

7 March 2025

**Answers for the European Centre for Medium-Range Weather Forecasts (ECMWF) Appeals Board, the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT) Appeals Board and for the European Space Agency (ESA) Administrative Tribunal
Questionnaire on the subject of general principles**

I. Identification methods

- 1) On what legal basis (written rule, implied power, etc.) does your tribunal recognise the applicability of general principles?

The power to apply general principles follows from the conception of an independent judge of superior qualification experienced in international law. It does not need to be expressly included in written statutes establishing an Administrative Tribunal (Appeals Board) of an international organisation.

There are some hints pointing at the judges' qualification. ESA Staff Regulation 33.1 provides that: "All members must be of recognised competence in law". Rule 34/1(iii) provides that: "At least two members of the Tribunal shall be eminent persons with particular competence in labour legislation and in staff relations, preferably from the international field." Art. 39.8 of the ECMWF Staff Regulations provides that: "The members of the Appeals Board shall be appointed by the Council from a list ... composed of candidates who must be independent from ECMWF and have a background in international legal matters".

- 2) Does your tribunal make a distinction between "general principles of law derived from national legal systems" and "general principles of law formed within the international legal system", and perhaps other principles (e.g. the general principles of international civil service law, etc.)? If so, which ones, for what reason(s) and what are the implications?

No. If a principle on which the Tribunal wants to rely is a "general principle of law", there is no need to identify its origin.

- 3) How does your tribunal go about identifying a general principle?

- a. By reference to national law? If so, which national law? Does your tribunal do a comparative law analysis, even if it is only a limited one? How are difficulties in translating legal concepts overcome?

Most "general principles" are universally recognised and need not be identified by reference to national law. However, if the exact wording of a general principle is in doubt, it may be helpful to refer to such national law where the principle is formulated in an exemplary manner (see, e.g., answer to No 7 "Promise").

b. By reference to your tribunal's previous case law?

If possible, yes. It is desirable that decisions of a tribunal be consistent with its own case law.

c. By reference to the case law of other international administrative tribunals? If so, which ones? Is this reference explicit in the judgments handed down or does your tribunal refer to such case law only when preparing judgments?

The decisions of the Appeals Boards of ECMWF and EUMETSAT and of the Administrative Tribunal of ESA rarely refer to the case law of other international tribunals. If they do, they would cite the relevant decision in the judgment.

d. By explicit or implicit reference (please specify) to an international text, e.g. with regard to general principles relating to human rights? If so, which text(s)?

The Administrative Tribunals (Appeals Boards) of ECMWF, ESA and EUMETSAT have always maintained that specific provisions contained in international conventions such as the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union are not directly applicable to international organizations. Nevertheless, the Administrative Tribunals have ruled that they will assume that, unless provided otherwise, a specific provision of the internal law should not be given an interpretation that would be in conflict with fundamental principles enshrined in such international charters which are adopted by most or all of the Member States.

EUMETSAT APPEALS BOARD, Decision of 14 January 2020 in case No 7, § 76, 77:

The Claimant submits that his claim may also be based on European law, without stating more details. He probably relies on the "Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work" ("the TAW Directive") which is the equivalent of the German AÜG.

It is true that such European law would not be directly applicable since EUMETSAT is not a member of the EU and therefore not subject to its legislation (nor to its jurisdiction). However, the Appeals Board acknowledges that most member states of EUMETSAT are member states of the EU as well and cannot be supposed to have created internal EUMETSAT law which would sharply contradict European law and European values (such as the European Charter of Fundamental Rights which is also incorporated into EU law).

e. By some other method?

If more than one method is used, please number them in order of preference, if any.

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4) Can your tribunal rely on a general principle proprio motu?

Yes. It is an implicit power of the Tribunal. Following the principle "iura novit curia", the parties need not open the way to the application of general principles.

