

**INTERNATIONAL RENEWABLE ENERGY AGENCY**

Fourth meeting of the Council

Abu Dhabi, 12 – 13 November 2012

**Administration of Justice at IRENA**

**Report of the Director-General**

1. The main purpose of the present report is to present to Members options for the implementation of staff regulation 12.3 which provides for the establishment of “an independent judicial or arbitral mechanism” at the second level of the administration of justice system in IRENA. For the reasons explained in the report, the focus is on an arbitral mechanism.
2. It sets out the terms of the basic decision to be made by the Assembly as to whether the arbitration system should be outsourced or whether it should be established and run within IRENA.
3. The Director-General’s recommendations are set out in the report.

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## Introduction

1. Article 12 of the Staff Regulations affirms the principle that staff members have the right to appeal against administrative decisions affecting them directly, and establishes for that purpose a two-tier system for administration of justice at IRENA.
2. At the first level, staff regulation 12.2 provides for machinery with staff participation to advise the Director-General on appeals submitted by staff members against administrative decisions affecting them directly. Chapter 12 of the Staff Rules promulgated by the Director-General sets out the basic principles to be observed in the process.
3. At the second level, staff regulation 12.3 provides for the establishment of an independent judicial or arbitral mechanism to which staff members dissatisfied with the outcome of the internal appeal process may present a recourse against the validity of the final decision taken by the Director-General. Establishment of the second level mechanism requires IRENA Members to decide on the manner in which that mechanism is to be implemented.
4. The present report will briefly present the progress made in respect of the establishment and functioning of the internal appeal process and present to the governing bodies options and specific recommendations for the establishment and functioning of the independent mechanism mandated by staff regulation 12.3. For ease of reference, Article 12 of the Staff Regulations and Chapter 12 of the Staff Rules are set out in **Annex 1** to the present report.

## **PART ONE. – First level: the internal appeal process**

5. The process follows the peer-review approach used by many international organizations of the UN Common System where a staff member dissatisfied with the outcome of the management review of a contested decision submits an appeal to an Appeals Board with staff participation.
6. Typically, an Appeals Board consists of one member appointed by the executive head, one member designated by the staff representative body, and a chairperson appointed by the executive head after consultation with the staff representative body. IRENA staff are working towards establishing a staff representative body, but the work is still on going. Under the circumstances, the Director-General requested the staff at large to collectively

designate one of their colleagues to participate in the Appeals Board to be established on an interim basis, pending the formal constitution of a staff representative body and the establishment of a standing Appeals Board.

7. To facilitate the work of the interim Appeals Board, the Director-General presented to the members of the Board draft Provisional Rules of Procedure for their comments on 31 July 2012. The interim Appeals Board reviewed the draft and approved the Provisional Rules, after making changes they found necessary, on 24 August 2012, and is ready to consider statements of appeal that may be filed by appellants.

## **PART TWO. – The independent second-level mechanism**

### **A. Background**

8. Staff regulation 12.3 provides:

“The Director-General shall make arrangements for staff members dissatisfied with the outcome of the internal appeal process under regulations 12.1 and 12.2, or with the disciplinary measure imposed after advice from the body established under regulation 11.2, to have access to an **independent judicial or arbitral mechanism** if they wish to present a recourse against the validity of the final decision taken by the Director-General.” (emphasis added)

9. When Members considered the text of staff regulation 12.3 prior to its adoption by the first Assembly, several delegations expressed the view that the Agency should take steps towards becoming one of the international organizations subject to the jurisdiction of the International Labour Organization Administrative Tribunal (ILOAT). Other delegations opposed that view and stated a strong preference for an arbitral mechanism that would be better suited to the needs of the Agency. In the end, delegations appeared satisfied with the prospect that, for the time being, the Agency would put into place an arbitral mechanism. In addition, the Secretariat has been informed recently by the ILOAT Registrar that, “at the moment and for the years to come [the] Tribunal is facing a situation which has led it not to accept to extend its jurisdiction, except to organizations belonging to the United Nations system.” IRENA is not an organization of the UN common system.
10. The present report presents a number of options and recommendations for the implementation of an arbitral mechanism. Staff regulation 12.3 makes the Director-General responsible for making arrangements for staff to have access to that mechanism

but the establishment of the actual mechanism, its components and its rules would require Assembly approval and subsequent incorporation into the terms of employment of staff. The Assembly would also have to consider the financial implications of the proposed system.

11. The basic decision to be made by Members is whether the arbitration system should be outsourced or whether it should be established and run within IRENA. Each alternative is addressed in turn below.

## **B. The outsourcing option**

12. The Director-General is cognizant of the availability of numerous instances, at the international, local, national or regional level, many of which have developed expertise in international disputes. A sample of highly respected institutions has been reviewed<sup>1</sup>, including:

- Permanent Court of Arbitration;
- International Centre for Dispute Resolution (a Division of the American Arbitration Association);
- International Court of Arbitration (independent arbitration body of the International Chamber of Commerce);
- London Court of International Arbitration;
- Arbitration Institute of the Stockholm Chamber of Commerce;
- Dubai International Arbitration Centre;
- Swiss Chambers of Commerce Association for Arbitration and Mediation.

13. Typically, arbitration institutions provide full administration of the system, consistent with their Arbitration Rules. Some institutions allow the parties to adjust the standard rules, or to request that the arbitration be conducted either under ad hoc rules or under the Arbitration Rules established by the UN Commission on International Trade Law (UNCITRAL).<sup>2</sup>

14. When considering whether the arbitration process should be outsourced or established by and within IRENA, it is important to distinguish two separate aspects: (i) the

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<sup>1</sup> All the institutions included in the sample have publicly available information on fees charged for their services.

<sup>2</sup> As is the case, for instance, for the Permanent Court of Arbitration and the London Court of International Arbitration.

administration of the system and (ii) the substance of rules that will govern the arbitration process. These components are addressed below.

*Administration of the system*

15. Administrative support is required to provide a whole range of services, including arrangements to receive arbitration requests, to deal with correspondence, to receive and transmit all claims and counterclaims, to ascertain availability of arbitrator(s), parties and witnesses, to arrange for any hearings, to obtain all necessary background documentation for consideration of the case, to arrange for translations if needed, etc. Some institutions also act under the applicable arbitration rules as “Appointing Authority” to designate the arbitrator(s) and resolve any challenges. They may also be required to designate such an Appointing Authority.
16. The main advantage of outsourcing the administration of the system to an arbitration institution is that the services would be rendered by an outside entity that has relevant experience and is equipped to deal with those matters.
17. On the other hand, Members may have reservations about turning over the handling and processing of internal disputes with staff to a completely separate entity that would operate on the basis of principles, rules and considerations not shared or approved by Members.
18. Administration of the system by an arbitration institution would also be costly. Indicative administrative costs are provided in **Annex 2, Table 1**. Except for some institutions applying hourly rates, the costs are calculated by reference to the total amount of claims and counterclaims in a particular case. In order to simplify the presentation of information, the range of costs provided in Table 1 shows the costs that would be charged when the amounts in dispute amount to \$50,000, and the costs that would be charged when the amounts in dispute reach \$500,000.
19. Additional costs would also be charged for services not included in the standard rate, such as extra charges for emergency relief; hearing room rental; fees for delaying or cancelling hearings; translation or interpretation; communication costs, travel of administrators, etc. The Arbitration Institute of the Stockholm Chamber of Commerce provides an estimate of additional costs (\$1,367 for \$50,000 claims and \$4,432 for \$500,000 claims). All these administrative costs and extra charges are separate and

distinct from the fees and expenses payable to arbitrators (see paragraphs 22 to 25 below).

