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IFAD's Appeals Process: Assessment and Recommendations

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For: Approval

Recommendation for approval

This report concerns IFAD's potential withdrawal from the jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT) and its submission to the jurisdiction of the United Nations Appeals Tribunal (UNAT). The Executive Board is invited to consider and approve the recommendation provided in paragraph 29.

IFAD's Appeals Process: Assessment and Recommendations

I. Introduction

1. At its thirty-fifth session, the Executive Board approved document EB 88/35/R.78, subjecting IFAD to the administrative jurisdiction of the Administrative Tribunal of the International Labour Organization (ILOAT) for cases arising from staff members' appeals against final decisions by IFAD Management. Since then, the ILOAT has issued 22 judgements in which IFAD was a party.¹
2. Three potential tribunals were considered under document EB 88/33/R.19, during the Executive Board review of the submission of IFAD to an administrative tribunal: the ILOAT, the United Nations Administrative Tribunal² and the World Bank Administrative Tribunal (WBAT). The decision was made to eschew the WBAT based on the desire to further align IFAD with the United Nations Common System. There is no significant substantive debate on record on the merits (30 years ago) of the United Nations Administrative Tribunal versus the ILOAT.
3. On 1 August 2018, the Executive Management Committee (EMC) approved the proposal to review options for IFAD's submission to the jurisdiction of an administrative tribunal. Subsequently, IFAD conducted a benchmarking exercise and presented the results to the EMC at a meeting held on 23 January 2019, at which the following issues were discussed:
 - (i) Alignment with various entities currently under ILOAT's jurisdiction: various entities that are currently under ILOAT's jurisdiction have raised concerns about how the ILOAT has been handling cases, particularly regarding lack of jurisprudential consistency and appropriate weight of proportionality of decisions, among other matters;
 - (ii) Standard of proof: the concern that the ILOAT standard of proof – "beyond a reasonable doubt" – does not allow the Fund to react properly in disciplinary cases, including ensuring the full implementation of its zero tolerance towards sexual harassment (SH), sexual exploitation and abuse (SEA), anticorruption and other crucial disciplinary issues;³
 - (iii) Administrative costs: ILOAT's administrative costs are significantly higher than those of the United Nations Appeals Tribunal (UNAT) (roughly 40 per cent more); and

¹ ILOAT judgements 1017, 1614, 1717, 1724, 1970, 2102, 2103, 2206, 2392, 2442, 2591, 2867, 3003, 3143, 3152, 3409, 3410, 3411, 3739, 3855, 3856 and 3995.

² The United Nations Administrative Tribunal went under a substantial redesign that came into effect in 2009. Although the acronym remained the same, it now stands for "United Nations Appeals Tribunal".

³ See www.unaids.org/sites/default/files/media_asset/report-iep_en.pdf.

- (iv) Time to decision: the timespan for staff and IFAD to await tribunal decisions from the ILOAT is 2 to 3 times longer than that of UNAT (although the ILOAT is working to reduce this).⁴
4. At the conclusion of the discussion, the EMC endorsed the recommendation for IFAD to submit to the jurisdiction of the UNAT, while maintaining, at this stage, the current first instances of IFAD's internal grievance process (i.e. the Mandatory Administrative Review [MAR] and the Joint Appeals Board [JAB]). The EMC also requested that consultations be conducted with the IFAD Staff Association (ISA) and that the proposal be submitted to the Executive Board for approval at its 126th session in May 2019.

II. Benchmarking exercise

5. IFAD considered the following options for submission to the jurisdiction of an administrative tribunal: (i) remaining at ILOAT; (ii) joining the UNAT; (iii) joining a non-United Nations administrative tribunal (e.g. those of the World Bank or International Monetary Fund [IMF]); and (iv) establishing a new tribunal (a specific IFAD tribunal or one for the Rome-based agencies [RBAs]).
6. To this end, a comprehensive benchmarking exercise was conducted (see annex) by analysing the statutes of the ILOAT, UNAT, and the administrative tribunals of the World Bank, IMF, Asian Development Bank and Technical Centre for Agricultural and Rural Cooperation (CTA), and conducting interviews with counterparts in these agencies. IFAD also received input from other organizations that had recently withdrawn from the jurisdiction of the ILOAT.
7. As a result of the benchmarking exercise, IFAD considers that submitting to the jurisdiction of the UNAT would be the most suitable option based on institutional and legal considerations.
8. It must be noted that since becoming operational in July 2009 (upon the redesign of the United Nations system of administration of justice), the jurisdiction of the UNAT now encompasses appeals from approximately 60 United Nations system entities, including the institutions under the jurisdiction of the United Nations Dispute Tribunal, the United Nations Relief and Works Agency for Palestine Refugees Dispute Tribunal, the United Nations Joint Staff Pension Fund, and six other organizations that are also part of the United Nations system.
9. Although the ILOAT has jurisdiction over several United Nations system entities, it is also the forum for numerous non-United Nations organizations. In fact, out of the 59 organizations that currently submit to the ILOAT, approximately 15 are United Nations system entities. In contrast, the UNAT only hears cases from United Nations agencies.
10. Other matters that should be considered are detailed below.

