



**10 years of the NATO Administrative  
Tribunal – Sharing experiences**

**10 ans du Tribunal administratif de  
l'OTAN – partage d'expériences**



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– Sharing experiences

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On the occasion of the 10th anniversary of the  
North Atlantic Treaty Organization Administrative Tribunal

A l'occasion du 10ème anniversaire du Tribunal administratif  
de l'Organisation du Traité de l'Atlantique Nord

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## Editor's note

This booklet seeks to echo the conference that was held to commemorate the tenth anniversary of the NATO Administrative Tribunal at the end of June 2023. The conference consisted of a closed session for judges and registrars of some twenty international administrative tribunals, followed by the conference proper.

Included in this booklet are a selection of the presentations from the conference, which reflect the wealth of the issues that were discussed.

Laura Maglia

*Registrar*

## Opening remarks

Lorenz Meyer-Minnemann<sup>1</sup>

President de Coaker, dear Colleagues.

Thank you for inviting me. I am truly honoured to see so many top lawyers and so many international bodies represented here today.

The Secretary General has asked me to welcome you on his behalf and to convey his greetings to all of you.

NATO is an Alliance of democracies, committed to upholding the rule of law.

Our founding document, the Washington Treaty, states in its preamble that the Allies are “determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.”

As you gather here today, these values are under threat from many directions.

Russia’s aggression against Ukraine has shattered peace in Europe and has brought war back to the continent on a scale and intensity not seen since 1945.

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<sup>1</sup> Executive Coordinator - First Deputy Director of the NATO Secretary General’s Private Office

Terrorism, in all its forms and manifestations, is a direct threat to the security of our citizens.

And authoritarian regimes, like China, are openly challenging our interests, our values, and our democratic way of life.

It goes without saying that if we want to safeguard our common values against these threats and challenges, we must not only defend these values, but we must also live by them every day.

And this means that any organization that is committed to safeguarding the rule of law must be committed to submitting to the rule of law.

We at NATO are proud to live by this principle.

NATO first established an Appeals Board in 1965, and for nearly more than 40 years, this body was the final stage in NATO's internal dispute resolution mechanism.

Then the North Atlantic Council, NATO's governing body, decided to conduct a thorough review and modernization of the system. And on 1 July 2013, the Council established the NATO Administrative Tribunal.

Ten years have passed since then. Around 300 cases have been handled by the NATO Administrative Tribunal. And much has been accomplished:

- setting up an entirely new system;
- devising and implementing new procedures;

- shaping case law; and
- setting up the necessary logistics.

So, today, I simply want to express my gratitude.

Gratitude for the professional work that you do to ensure the proper administration of justice in NATO – but also in all of the other international organizations that many of you serve.

And I want to take this opportunity to thank in particular Mr Chris de Cooker, who, as the first President of NATO's Administrative Tribunal, has led a tremendous team effort.

My gratitude also goes to Mr Laurent Touvet, the first Vice-President, María-Lourdes Arastey Sahún – and not least to Laura Maglia, the tireless Registrar of the Tribunal.

All of you should be very proud of what you have achieved in establishing the NATO Administrative Tribunal and making its first decade so very successful.

And let me assure you: coming from me, this is not idle praise. Because as much I stand here before you today saying nice things about the NATO Administrative Tribunal, I will admit that I have had my difficulties with some of the judgments that were handed down against the administration that I represent.

But this, dear friends, lies in the nature of impartial justice. Justice being served sometimes means losing cases.

The important thing is that we, as an organization – Staff and Administration – trust our Administrative Tribunal. We may not always agree with all its positions, but we always respect them.

That trust and respect is derived from the professionalism and quality that the NATO Administrative Tribunal has in its ranks. And it is also grounded in the constructive dialogue that we have built on all levels.

For that, too, I would like to thank President de Cooker. For the initiative to hold townhall meetings with the staff. And for the direct channels that the two of us have established to overcome the occasional bureaucratic hurdle, and enable smooth and efficient work of the AT.

So let me wish you a very successful conference on this 10th anniversary of the NATO Administrative Tribunal.

I see that the topics you have selected for today are highly relevant. The panels are brimming with legal expertise – including from my former colleague Steve Hill. And I very much welcome that you are also including representatives of the staff in your discussions.

So, welcome again. It is an honour to have all of you here. And I will now hand over to President de Cooker for his welcoming address.

# Introduction

## The first ten years of the NATO Administrative Tribunal in perspective

Chris de Cooker<sup>2</sup>

For this author the NATO AT adventure started in 2011 with an appointment to a panel reviewing NATO's internal dispute resolution system.