II. Relationship with other sources

5) What legal value does your tribunal attach to general principles in relation to the various types of secondary legislation produced by the organisation (decisions adopted by organs of the organisation, including organs composed of states - e.g. General

Assembly of the United Nations - or representatives of states - e.g. the Committee of Ministers of the Council of Europe -), in relation to the instrument establishing the organisation and in relation to other sources of international law? Why?

In the first line, decisions should be based on the internal legal system of the organisation created by the organisation itself. In the second line, secondary legislation would be applicable, especially legislation created in co-ordination of the six Co-ordinated Organisations (CoE, ECMWF, ESA, EUMETSAT, NATO, OECD) and adopted by the organisation. Beyond that, there are only very few international principles that play a major role in the jurisprudence of the Appeals Boards and the Administrative Tribunal named above under 3.d. (e.g. the right to be heard, the right to access to justice and to effective legal protection; equal treatment, proportionality, non-retroactivity). Having recourse to general principles of international law is only needed if and insofar the relevant particular law of the organization does not give a clue how to solve a case in a decent manner.

6) Has your tribunal ever agreed to examine, if only by way of an objection, the legality of an act adopted by a body composed of states in relation to a general principle? If so, what were the implications, both legally (for the instrument in question) and politically (within the organisation)?

Yes, occasionally, by way of exception.

7) Could you give at least one example of a general principle in procedural matters, one example of a general principle in substantive matters (e.g. the principle of independence, the principle recognising acquired/essential rights, etc.) and one example of a general principle in matters relating to human rights protection, regarding the status of the principle in the hierarchy of norms?

- **Example of a general principle in procedural matters**

❖ *Application of international law ex officio:*

ESA Appeals Board, Decision of 21 December 2021 in case No 129, § 43:

(On the legal standing of a party): The Appeals Board has to examine the admissibility *ex officio* and cannot accept an agreement or concurrent views of the Parties as binding. A lack of standing of a claimant cannot be overruled by mutual understanding of the parties or by the consent of the Defendant.

❖ *Access to justice:*

1. ESA APPEALS BOARD, Decision of 22 January 2013 in cases 88/89:

The Appeals Board notes that the Staff Rules do not expressly confer upon the Staff Association Committee any right to appeal to the Appeals Board. According to Staff Rule 33.1, the Appeals Board is required to hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member, a former staff member or persons entitled under him. According to Staff Rule 33.2, the Appeals Board shall rescind any decision against which there has been an appeal if the decision is contrary to the Staff Regulations, Rules or Instructions or to the claimant's terms of appointment or vested rights, and if the claimant's personal interests are affected. ... From this it clearly follows that only a "staff member, a former staff member or persons entitled under him", able to "exhaust" the Advisory Board procedure, have the right to lodge an appeal. Notwithstanding this, the Appeals Board recognizes that procedural rights may develop as a matter of law. The Appeals Board considers that, as the staff have no access to national courts and all disputes arising within ESA arising from any explicit or implicit decision taken by the Agency are to be heard by the Appeals Board only, to deny the Staff

Association any right of appeal would constitute a denial of legal protection. The Appeals Board, therefore, is competent to hear any dispute arising between the Agency and the Staff Association Committee, provided the dispute pertains to the existence or the extent of rights conferred upon the Staff Association Committee. This competence cannot be denied on the ground that the Staff Association Committee is not a legal persona. Within ESA, it is a well founded body established in Chapter IX of the Staff Rules.

2. EUMETSAT Appeals Board, Decision of 14 January 2020 in case No 7, §§ 34 et seq.:

The Claimant has been working ... as a janitor ("Hausmeister"), i.e. a caretaker of the EUMETSAT premises located in Darmstadt. He has never been directly engaged by EUMETSAT but does his work on the basis of working contracts concluded by EUMETSAT with different German firms providing various maintenance and cleaning services for institutional clients. ... The dispute between the parties does not arise "out of these Staff Rules". Nevertheless, the Claimant claims to be a de jure staff member, without being appointed in the manner described in the Staff Rules. Since this very question is at issue, the Appeals Board is competent to decide the case.

