



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1189



**Louis Savadogo
(Appellant)**
v.
**Registrar
of the International Tribunal for the Law of the Sea
(Respondent)**
JUDGMENT

Before:	Judge Graeme Colgan, Presiding Judge Dimitrios Raikos Judge Martha Halfeld
Case No.:	2021-1537
Date:	18 March 2022
Registrar:	Weicheng Lin

Counsel for Appellant:	Ludovica Moro
Counsel for Respondent:	Ximena Hinrichs Oyarce

JUDGE GRAEME COLGAN, PRESIDING.

1. For the reasons set out below, we consider that we are without jurisdiction under Article 2(10) of the United Nations Appeals Tribunal Statute to determine the merits of Mr. Savadogo's appeal. We remit the case to the Joint Appeals Board (JAB) of the International Tribunal for the Law of the Sea (ITLOS or Agency) for decision by the JAB as a neutral decision-maker and as now constituted pursuant to Article XI of the ITLOS Staff Regulations as adopted with effect from 1 December 2021. A decision of Mr. Savadogo's case by the JAB as now constituted under the ITLOS's Staff Regulations may enable him to bring an appeal if he contests the JAB's decision of his case.

Facts and Procedure

Background Facts, the JAB's Report, and the ITLOS Registrar's Decision

2. Mr. Savadogo, a Legal Officer with the ITLOS, was dissatisfied with his non-selection for a similar role with the Agency but at a higher level. His appeal against that decision was considered by the ITLOS' JAB which issued a comprehensive recommendatory report dated 10 December 2020. Although the JAB considered and recommended that Mr. Savadogo's appeal not be sustained on its merits, it concluded that his due process rights had been breached by the ITLOS and recommended that he be paid USD 2,000 as moral damages for this breach.

3. It is important to consider and record the manner in which the JAB expressed its function and the outcome of the appeal before it. It wrote, in its 10 December 2020 Report, to the Registrar of the ITLOS, below the heading "Conclusions and recommendations": "The JAB recommends awarding the Applicant an amount of USD 2,000 to compensate him for moral damage".

4. On 27 December 2020, the Registrar of the ITLOS, as Mr. Savadogo's employer, accepted the JAB's Report containing recommendations to the Registrar. The Registrar's decision conveyed to Mr. Savadogo on 27 December 2020 was materially: "Pursuant to paragraph 11 of Annex VI to the Staff Regulations of the Tribunal, I hereby wish to inform you that, with a view to settling the matter, I decided to accept the recommendation of the JAB to pay the amount of USD 2000". The Registrar's letter of 27 December also referred to Regulation 11.2(m) of the ITLOS Staff Regulations which purported to allow appeals to UNAT if, among other things, the staff member disagrees with "... the decision of the Registrar".

5. This procedure followed the ITLOS' Staff Regulations that were in force at the relevant times. Regulation 11.2 provided for the establishment of a JAB. Regulation 11.2(m) addressed appeals to the UNAT with the opening words: "If the applicant does not agree with the decision of the Registrar or if the Registrar has not taken a decision on the recommendation within 14 days after receipt of the report, the applicant may submit an appeal to the United Nations Appeals Tribunal ..." The Regulation purported to be in compliance with the UNAT's Statute and with the Agreement entered into between the ITLOS and the United Nations in 2010 by which those parties agreed to the UNAT having final appellate jurisdiction in cases such as this.

6. Also relevant to this process, and consistent with Regulation 11.2, is Annex VI(10) to the ITLOS Regulations. It provided that following the JAB's consideration of a staff member's appeal, a report would be submitted to the Registrar and copied to the staff member. That report was to contain "the recommendations of the [JAB]". Annex VI(11) then provided that, within 14 days of receipt of the JAB's report, the Registrar "shall communicate his or her decision on the recommendations" to the staff member and to the JAB.

Submissions

7. Because we have considered and decided this appeal on preliminary jurisdictional grounds and having found that we are without jurisdiction to determine the appeal on its merits, we have not examined or determined these. Without any disrespect to the parties and their representatives who presented these, it is therefore unnecessary to set out the parties' submissions which were made solely on those merits.

Considerations

8. There is a preliminary and fundamental jurisdictional reef on which we have concluded that the case has foundered. This also influenced our decision to refuse an in-person hearing of the appeal as was sought by the Appellant. None of the issues that were advanced in favour of an in-person hearing, irrespective of whether we would have been persuaded to grant such a hearing, will be determined by us based on our conclusion that we are without jurisdiction to entertain this appeal. We formally refused this motion for an in-person hearing.