The four-member review panel was appointed in June 2011. It interviewed many stakeholders, read many documents, and assisted in one session of the now former Appeals Board. It presented its report in November. It made rather complete and far-reaching proposals. It, first of all, emphasized the need for early resolution of conflicts, preferably by informal means. It proposed informal resolution via mediation or

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<sup>2</sup> Former president of the NATO Administrative Tribunal between 2013 and 2023. At the moment of writing, President of the Asian Development Bank Administrative Tribunal, of the EBRD Administrative Tribunal, of the Administrative Tribunal of the ICMD, and of the SKAO Independent Employment Tribunal, as well as judge at the GAVI Appeals Tribunal and the OECD Administrative Tribunal. He was an *ad hoc* judge for staff appeals in the Special Tribunal for Lebanon in 2018 and 2021. He was Chair of the Appeal Panel of the Global Fund in 2016–2020 and of the BIPM Appeals Committee in 2020–2023. He is a member of the Panel of Independent Reviewers of the Asian Infrastructure Investment Bank and Mediator at ITER.

ombudsman, a two-step system of administrative review, a reinforced peer review mechanism, and, last but not least, the creation of a new administrative tribunal.

Internal consultations followed and most of the proposals were agreed and implemented. There is no clear information on the extent to which mediation has been introduced and applied. It is there on paper, but there is no systemic reporting on it, unfortunately. It would, in fact, be a good thing to have an annual overall report on dispute resolution in the Organization, which is, for example, being done in the World Bank.

There is regrettably still not an ombudsman function in place in NATO. The Tribunal has seen so many cases that could have been resolved earlier and by different means. This Tribunal has itself, however, never used one of the powers it has, that is to refer a matter to mediation, but that may change. But it must also be said that most of the time the parties, at this late stage, are just seeking a final answer. Besides, mediation is expensive, certainly more expensive than the Tribunal.

Coming to the formal system, the panel proposed a two-step administrative review mechanism as a first step. The first step is a simple one either directly with or via the line manager. The panel felt that the line manager should be involved, or at least consulted, regarding any topic concerning his or her

staff, including, for example, disputes with HR about certain allowances. I know that others, including managers, disagree.

This didn't survive. It didn't help much that line managers were receiving major legal arguments, which were repeated in the next steps until reaching the Tribunal, as if all these steps below were necessary only to go to the Tribunal and not to seek an early resolution of a case. So in 2019, the rules were changed and only a single administrative review step was retained.

Things got even worse when these changed rules also allowed, without proper consultation, retired staff to go directly to the Tribunal, i.e. without any pre-litigation. The rules now provide that the President of the Tribunal may refer the case to the NATO body concerned for a decision on the relief sought. The Tribunal is not a mailbox, nor an ombudsman. This should be remedied.

There is not much that can be said here about the Complaints Committees, i.e. the peer review, other than that when the Tribunal receives a report, it is well done and generally contains the necessary facts. It is, again, not clear, however, how many cases are resolved at this stage.<sup>3</sup>

On 23 January 2013 the NATO Council approved the entry into force of the new justice system, including the new

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<sup>3</sup> See the comments of Carlos Suarez *infra*.

administrative tribunal, on 1 July 2013. The proposal was to modernize and professionalize the judicial system by redefining requirements and enhancing the Tribunal's independence and, very importantly, the perception thereof. For example, judges cannot be former NATO staff and they cannot become NATO staff for a period of five years after having served on the Tribunal. I think they should never, but that is the rule as it stands.

On 22 April 2013, the judges were appointed by the Council, which also appointed me President. The judges hardly knew one another. I had met John Crook once at a conference ten years earlier. I had met Laurent Touvet when the review panel interviewed the Appeals Board. He was a member of that Board for, if I remember correctly, seven years and he not only personally made the transition from the Appeals Board to the Tribunal, but also greatly contributed to the transition itself, for which I cannot thank him enough. No one knew María Lourdes Arastey-Sahún at the time. Now I do and I am so happy that she can join us today. And only Laurent Touvet knew Christos Vassilopoulos who was an alternate judge on the Appeals Board. Christos left the Tribunal more than a year ago.