Should the Claimant be barred from access to the Appeals Board, he would see himself deprived of any possibility to bring his lawsuit against the Defendant before a competent court. This would amount to an unacceptable denial of justice. ... EUMETSAT cannot be sued by the Claimant before a German Labour Court. In the court proceedings which the Claimant initiated before the Labour Court of Darmstadt, the Defendant invoked EUMETSAT's immunity from Jurisdiction and Execution ... Thus, EUMETSAT's immunity bars the Claimant's access to a German Court. The Appeals Board, therefore, is competent to decide the case.

3. ESA Appeals Board, Decision of 21 December 2021 in case No 129, §§ 44, 45:

The ... Claimant does not fall within the scope of claimants who have legal standing before the Appeals Board according to Staff Regulation 33.1 and 33.2 since she is neither a staff member nor a former staff member nor a person entitled under him or her. Contrary to the contentions of the Claimant, her legal standing does not derive from the fact that she challenges a decision of the Director General. Admissibility requires both standing of the party and a challengeable decision. One of these prerequisites does not include the other.

Nevertheless, the Claimant is entitled to bring her appeal before the Appeals Board. It is established in international jurisprudence that candidates applying for a staff position, as well as people whose contention to be staff members is denied by the organization, have legal standing before the competent Appeals Board or Administrative Tribunal (see e.g. the Appeals Board's decision No 71 of 28 April 2000 – Beer and Regan, and the Decision No 7 of 14 January 2020 of the EUMETSAT Appeals Board – Sawelew -, paragraph 34 and 35).

❖ *Retroactivity:*

ESA Appeals Board, Decision of 7 May 2019 in cases 112-114, §§ 55-65:

a) Basically, the principle of non-retroactivity forbids an organisation from linking to facts or events that have occurred in the past a less favourable legal effect than that which had been provided for when the facts or the events occurred. The principle of non-retroactivity is not enshrined in the ESA Staff Regulations. However, it is a universally-recognised principle of the rule of law and therefore is binding on the Appeals Board also. It does not only apply to legal provisions but also to administrative practice.

b) The principle has been shaped both in national and in international jurisprudence. The Appeals Board refers to the following examples from case law:

- ILOAT 3884 of 28 June 2017

The principle of non-retroactivity, which is one of the general principles of international civil service law, forbids an organisation from applying to staff retroactively a rule which is unfavourable to them (see, for example, Judgments 963, under 5, 1979, under 5(h), or 2439, under 12).

Such unlawful retroactive effect occurs *inter alia* when a new rule that has not yet entered into force (see, for example, Judgments 1012, under 7, or 1641, under 8) or a new administrative practice that has not been clearly announced in advance (see, in particular, Judgments 767, under 9, 792, under 8, 1053, under 7, and 1610, under 21) is applied to an official in a manner which goes against her or his interests.

- ILOAT 2439 of 6 July 2005

(12) In accordance with the principle of non-retroactivity, an organisation cannot apply retroactively to staff a rule which is unfavourable to them (see Judgment 1979, under 5(h)). The question of whether a rule is favourable or unfavourable to a staff member needs to be approached in general terms.

- ILOAT 1979 of 12 July 2000

5(h) (h) The rule against retroactivity prevents an organisation from applying retroactively to staff a rule which is unfavourable to them. In order to determine whether a measure is unfavourable its overall effects must be assessed.

- ILOAT 1610 of 30 January 1997

(21) To be binding in law a practice must be so constant and consistent as to reflect a general rule: see for example Judgment 1080 (in re Barahona No. 3 and others) under 7. ... At all events, an organisation may always put an end to a practice provided it does not thereby infringe any provision of the rules and the change is properly announced and not brought in retroactively: see Judgment 767 (in re *Cachelin*) under 9.

- ILOAT 1130 of 3 July 1991

The rule against retroactivity, though a general principle of law, is not absolute. One qualification is, ..., that the retroactive decision will be admissible in law where the effect of it is favourable to the staff member it applies to. Another qualification is that the rule will not hold where the retroactive decision supersedes an earlier one which, at the time at which it was taken, was merely provisional and so was to hold good only until replaced by a final decision.