9. The Registrar of the ITLOS is the human embodiment of the Appellant's employer. In the Appellant's case and following the scheme of the then-applicable Staff Regulations, the JAB made not a decision, but rather a recommendation to the Registrar who, in turn, purported to make the decision about the Appellant's appeal. That the Registrar accepted the

JAB's recommendations is immaterial jurisdictionally: the Registrar could, potentially, have rejected the JAB's recommendation, either wholly or in part or have made another decision altogether. Recommendations are, even if persuasive, just that, advice. Decisions are determinative and subject only to rights of appeal.

10. Regrettably, this was the situation precisely in a number of UNAT judgments issued from 2019, the effect of which was repeated, summarised and elucidated in a recent judgment by the Full Bench of this Tribunal in *Mary Margaret Fogarty et al.*¹ This judgment reiterated what those earlier judgments had said on the jurisdictional question at a time before the JAB and the Respondent made their recommendations and decision respectively, in the instant case.

11. For the UNAT to have jurisdiction to consider an appeal from a staff member of such a body as the ITLOS, the staff member's claim had to be decided by a neutral (that is, an independent) authority and not by the employer (in the person of the head of the Agency) on the recommendation of such a neutral first instance body. While we accept that the JAB is a body independent of the Agency whose cases it considers, this case suffers from the same fundamental jurisdictional defect as did, for example, the International Maritime Organisation's JAB in the *Spinardi* case,² another of those previous judgments addressed by the Full Bench in *Mary Margaret Fogarty et al.*

12. The UNAT's jurisdiction to entertain an appeal such as this is determined by compliance with Article 2(10) of its Statute. With the relevant passages highlighted, this provides:

... The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, 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 shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and

¹ *Mary Margaret Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1148.

² *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957.

shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. *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.* In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

13. The important features of Article 2(10) for the purposes of this case are that there is a neutral, decision-making first instance process put in place by the Agency. It follows that the UNAT's role is that of a second tier and final appellate tribunal.

14. As already noted, such an Agreement was entered into between the ITLOS and the United Nations in 2010 and the ITLOS's Staff Regulations and Staff Rules were made thereunder.

15. We understand that the ITLOS changed and consolidated the relevant Staff Regulations and Staff Rules with effect from 1 December 2021 so that the JAB now makes decisions (from which appeals may be brought to the UNAT) rather than, as occurred in this case, recommendations to the Registrar of the ITLOS, which the Registrar may or may not accept. Unfortunately, this amendment came too late for the parties to this case, and as we have already noted, there are no indications it was made with retroactive effect. That is, it was not operable, whether expressly or impliedly, before the date of the changes to the Staff Regulations and Staff Rules which was after the events at issue in this case having taken place. Both the original decision about Mr. Savadogo's non-selection, and the decision on appeal against it, were made by the Registrar and, although following the flawed Staff Regulations and Staff Rules, these were non-compliant with Article 2(10) of the UNAT Statute which is what gives this Tribunal the power or jurisdiction to determine the Appellant's case.

16. In an effort to assist the parties to dispose of the case, and although not argued by either, we have considered whether it might be said that the amendments to the Regulations and Rules, although purporting to take effect from 1 December 2021, nevertheless had implied retrospective effect so that they may be considered to have been in force at the time Mr. Savadogo's case was decided. We are not, however, prepared to determine this was so for several reasons, in addition, of course, to the lack of any express reference to retroactivity in

the documented changes. Second, the Respondent who might have benefitted from such a legal fiction has argued adamantly in opposition to the appeal that the JAB's recommendation and her own acceptance of that and the decision were the lawful way of dealing with these matters at the time. Her argument does not allow for implied retroactivity. The third reason is that even if the post 1 December 2021 Regulations and Rules applied to the decision appealed by Mr. Savadogo, we would have no choice but to allow the appeal because, following our jurisprudence described elsewhere in this Judgment, the Registrar's decision following the JAB's recommendation would not have been in compliance with our jurisdictional provision, Article 2(10) of the UNAT Statute. That would be the same result in practice as we have arrived at by the route that is jurisprudentially more sound.

17. This situation is not saved, as the Respondent argues, by the contents of the Agreement entered into between the ITLOS and the United Nations on 13 July 2010 by which the ITLOS joined the United Nations' internal justice system at the UNAT level. Although that agreement did outline the JAB-recommendatory/Registrar-decider structure of the appeal system that was adopted and operated, the recent judgments of this Tribunal indicate that this architecture did not accord with Article 2(10) of the UNAT Statute, which required that such decisions be made by a neutral first instance body, in this case the JAB, and not the original decision-maker, the Registrar of the ITLOS. Nor does it change the legal position, as the Respondent says, that all of the previous recommendations of the JAB may have been adopted by the Registrar as his/her decisions on staff appeals. A recommendatory regime (as opposed to a decisive one) allows inherently for acceptance or rejection of the recommendations made and it is not difficult to envisage a situation in which a recommendation is clearly erroneous or with which the Agency's head disagrees so adamantly that he/she simply cannot accept it. In such instances, the Article 2(10) regime allows for the remedy of appeal to the UNAT.

