILOAT judgments that deal with the tribunal's jurisdiction based on this paragraph, Judgments No 1052[63], 4809[64], 3445[65], 2148[66] and 803[67] entail a positive decision on the tribunal's competence. On the contrary, Judgments No 1267[68], 967[69] and 4652[70] dismiss the complaint due to a lack of jurisdiction. In Judgment No 2888 the tribunal

[57] Judgment No 624 *Giroud and Lovrecich v EPO* (ILOAT, 5 December 1984).
[58] Statute of the ILOAT, art VII para 1.
[59] Judgment No 466 *Tarrab v ILO* (ILOAT, 28 January 1982).
[60] Statute of the ILOAT, art II para 2.
[61] Statute of the Administrative Tribunal of the International Labour Organization (adopted 9 October 1946, as amended) art II para 4 (Statute of the ILOAT).
[62] Statute of the ILOAT, annex para 2.
[63] Judgment No 1052 *James v ILO* (ILOAT, 26 June 1990).
[64] Judgment No 4809 *K v ILO* (ILOAT, 31 January 2024).
[65] Judgment No 3445 *Z, S, C and P v ILO* (ILOAT, 11 February 2015).
[66] Judgment No 2148 *KK v ILO* (ILOAT, 15 July 2002).
[67] Judgment No 803 *Grover v ICC* (ILOAT, 13 March 1987).
[68] Judgment No 1267 *Quraishi v ILO* (ILOAT, 31 January 1994).
[69] Judgment No 967 *Antal v ICITO/GATT* (ILOAT, 27 June 1989).
[70] Judgment No 4652 *D v GCF* (ILOAT, 7 July 2023).

rejects its jurisdiction regarding some (service) contracts and confirms its jurisdiction regarding other (external collaboration) contracts.[71]

An example of a choice of forum clause that the ILOAT considers fit to establish its jurisdiction is the following: '[A]ny conflict arising from the application or interpretation of [these] contracts should be submitted to the Tribunal, in accordance with Article II, paragraph 4, of its Statute'.[72] Such a suitable clause was present for example in Judgment No 1052 which deals with the claims for reinstatement and damages for loss of pay of a language teacher after not being employed any longer after the probation period. Language teachers were neither ILO officials nor subject to the Staff Regulations of the International Labour Office but employed under standard contracts and subject to special service regulations. The complainant held two successive contracts with the ILO during his two-year probation period from 1 September 1987 to 31 August 1989. Clause 10 of this contract contained a choice of forum clause of the above mentioned kind. By a letter of 15 June 1989 the complainant was informed that he would not be amployed after the expiry of his contract on 31 August 1989 due to complaints by students. The complainant now claims reinstatement and damages for loss of pay from 1 September 1989. The tribunal considers itself competent under Article II paragraph 4 of its statute and declares the complaint receivable, but devoid of merit.[73]

In Judgment No 4809 the complainant is a provider of IT services to the International Labour Office. He held a series of external collaboration contracts, two short-term contracts and one special short-term contract between December 2000 and January 2007 and seeks a contractual redefinition of his employment as one fixed-term contract.[74] Regarding its jurisdiction the ILOAT first confirms that

> where an external collaboration contract confers jurisdiction for settling disputes concerning its performance on another judicial authority or […] on an arbitral body, the Tribunal cannot hear such a dispute, even where it concerns precisely the redefinition of the contract in question as a contract appointing an official.[75]

Nevertheless, it then continues:

> [P]lainly this case law does not apply when that contract grants jurisdiction to the Tribunal to hear disputes relating to its performance, as permitted under Article II,

[71] Judgment No 2888 *M v ILO* (ILOAT, 3 February 2010).
[72] Judgment No 3445 *Z, S, C and P v ILO* (ILOAT, 11 February 2015). See also Judgment No 1052 *James v ILO* (ILOAT, 26 June 1990); Judgment No 2148 *KK v ILO* (ILOAT, 15 July 2002).
[73] Judgment No 1052 *James v ILO* (ILOAT, 26 June 1990).
[74] Judgment No 4809 *K v ILO* (ILOAT, 31 January 2024).
[75] ibid con 2.