A. Alignment with various entities currently under ILOAT's jurisdiction

11. Within the last couple of years, various agencies have opted to leave the ILOAT. Consequently, the International Labour Organization (ILO) has recently proposed amending the ILOAT statute in order to establish additional mandatory requirements with which organizations must comply prior to leaving the tribunal. In fact, the ILO Governing Body is scheduled to consider amendments to the ILOAT statute that will likely regulate or limit an organization's right to withdraw from ILOAT jurisdiction.
12. In response to that proposal, nine entities that are currently under ILOAT's jurisdiction, including IFAD, the Food and Agriculture Organization of the United

⁴ *Id.* at para. 162.

Nations (FAO) and the World Food Programme, sent a joint letter to the ILO on 29 October 2018, raising concerns about how the ILOAT has been handling cases in recent years. Among other matters, the signatories noted concerns on the high ILOAT standard of proof equivalent to criminal standards, and stated that there has been a lack of jurisprudential consistency and appropriate weight of proportionality of the decisions (particularly regarding damages and specific performance). Subsequently, several other entities submitted letters raising similar concerns or endorsing the joint letter of 29 October. Although the ILO has made efforts to respond to some of the concerns raised by the entities, the proposed amendments fail to address several of the serious issues raised. A subsequent letter was sent to the ILO on 21 January 2019 signed by 22 entities restating these issues. As of present date, at least 27 entities (of the 59 that are currently under ILOAT's jurisdiction) have formally expressed concerns and dissatisfaction over the potential amendments to the ILOAT statute.

13. The ILO called a meeting on 12 March 2019, inviting the legal counsels of all member entities. At least 20 entities, including IFAD, were represented at the meeting. They voiced, yet again, their concerns and requested that the matter not be submitted to the ILO Governing Body. Regardless of these pleas, the ILO submitted the proposed amendments. Subsequently, the ILO Governing Body decided to defer consideration of the amendments to October-November 2019.

B. Standard of proof

14. The ILOAT standard of proof for an organization to demonstrate misconduct by a staff member is "beyond a reasonable doubt".⁵ This is the highest burden of proof, and it is usually applied in national courts for criminal cases, which require that the fact at issue must be established to a degree of almost certainty. This is of particular relevance in the context of sensitive allegations of misconduct.
15. This threshold is not proportionate in the context of an organization's investigation.⁶ For example, it may effectively prevent the Fund from terminating the contract of or penalizing an offender, while failing to prevent and protect SH/SEA victims or demonstrate IFAD's zero tolerance on the issue. Moreover, this standard of proof may discourage victims and witnesses, who may perceive that allegations and further investigations do not yield any relevant consequences.⁷
16. In contrast, UNAT's standard of proof for misconduct is "clear and convincing evidence". This threshold is also high and requires a thorough examination of the allegations. However, it is more appropriate to the nature of IFAD's investigations and sanctions processes, while allowing the Fund to fulfil its strong commitment to SH/SEA, anticorruption and other crucial matters.
17. It appears that the ILOAT is the only administrative tribunal that requires such a high standard of proof and applies it to all disciplinary cases, regardless of the sanction involved, including in cases that do not involve dismissal or demotion of employees.⁸
18. In a recent case involving an employee of FAO who had been suspended for misconduct (V. versus FAO, ILOAT judgement no. 3880 (2017)), the ILOAT confirmed that the burden of proof for this type of disciplinary action was "beyond a reasonable doubt". Moreover, even in cases where the misconduct is potentially severe, the ILOAT still requires compliance with this standard of proof. This was further reaffirmed in a case involving a staff member of the International Organization for Migration (IOM), whose contract was not renewed due to the staff

⁵ The ILOAT applied this standard of proof in recent judgements 3563, 3578, 3640, 3725, 3875, 3964 and 4047.

⁶ A recent independent study by a panel of outside legal experts noted that this standard is "erroneous and misplaced" for international organizations' investigations. See www.unaids.org/sites/default/files/media_asset/report-iep_en.pdf.

⁷ *Id.*

⁸ *Id.*

member's involvement in acts of retaliation, breach of confidentiality and other unprofessional behaviour (D. versus IOM, ILOAT judgement no. 3848 (2017)).