18. The "neutral first instance process" referred to in the UNAT Statute must be a decision-making process. Neutrality means independence of the body, person or agency against whom the claim is brought. The neutrality cannot encompass a process in which the appellate decision-maker is the same person as made the original decision which is the subject of the appeal. Nor is it sufficient that only part of the decision-making process is neutral, that is independent of the employer, as the JAB was in this case. The decision-maker in the staff member's case must be neutral and must be part of that required neutral process. Indeed, the decision-making part of that process is arguably its most important element and so must

be neutral, that is independent of the parties to the case. The Registrar of the ITLOS in this case was, as both employer and final decision-maker, not neutral.

19. As already noted, we understand that the ITLOS changed its relevant Regulations with prospective effect from 1 December 2021. The issue of the compliance of these new regulations with Article 2(10) of the UNAT Statute is not before us for decision, so it is not appropriate for this Tribunal, without an actual case before it and submissions made about that issue, to determine whether these new regulations would comply with the jurisdictional requirements under our Statute. As the recent full bench Judgment in *Mary Margaret Fogarty et al.* confirms, rule change is an exercise that must be taken by the ITLOS with the benefit of legal advice. It is not a function of the UNAT either to change regulations or to advise on how they should be changed. Their lawfulness may, potentially, arise for decision by the UNAT in another case. Nothing in this Judgment should be taken to determine either the lawfulness of the current regime for deciding appeals to the JAB or the merits of Mr. Savadogo's case on appeal.

20. The appeal is not receivable for jurisdictional reasons and so must be remitted to the JAB for decision by that body.

21. We wish to add the following observation for the benefit of other parties in a similar position to the Respondent, that is other agencies which have elected to join the United Nations' internal justice system. We have been advised of uncertainty among such agencies and we are aware of the unfortunate history of some cases being remanded more than once to internal appeals boards to bring cases within our jurisdiction. That has benefitted no-one, whether staff or the agencies, and has added to our already stretched dockets of appeal cases.

22. As the leading cases on this issue have made clear, the problem arises when the conditions attaching to Article 2(10) of the UNAT Statute are not met, that is most commonly when the agency does not have a neutral decision-making body from which appeals may go to the UNAT.¹ That is an essential prerequisite of the UNAT's remit – unless that condition is fulfilled, then the UNAT has no jurisdiction to consider the appeal substantively and must say so. In such cases, the UNAT has sent the case back to the agency to be decided by a properly constituted, neutral decision-making (not advisory) body.

¹ See, for example, *Sheffer v. International Maritime Organization*, Judgment No. 2019-UNAT-949; *Spinardi, op cit.* Judgment; *Dispert & Hoe v. International Maritime Organization*, Judgment No. 2019-UNAT-958.

23. Confusion appears to have arisen also about whether, when, and how an agency may have to change its Staff Regulations and Rules or other legislative codes which establish such a body and to which staff can look if they wish to challenge administrative decisions of the agency. It is not the function of the UNAT to tell or advise an agency how to make such changes as may be necessary to achieve that compliance with its special agreement with the United Nations to allow appeals to come to the UNAT. Agencies must take their own legal advice about what they may need to do in this regard. Nevertheless, getting these policies and procedures right is also a matter of whether the UNAT has jurisdiction under Article 2(10): a special agreement between an agency and the United Nations can only be concluded if the agency utilizes a neutral first instance process that, among other things, provides a written decision.

24. We have considered whether, in light of the detailed paragraphs 48-69 of the full bench Judgment in *Mary Margaret Fogarty et al.*, any reasonable confusion can be said to arise from these repeated judicial statements about the requirements for compliance with Article 2(10) of the UNAT Statute, and in particular, whether a legal adviser familiar with this field of law and providing advice to an agency wishing to adopt the UNAT appellate system, could be confused thereby. We do not consider that such confusion about what to do and how to do it should reasonably occur. While these observations are another attempt to assist agencies generally (and should not be seen as affecting any one of them in particular including the ITLOS, which has now effected the change), we consider this is as far as it is permissible for an appellate tribunal to go in such an attempt to assist such agencies.

Judgment

25. We decline to receive the appeal and remit the case to the JAB of the ITLOS for decision by the JAB as a neutral decision-maker.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Colgan, Presiding
Auckland, New Zealand

(Signed)

Judge Raikos
Athens, Greece

(Signed)

Judge Halfeld
Juiz de Fora, Brazil

Entered in the Register on this 5th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar