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The UNAT and the applicability of the principle "*nemo iudex in causa sua*" or "no-one is judge in his own cause"

In Brief

In October 2019, the UNAT issued a series of rather revolutionary judgments, which were published in February 2020.[1] In these judgements, starting with *Dispert & Hoe v. Secretary-General of the International Maritime Organization* (IMO), the UNAT held that the head of an international organization cannot be considered a neutral instance, pursuant to the fundamental principle of natural justice '*nemo iudex in causa sua*' (Latin, lit. "no-one is judge in his own cause"). The UNAT found that the Staff Appeals Board (SAB) of the IMO, as a neutral institution, should be entitled to issue decisions which are subject to the UNAT's review in second instance, instead of only making recommendations to the Secretary General. The Secretary General, on the other hand, is both the employer's representative and the original decision-maker appealed against, and therefore cannot be considered a neutral instance who can decide upon his own decisions.[2]

Nemo iudex in causa sua as it applies in the UNAT

The Tribunal reinforced the above principle in its 2020 judgements. The Tribunal in *Ahmed El Sehemawi v. Secretary-General of the International Civil Aviation Organization* (ICAO)[3] found that it does not matter if the internal appeals board (in this case, the Advisory Joint Appeals Board, or AJAB) is considered as a neutral first instance process as its interim report is not a 'decision' but simply submits the views of the board to the Secretary-General of the ICAO who will then make the final decision. The Tribunal held that "*in reality, at ICAO, there is no neutral first instance process including a decision. The AJAB is a neutral institution but does not issue a decision. The Secretary-General of the ICAO, who issues the contested decision, is not neutral, but a party of the litigation.*" It follows that the Tribunal is "*not satisfied that the essential elements of a neutral first instance process are present to have constituted a decision that could*

[1] *Dispert & Hoe v. Secretary-General of the International Maritime Organization* (IMO), Judgment No. 2019-UNAT-958; *Spinardi v. Secretary-General of the IMO*, Judgment No. 2019-UNAT-957; *Sheffer v. Secretary-General of the IMO*, Judgment No. 2019-UNAT-949. These judgements were later quoted in more recent cases.

[2] 2019-UNAT-958 para. 19: "the Secretary-General of the IMO cannot himself be regarded as a neutral part of the process. That is because he is both the employer's representative and the original decision-maker appealed against." [emphasis added]

[3] *Ahmed El Sehemawi v. Secretary-General of the International Civil Aviation Organization* (ICAO), Judgment No. 2020-UNAT-1034, in particular paras. 21 and 22.

be appealed to the Appeals Tribunal."[4] The case was therefore remanded back to the AJAB for a decision binding on the parties and which would constitute a neutral first instance process.[5]

In *Abrate et al. v. Secretary-General of the World Meteorological Organization* (WMO),[6] it was held that, given the unsuitability of the WMO Joint Appeals Board (JAB) in issuing first instance decisions, the WMO would enter into a special agreement with the UN extending the jurisdiction of the UNDT and UNAT to the WMO. Therefore, through the agreement, the WMO JAB has *de facto* been replaced by the UNDT as first judicial instance. The matter at hand in the case was therefore remanded to the UNDT for a decision which would act as the neutral first instance process for the WMO.[7]

Lastly, in *Michel Rixen v. Secretary-General of the WMO*, the Tribunal maintains a consistent approach as to the unsuitability of the JAB to serve as a first instance: "*the JAB/WMO's report is not a "decision" from a "neutral first instance process" but simply provides advice or recommendations to the Secretary-General of the WMO, who can adopt the recommendations or ignore them*."[8] This case is about the diverging decisions between ILOAT and UNAT regarding the post adjustment multiplier (PAM) in Geneva, but this is another story for the next newsletter!

Corollary to the above cases, a fundamental question arises: does the contested "decision," whether that is the internal appeals board's report or the Secretary-General's final decision resulting from the report, comply with the requirements of Article 2(10) of the Appeals Tribunal Statute?[9]

Article 2(10) of the Appeals Tribunal Statute provides that:

> "The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency […], where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. […] Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law […]." [emphasis added]

It follows from the above that all international organizations with an internal justice mechanism comparable to that of IMO, WMO, or ICAO– i.e., with an internal appeals board which issues recommendations to the head of the organization, as opposed to first instance decisions– do not comply with the requirements of Article 2(10). As a matter of fact, the head of an organization structured as above is a party to the proceedings and therefore will never be a neutral instance in a case affecting the legality of one of his or her own decisions.

The Tribunal's reasoning simply reinforces the legal principle of *nemo iudex in causa sua*, which is a general principle of law. It took years for the Tribunal to come to this simple conclusion and

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[4] 2020-UNAT-1034 para. 21: "The fact that, under ICAO's Staff Regulations and Rules, the AJAB was established and is considered as a neutral first instance process, does not bind the Appeals Tribunal. In reality, at ICAO, there is no neutral first instance process including a decision. [emphasis added]

[5] 2020-UNAT-1034 para. 22: "Therefore, the case has to be remanded to the AJAB under Article 2(10) of the Appeals Tribunal Statute for a decision which is binding on the parties and which also constitutes the neutral first instance process that produces a decision with reasons, a statement of the relevant facts, and the relevant law." [emphasis added]

[6] *Abrate et al. v. Secretary-General of the World Meteorological Organization* (WMO), Judgement no. 2019-UNAT-1319.

[7] 2019-UNAT-1319, para. 33.

[8] *Michel Rixen v. Secretary-General of the WMO*, Judgement no. 2020-UNAT-1038. See in particular paras. 44 and 45.