### *Substantive Arbitration Rules*

20. Each institution has established Arbitration Rules setting forth procedures and substantive provisions to be followed by parties and arbitrators in the presentation, consideration and resolution of cases. The procedures govern, inter alia, the contents and timelines for notices or requests for arbitration, statements of claims, counter-claims or defense and any amendments, representation and assistance to the parties, composition of the arbitral tribunal and challenges to arbitrators, place and conduct of hearings, applicable law, award, sharing of costs and fees by the parties, etc. Several institutions also accept to conduct arbitrations in accordance with ad hoc rules agreed upon by the parties, or with the UNCITRAL Arbitration Rules. The parties typically have the option to decide whether the case will be considered by a sole arbitrator or a panel of arbitrators.
21. The easiest and quickest way for IRENA to obtain an arbitral mechanism would be to accept an existing set of arbitration rules. However, it should be observed that all these rules are geared to complex commercial disputes with provision for unlimited amounts of damages. They provide heavy procedures suitable for such disputes that would unnecessarily complicate the resolution of the fairly simple disputes with staff that are likely to arise in an international organization of the size of the Agency. Moreover, as mentioned above, this could entail application of principles and considerations not shared or approved by Members.
22. Conduct of arbitration under the auspices of an arbitration institution would also entail payment of substantial fees to individual arbitrators, above and beyond the administrative fees payable to the institution itself. Some institutions set the rates by reference to the amount of the claims and counterclaims presented for arbitration. Others fix the fee for each arbitrator based on the range of compensation indicated by arbitrators in their individual profiles. Still others make the fee subject to the time spent by arbitrators, the complexity of the case, and special circumstances.
23. Indicative fees payable to arbitrators are provided in **Annex 2, Table 2**. Using the approach followed in Table 1 providing indicative administrative fees, the range of fees presented in Table 2 shows the fees that would be payable when the amounts in dispute are \$50,000, and the fees that would be payable when the amounts in dispute reach

\$500,000. Most institutions provide for an upwards adjustment of the fee otherwise payable depending on the complexity and other features of the case.

24. In addition, the arbitrator is entitled to reimbursement of costs incurred in relation to the case, for instance, travel expenses and a charge for time spent travelling or for time reserved for the case but not used as a result of late postponement or cancellation of hearings.
25. It should be noted that **Annex 2, Table 2** presents fees that would be payable in cases considered by a sole arbitrator. The fees or range of fees indicated in Table 2 are subject to substantial increases when a case is submitted to more than one arbitrator. The amount of the increase varies with each institution. In institutions determining the fee amount by reference to the amount of the claim under arbitration, the increase could be up to a maximum normally not exceeding three times the fee of one arbitrator,<sup>3</sup> or a slightly lower amount.<sup>4</sup> In institutions where the fee is calculated at an hourly rate, the increase will depend on the amount of that rate for each arbitrator; the fact that three will be involved will automatically result in a significant increase.<sup>5</sup>
26. Overall, taking into account:
- the concern about having an international organization such as IRENA turning over to an outside entity the responsibility of making binding decisions on the Agency in an area where all the basic principles have been defined by Members in the Staff Regulations and elaborated in the Staff Rules issued by the Director-General;
  - the concern of having individual arbitrators not vetted by the governing bodies making decisions that could be used as precedents and distort the purpose and intent of the principles adopted by the Assembly, including application of the UN Common System to the conditions of service of staff members;
  - the fact that Arbitration Rules are primarily geared to resolving complex, multi-million dollar commercial disputes under rules that would be unnecessarily complex and cumbersome for the purpose of resolving relatively simple employment disputes on rights and entitlements of individual staff members under the Staff Regulations and Rules; and

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<sup>3</sup> As is the case for the International Court for Arbitration/ICC under Appendix III, Article 2.3 of its Arbitration Rules and for the Dubai International Arbitration Centre (DIAC Arbitration Rules, Appendix, Article 3.1).

<sup>4</sup> For arbitrations conducted under the Rules of the Arbitration Institute/Stockholm Chamber of Commerce, co-arbitrators would receive 60% of the fee of the Chairperson, which is the same as that payable to a sole arbitrator (Appendix III, Articles 2.1 and 2.2). Under the Swiss Rules of International Arbitration, each additional arbitrator receives 75% of the fee that would be payable to a sole arbitrator, subject to a minimum of \$372 [CHF350] per hour (Appendix C, Schedule of Costs, section 6).

<sup>5</sup> See, for instance, the Schedule of Arbitration Costs for the London Court of International Arbitration, paragraph 4.



- the costs involved,

the Director-General finds that there are strong grounds for the governing bodies to give favorable consideration to an alternative approach under which the Assembly would approve the establishment of an IRENA-specific arbitration system, where a pool of arbitrators would be vetted by Members and would consider cases under rules kept as simple as possible, at a cost that would be lower than if the system was outsourced to an arbitration institution.

### **C. An IRENA-specific arbitration system**

27. The following paragraphs will set out the salient points of the Director-General's proposal for an IRENA-specific arbitration system. The proposal aims at establishing for the Agency an arbitral system under rules that would ensure a fair and independent process, keeping in mind that such a process should be as simple as possible, given the nature of the disputes that will arise in an employment context, the small number of staff and the limited human and financial resources of the Agency. Experience may reveal unforeseen difficulties, and raise concerns that will need to be addressed. For that reason, the Director-General recommends that the draft Arbitration Rules set out in **Annex 3** be approved by the Assembly as "provisional", and that the system be reviewed by the governing bodies two years after the Assembly's decision in the light of a report prepared by the Director-General after consultations with the staff representative body on the operation of the system, presenting recommendations to address issues or concerns that may have appeared in light of experience.

#### **Administration of the system**

28. An alternative approach to outsourcing the administration of the system to an arbitration institution would be for the Assembly to adopt a self-administered system, where the Director-General would appoint an individual to serve as Secretary of the arbitral tribunal, when the need arises. The role of the Secretary would be to perform support functions, under the overall authority of the arbitrator(s) selected for a particular case. The terms of reference of the Secretary would emphasize the need for complete confidentiality and impartiality.
29. The Secretary could be an IRENA staff member who would perform the functions in addition to regular duties, or a person retained for the purpose on a part-time basis, if and when needed, at a cost that would be lower than the administrative and extra costs

charged by an arbitration institution. The performance and conduct of the Secretary would be evaluated by the arbitrator at the conclusion of the process and would become part of the official performance record of the Secretary.

### **Provisional Arbitration rules**

30. The IRENA Provisional Arbitration Rules would be based on the UNCITRAL rules, simplified and adjusted as necessary to respond to the particular needs of the Agency, the small number of staff, and the nature of the disputes to be resolved, which would normally be much simpler than a complex commercial arbitration. An important feature of the UNCITRAL Rules is that they were adopted by a world-wide consensus rather than being rooted in any particular legal system.
31. Consideration of the IRENA Provisional Arbitration Rules by the Council and the Assembly would allow Members to ensure that the process is fair and impartial, and that it respects the due process rights of both the staff member concerned and the Agency. It would also alleviate possible concerns that could otherwise appear concerning independence of the process from the Secretariat, where administrative decisions affecting individual staff members would have been made.
32. A draft of IRENA-specific rules is provided in **Annex 3** to the present report. Some of the most important features are explained below.

### *Sole Arbitrator*

33. The draft rules specify that cases would be considered and decided by a sole arbitrator, an approach which is often used even in complex cases, as it eliminates the need to engage in the lengthy process of selecting a panel of arbitrators acceptable to both parties and reduces the overall arbitration costs. The sole arbitrator approach would be particularly appropriate for the resolution of the fairly straightforward issues arising in an employment dispute, relating for instance to non-confirmation or non-renewal of appointment, non-selection for promotion, claims of discrimination or prejudice; non-payment of an entitlement.