We held (informal) meetings towards the end of May: we received briefings about the (complicated) set-up of NATO and drafted our Rules of Procedure and Code of Conduct. Laura Maglia was put at our disposal by the Office of Legal

Affairs (OLA) and became our Registrar. We had regular and very useful consultations with OLA and the Staff Association, while respecting one another's roles and responsibilities. We tried to be as transparent as possible. We even had debriefing and lessons learned meetings after the first sessions. We just wanted to get it right. I do wish to thank in particular Peter Olson and Carlos Suarez for sharing this idea to get it right.

The next thing we had to do as new judges was to agree on what I would call a house style – John called it “architecture.” We quickly became a great team, which of course included Laura Maglia, who always kept us focused. She still does. We designed a template for our judgments and agreed that our judgments should be to the point, addressing each legal argument in a clear manner and answering them in law, not in equity, but in such a way that they could be understood also by non-lawyers. We immediately decided not to have a major first judgment outlining our competence and sources of law – no de Merode!

We followed the example of our predecessor, the Appeals Board, and that of other Europe-based tribunals, to hold short oral hearings, where parties can explain their positions and answer questions from the Tribunal. I think we struck the right balance, trying not to be too formalistic. This is thanks to the cooperation and some flexibility of all stakeholders.

Another important aspect is the relationship between the Tribunal and the Organization. The Tribunal is independent,

but it needs the cooperation of the Organization for day-to-day, mainly administrative issues. The go-between function is traditionally with the general counsel and also in NATO this was perfectly done by Peter Olson and mainly Steve Hill, since Peter left in 2014. These are not always small issues. I think about official matters like the appointment or renewal of judges, the proper liaising for the budget independence, the necessary posts for the functioning of the Tribunal, etc.

I will not spend too much time on details and statistics, but we inherited 17 cases from our predecessor, the Appeals Board, and had received five new cases by the time we held our first session of hearings in the second week of September 2013. In 2013 we held hearings in 15 cases and we issued 8 judgments, with one case resulting in a decision, following a settlement outside the courtroom. The other judgments were issued in 2014. It is now ten years later and we have registered the 388th case. Now some of these are collective cases (the “footnote” cases, for example), but we have issued close to 200 judgments and 100 orders. All the decisions were taken unanimously. So not one vote, not one dissenting opinion. As a comparison the Appeals Board, in almost 38 years, delivered 622 decisions ruling on 875 appeals lodged with it. Statistics show that it takes on average 7–8 months from appeal to judgment – including four months for the written procedure alone. This compares very well with other similar tribunals.

It is not easy to draw conclusions from these data. People often ask whether NATO staff are litigious. The short answer is that I don't know. I don't know, for example, how many cases were resolved before going to the Tribunal. I do know, however, as I said earlier, that in my view some cases should never have been brought to the Tribunal. Often both parties share the blame for this. Administrations must take claimants and appellants seriously. Saying, like in some instances, that a letter has never arrived is not enough.

It is clear, however, that staff and retirees have found their way to the Tribunal and apparently are not afraid to do so, or apparently less than in other organizations. That is a good sign. It is also clear that, per capita, NATO staff appeal more to their tribunal than staff in any other organization. I repeat that the NATO AT has issued 20 judgments on average per year (almost 16.5 for the Appeals Board). It is too complicated to compare with the UN family, but the World Bank AT, another major tribunal, has had on average 16.5 judgments per year for roughly double the staff and retirees under its jurisdiction.

In the meantime, life has gone on. In accordance with the rules, two judges had to leave after eight years (María Lourdes Arastey Sahún and John Crook), and Christos Vassilopoulos resigned last year. We have three new judges, who have very well fitted into the team: Seran Karatari Köstü, Anne Trebilcock and Thomas Laker.

In particular during the last ten years one could witness the introduction of harassment policies and claims procedures. The NATO Tribunal had to deal with a number of important cases and so did other tribunals.

And then Covid happened. The judges could no longer meet and, initially, oral hearings could not be held. And no one knew how long this would last. As a first step the NATO AT proposed to the parties in pending cases that it adjudicate on the basis of the written procedure only. This was generally accepted, but not without hesitation. In one case an appellant insisted on having an oral hearing, so he had to wait. He was apparently not in a hurry although this was a dismissal case.

All quickly discovered the techniques of video-conferencing, including hybrid meetings, which was not always easy to reconcile with security concerns.

The number of cases before the NATO AT did not dramatically diminish during this period.

So, a new international administrative tribunal was born. It must have been around the twentieth of such tribunals that were established. And since then more than a dozen have followed in this proliferation of tribunals.<sup>4</sup> More than twenty of them were represented at this conference!