[9] The Tribunal concerned itself with a similar question in 2020-UNAT-1038 para. 38.

to finally revert the massive conflict of interest underlying the internal justice system of most international organizations, whereby the head of the organization, necessarily a party to the proceedings, has always been entrusted with the power of issuing final decisions.

The natural conclusion is that the organizations that are a part of the UNAT system will have either to refer to the UNDT in the first instance or to reform their internal mechanism in order to have internal neutral independent appeals bodies able to issue final decisions. The judgements of the UNAT upholding the principle of *nemo iudex in causa sua* changed international administrative law as it affects the internal justice system of several organizations: indeed, the structure of most international organizations' internal justice system is entirely comparable to that of IMO, with the main difference being that some organizations (like IMO) belong to the UN disputes system while many others to the ILOAT system.

The applicability to the ILOAT

The constant violation of the principle *nemo iudex in causa sua* is even more concerning when the recommendations issued by an internal appeals board are divergent from the Secretary General's final decision, meaning that the internal appeals body recommends the head of the organization, in favour of the staff, to set aside the administrative decision negatively affecting the staff member but the head of the organization departs from such recommendation and confirms his/her initial decision.

This happened recently in a case pending before the ILOAT, where the internal appeals board of an organization recommended the reinstatement of the staff member unlawfully dismissed but the head of the organization adopted a final decision confirming the initial decision to dismiss the staff member.

In the above-mentioned pending appeal to the ILOAT the appellant claimed that the decision should be set aside on the basis that it violates the principle of *nemo judex in causa sua*, and that the head of the organization exercised discretion improperly in disregarding the internal board's recommendations.

Reference was made to the precedent of the UNAT ruling in *Dispert & Hoe* (see above), wherein it was held that the SAB of the IMO should be entitled to issue final decisions which are subject to the UNAT's review rather than the Secretary-General's, and furthermore, that the Secretary-General, as both the employer's representative and the original decision-maker appealed against, is not a neutral party and therefore should not be allowed to rule upon his own decisions. *Mutatis mutandis,* the above applies to organizations with similar structure, with the only difference being that IMO belongs to the UN disputes system while the organization at stake belongs to the ILOAT dispute system.

Although the UNAT and ILOAT have separate, distinct jurisdictions, they often cross-reference their judgments;[10] since 2006 they have concurred that their jurisprudence should be harmonised in order to ensure equal treatment of staff members. Specifically, the UNAT has held that:

> "the Tribunal is of the view that although judgments from ILOAT are not binding upon it, they have a persuasive value and warrant consideration, especially when they touch upon issues that affect the common system as a whole. A convergent and uniform

[10] See for example, Judgment No. 2014-UNAT-397, [22], referencing the ILOAT on the issue of impartiality of decision-making bodies.

> interpretation of rules or legal principles applying all across the common system when the factual situations at hand raise similar legal issues is desirable and proper."[11]

The harmonization of jurisprudence of international administrative tribunals is not always possible; however, it would be desirable that on such an important issue like that of neutrality and independence of final decisions the two main Tribunals would adopt the same approach. This is the reason why it is very important to raise the issue before the ILOAT as well. We look forward to learning how the ILOAT will address the 'nemo iudex in causa sua' principle and if once again the judgment will be an example of harmonization or yet an example of diverging opinions.

Comment

Applying the UNAT's reasoning to the case pending before the ILOAT, the question arises, why does an internal appeals board exist if the head of the organization then adopts decisions as he or she sees fit, disregarding the recommendations received?

The way the system of most organizations is currently designed gives this power to the head of the organization as the internal appeals board can only issue recommendations and not binding decisions. This system is fundamentally flawed as it entails a massive conflict of interest whereby the head of an organization, being both the initial and final decision-maker, could never be in the position to issue impartial, neutral, and objective decisions.

The recent UNAT judgments quoted above constitute a fundamental change of jurisprudence as they throw into sharp relief the conflict of interest affecting the internal justice system of several international organisations. They are all in need of reform of their internal administration of justice in order to remedy the obvious conflict of interest between the appeals board's role and the head of the organization's unchallenged and arbitrary power of adopting final decisions. Such absolute discretion allows the head of an organization to ignore recommendations of the internal appeals body which has been designed to fulfil the role of fact-finder and a neutral and objective first instance of review.

Both the UNAT and ILOAT have recognised that, as a general rule of law,

> "*a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. […] Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule.*"[12]

It is self-evident that the head of an organization, as the person who makes the initial decision to, e.g., dismiss a staff member, is not a neutral party to issue a final decision upon its lawfulness. To avoid such conflict of interest, any internal appeals board should be able to adopt final decisions at first instance, which should then be subject to appeal directly to either the UNAT or the ILOAT.

This would avoid the creation of inequalities in the access to justice of international civil servants. If in the above-mentioned case pending before the ILOAT the Tribunal were to rule in favour of the staff member concerned, this would harmonise with the existing UNAT jurisprudence. It is a well-established principle and attempted practice that the two main tribunals of the international civil service, the ILOAT and the UNAT, adopt common approaches

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[11] *Mirella et al. v UN Secretary-General*, Judgment No. UNDT/2017/099/Corr.1 (2017), [79]

[12] Judgment No. 2014-UNAT-397, para. 22, citing ILOAT Judgment No. 179

on issues of general interest for staff or affecting a large number of staff. This is not always possible; however, on such an important point of law, we are confident that the Tribunal will carefully analyse this fundamental aspect of international administrative law.