- ILOAT 963 of 27 June 1987

5. ... Any authority is bound by the rules it has itself issued until it amends or repeals them. The general principle is that rules govern only what is to happen henceforth, and it is binding on any authority since it affords the basis for relations between the parties in law. Furthermore, a rule is enforceable only from the date on which it is brought to the notice of those it applies to. ... Since the impugned decisions retroactively reduce the refundable amount of education expenses, they are unlawful and cannot stand.

- ILOAT 767 of 12 June 1986

9. Another line of argument advanced by the ILO is that even if it did construe 11.16 too loosely it could always put an end to the practice. The ILO may indeed change the interpretation provided it does not thereby infringe any provision of the Staff Regulations. But

the change has to be properly made known and may not be retroactive.

❖ *Reiteration of a decision does not re-open a new time limit:*

1. ESA Appeals Board, decision of 12 December 2017 in Case No. 104, § 28:

... the Director General's letter ... was not a new decision, but just a confirmation of the decision of 3rd October 2016. It is standing jurisprudence that an identical reply of the Director General does not create a new decision, triggering a new time period. In its Decision No. 70 – A. M. Chofflet v. ESA – of 8th July 1998, the Appeals Board said (and has confirmed this in its decision No. 92 of 6th November 2013):

“It is one of the clearest and longstanding established principles of international administrative case law that confirmation of an administrative decision definitely does not imply resetting established time limits.”

2. ESA Appeals Board, Decision of 31 January 2018 in case No 106 § 55:

Pursuant to the case-law of the ILOAT (see e.g. Judgment 3870 of 28th June 2017, Consideration 4) “... for a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) and not a purely confirmatory decision, the following conditions are to be met: the new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and it must relate to different issues from the previous one or be based on new grounds (see Judgments 660, 2011, under 18, and 3735, under 4”).

❖ *Promise:*

ESA Appeals Board, Decision of 31 January 2018 in case No. 106 §§ 71, 73:

Taking into consideration other international judgments as well as legal provisions established in countries with a long lasting tradition of administrative law (e.g. § 38 of the German *Verwaltungsverfahrensgesetz*), the Appeals Board considers the following elements as necessary for a legally valid promise:

- (a) The promise can be made orally or in writing;
- (b) It must be made by the competent authority;
- (c) Its content is a commitment to issue or not to issue a specific administrative decision;
- (d) The promised administrative decision must be legal;
- (e) The promised administrative decision must be executable and enforceable;
- (f) In case that other authorities have to co-act beforehand, the co-action must have taken place;
- (g) The promise is no longer valid if the factual or the legal situation alters to such a degree that the authority would not have given the promise or would no longer be entitled to make the promise.

❖ *Hierarchy of norms:*

EUMETSAT Appeals Board, decision of 26 September 2018 in case 6, § 49:

The view of the Claimant that the special rules governing the appraisal procedure (contained in the Staff Appraisal Guidance Booklet ...) would constitute “*lex specialis*” with the effect that neither the Appeals Board procedure under Article 38 nor the time limits governing this procedure would apply, is not correct. The Booklet is no more than internal guidance which covers the “appraisal report making procedure”. It is not an independent source of law such that it creates legally enforceable norms and is in any event lower in hierarchy than the Staff Rules or Staff Instructions and cannot derogate or supersede them.

ESA Administrative Tribunal, Decision of 22 March 2024 in case No. 143, § 50:

Thus, Article 36.1 CPS allows for – and even needs – some interpretation in order to implement it correctly. Technically, such interpretation may be done by means of Implementing Instructions. Although the Instructions to the CPS Rules belong to the pension matter outsourced to Co-ordination (see the Administrative Tribunal's decision No 134 of 22 April 2022, paragraph 65), they are part of subordinate legislation in the hierarchy of norms (ESA Convention – Regulations – Rules – Instructions) governing employment contracts and pensions in the Agency. Therefore, they must be consistent with the enabling instrument, the higher-ranking Article 36.1 CPS. Within these limits, they may detail or explain or interpret Art. 36.1 CPS, but they must not contradict it, alter its content or reduce its field of application.