> paragraph 4, of the Tribunal's Statute […] In this case, the external collaboration contracts concluded by the ILO and the complainant all included a provision in paragraph 12 specifically conferring jurisdiction on the Tribunal to hear "[a]ny dispute arising out of [their] application or interpretation".[76]

Consequently, the tribunal affirms its jurisdiction based on Article II paragraph 4 in this case.

The complainants in Judgment No 3445 held external collaboration contracts, too, with the International Labour Office and the United Nations Development Programme from 1 December 2005 to 30 June 2006 for a joint program after a hurricane in Guatemala. These contracts provided that any conflict arising from the application or interpretation of these contracts should be submitted to the ILOAT, in accordance with Article II, paragraph 4, of its Statute. On 16 November 2006 the external collaboration contracts for March, April and June 2006 were rescinded due to unsatisfaction with the performance which is the decision the complainants are impugning. The ILOAT accepted its jurisdiction in this case without going into more detail about it in its judgment.[77]

Similarly, in Judgment No 2148 a holder of a special service agreement with the ILO, more specifically the National Programme Coordinator for IPEC in Islamabad, filed a complaint against the decision of non-renewal of her agreement. Paragraph 23 of the special service agreement provided that '[a]ny claim or dispute relating to the […] execution of the present agreement which cannot be settled amicably will be referred to the Administrative Tribunal of the ILO'.[78] Likewise, the ILOAT affirmed its jurisdiction on this basis without further explanation.[79]

In Judgment No 803 the complainant, a computer programmer, files a claim against the International Computing Centre ('ICC') which is a 'common facility' in Geneva providing computer services for the UN agencies. Administrative services are provided to the ICC by the WHO and the WHO Staff Regulations and Rules regulate the appointment of ICC staff members. Concerning the ILOAT's competence, the tribunal reasons that it has jurisdiction under Article II paragraph 4 of its statute in this case since the ICC is administered by the WHO which has recognized its competence.[80]

With regard to negative decisions on jurisdiction, Judgment No 1267 concerns claims which were not based on a contract: The complainant worked for the ILO on a national

[76] ibid con 2.
[77] Judgment No 3445 *Z, S, C and P v ILO* (ILOAT, 11 February 2015).
[78] Judgment No 2148 *KK v ILO* (ILOAT, 15 July 2002) con 9.
[79] Judgment No 2148 *KK v ILO* (ILOAT, 15 July 2002).
[80] Judgment No 803 *Grover v ICC* (ILOAT, 13 March 1987).

vocational training project in Pakistan under a series of external collaboration contracts from 1 November 1982 to 31 March 1984 and as a specialist in in-plant training under a service agreement from 1 April 1984 to 31 December 1985. From 30 April 1990 onwards he held another external collaboration contract. In March 1984 the complainant put forward the idea of a national supervisory training center in discussions with the general manager of the Pakistan Industrial Technical Assistance Centre (PITAC) which was outside the scope of his duties. In May 1990 he was offered an appointment as national supervisory training adviser at 2 500 $ a month for 30 months. After some changes in the documents, in May 1991 the complainant was informed that the budget was reduced to 1 500 $ a month and that recruitment was to be by advertisement in the press. Following, the complainant raises two main claims: compensation of 210 000 $ plus interest for the concept, development and sales of idea regarding the national supervisory training center and compensation of 75 000 $ plus interest for the breach of contract by the ILO to employ him as national supervisory training advisor at 2 500 $ a month for 30 months.[81] With regard to the first claim, the tribunal held that it

> did not arise under the contracts which he held from 1 November 1982 to 31 December 1985 and which related to a different project with different objectives. Between 1 January 1986 and 29 April 1990 he had no contract at all with the Organisation so that any work he then did to develop his idea cannot have been done under contract. And the work which he did between 30 April and 24 May 1990 was covered by, and fully paid for under, a contract for external collaboration. Since the claim does not arise out of a dispute over any contract to which the Organisation was a party the Tribunal is not competent to entertain it.[82]

Relating to the second claim, the tribunal concluded that

> though support for the complainant's candidature for the post of national adviser may well have been expressed on several occasions, there was neither a contract concluded with him nor even a definite offer of employment made to him for the purpose. His second claim too therefore fails because the Tribunal is not competent to entertain it.[83]

In Judgment No 967 the complainant was employed in the snack bar of the GATT and his contract of employment specified that he was not an official of the GATT and not subject to