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<sup>4</sup> See Chris de Cooker, *Proliferation of International Administrative Tribunals*, 2022 *Asian Journal of International Law*, Volume 12, Issue 2 July 2022, pp. 232-247;

Shin-ichi Ago wrote an article asking the question whether “international administrative tribunal” was the right term to describe what we are and what we do, and whether we should not be called international civil service tribunals.<sup>5</sup> He has a point: international administrative tribunals generally adjudicate in staff matters. But international administrations do take many decisions that may be challenged, not only in staff matters. So the question can be turned around: do organizations use their tribunals fully?

The competences of international administrative tribunals are limited by their statutes, which generally clearly stipulate that tribunals do not have any powers other than those conferred on them. But that does not mean that these statutes cannot be changed. A bad example is the United Nations General Assembly, which just by resolution and without changing the tribunals’ statutes limited the competence of its tribunals by holding that the tribunals must conform with the provisions of General Assembly resolutions on issues related to human resources management and that the decisions of the Assembly related to human resources management and

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<https://doi.org/10.1017/S2044251322000170>

<sup>5</sup> Shin-ichi Ago, *A few thoughts about the concepts of international administrative tribunals and international administrative law*, *Asian Journal of International Law*, Volume 12, Issue 2, July 2022, pp. 207 – 215.

administrative and budgetary matters are subject to review by the Assembly alone, in other words not by the tribunals.<sup>6</sup>

In the Asian Development Bank (ADB) a great number of staff challenged the 2015 changes to the rules on education allowance, in the so-called Perrin cases. Some applicants didn't have children (yet), for others the rules had not been directly applied to them yet, but for some others they had been already, although most of the changes were phased in over time. The Tribunal held that under its statute as it stood, appeals could only be brought against implementing decisions and not against general rules or reglementary decisions. It pointed out that the latter was possible in the International Monetary Fund (IMF) and to some extent in the European Bank for Reconstruction and Development (EBRD).<sup>7</sup> The clear message was that if the ADB wanted the same, it would have to amend the Tribunal's statute. The Tribunal would then act in accordance with its amended statute.

The same can be said of what happened at NATO, also in 2015 and 2016, in Cases 1056-1064. Nine international civilian consultants at NATO Headquarters Sarajevo were seeking recognition of their claim that they were NATO staff members. When the Tribunal heard the case, the sole issue before it was its jurisdiction to consider the claims. The

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<sup>6</sup> Cf. General Assembly Resolution 73/276 (22 December 2018).

<sup>7</sup> See the contribution of Joan Powers *infra*.

Tribunal noted that it was mindful that it is a body of limited jurisdiction and that it did not have any powers beyond those conferred under its Statute. The appellants freely acknowledged throughout the proceedings that they were not staff members within the literal scope of the staff regulations. The essence of their claim was that they ought to be staff members. The Tribunal observed that the appellants were not NATO staff as that status was clearly defined in the staff rules and therefore did not satisfy the clear and mandatory requirements for bringing an appeal to the Tribunal.

The Tribunal also denied the request to state that its judgment created a legal vacuum and to urge the competent NATO authorities to seek a solution affording the appellants access to a court or to arbitration. The adequacy of the remedies available under the regulations governing their contracts, which by the way are almost identical to the NATO staff regulations, or the possibility of creating an administrative board of inquiry to consider the grievances were matters going more to the merits of the claims than to the Tribunal's jurisdiction. Moreover, these matters were not addressed in the written and oral proceedings in sufficient detail. Indeed, the Tribunal was informed at the hearing that appellants, while protesting their lack of information, had not requested or considered the regulations applicable to boards of inquiry.

Also here the message is clear: being limited by the powers given under the statute does not mean that the statute cannot be amended to give wider powers for the future.

All tribunals should be competent to hear, under certain conditions, appeals from unsuccessful candidates for staff positions. Only a few have this power.

In addition, international administrative tribunals could and should deal with more than just staff cases. Organizations must be extremely careful to ensure that mechanisms are in place for disputes arising out of all contracts they have, whatever they are. Organizations should not blindly rely on their immunities. It is no longer certain how national courts will deal with the organizations' immunities. It is anyway cumbersome and time-consuming to seek respect of immunities, protracting periods of uncertainty. It is also not yet clear what the International Law Commission is going to do with its new topic of study which was renamed "settlement of disputes to which international organizations are parties", which will include "disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organization."