❖ *Tu patere legem quam ipse fecisti:*

ESA Appeals Board, Decision of 14 June 2017 in case No 102, § 45:

If the Administration binds its own discretion by issuing a document like the internal Staff Contract Policy, it is bound to follow the principles laid down therein in all cases to which it applies.

ESA Appeals Board, Decision of 21 December 2020 in case No 129, § 56, 57

The Agency is free to formulate the requirements of a post according to its own needs. It may formulate requirements that are mandatory, and others that are desirable. ... At the same time, the Agency is bound by the principle of equal treatment. Therefore, it has to treat all applicants and all applications in the same way. The Agency is bound to follow the procedural rules established by law or by its own practice. ... If the Agency has fixed in the vacancy notice some mandatory requirements that must be met by the candidate, it may not deviate from its own standard by appointing a candidate who does not meet these requirements.

❖ *Legal certainty:*

1. ESA Appeals Board, Decision of 18 January 2016 in case No 96:

C'est cette décision à laquelle vise l'art. 41.4 (i) du Statut qui demande au requérant d'attaquer une décision dans un délai de trois mois. Cette règle est établie pour assurer la sécurité juridique. L'administration, qui prend une décision, attaquant devant la Commission de Recours, doit savoir après trois mois si cette décision, même au cas où elle est illégale, est valable et développe son effet matériel. Le jugement No 1279 du TAOIT en date du 14 juillet 1993, précise au considérant 9 que « les délais de recours remplissent une fonction de sécurité juridique. Or, ce besoin de sécurité existe pour les deux parties au rapport contentieux : pour l'administration, qui a intérêt à ce que les mesures qu'elle est amenée à prendre ne puissent pas être indéfiniment contestées; et pour le justiciable, qui doit savoir, surtout en présence de mesures administratives qui parcourent des stades successifs, du général au particulier, à quel moment il peut agir utilement, sans s'exposer au risque de voir son recours rejeté, soit comme prématuré, soit comme tardif. »

2. ESA Administrative Tribunal, Decision of 22 January 2021 in case No. 118, § 76:

The Administrative Tribunal ... accepts that the Claimant had valid reasons to accept the decision of 6 May 2014. Nevertheless, that decision was relevant for the restructuring of ... and of far-reaching importance for the career of the Claimant. The rules of administrative law require legal certainty as to the validity of such a decision. Therefore, Regulation 41.4 (i) of the Staff Regulations, Rules and Instructions provide that a decision must be challenged within three months of its notification. If it is not challenged before the expiry of that time limit, the decision

becomes binding and final irrespective of the legality of its content or of its underlying motivation.

- **Example of a general principle in substantive matters**

❖ *Acquired rights:*

ESA Administrative Tribunal, Decision of 15 October 2021 in cases No 122-128, § 108 et seq.:

The term “vested rights” used in the Staff Regulations has the same meaning as the term “acquired rights”, which, according to constant international jurisprudence, are the rights conferred upon the staff member which are of a fundamental and essential nature and so serious and important that they were decisive when it came to the staff member accepting the appointment and, later, being encouraged to stay. An acquired right is “one the staff member may expect to survive any amendments of the rules” (see, e.g., ILOAT decision No. 832 of 5 June 1987, consideration 13; No. 4028 of 26 June 2018, considerations 12 and 13, and No. 4380 of 18 February 2021, considerations 9-11).

The Administrative Tribunal (former Appeals Board) has long since accepted this concept. In its decision Nos 24–27 of 8 July 1986, the Appeals Board said:

“qu'en effet par conditions fondamentales ou essentielles il faut entendre les conditions dont la gravité ou l'importance est de nature à déterminer l'acceptation par l'agent de sa nomination ou de son maintien au service de l'Agence”.