[81] Judgment No 1267 *Quraishi v ILO* (ILOAT, 31 January 1994).
[82] ibid con 9.
[83] ibid con 11.

the Staff Regulations. Therefore, he does not base the ILOAT's competence on the status as an official but, correctly, on Article II paragraph 4 of the ILOAT statute. He argues that the choice of forum is implied in his contract. The tribunal ruled that the choice of forum cannot be implied but must be expressly agreed between the parties. Hence, it is not competent in this case.[84]

In Judgment No 2888 the complainant requested the reclassification of his contracts as fixed-term contracts. He held an external collaboration contract with the International Labour Office from June to December 2003 and from January 2004 to June 2005 he continued to provide his services under other external collaboration contracts which were concluded with his Swiss law company. The reclassification of these contracts is within the competence of the ILOAT, although they expressly stated that their holder was not an ILO official, because they contained a clause attributing jurisdiction to the tribunal according to Article II paragraph 4 of the statute of the ILOAT. From July 2005 to December 2007 the complainant supplied his services under different service contracts, again concluded with his law company.[85] These service contracts are not within the ILOAT's jurisdiction because the relevant arbitration clauses expressly conferred jurisdiction to another judicial body. More precisely, the ILOAT stated:

> […] Annex 1 to the contracts in question […] stipulated in paragraph 11.2 that "[a]ny dispute, controversy or claim arising out of or relating to [these] Contract[s]" which could not be resolved by mutual agreement should be settled by arbitration in accordance with the terms and conditions defined in that annex. The Tribunal has already had occasion to rule that it has no jurisdiction to hear a dispute relating to a contract concluded with an independent contractor or collaborator which contains such an arbitration clause […]
>
> It is true that the direct application of this case law might give rise to misgivings in a case such as this, where the controversy hinges on whether the disputed contract should be reclassified as a contract appointing an official. In such circumstances, the question of the Tribunal's jurisdiction in fact touches on the merits of the case, since were the complainant to be recogni[z]ed as an official by the Tribunal, he would be entitled to bring his claims before the Tribunal. It might therefore seem logical not to decide this issue until the merits of the request for reclassification have been examined. However, this line of reasoning cannot be applied where, as in the present

[84] Judgment No 967 *Antal v ICITO/GATT* (ILOAT, 27 June 1989).
[85] Judgment No 2888 *M v ILO* (ILOAT, 3 February 2010).

> case, jurisdiction to hear any dispute concerning the contract is expressly attributed to another judicial or arbitral body. A request that a contract be reclassified constitutes by its very nature a dispute relating to that contract. The Tribunal will not overstep the limits of its jurisdiction, as defined in Article II of its Statute, by giving a ruling of any kind on the merits of claims which it should not entertain at all.[86]

Judgment No 4652 takes up this case law and concerns the redefinition of the contractual relationship between the Green Climate Fund ('GCF') and the complainant, a consultant, as a *de facto* employment relationship identical to that of a staff member. The contracts between the GCF and the complainant expressly stated that they did not create the relationship of employer and employee and that the complainant was retained to work as a consultant. Furthermore, they entailed an arbitration clause which provided for arbitration by a single arbitrator in the Republic of Korea. The central legal issue was whether the complainant was to be considered an official of the organization or not. About this matter, the ILOAT stated that the contracts contain a very clear definition of the relationship between the parties, even though the status as an official does not depend exclusively on the wording of the contract and the ILOAT may need to rely on other documents in other cases.[87] Regarding the ILOAT's competence, the judgment repeats the reasoning of Judgment No 2888, as cited above, more precisely its lack of jurisdiction on the basis of arbitration clauses in contracts with independent contractors that expressly confer jurisdiction to another judicial or arbitral body. Judgment No 4652 then continues by stating that including an arbitration clause in the contract of an official would be contrary to the statute and the basis on which organizations recognize the ILOAT's jurisdiction. An official of an organization which has recognized the tribunal's jurisdiction has a right to litigate according to Article II paragraph 5 of the statute regardless of an arbitration clause.[88] Including an arbitration clause in the contract of a non-official

> […] is not unlawful in itself. In this case, as noted above, the arbitration clause specifically provides for arbitration by a single arbitrator in the Republic of Korea. […]

[86] ibid cons 5, 6.
[87] Judgment No 4652 *D v GCF* (ILOAT, 7 July 2023).
[88] ibid.