34. The three-arbitrator approach is not recommended as it is better suited in complex commercial disputes involving a high level of monetary claims and counterclaims or in disputes involving particularly sensitive issues, including those of a political nature.<sup>6</sup>
35. When considered against the need to resolve relatively simple employment disputes between the Agency and individual staff members, the sole arbitrator approach appears preferable as it would simplify and expedite the process, and reduce the related costs.
36. The Director-General recommends the establishment of an Arbitration Panel which would contain a list of approved arbitrators that are unquestionably perceived by the Agency and the staff as knowledgeable, fair and impartial. It is proposed that the Director-General, after obtaining the views of the staff representative body, communicate to the Council for approval a list of at least six qualified candidates for inclusion in the Arbitration Panel and that, after consideration by the Council, the list contains at least five approved arbitrators.
37. In order to be considered for inclusion in the Arbitration Panel, candidates would need to have experience in handling and resolving employment cases, preferably in the context of an international organization, either as a member of a judicial or arbitral body or as a senior manager in an international organization; be familiar with issues and functions relevant to an international organization; be of good character; and have a reputation as a knowledgeable, fair and impartial individual. Due account should be taken of the need to ensure geographical and gender balance among Panel members.

#### *Selection of the arbitrator*

38. Once the Arbitration Panel has been established, it would be for the claimant to select one arbitrator from the list of approved arbitrators. In the event that the claimant would object to every name on the roster, it would be for the Ethics Advisory Board to select the arbitrator after considering the objections made by the claimant and the views of the Director-General on the objections that have been made. The decision of the Ethics Advisory Board would be final and would not be subject to further challenge or appeal.

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<sup>6</sup> For instance, under the provisions of section 32 of the draft Agreement on Privileges and Immunities under consideration by Members, each party to the dispute designates one arbitrator and these two arbitrators appoint a third one, who will chair the tribunal. If no agreement can be reached by the first two arbitrators, the third one is to be appointed by an outside authority, namely, the President of the International Court of Justice.

*Powers of the arbitrator and remedies*

39. The arbitrator would have authority to issue a decision binding on both parties.
40. The draft Provisional Arbitration Rules annexed to this report contain some limits on the remedies that the arbitrator could order. The most important limits are similar to those in force for many years for the United Nations Administrative Tribunal and remain in force in the new judicial system introduced in 2009:<sup>7</sup>
- a. The arbitrator would have the power to order rescission of a contested decision or specific performance, provided that, where the contested decision concerned appointment, promotion or termination, the arbitrator would be required to set an amount of compensation that the Director-General may elect to pay as an alternative to the rescission of the contested decision or specific performance ordered, subject to the maximum amount specified in the following sub-paragraph;
  - b. Given that, unlike the United Nations, IRENA places a maximum of seven years on the total period of service in the Agency, the amount awarded as compensation would not exceed the equivalent of two years' net base salary of the individual having requested arbitration.
41. The rationale of the limitation of the power of the arbitrator to order specific performance, such as promotion of a staff member or reinstatement after termination of appointment, is a recognition of the need to take into account that such decisions could have a seriously negative effect on the functioning and management of the organization. Not only could it mean that an individual could be reinstated for technical reasons in an environment where working relations have been badly damaged and are beyond repair but the order to reinstate or promote an appellant could affect the rights of a staff member who has been appointed against a position that would no longer be vacant, thus making that staff member supernumerary or redundant due to no fault of his or her own.
42. The two-year limit on the amount of compensation that could be awarded is proposed because the cases to be considered are, by definition, related to employment in an agency

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<sup>7</sup> Article 10.5(a) of the UNDT Statute provides:

“As part of its judgment, the Dispute Tribunal may order one or both of the following:

“(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph.

“(b) Compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation and shall provide the reasons for that decision.”

where fixed-term appointments are normally granted for a maximum duration of two years and where the Staff Regulations specifically provide that a fixed-term appointment does not carry any expectancy of renewal, legal or otherwise,<sup>8</sup> and where there is an overall limit of seven years on the entire period of service of staff members on fixed-term appointments.<sup>9</sup>

43. The Director-General also proposes that the Provisional Arbitration Rules prohibit the award of punitive or exemplary damages.<sup>10</sup> Compensation should be for damages actually suffered by a staff member, rather than used to punish the Agency and its Members for decisions made by individual staff members. If any staff member has made decisions or acted in a way which, in retrospect, amount to misfeasance or intentional wrongdoing rather than merely technically incorrect or an error of judgment, that staff member can be held individually accountable by means more appropriate than the award of punitive or exemplary damages which would have to be paid from public funds.
44. The last limitation contained in the draft Provisional Arbitration Rules pertains to the assessment of the efficiency or relative efficiency of staff members leading to an administrative decision or related action. It is by nature a matter of personal judgment to be made by the appropriate officials. In those cases, the arbitrator would not consider the substance of the decision but limit the review to ascertain whether the applicable procedures were properly followed, and whether the decision was motivated by prejudice or some other extraneous factor.<sup>11</sup>

*Who bears the costs of the arbitration process?*

45. Typically, arbitration costs are borne by both parties, in varying proportion or amounts, depending on the arbitration mechanism used by the parties. It would be difficult to require IRENA staff to bear a substantial share of the costs of the arbitration system because this would not be consistent with the letter and the spirit of staff regulation 12.3 which requires the Director-General to make arrangements for staff members to have

<sup>8</sup> IRENA staff regulation 5.4(f). The UN Staff Regulations contain a similar provision (staff regulation 4.5(c)).

<sup>9</sup> IRENA staff regulation 5.4(b).

<sup>10</sup> As is done in the UN under Article 10.7 of the UNDT Statute: “The Dispute Tribunal shall not award exemplary or punitive damages.”

<sup>11</sup> In the 2002 version of the UN Staff Rules that applied until the internal appeal system was abolished and replaced by a new fully judicial system in 2009, staff rule 111.2 (k) provided:

“(k) In the case of termination or other action on grounds of inefficiency or relative efficiency, the panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor.”

access to an independent judicial or arbitral mechanism. Nor would it be consistent with the general approach taken by organizations of the UN common system on the subject. Moreover, this could be seen as an attempt to actively discourage litigation and deny staff their due process rights to a fair resolution of their disputes with the Agency.

46. However, experience in other international organizations shows that providing totally free access to the justice system can and does encourage litigation because there is no deterrent to frivolous or repetitive appeals, and no incentive to reach an amicable resolution before litigation. A modest registration fee, adjusted to the level of income of the staff member, could be introduced, e.g. \$250 for staff at the General Service level and \$500 for staff at the Professional level and above. The fee could be refunded to the staff member if ordered by the arbitrator in cases where the claim was successful. The fee should be paid by check payable to IRENA or by electronic transfer to a bank account designated by IRENA. The fee would be accounted for separately and would be available for refund until the case is concluded.
47. The draft Provisional Arbitration Rules also contain another disincentive for staff members who may be tempted to engage into frivolous or repetitive proceedings, namely a provision that, in cases where the arbitrator determines that a party has manifestly abused the proceedings, costs may be awarded against that party.<sup>12</sup>
48. A claimant would have the right to be assisted and represented by a staff member or former staff member of IRENA or of another international organization, a service typically provided at little or no cost by individuals who volunteer for that purpose. Claimants in an arbitration proceeding would also have the right to be assisted or represented by outside counsel, but this would be at their own cost. Overall, however, the bulk of the cost of the system would be borne by the Agency, except for the costs of outside counsel.

#### *Place of arbitration*

49. In order to minimize costs, the Provisional Arbitration Rules would provide that the place of arbitration is Abu Dhabi, on the understanding that a substantial part of the preparatory work could be done from other locations and transmitted electronically where appropriate, and that travel expenses to any hearings would be reduced by making

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<sup>12</sup> *cf.* Article 10.6 of the UNDT Statute:

“Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.”

maximum use of tele- or videoconference facilities. The arbitrator would also have authority to select another location if this were essential to the efficient resolution of the dispute, for instance if the dispute arose in an IRENA office other than Abu Dhabi.