Likewise, it said in its decision No. 78 of 18 July 2003:

“Or, comme l'a observé la Commission dans de précédentes décisions et conformément à une jurisprudence constante d'autres tribunaux internationaux, il ne peut en aller ainsi que lorsque la modification est d'une ampleur telle qu'elle aurait été de nature, si elle était intervenue avant l'engagement de l'agent, à remettre en cause son acceptation des conditions qui lui étaient offertes”.

The parties concur that the right to have salaries and pensions regularly adjusted is of a statutory nature and not contained as an individual stipulation in the Claimants' letters of appointment. Instead, it derives from statutory law contained in the Staff Regulations, Rules and Instructions to which Staff Regulation 8.2 refers. In such case, the test of whether or not a right contained in an employment contract is of a fundamental and essential nature and so serious and important that it was decisive when it came to the staff member accepting the appointment with ESA and, later, being encouraged to stay, requires an assessment which must be done in a generalised manner, i. e. from the perspective of all the people concerned, to whom the relevant statutory provision applies. It is not possible to assume that a certain right created by a general legal provision constitutes an acquired right for some of the people concerned, and not for others. A right is an acquired right for all concerned, or for none of them. ... The view of an individual may be decisive only if it is an individual right which is solely conferred on that person (see ILOAT Judgment No. 832 of 5 June 1987, consideration 13, and ESA Administrative Tribunal decision No. 132 of 26 July 2021, paragraph 85).

❖ *Exception d'illégalité*

ESA Administrative Tribunal, Decision of 15 October 2021 in case No. 119, § 47, 48:

With regard to the argument that barring the Claimants the way to the Administrative Tribunal would amount to a denial of access to justice, the Administrative Tribunal notes that pensioners

of the Agency would have standing to invoke by an “*exception d’illégalité*” any illegality of the process leading to the amendment of the Co-ordinated Pension System. In its decision No. 98-100 of 23 September 2016, paragraph 46, the Appeals Board held that:

The decision of the Director General to settle the claims for Daily Subsistence Allowance on the basis of the new scheme implemented into the Staff Rules as per 1st January 2015 is illegal and has to be rescinded by the Appeals Board if the new scheme has been set up in violation of prevailing law. It is well established in international administrative law that an agent may invoke the illegality of a general rule which is individually applied in his case, if and insofar as the illegality of the rule renders illegal the decision which he appeals against (see e.g. ILOAT decision 3291 of 5 February 2014). Although it is beyond the competence of the Appeals Board to declare invalid such a rule – the Appeals Board not being a constitutional court vested with such powers (see Appeals Board Decision No. 85) –, the Appeals Board may rescind the decision of Administration on the ground that the underlying rule is illegal and thus cannot be the basis of legal decisions (“*exception d’illégalité*”).

- **Example of a general principle in matters relating to human rights protection**

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8) What function(s) does your tribunal assign to general principles? For example, are they intended to:

a. fill gaps in written law?

Yes.

b. facilitate the interpretation of written provisions, e.g. by interpreting written provisions in the light of general principles?

Yes; see answer to question 3) d. If more than one interpretation is possible, then the interpretation should prevail which may be supported by general law principles such as transparency, the principle “tu patere legem quem ipse fecisti”, equal treatment etc.

c. ensure substantive rule of law (Rechtsstaatlichkeit), for example pursuant to general principles relating to human rights, including within international organisations? other?

Yes. The Appeals Boards will always assume that the member states of the organisation should not be supposed to have created law which is contrary to international law binding the member state. All member states of the organisations here in question are supposed to ensure the rule of law.

d. other?

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III. Establishing the boundaries of principles

9) Where a general principle is applicable, how is it delimited? Have there been any cases where the general principle has been found to have been violated? Could you illustrate your answer, if applicable, with regard to the following areas:

a. human rights principles;

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b. procedural rights;

See answers to No. 7.

c. duty of care, i.e. positive obligations for the competent authority;

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d. acquired/essential rights;

See answers to No. 7.

e. any other principle you wish to mention?

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