> The Tribunal would be competent to hear disputes concerning the execution of a contract of a non-official where the contract itself provides for the Tribunal's competence, as provided for by Article II, paragraph 4, of its Statute […][89]

However, in the present case the tribunal concludes that it is not competent.[90]

[89] ibid cons 20, 21.
[90] Judgment No 4652 *D v GCF* (ILOAT, 7 July 2023).

3. The CJEU's case law on Article 272 TFEU

Article 272 TFEU (ex Article 238 TEC) stipulates the CJEU's competence based on arbitration clauses: 'The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'.[91] This article is a rule of jurisdiction *sui generis* and an open provision.[92]

The relevant case law often touches upon the question of the distinction between an action for annulment according to Article 263 TFEU and Article 272 TFEU:

> [T]he Court has found that, in the context of an action for annulment, the power of interpretation and application of the provisions of the FEU Treaty by the EU judicature does not apply where the applicant's legal position falls within the contractual relationships whose legal status is governed by the national law agreed to by the contracting parties […]
>
> Were the EU judicature to hold that it had jurisdiction to adjudicate on the annulment of acts falling within purely contractual relationships, not only would it risk rendering Article 272 TFEU — which grants the Courts of the European Union jurisdiction pursuant to an arbitration clause — meaningless, but would also risk, where the contract does not contain such a clause, extending its jurisdiction beyond the limits laid down by Article 274 TFEU, which specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party […][93]

When an institution, particularly the European Commission, grants financial contributions by means of a contract falling within Article 272 TFEU, 'it is bound to stay within that framework'.[94] The institution must not use ambiguous formulations that could be understood as conferring unilateral decision-making powers beyond the contractual stipulations.[95]

In other cases, the CJEU gives special consideration to the declaratory nature of the action brought by the appellant before the General Court: A question regarding jurisdiction must be raised by the CJEU of its own motion, even if the parties have not asked to do so.

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[91] Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C326/47 art. 272.
[92] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) Opinion of AG Kokott, paras 18-22.
[93] Case C-14/18 P *Alfamicro v Commission* [2019] OJ C 139/18, paras 48-49. See also Case C-506/13 P *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro v Commission* (ECJ, 9 September 2015) paras 18-19; Case C-584/17 P *ADR Center SpA v Commission* (ECJ, 16 July 2020) paras 63-64.
[94] Case C-506/13 P *Lito Maieftiko Gynaikologiko kai Cheirourgiko Kentro v Commission* (ECJ, 9 September 2015) para 21.
[95] ibid.

Under an arbitration clause the CJEU may have to decide a dispute on the basis of the national law governing the contract. However, its jurisdiction is only determined by Article 272 TFEU and the arbitration clause which cannot be affected by national law (possibly excluding its jurisdiction).[96]

> It follows from the foregoing that Article 272 TFEU is a specific provision allowing the courts of the European Union to be seised under an arbitration clause agreed by the parties for contracts governed by either public or private law, and without restriction as regards the nature of the action to be brought before the courts of the European Union.[97]

The opinion of Advocate General Kokott on *Planet AE v Commission*[98] provides a deeper insight into the legal reasoning behind this judgment: There is no exhaustive list of categories of action that could be possible legal remedies under an arbitration clause.[99]

> [I]f Article 272 TFEU leaves the parties free to bring their legal disputes before the Courts of the Union for judgment to be given, those courts must also, in principle, have jurisdiction in relation to all claims submitted in the context of such disputes, including any claims seeking a declaration.[100]

This follows from Article 47 CFR, the principle of effective legal protection.[101] Whereas the TFEU exhaustively lists possible categories of action for other types of legal relationships, it is 'specifically silent on the issue of arbitration clauses'.[102] The possible content of the contracts 'governed by public or private law'[103] is not further specified. Certainly, under Article 272 TFEU, the CJEU must assure comprehensive and effective legal protection to the parties.[104] Moreover, there are convincing reasons for assessing the admissibility of actions (for a declaratory judgment) under Article 272 TFEU solely on the basis of EU law and not the law applicable to the contract (usually national law): Firstly, the conditions of admissibility of actions are an essential core element of procedural law and must therefore be assessed according to the rules that apply to the court (*lex fori*), in this case EU law. Secondly,