The competences of international administrative tribunals can, and probably should, be enlarged in the interests of the organizations. There are already good examples. The Court of Justice of the European Union, is, of course, an exceptional court, but part of its competence, indeed a small part, is also

to hear staff cases. It has a much wider competence. The International Labour Organization Administrative Tribunal (ILOAT) Statute provides in Article II, paragraph 4, that it is also competent to hear disputes arising out of contracts to which the International Labour Organization is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution. The ILOAT has recently opened this provision, which was included for the benefit of the ILO only, to the other organizations that have accepted its jurisdiction in the following words:

The Tribunal would be competent to hear disputes concerning the execution of a contract of a non-official where the contract itself provides for the Tribunal's competence, as provided for by Article II, paragraph 4, of its Statute (see Judgments 967 and 803).<sup>8</sup>

This means that other organizations that accept the ILOAT's jurisdiction could have a similar provision.

The Statute of the International Institute for the Unification of Private Law (UNIDROIT) Administrative Tribunal, for example, already has one.

The Square Kilometre Array Observatory (SKAO) is a new international organization. It set up its Independent Employment Tribunal in 2023 to adjudicate on disputes between the organization and its employees. SKAO has

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<sup>8</sup> ILOAT Judgment No. 4652, Consideration 21.

several types of employees with different contractual arrangements. The tribunal must deal with all of them, and it may well be that at some point it has to apply domestic labour law.

Many international administrative tribunals have already applied domestic law, for example regarding family law.<sup>9</sup> So, the borderlines traditionally drawn between staff and non-staff, between international law and national law, etc., are fading.

The Council of Europe has entrusted its Administrative Tribunal with adjudicating on appeals under the data protection regulations with effect from 1 January 2023. Other organizations will likely follow.

To conclude this point: it is the author's firm belief that international organizations must make a bigger use of their administrative tribunals and, when necessary, give them wider, not fewer, powers. They must have a holistic approach in this respect. A patchwork of band-aids will not be a solution.<sup>10</sup>

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<sup>9</sup> See Dražen Petrović, Domestic law and international administrative tribunals, in: *The international legal order in the XXIst century, Essays in honour of Professor Marcelo Gustavo Kohen*, Brill/Nijhoff, 2023, in particular pp. 619-627.

<sup>10</sup> A good example is the (secretive) creation of the Mission Appeals Tribunal within one of NATO's agencies. One will in vain look for a decision of a governing body setting up this tribunal and adopting its statute. Rules of Procedure have been adopted by the agency's legal

Another point of concern is the independence of international administrative tribunals. The bad example of the United Nations was given above. Sometimes administrations change rules when they disagree with a ruling by a tribunal. Some organizations seem to give the impression that they think that they own the tribunal. This is a big mistake. Tribunals are set up because there is a major public policy that requires organizations to set up an independent tribunal and to respect its independence. This cannot then slowly be undone through the legislative process. All must remain vigilant.

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adviser and also the selection of the ten (!) judges and criteria applied are non-transparent. It is not good to have two tribunals functioning in parallel within one agency. One could, however, argue that this is the first tribunal operating within an organization to deal with disputes of non-staff. NATO should also in this matter have a holistic approach. The NATO Council could, and should, give more powers to its Administrative Tribunal.

## Some reflections on eight years on the NATO AT

John R. Crook<sup>11</sup>

Following a reform of the NATO internal justice system, on 22 April 2013, the North Atlantic Council appointed me and four other colleagues to serve as judges on the NATO Administrative Tribunal as of 1 July 2013, with Chris de Cooker as President.

The five of us did not know each other before; some had perhaps limited previous professional exchanges, but we were all new to this new adventure. I had worked in a variety of legal contexts along my career, and I was impressed by the professional skill and judgment of my colleagues on the Tribunal, particularly the sustained leadership of our President Chris de Cooker, who I came to count as a good friend. All with different backgrounds and nationalities, each member of the Tribunal brought a distinctive perspective and legal and analytical skills to our work. These meshed well in a process of collaboration that produced what I think was a body of clear reasoned decisions. Whether these were seen as correct and fair by the parties to the particular cases I do not know, but I trust they were at least clear on what the Administrative Tribunal decided and why.

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<sup>11</sup> Former judge of the NATO Administrative Tribunal (2013–2021).

My years of work in the resolution of inter-State and investment disputes in other settings bring the following thoughts about NATO, the nature of our cases and our methods of work.