*Cost estimates for an IRENA-specific arbitration system*

a. Administrative costs

50. Should the Director-General determine that it is possible to assign the duties of Secretary to a serving staff member without substantial impact on his or her ability to perform their regular functions, there would be no additional costs for the additional duties. If the services of an additional person were required, it would be for a limited period, estimated at one work month or total amount of \$ 10,800 per annum.

b. Arbitrator's fee

51. The Director-General has considered the different approaches used in the arbitration institutions listed in **Annex 2, Table 2**. From a budgetary point of view, it would be difficult to follow an approach where the fees are determined on a case-by-case basis,<sup>13</sup> or an approach where the fees depend on the individual rates of compensation set by each arbitrator.<sup>14</sup> Moreover, either of these two approaches could result in widely different rates of remuneration for arbitrators, which would not be consistent with the need for an international organization where the Staff Regulations are based on the principle of equal pay for equal work to ensure that all the approved arbitrators on the Arbitration Panel are treated on an equal basis.

52. Another approach would be for the Agency to fix an hourly rate for the arbitrator's fee.<sup>15</sup> While this would provide a remuneration basis that would apply to all arbitrators, there would be no guidance or restraints on the time spent by individual arbitrators in a particular case. Moreover, the approach would require each arbitrator to prepare detailed time sheets and would consume time that could be used more productively in reviewing the case to be arbitrated.

53. The approach adopted by most of the institutions reviewed for this report use as a starting point the amount of the claim to be arbitrated, and place a minimum and maximum

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<sup>13</sup> *e.g.*, Permanent Court of Arbitration.

<sup>14</sup> *e.g.*, International Centre for Dispute Resolution [American Arbitration Association].

<sup>15</sup> *e.g.*, London Court of International Arbitration.

amount, within which the fee will be determined taking into consideration the specific features of the case under consideration, including its complexity and the amount of work required. This approach is well suited to commercial disputes, where claims and counterclaims are typically expressed in monetary terms. This is not the case in disputes with individual staff members in international organizations where cases are only rarely limited to the technical question whether a specific monetary entitlement under the Staff Regulations and Rules should be paid. Many staff members typically claim that the decision under consideration was due to prejudice or other improper motives, especially for discretionary decisions such as non-renewal of appointment, unsuccessful application for a promotion, or termination of appointment. In such cases, the staff member concerned could be tempted to ask for the maximum compensation that could be awarded under the Provisional Arbitration Rules proposed in the present report (2 years' salary), or even a higher amount, even though such a higher amount could not be awarded under the rules.

54. In order to keep the system as simple as possible, it is proposed that the arbitrators would receive a fixed daily fee, with a minimum and maximum placed on the number of days that would be devoted to their work:
  - a. Arbitrators would, in all cases in which they participate, be remunerated for 5 days' work, in recognition of their participation in the process, of the need to familiarize themselves with the claim before them and with the materials necessary to reach a decision;
  - b. If more time was needed, up to an additional 5 days, the arbitrator would state for the record the reasons in writing, e.g., volume of materials produced; complexity of the case; need for extensive research, etc. and proceed with his or her work. The arbitrator's statement would be subject to review by the External Auditors at the time of the audit of the Agency's financial statements;
  - c. In truly exceptional circumstances due to the special features of the case, the arbitrator could request the Ethics Advisory Board to approve payment for a period longer than 10 days overall, explaining the reasons for the request.
55. It is further proposed that the daily rate be established at \$1,000. This is less than the fees usually earned by arbitrators in a commercial setting, especially for high-level claims, but the proposed amount takes into account the fact that fees are paid from Members' contributions and the anticipation that arbitrators will accept to serve on these terms to show their support for the objectives of the Agency and their commitment to public service. The daily rate would be subject to a periodic review on the recommendation of the Director-General in the light of experience. Following this proposal, a total amount



of \$ 5,000 would be required for Arbitrator's fees per case and \$ 1,000 for each additional day of arbitration. Arbitrators would also receive travel expenses on conditions similar to those applicable to staff members estimated at \$ 3,200 to \$ 14,200 per case depending on country of residence of the Arbitrator and \$ 340 for each additional day of arbitration.

### **Decisions for consideration by the Council**

#### **56. The Council may wish to:**

- a. Consider the two options for an arbitration system presented in the present report;**
- b. Recommend to the Assembly that it decides:**
  - i. to select the option of an IRENA-specific arbitration system;**
  - ii. to adopt the Provisional Arbitration Rules set out in Annex 3 to the report;**
  - iii. to approve the conditions of service for arbitrators set out in paragraphs 54 and 55 of the Director-General's report;**
  - iv. to request the Director-General, after consultations with the staff representative body, to submit to the Council for approval at the meeting following the 3<sup>rd</sup> session of the Assembly, a list of at least six qualified candidates for inclusion in the Arbitration Panel;**
  - v. to request the Director-General, after consultations with the staff representative body, to submit to the Assembly at its 5<sup>th</sup> session a report on the operation of the system and recommendations to address issues or concerns that may have been found in the process.**

**Text of Article 12 of the IRENA Staff Regulations and Chapter 12 of the Staff Rules**

**STAFF REGULATIONS - ARTICLE 12**

**ADMINISTRATION OF JUSTICE**

**Regulation 12.1**

Staff members have the right to appeal against administrative decisions affecting them directly, including disciplinary measures imposed without prior advice from the body established under regulation 11.2. The appeal must be based on an alleged non-observance of their terms of appointment, including pertinent Staff Regulations and Rules.

**Regulation 12.2**

The Director-General shall establish machinery with staff participation to advise him or her on appeals submitted by staff members against administrative decisions affecting them directly.

**Regulation 12.3**

The Director-General shall make arrangements for staff members dissatisfied with the outcome of the internal appeal process under regulations 12.1 and 12.2, or with the disciplinary measure imposed after advice from the body established under regulation 11.2, to have access to an independent judicial or arbitral mechanism if they wish to present a recourse against the validity of the final decision taken by the Director-General.

**STAFF RULES - CHAPTER 12 –****APPEALS AND ADMINISTRATION OF JUSTICE****Rule 112.1*****Right to appeal***

- (a) Staff members have the right to appeal against administrative decisions affecting them directly. The appeal must be based on an alleged non-observance of their terms of appointment, including pertinent Staff Regulations and Rules.
- (b) Appeal against an administrative decision shall not have the effect of suspending action on the contested decision.

**Rule 112.2*****Internal appeal process***

Except as otherwise provided in rules 112.3 and 112.4, staff members wishing to appeal an administrative decision shall follow the internal appeal process set out below:

- (a) As a first step, the staff member shall address to the Director-General a request for management review of the decision within 30 calendar days of being informed of that decision.
- (b) If the staff member is not satisfied with the answer received, or if no answer is received within 15 days of the request for management review, the staff member may submit an appeal to the body with staff participation established under staff regulation 12.2.
- (c) The time limit for filing an appeal is 30 calendar days after the answer to the request for review. If no answer was provided, the time limit is 30 calendar days after the expiration of the 15-day period during which a timely answer could have been provided.
- (d) The appeal body shall consider the appeal expeditiously and advise the Director-General of its findings and recommendations.
- (e) The Director-General shall make a final decision on the appeal, in light of the findings and recommendations of the appeal body.
- (f) The staff member may challenge the Director-General's final decision before the independent judicial or arbitral mechanism provided under staff regulation 12.3.

(g) The Director-General shall establish detailed procedures as may be needed for the implementation of the appeals process.