19. By comparison, the UNAT has explicitly rejected "beyond a reasonable doubt" as the proper standard of proof for disciplinary cases (Molari versus Secretary-General of the United Nations, UNAT judgement no. 2011-UNAT-164 (2011)), noting that disciplinary cases are not criminal and that the proper standard of proof for misconduct is "clear and convincing evidence".

C. Administrative costs

20. IFAD examined the administrative costs arising from ILOAT in the context of the potential move to UNAT. Under the jurisdiction of the UNAT, IFAD would pay US\$9,500 per case, nearly 40 per cent less than the current administrative costs of US\$16,245 associated with the ILOAT.⁹

D. Time for decision issuance

21. The UNAT's robust system throughout its proceedings and at a decision-making level results in more consistent judgements being issued, within a period from 8 to 10 months.¹⁰ Such an efficient time frame will be of immediate benefit to both IFAD and staff members, and render the process more reliable and predictable.
22. In contrast, the ILOAT issues decisions two to three years after proceedings have initiated. While ILOAT is working to shorten this timespan, it is unclear when this would become effective, to what extent the time gap would be reduced or whether such reduction would be sufficient in the event of another unexpected workload increase for ILOAT.¹¹

III. Consultation with the IFAD Staff Association

23. Prior to presenting the Board with the proposal to withdraw from the jurisdiction of ILOAT and submit to that of UNAT, Management consulted the ISA. As part of this consultation process, the Human Resources Division and the Office of the General Counsel held meetings with members of the ISA Executive Committee (ECSA), including the Chairperson, to explain the reasoning behind the proposal. Furthermore, at their request, a table containing the key highlights of the benchmarking exercise and an explanatory paper were shared for their information. ECSA set up a task force through which it consulted more than 40 members, and hired an external independent legal counsel to review the proposal, and also reached out to counterparts at other international organizations to obtain their views on the matter.
24. On 11 March 2019, ECSA provided a written response on the proposal, in which it recognized that both the ILOAT and UNAT were "well-established reputable tribunals, fully fit to address disputes affecting staff members of the Fund." Although not persuaded that the reasons for changing tribunals are sufficiently compelling, ECSA proposed that a move to the UNAT should include adopting the jurisdiction of the United Nations Dispute Tribunal (UNDT). By way of background, the first-tier review (e.g. IFAD's current JAB or the UNDT) occurs before any appeals to ILOAT or UNAT, and the structure of such first-tier review is within IFAD Management's discretion. ECSA also stated that a change in tribunals should not affect ongoing cases, including those in which the administrative decision was made prior to the change becoming effective.
25. IFAD Management is extremely grateful for ECSA's careful review and consideration of this proposal. Management takes note of the issues raised and clarifies that, should the Board approve this proposal, claims submitted to IFAD's grievance

⁹ The amounts regarding the cost per case before the UNAT was provided to IFAD by the UNAT's registrar's office.

¹⁰ Timing information provided by UNAT's registrar's office.

¹¹ See footnote 4.

system (i.e. JAB or ILOAT) prior to the Board's approval will be subject to the ILOAT's jurisdiction as part of a wind-up transitional phase.

26. As for ECSA's request for the first-tier submission to the jurisdiction of the UNDT Management clarifies that IFAD's current first instance review of claims (i.e. JAB) was substantially modified within the last two years. Among other changes, the composition of the members that review claims was enhanced by including an external Chairperson who is a renowned jurist. Given these recent changes, Management opted for continuing with the JAB and has engaged with ISA to further strengthen the JAB. Among the many proposals under consideration, IFAD is assessing whether the staff representatives who sit on the Board should be offered legal training or replaced with outside experts. Moreover, the process could be streamlined by reducing the number of pleadings. Instead of four pleadings in total, parties would submit only two pleadings – a complaint and a reply. The time for submitting these pleadings could be extended from the current 30 days to either 45 or 60 days. Lastly, the recommendations issued by the JAB could be enhanced by providing further substantiated reasoning for such recommendations. While the first-tier structure is not for decision by the Executive Board, IFAD Management nonetheless wishes to note these concrete avenues it is exploring to enhance and further strengthen the JAB .

IV. Next steps

27. Should the Executive Board approve this proposal, IFAD will inform the ILOAT of the decision to withdraw from its jurisdiction. In parallel, IFAD will initiate the process to submit to UNAT's jurisdiction.
28. It must be noted that any matter that has been submitted to IFAD's grievance system (i.e. MAR, JAB and ILOAT) prior to the date of Executive Board approval will follow the normal course of review, including submission to the jurisdiction of the ILOAT.

V. Recommendation

29. In light of the above, the Executive Board is invited to approve the proposal for IFAD to withdraw from the ILOAT's jurisdiction and to submit to the jurisdiction of the UNAT.