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[96] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) paras 20-21. See also Case T-460/08 *Commission v Acentro Turismo SpA* [2010] OJ C 38/11, paras 33, 37.
[97] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) para 23.
[98] ibid.
[99] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) Opinion of AG Kokott, para 19.
[100] ibid para 20.
[101] ibid.
[102] ibid para 22.
[103] Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C326/47 art. 272.
[104] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) Opinion of AG Kokott, para 22.

the principles of autonomy and uniform application of EU law speak in favor of an assessment of the admissibility based on EU law. Thirdly, there is no need to resort to the law applicable to the contract to assess the admissibility of the action because EU law entails comprehensive, generally applicable principles. One of these prerequisites is a party's interest in bringing proceedings which is often the key issue when actions for a declaratory judgment are brought before the CJEU.[105]

To sum up, Article 272 TFEU which establishes the CJEU's jurisdiction on the basis of arbitration clauses in contracts with the EU is an open provision.[106] As far as the admissibility of actions under Article 272 TFEU is concerned, there are no restrictions on the possible content of the contracts or the nature of the actions.[107] The admissibility of actions of this kind is to be judged in the light of EU law.[108] With regard to the distinction from Article 263 TFEU, disputes arising out of contractual relationships cannot be referred to the CJEU under Article 263, but under Article 272 TFEU.[109]

[105] ibid paras 24-38.
[106] ibid para 22.
[107] Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) para 23; Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015) Opinion of AG Kokott, para 20, 22.
[108] ibid.
[109] Case C-14/18 P *Alfamicro v Commission* [2019] OJ C 139/18, paras 48-49.

4. Discussion and conclusion

What lies behind the establishment of international administrative tribunals in general and the ILOAT specifically, is the immunity of international organizations before national courts. Thus, the ILOAT was established precisely to settle disputes between international organizations and their employees homogeneously.[110] Consequently, this paper has examined the conditions for access to the ILOAT, more precisely its jurisdiction.

In response to the question posed at the beginning – How does the ILOAT apply Article II paragraph 4 of its statute and to what extent is this consistent with or does this differ from the case law of the CJEU on Article 272 TFEU? – the following conclusions can be drawn: The ILOAT's jurisdiction under choice of forum clauses according to Article II paragraph 4 of its statute is more limited than the CJEU's competence based on arbitration clauses under Article 272 TFEU. Article II paragraph 4 of the statute of the ILOAT is applicable to non-officials *(ratione personae)* who hold contracts including an adequate choice of forum clause with an organization that has recognized the ILOAT's competence.[111] This is not a very far-reaching restriction, however Article 272 TFEU does not entail such a limitation and is therefore broader. Moreover, the ILOAT's competence *ratione materiae* is limited to disputes regarding the execution of a contract with the ILO or any organization that has accepted its jurisdiction.[112] This does not appear to be a substantial limitation either. Nevertheless, the CJEU's competence based on Art 272 TFEU is even broader in comparison since, according to the wording, there are explicitly no restrictions as to the possible content of the contract or, according to the case law, the nature of the claims.[113]

It should be remembered that both provisions concern contractual claims and the identified differences are small. It should also be noted that especially the case law of the ILOAT on Article II paragraph 4 of its statute is not extensive but seems to be largely consistent. In conclusion, it can be stated that Article 272 TFEU is applied slightly more broadly by the CJEU than Article II paragraph 4 of the ILOAT's statute by the ILOAT, even though there are also significant similarities in the application of these two provisions. In further studies, it may be of interest to investigate whether people other than non-officials could appeal to the ILOAT under Article II paragraph 4 of its statute, too, and whether non-

[110] August Reinisch, 'The immunity of international organizations and the jurisdiction of their administrative tribunals' (2008) 7(2) Chinese JIL 285.
[111] Statute of the ILOAT art II para 4; Judgment No 4652 *D v GCF* (ILOAT, 7 July 2023).
[112] Statute of the ILOAT art II para 4; Judgment No 2888 *M v ILO* (ILOAT, 3 February 2010).
[113] Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C326/47 art. 272; Case C-564/13 P *Planet AE v Commission* (ECJ, 26 February 2015).

employment-related disputes would also be settled by the tribunal under this provision. In the research for this paper, no case law of the ILOAT could be found that would answer these questions. These are questions that would be worth being addressed by the ILOAT and studied in more detail.

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