### **Rule 112.3**

#### ***Appeal against non-confirmation of appointment***

(a) A decision taken under rule 110.5 not to confirm a staff member's appointment may be appealed in writing to the Director-General within 15 calendar days of receipt of notice of non-confirmation.

(b) The Director-General's decision shall be final, and shall not be subject to the internal appeal process established in rule 112.2 (a) to (e).

(c) The staff member may challenge the Director-General's final decision before the independent judicial or arbitral mechanism provided under staff regulation 12.3.

### **Rule 112.4**

#### ***Appeal against decisions imposition of disciplinary measures***

(a) Decisions to impose disciplinary measures after advice from a body with staff participation under rule 111.4(b) may be appealed directly to the independent judicial or arbitral mechanism provided under staff regulation 12.3.

(b) Appeals against decisions to summarily dismiss a staff member under staff rule 111.4(a) shall be submitted to the appeal body established under staff regulation 12.2. The time limit for submitting such appeals shall be 30 calendar days after notification of the summary dismissal. The provisions of rule 112.2(d) to (f) shall apply after a timely appeal has been submitted to the appeal body.

## Indicative costs of outsourced arbitration

**Table 1 – Administrative costs**

The range of administrative costs provided in Table 1 shows, wherever the information permits, an indicative range of the base administrative costs when the amounts in dispute are approximately \$50,000 and in cases where the amounts in dispute are approximately \$500,000.

An amount for additional costs may be added, depending on the features of the specific arbitration. For example, the Arbitration Institute of the Stockholm Chamber of Commerce estimates those additional costs at \$1,367 for \$50,000 claims and \$4,432 for \$500,000 claims.

<b>Arbitration Institution</b>	<b>Indicative administrative costs<sup>1</sup></b>
Permanent Court of Arbitration	Hourly rates ranging from \$64 [€50] to \$322 [€250] for Registry Services.  Additional charges apply when the Court designates an Appointing Authority or itself acts in that capacity.
International Centre for Dispute Resolution/American Arbitration Association	Filing fee: \$1,800 to be paid by employer; \$175 to be paid by employee, plus:  - \$1,275 for claims of \$50,000; or  - \$6,100 for claims of \$500,000.
International Court of Arbitration/ International Chamber of Commerce	\$3,000 for claims of \$50,000  \$14,165 for claims of \$500,000
London Court of International Arbitration	Registration fee: \$2,836 [£1,750], plus:

<sup>1</sup> All amounts are provided in US dollars for comparison purposes. For institutions using a different currency, the indicative fee expressed in US dollars results from the application of the UN official exchange rate in force at the time of writing the present report.

	<p>- hourly rates ranging from \$162 [£100] to \$365 [£225] for Secretariat officials and staff</p> <p>- 5% of fees and expenses for overhead charges</p>
Arbitration Institute of the Stockholm Chamber of Commerce	<p>Registration fee: \$1,931 [€1,500] plus:</p> <p>- \$2,713 [€2,108] for claims of \$50,000 [€38,850]; or</p> <p>- \$10,723 [€8,332] for claims of \$500,000 [€388,500]</p>
Dubai International Arbitration Centre	<p>Registration fee: \$1,361 [AED 5,000], plus:</p> <p>- \$1,361 [AED 5,000] for claims of \$50,000 [AED183,650]; or</p> <p>- \$8,168 [AED30,000] for claims of \$500,000 [AED1,836,500]</p>
Swiss Chambers of Commerce Association for Arbitration and Mediation	Registration fee: \$4,792 [CHF 4,500]

**Table 2 – Arbitrators’ fees**

The range of fees presented in Table 2 shows, wherever the information permits, an indicative range of the fees payable to a sole arbitrator in cases when the amounts in dispute are \$50,000 and in cases where the amounts in dispute are \$500,000.

Most institutions provide for adjustment of the fee, depending on the special features of the case and the work required.

<b>Arbitration Institution</b>	<b>Fees Payable to Sole Arbitrators<sup>2</sup></b>
Permanent Court of Arbitration	Determined on a case-by-case basis under the Optional Rules for Arbitration between International Organizations and Private Parties, depending on complexity, time spent, amount in dispute and other relevant factors.
International Centre for Dispute Resolution/ [American Arbitration Association]	Varies depending on the arbitrator’s stated rate of compensation, which could range from \$500 an hour to a much higher hourly rate.
International Court of Arbitration/ [International Chamber of Commerce]	- \$6,005 (average) for claims of \$50,000 - \$26,924 (average) for claims of \$500,000
London Court of International Arbitration	Fees payable to arbitrators are calculated at an hourly rate, normally not exceeding \$729 [£450].
Arbitration Institute of the Stockholm Chamber of Commerce	- \$6,713 [€5,216] (median) for claims of \$50,000 [€38,850] - \$21,313 [€16,560] (median) for claims of \$500,000 [€388,500]

<sup>2</sup> The fees provided in the table aim at providing a broad range of fees and simplify the fee schedules, which can be obtained in full from the website of the institutions concerned.

Dubai International Arbitration Centre	- \$4,700 (average) for claims of \$50,000 [183,650 AED]  - \$17,449 (average) for claims of \$500,000 [1,836,500 AED]
Swiss Chambers of Commerce Association for Arbitration and Mediation	- from \$2,000 to \$6,000 for claims of \$50,000  - from \$16,667 to \$53,333 for claims of \$500,000



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**Draft IRENA Provisional Arbitration Rules<sup>1</sup>****Section I. Introductory rules****Rule 1. Scope of application and time limits to initiate arbitration**

1. The IRENA Provisional Arbitration Rules (“the Rules”) shall govern any arbitration between an IRENA staff member or former staff member (“the claimant”) and the Agency pursuant to Article 12 of the Staff Regulations and Chapter 12 of the Staff Rules, in respect of final decisions taken by the Director-General:

- (a) After receiving advice from the Appeals Board with staff participation established pursuant to staff regulation 12.2 and staff rule 112.2;
- (b) After receiving advice from the Disciplinary Board with staff participation established pursuant to staff regulation 11.2;
- (c) After consideration of an appeal against the decision not to confirm an appointment upon a negative assessment of the performance and conduct of a staff member during the probationary period, pursuant to staff rule 112.3.

2. Claims in respect of a final decision taken by the Director-General must be initiated in accordance with rule 3 within 90 days of the date on which the final decision was communicated to the claimant.

**Rule 2. Communication of notices and calculation of periods of time<sup>2</sup>**

1. A notice, including a notification and any communication by or to the parties and by or to an arbitrator, may be transmitted by mail, courier service, facsimile, or electronically as a PDF attachment to an email. Use of any other electronic format is permitted only upon confirmation by the Secretary that it is acceptable.

2. If an address, including an e-mail address, has been designated by a party for purposes of arbitration proceedings, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received.

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<sup>1</sup> These Rules are based on the UNCITRAL Arbitration Rules adopted by the General Assembly. However, those Rules are designed for complex commercial arbitrations. Accordingly, they have been simplified and modified as described in the report of the Director-General to make them appropriate for employment disputes in the context of an international organization.

<sup>2</sup> Rule 2 is based on Article 2 of the UNCITRAL Arbitration Rules.

3. If, after reasonable efforts, delivery cannot be effected in accordance with paragraph 2, a notice or communication is deemed to have been received if it is sent to the addressee's last-known habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.
4. A notice shall be deemed to have been received on the day it is delivered. A notice transmitted by electronic means is deemed to have been received on the day it is sent, allowing for time differences between the sender and the recipient.
5. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

**Rule 3. Notice of arbitration and registration fee<sup>3</sup>**

1. A claimant seeking recourse to arbitration shall initiate the process by communicating a notice of arbitration to the Director-General and transmitting the applicable registration fee.
2. The notice of arbitration shall include the following:
  - (a) The full name, address, email address, telephone number and any other relevant contact details of the claimant;
  - (b) The full name, address, email address, telephone number and any other relevant contact details of the claimant's counsel or representative, if any;
  - (c) A brief description of the claim, with copy of the final decision of the Director-General on which arbitration is requested;
  - (d) The relief or remedy sought.
3. At the same time as the notice of arbitration, the claimant shall transmit a registration fee of \$250 for a claimant at the General Service level and \$500 for a claimant at the Professional level and above.