Benchmarking and administrative tribunal options

I. Remaining at the Administrative Tribunal of the International Labour Organization (ILOAT)

1. This option may prevent IFAD from responding to allegations of misconduct, including implementing its zero-tolerance policy towards sexual harassment (SH), sexual exploitation and abuse (SEA), anticorruption and other crucial matters. IFAD would be required to demonstrate that the allegations of misconduct are "beyond a reasonable doubt", a high burden of proof normally applied by national courts in criminal cases.
2. This option would also maintain current costs, which is particularly relevant as the number of cases might increase.¹²

Table 1

	<i>Costs</i>	<i>Time for decision issuance</i>	<i>Standard of proof for misconduct/disciplinary action</i>	<i>Language</i>	<i>Other considerations</i>
ILOAT	US\$16,245/ case	2-3 years*	Beyond a reasonable doubt	English/ French	Upcoming amendments that might limit withdrawal

* This timeframe has been observed in various recent cases in which IFAD is a party.

II. Joining the United Nations Appeals Tribunal (UNAT)

3. From an institutional perspective, joining the UNAT would be more aligned with IFAD's needs.
4. The burden of proof imposed by the UNAT for cases involving misconduct remains high and requires legal certainty, while remaining aligned with the investigation and sanctions processes of an international organization. This option would allow IFAD to impose disciplinary measures for misconduct, while protecting victims, including in the context of SH/SEA.
5. The cost of UNAT's administrative service is nearly 40 per cent lower than that of ILOAT. Furthermore, decisions are issued in half or, in some instances, one third of the time needed by ILOAT.

Table 2

	<i>Costs*</i>	<i>Time for decision issuance**</i>	<i>Standard of proof for misconduct/disciplinary action</i>	<i>Language</i>	<i>Other considerations</i>
UNAT	US\$9,500/ case	8-10 months	Preponderance of the evidence / clear and convincing evidence	English/ French	Although based in New York, the UNAT can decide to hold sessions in Geneva.

* Cost information provided by UNAT's registrar's office.

** Timing information provided by UNAT's registrar's office.

III. Joining a non-United Nations administrative tribunal

6. The administrative tribunals of both the Asian Development Bank (AsDB) and the Technical Centre for Agricultural and Rural Cooperation (CTA) are currently not available to external organizations. The CTA Administrative Tribunal was established in 2018 but has not issued decisions yet.
7. A major concern with regard to the tribunals of the International Monetary Fund (IMF) and the World Bank is that they do not currently serve external

¹² At present, IFAD has five matters concluded and pending judgement with the ILOAT, and 9 are ongoing, resulting in a total of US\$227,430 in administrative expenses paid to the ILOAT; the same number of cases would have had a cost of US\$133,000 at the UNAT. This estimated amount for UNAT is based on information received by the UNAT registrar's office.

organizations, although their statutes would allow for this eventuality. Therefore, IFAD cases would be a minority in the workload of either tribunal. This would likely result in limited knowledge and expertise on IFAD's institutional policies and procedures, which could affect the quality and applicability of the decisions for IFAD. Further, the costs of the IMF Administrative Tribunal are considerably higher than those of the UNAT and the ILOAT.

Table 3

	<i>Costs*</i>	<i>Time for decision issuance**</i>	<i>Standard of proof for misconduct/disciplinary action</i>	<i>Language</i>	<i>Other considerations</i>
AsDB	US\$25,000-30,000/year	N/A	Preponderance of the evidence	English	The tribunal's secretary and adviser serve on a part-time basis. Not available for external institutions.
CTA	EUR 21,478.86/case	1 year	N/A	English/ French	Not available for external institutions. Established after CTA withdrew from ILOAT. CTA was unable to join UNAT as it is not part of the United Nations system. Given that CTA has been recently established, there is no precedent as of now.
IMF	Annual fee determined on size of the institution plus US\$100,000/case	1 to 2 years	Preponderance of the evidence	English	Although possible, the tribunal does not currently serve external institutions. Due to limited workload, serving another institution would represent a considerable increase in its functions.
World Bank	To be determined	8-10 months	Preponderance of the evidence	English	Although possible, the tribunal does not currently serve external institutions. These would be a minor part of the overall caseload.

* Cost information obtained during consultations with registrars and/or various parties to the aforementioned tribunals.

** Timing information obtained during consultations with registrars and/or various parties to the aforementioned tribunals.

IV. Establishing a new tribunal (a specific IFAD tribunal or a tribunal for Rome-based agencies)

8. By joining UNAT, IFAD would benefit from its proven robust system and strong case jurisprudence.
9. From a practical point of view, the establishment of a new tribunal, either solely for IFAD or in conjunction with other RBA entities, would require instituting a registrar to handle the submissions, the drafting of procedures and selection of judges, among other matters.
10. It is not possible to determine at this stage the costs that would result from the establishment of a new tribunal.