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<sup>3</sup> Rule 3 is based on Article 3 of the UNCITRAL Arbitration Rules and paragraph 46 of the report of the Director-General.

**Rule 4. Response to the notice of arbitration<sup>4</sup>**

1. Within 30 days of receipt of the notice of arbitration and registration fee, the Director-General or his representative shall communicate to the claimant a response to the notice of arbitration, which shall include:

- (a) The full name, address, email address, telephone number and any other relevant contact details of the representative of the Director-General;
- (b) A response to the claimant's description of the claim, and the relief or remedy sought;
- (c) The full text of the IRENA Arbitration Rules;
- (d) The full name, address, email address, telephone number and any other relevant contact details of the Secretary of the Arbitration Panel ("the Secretary");
- (e) The list of arbitrators constituting the Arbitration Panel, together with the curriculum vitae of each arbitrator, drawing the claimant's attention to rule 10 of these Rules and requesting the claimant to take action within 15 days in accordance with that rule.

2. The response to the notice of arbitration may also include a brief description of any claim or counterclaim that the Director-General or his representative ("the respondent") will make against the claimant.

**Rule 5. Representation and assistance by counsel<sup>5</sup>**

1. Each party may choose to be represented or assisted by counsel, who shall be a person of the choice of the party concerned, provided each party informs the Secretary of the full name and contact details of his or her counsel, and specifies whether counsel will act for purposes of representation or assistance.

2. The cost of retaining or appointing counsel to represent or assist a party shall be borne by that party.

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<sup>4</sup> Rule 4 is based on Article 4 of the UNCITRAL Arbitration Rules.

<sup>5</sup> Rule 5 is based on Article 5 of the UNCITRAL Arbitration Rules.

**Rule 6. The Secretary<sup>6</sup>**

1. The Director-General shall appoint a Secretary who shall provide the necessary administrative support to the Arbitration Panel.
2. The Secretary shall discharge the duties set out in these Rules and shall work at the direction of the Arbitration Panel members. In particular, the Secretary shall transmit all documents and make all notifications required by these Rules and perform any other duties that are required by an arbitrator for the efficient functioning of the arbitration process.
3. The performance and conduct of the Secretary shall be evaluated at the conclusion of the process by the member of the Arbitration Panel having conducted an arbitration with the support of the Secretary. Such evaluation shall form part of the official performance record of the Secretary.

**Section II. Appointment of arbitrators**

**Rule 7. List of arbitrators on the Arbitration Panel<sup>7</sup>**

1. The Director-General, after obtaining the views of the staff representative body, shall communicate to the Council for approval a list of at least six qualified candidates for inclusion in the Arbitration Panel.
2. In order to be considered for inclusion in Arbitration Panel, candidates shall have experience in handling and resolving employment cases, preferably in the context of an international organization, either as member of a judicial or arbitral body or as a senior manager in an international organization; be familiar with issues and functions relevant to an international organization; be of good character; and have a reputation as a knowledgeable, fair and impartial individual. Due account shall be taken of the need to ensure geographical and gender balance among Panel members.
3. The Council shall approve a list of at least five arbitrators, who will be appointed for a renewable term of two years.

**Rule 8. Sole arbitrator<sup>8</sup>**

Arbitration proceedings shall be conducted by a sole arbitrator.

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<sup>6</sup> See paragraphs 28-29 of the report of the Director-General.

<sup>7</sup> See paragraphs 36-37 of the report of the Director-General.

<sup>8</sup> See paragraphs 33 to 35 of the report of the Director-General.

**Rule 9. Selection of arbitrator<sup>9</sup>**

1. Within 15 days of receipt of the list of approved arbitrators, the claimant shall select one arbitrator and notify the Secretary of the name of the arbitrator he or she has selected.
2. If the claimant objects to all the arbitrators on the list he or she shall, within 15 days of receipt of the list of approved arbitrators, notify the Secretary, setting forth the reasons for declining to select any of the arbitrators on the approved list. The Secretary shall transmit such notification to the Chairperson of the Ethics Advisory Board, with a copy to the respondent who will have the opportunity to present written comments to the Ethics Advisory Board.
3. In cases where the claimant objects to all the arbitrators on the Arbitration Panel, the Ethics Advisory Board shall appoint an arbitrator from the approved list after considering the objections of the claimant and the written comments of the Director-General on those objections.
4. The decision of the Ethics Advisory Board on the appointment of an arbitrator shall be final and without further appeal.
5. In the event the claimant fails to respond within 15 days of receipt of the list of approved arbitrators, the Secretary shall send him or her a reminder, requesting an answer within seven days. In the absence of an answer, the claim shall be considered abandoned, without prejudice to the right to renew it upon submission of evidence of exceptional circumstances which, in the view of the Ethics Advisory Board, would justify the delay in responding and warrant a re-opening of the process.

**Rule 10. Disclosure by arbitrator and request to replace the arbitrator<sup>10</sup>**

1. When an arbitrator is approached in connection with his or her appointment to serve on a particular case, he or she shall disclose to the Chairperson of the Ethics Advisory Board any circumstances likely to give justifiable doubts as to his or her impartiality or independence. The Ethics Advisory Board shall consider the matter and decide whether the arbitrator should continue or be replaced by another arbitrator.
2. A party may request the Ethics Advisory Board to replace the arbitrator after his or her appointment only for reasons of which that party became aware after the appointment. Such a request must be made within 15 days of discovering the grounds on which the request is based, and set out the grounds on which the request is based. The Ethics Advisory Board shall consider the matter and decide whether the arbitrator should continue or be replaced by another arbitrator.

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<sup>9</sup> See paragraph 38 of the report of the Director-General.

<sup>10</sup> Rule 10 is based on Article 11 of the UNCITRAL Arbitration Rules.

**Rule 11. Replacement of arbitrator<sup>11</sup>**

1. In the event where the arbitrator has to be replaced prior to or during the course of the arbitral proceedings, a substitute arbitrator shall be selected by the claimant or the Ethics Advisory Board pursuant to the procedure set out in rule 9.
2. If an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the new arbitrator decides otherwise.

**Rule 12. Exclusion of liability<sup>12</sup>**

Save for intentional wrongdoing, arbitrators shall not be subject to any claim based on any act or omission in connection with the arbitration.

**Section III. Arbitral proceedings**

**Rule 13. General provisions<sup>13</sup>**

1. Subject to these Rules, the arbitrator may conduct the arbitration in such manner as he or she considers appropriate, provided that the parties are treated with equality and fairness. The arbitrator shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute between the parties. Procedural matters not covered by these Rules shall be dealt with by decision of the arbitrator in light of the facts of the case under consideration.
2. As soon as practicable after the arbitrator has been appointed and after inviting the parties to express their views, the arbitrator shall establish the timetable of the arbitration, including deadlines for submission of written pleadings. The arbitrator may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or contained in the timetable.
3. All notices and communications to the arbitrator shall be sent to the Secretary and shall be copied to the other party. The Secretary shall transmit all notices and communications from the arbitrator to the parties. All communications to the parties shall be made at the same time, except as otherwise permitted by the arbitrator.

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<sup>11</sup> Rule 11 is based on Article 14 of the UNCITRAL Arbitration Rules.

<sup>12</sup> Rule 12 is based on Article 16 of the UNCITRAL Arbitration Rules.

<sup>13</sup> Rule 13 is based on Article 17 of the UNCITRAL Arbitration Rules and, for paragraph 4 of the rule, on paragraph 49 of the report of the Director-General.

4. The place of arbitration shall normally be at the seat of the Agency in Abu Dhabi after conclusion of the exchange of written pleadings in accordance with rules 14 to 17. The arbitrator may conduct the arbitration at another location if he or she deems this essential for resolution of the case and has given the Parties an opportunity to comment in writing on the relocation. The reasons for such relocation shall be explained in the award. Every effort shall be made to limit travel expenses by making maximum use of IRENA's teleconference and videoconference facilities.

5. No documents pertaining to any informal settlement efforts of the claim may be submitted by any party, and no mention of any such efforts shall be made in any written pleadings or oral arguments made before the arbitrator.

6. The arbitration shall be conducted in English. If a party produces or submits a document in another language, that party must provide at the same time an English translation, with a certification that the translation was prepared by a qualified translator.

#### **Rule 14. Statement of claim<sup>14</sup>**

1. Unless the claimant has elected to treat the notice of arbitration as a statement of claim pursuant to Rule 4.3, he or she shall transmit a statement of claim in writing to the Secretary within the period of time defined by the timetable established by the arbitrator in accordance with rule 13.2.

2. The statement of claim shall include the following:

- (a) The full name, address, email address, telephone number and any other relevant contact details of the claimant;
- (b) The full name, address, email address, telephone number and any other relevant contact details of the claimant's counsel, if any, specifying whether counsel will serve for purposes of representation or assistance;
- (c) A copy of the final decision of the Director-General being appealed;
- (d) A statement of the facts supporting the claim;
- (e) The points at issue, including an explanation of which staff regulations, staff rules or subsidiary rules are alleged not to have been observed by the Director-General;
- (f) A reasoned explanation for any request for a hearing;
- (g) The legal grounds or arguments supporting the claim;

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<sup>14</sup> Rule 14 is based on Article 20 of the UNCITRAL Arbitration Rules.

- (h) The relief or remedy sought; and
  - (i) A copy of all documents referred to by the claimant in the statement of claim, each being identified as “Claimant’s Annex” on the top of the first page of each annex followed by the number of each annex;
3. The statement of claim and all annexes shall be transmitted to the Secretary in one original, signed by the claimant and his or her counsel or representative, if any, together with annexed documents in accordance with these Rules and three copies of the statement of claim and annexes. Alternatively, the signed statement of claim and all annexes may be electronically transmitted to the Secretary in accordance with Rule 2.1.
4. The claimant shall certify that all copies, including any copies electronically transmitted to the Secretary are true copies of the originals and that all translations have been provided by qualified translators.
5. After ascertaining that the requirements of this rule are complied with, the Secretary shall transmit a copy of the statement of claim and any annexes to the respondent. If the formal requirements of this rule are not fulfilled, the arbitrator may require the claimant to conform the statement of claim and any annexes to the requirements of this rule within a specified time. Once the corrections are properly made, the Secretary shall transmit a copy of the statement of claim and any annexes to the respondent.

**Rule 15. Respondent’s answer<sup>15</sup>**

1. Within 30 days of the receipt of the statement of claim or notice from claimant that the notice of arbitration is to be treated as a statement of claim pursuant to Rule 4.3, the respondent shall communicate its answer in writing to the Secretary.
2. The respondent’s answer shall contain the following:
- (a) The full name, address, email address, telephone number and any other relevant contact details of the representative of the Director-General;
  - (b) A statement setting out facts and arguments in support of the decision being appealed;
  - (c) A reasoned explanation for any request for a hearing;
  - (d) The legal arguments supporting the answer;

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<sup>15</sup> Rule 15 is based on Article 21 of the UNCITRAL Arbitration Rules.



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- (e) The factual and legal grounds of any counterclaim against the claimant, and the relief or remedy sought;
- (f) A copy of all documents referred to by the respondent, unless already submitted by claimant, identified by the words “Respondent’s Annex” on the top of the first page of each annex followed by the number of each annex;
3. The respondent’s answer and all annexes shall be transmitted to the Secretary in one original, signed by the representative of the Director-General, together with annexed documents in accordance with these Rules and three copies of the answer and annexes. Alternatively, the signed answer and all annexes may be electronically transmitted to the Secretary in accordance with Rule 2.1.
4. The respondent shall certify that all copies, including any copies electronically transmitted to the Secretary, are true copies of the originals and that all translations have been provided by qualified translators.
5. After ascertaining that the requirements of this rule are complied with, the Secretary shall transmit a copy of the answer to the claimant. If the formal requirements of this rule are not fulfilled, the arbitrator may require the respondent to conform the answer to the requirements of this rule within a specified time. Once the corrections are properly made the Secretary shall transmit a copy of the answer to the claimant.

#### **Rule 16. Rejoinder and observations on rejoinder<sup>16</sup>**

1. The claimant may, within 30 days of the date on which the answer is received by him or her, file a rejoinder of no more than five pages, commenting on the respondent’s answer.
2. The respondent may, within 30 days of the date on which the rejoinder is received by him or her, file observations on the rejoinder of not more than three pages.
3. Any document referred to in the rejoinder and the observations on the rejoinder, as the case may be, shall be annexed thereto, unless already before the arbitrator. The number of the first annex to the rejoinder or observations on the rejoinder shall be the number following that given to the last annex submitted by the party concerned in the statement of claim or in the answer, as the case may be.
4. The rejoinder and the observations on the rejoinder, and any annexes thereto, shall be transmitted in an original and three copies to the Secretary. Alternatively, they may be electronically transmitted to the Secretary in accordance with Rule 2.1

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<sup>16</sup> Rule 16 is based on the practice of appeal bodies with staff participation in the Common System of international organizations.

5. The rejoinder and observations on the rejoinder shall be accompanied by a statement from the party submitting the document that all copies, including any copies electronically transmitted to the Secretary, are true copies of the originals and that all translations have been provided by qualified translators.

6. After ascertaining that the requirements of this rule are complied with, the Secretary shall transmit a copy of the rejoinder or observations on the rejoinder to the other party.

7. Subject to Rule 17, the written proceedings are closed after the observations on the rejoinder are filed or after the time limit for such filing has expired.

**Rule 17. Further written statements<sup>17</sup>**

The arbitrator may require the parties to submit further written statements and shall fix the periods of time for communicating such statements.

**Rule 18. Jurisdiction<sup>18</sup>**

1. The arbitrator shall have the power to rule on his or her jurisdiction.

2. A plea that the arbitrator does not have jurisdiction shall be raised no later than in the respondent's answer.

3. A plea that the arbitrator is exceeding the scope of his or her authority shall be raised as soon as the matter alleged to be beyond the scope of the authority of the arbitrator occurs.

4. The arbitrator may, in the cases referred to in paragraphs 2 and 3 of this Rule, admit a later plea if he or she considers the delay justified.

5. The arbitrator may rule on a plea concerning jurisdiction either as a preliminary question or in the award on the merits.

**Rule 19. Interim measures<sup>19</sup>**

1. The arbitrator may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure prior to the issuance of the award by which the arbitrator orders a party to take action that would prevent, or orders a party to refrain

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<sup>17</sup> Rule 17 is based on Article 24 of the UNCITRAL Arbitration Rules.

<sup>18</sup> Rule 18 is based on Article 23 of the UNCITRAL Arbitration Rules.

<sup>19</sup> Rule 19 is based on Article 26 of the UNCITRAL Arbitration Rules.

from taking action, that is likely to cause imminent irreparable harm or would prejudice the arbitral process itself, for instance a direction to preserve evidence that may be relevant and material to the resolution of the dispute.

### **Rule 20. Evidence<sup>20</sup>**

1. Each party shall have the burden of proving the facts relied on to support its statement of claim or answer.
2. The arbitrator may require the parties to produce documents or present other evidence within such a period of time as the arbitrator shall determine.
3. The arbitrator shall determine the admissibility, relevance, materiality and weight of the evidence offered.

### **Rule 21. Hearings<sup>21</sup>**

1. If requested in the statement of claim or the answer, the arbitrator may decide to hold a hearing and shall give the parties adequate advance notice of the date, time and place thereof. The hearing shall be limited to enabling the parties to present oral arguments in support of their pleadings.
2. Witnesses may be heard under the conditions and examined in the manner set by the arbitrator.
3. Hearings shall be held in public unless the arbitrator decides otherwise after considering the views of the parties. The arbitrator may require the retirement of any witness or witnesses during the testimony of other witnesses, except that a witness who is a party shall not, in principle, be asked to retire.
4. Whenever possible, the arbitrator shall conduct any hearing through means of telecommunication that do not require the physical presence of the parties, counsel or representatives, or witnesses at the hearing, such as videoconference or teleconference.
5. The arbitrator shall determine the sequence of any oral proceedings. The parties shall, however, retain the right to comment briefly on any statement to which they have not replied.
6. The arbitrator may, if he or she considers it necessary owing to exceptional circumstances, decide to reopen the hearing at any time before the award is made.

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<sup>20</sup> Rule 20 is based on Article 27 of the UNCITRAL Arbitration Rules.

<sup>21</sup> Rule 21 is based on Article 28 of the UNCITRAL Arbitration Rules.

**Rule 22. Default<sup>22</sup>**

1. If, within the period of time fixed by or pursuant to these Rules and without showing sufficient cause the claimant has failed to communicate a statement of claim, the arbitrator may issue an order for the termination of the arbitral proceedings.
2. If a party, duly notified under these Rules, fails to submit an answer, a rejoinder or observations on the rejoinder, or fails to appear at a hearing or to submit documents or evidence requested by the arbitrator, without showing sufficient cause for such failure, the arbitrator may proceed with the arbitration on the basis of the material already before the arbitrator.

**Rule 23. Waiver of right to object<sup>23</sup>**

A party who fails to object promptly to any non-compliance with these Rules shall be deemed to have waived the right to make such an objection, unless the party can show that, under the circumstances, its failure to object was justified.

**Section IV. The award**

**Rule 24. Applicable law<sup>24</sup>**

1. The arbitrator shall apply the Staff Regulations and the Staff Rules of the Agency and any relevant subsidiary issuances creating rights and obligations for staff. The arbitrator may also apply general principles embodied in the IRENA Statute and the Staff Regulations adopted by the Assembly.
2. The arbitrator shall not decide as *amiable compositeur* or *ex aequo et bono*.

**Rule 25. Settlement or other grounds for termination of proceedings before the issuance of the award<sup>25</sup>**

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitrator shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the arbitrator, record the settlement in the form of an award on agreed terms. The arbitrator is not obliged to give reasons for such an award.

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<sup>22</sup> Rule 22 is based on Article 35 of the UNCITRAL Arbitration Rules.

<sup>23</sup> Rule 23 is based on Article 32 of the UNCITRAL Arbitration Rules.

<sup>24</sup> Rule 24 is based on Article 35 of the UNCITRAL Arbitration Rules and on the fact that the conditions of service of staff members depend on the Staff Regulations and Rules of IRENA rather than national law.

<sup>25</sup> Rule 25 is based on Article 36 of the UNCITRAL Arbitration Rules.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitrator shall inform the parties of his or her intention to issue an order for the termination of the proceedings and give them 30 days to comment. An order terminating the proceedings shall set out the reasons for such action.

3. The Secretary shall send copies of the award on agreed terms or an order for termination of the arbitral proceedings to the parties.

#### **Rule 26. Scope of award<sup>26</sup>**

1. The arbitrator may order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the arbitrator shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to the limits set out in sub-paragraph 1(b);

(b) Compensation, which shall not exceed the equivalent of two years' net base salary of the claimant.

2. The arbitrator shall not award exemplary or punitive damages.

3. If the contested administrative decision is based on an assessment of the efficiency or relative efficiency of the claimant, the arbitrator shall consider only whether the applicable procedures were followed and whether the decision was improperly motivated by prejudice or by some other extraneous factor.

#### **Rule 27. Form and implementation of the award<sup>27</sup>**

1. The award shall be in writing. It shall be signed and dated by the arbitrator. The arbitrator shall state the reasons upon which the award is based.

2. The Secretary shall promptly transmit the signed award to the parties.

3. The award shall be final and binding on the parties.

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<sup>26</sup> See paragraphs 40 to 44 of report of the Director-General.

<sup>27</sup> Rule 27 is based on Article 34 of the UNCITRAL Arbitration Rules.

4. The Director-General shall implement the award promptly and take any action that is required of the Agency by the award.

5. Unless the arbitrator orders otherwise, the Director-General shall make the award public on the Agency's web site. However, the name, personal details and functional title of the claimant shall be redacted.

**Rule 28. Interpretation of the award<sup>28</sup>**

1. Within 30 days after the receipt of the award, a party, with notice to the other party, may request that the arbitrator give an interpretation of the award.

2. The interpretation shall be given in writing within 45 days after the receipt of the request. The interpretation shall form part of the award.

**Rule 29. Correction of the award<sup>29</sup>**

1. Within 30 days after the receipt of the award, a party, with notice to the other party, may request the arbitrator to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the arbitrator considers that the request is justified, he or she shall make the correction within 45 days of receipt of the request.

2. The arbitrator may within 30 days after the communication of the award make such corrections on his or her own initiative.

3. Corrections shall form part of the award. They shall be in writing and shall be transmitted to the parties by the Secretary.

**Section V. Costs**

**Rule 30. Fees and costs of arbitrator<sup>30</sup>**

The fees and costs of the arbitrator, established in accordance with conditions of service for arbitrators approved by the Assembly, shall be borne by the Agency.

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<sup>28</sup> Rule 28 is based on Article 37 of the UNCITRAL Arbitration Rules.

<sup>29</sup> Rule 29 is based on Article 38 of the UNCITRAL Arbitration Rules.

<sup>30</sup> See paragraphs 45 and 54 of the report of the Director-General.

**Rule 31. Support costs<sup>31</sup>**

The Agency shall also bear the cost of the Secretary and necessary support services, including the provision of teleconferences or video conferences arranged at the request of the arbitrator.

**Rule 32. Other costs<sup>32</sup>**

1. Each party shall bear its own costs in relation to the arbitration, including the costs of its counsel or representative, travel-related costs, communications, office supplies, etc.
2. The arbitrator has authority to order the Agency in the award, giving reasons thereof, to pay reasonable costs incurred by the claimant, in whole or in part.
3. The arbitrator shall also decide in the award whether the registration fee required by rule 3.3 should be refunded to the claimant, in whole or in part.
4. Should the arbitrator determine that a party has manifestly abused the arbitration process, he or she may award costs against that party in an amount fixed by the arbitrator.

**Section VI. Final provisions****Rule 33. Adoption and amendment of rules**

1. The present Rules are adopted as provisional until they are confirmed or finalized by the Assembly.<sup>33</sup>
2. The Assembly may amend the Rules from time to time.
3. The Director-General shall draw to the attention of the Assembly every recommendation or comment by an Arbitrator on the need for amendment of the Rules.

**Rule 34. Date of entry into force**

The Rules shall enter into force on the day following approval by the Assembly.

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<sup>31</sup> See paragraph 45 of the report of the Director-General.

<sup>32</sup> See paragraphs 46 to 48 of the report of the Director-General.

<sup>33</sup> See paragraph 27 of the report of the Director-General.