First, at least as reflected in the cases I saw, the civilian side of NATO, with the many separate NATO bodies with separate missions and personalities, struck me as a remarkably diffuse organization. It sometimes appeared to be more a collection of independent feudal baronies than a hierarchically structured international organization like those I knew from other experiences. The variety of NATO bodies was mirrored in the nature and quality of the cases we saw. Some NATO bodies had capable Legal and Human Resources staff and typically handled their personnel issues in a professional manner, even if we did not always agree with their decisions. For others, a claim before the Administrative Tribunal was an unusual and unfamiliar event that as a result might have been handled inexpertly.

The decentralized nature of the multiple NATO bodies was also reflected in their sometime inconsistent approaches to personnel issues and complaints. These included on the part of the Heads of at least some NATO bodies an occasional reluctance to read and follow the NATO Civilian Personnel Regulations.

The relative autonomy of the multiple NATO bodies also seems to have limited the ability of the International Staff Office of Legal Affairs (OLA) to work for consistency in interpretation and application of the Civilian Personnel Regulations (CPR) and similar matters. We typically encountered OLA only in cases where the Secretary General or the International Staff was the respondent or that involved the powers of the North Atlantic Council, NATO's supreme legislative authority. This limited OLA's opportunities to seek or reinforce harmonized interpretations of the Civilian Personnel Regulations and similar matters through litigation.

The cases I heard often were simple factually and legally, with little dispute as to the underlying facts. Did a NATO body follow NATO's personnel regulations in addressing a staff member's situation, or did it not? In a meaningful proportion of cases, it did not; these NATO bodies got into trouble for not reading or following the steps prescribed by the regulations. A few other cases involved aggrieved staff members who sought to utilize the Administrative Tribunal process, often *pro se*, to remedy denial of some claimed subsidy or benefit. In these cases, the amount in dispute could be quite modest in relation to the financial and human resources required to work it through the Administrative Tribunal process. (A few of these cases triggered in me positive feelings for the "costs-follow-the-event" rule applied in some legal systems, where a losing party pays the other party's legal costs.) A small number of

more consequential cases posed legally more difficult, delicate and important issues, particularly those involving the Organization's power to amend regulations or practices that might be looked to by staff members in planning their economic lives and futures.

The tools and procedures we used in the AT were much more rudimentary than those used in many other dispute settlement processes. Given the number of claims and the limited hearing days available, cases were necessarily decided primarily on the basis of the parties' written submissions. Hearings were brief – often less than an hour. They usually did not involve witness testimony, other than perhaps a short summary statement by the claimant at the end. Answers to Tribunal member's factual questions often came from counsel for the relevant party, who might not know the answer or, in a few instances, might be less than candid in response. We generally did not have time or means to probe deeply into disputed factual matters; there was limited questioning of witnesses or recourse to the kinds of fact-gathering tools available in other settings. We typically assumed that factual representations made in written pleadings and at hearings were correct, although there were a handful of situations where such representations turned out to conflict with evidence in the record.

Outcomes sometimes were heavily influenced by small points or clarifications made orally at the hearing. I had to rely on my notes of these crucial exchanges, and often regretted not having transcripts. Transcripts are admittedly expensive, and they would complicate hearing administration, particularly as two languages are involved. Nevertheless, for me at least, having them in both languages would have been very useful.

At the risk of sounding like special pleading, I might conclude with a comment about Administrative Tribunal remuneration. I did not elect to serve on the Tribunal as a revenue source, nor did my colleagues. However, for those of us who did not have full-time government, judicial or other employment, Tribunal work absorbed a great deal of time at what was in effect an effective hourly rate that was quite low in relation to normal compensation in international arbitration and other forms of international dispute settlement.

## **Independence Panel I**

Chaired by Judge Laurent Touvet<sup>12</sup>

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<sup>12</sup> Former Judge of the NATO Administrative Tribunal between 2013 and 2023. He joined the French Council of State in 1990 and since 2006 has been a State Councillor. Between 2001 and 2004 he was Head of the Services of the Higher Audiovisual Council, from 2007 and 2013, Director of Civil Liberties and Legal Affairs in the Ministry of Interior, Prefect of Ain between 2013 and 2016, Prefect of Haut-Rhin between 2016 and 2020 and since 2020 Prefect of Moselle.

## Recent changes in the Rules of Procedure of the Council of Europe Administrative Tribunal: Selected highlights

Nina Vajić and Christina Olsen<sup>13</sup>

### Introduction

New Rules of Procedure (RoP) entered into force for the Council of Europe Administrative Tribunal on 10 February 2023. The Tribunal was prompted to establish a new set of rules following the entry into force, on 1 January 2023, of the new Statute of the Tribunal, which had been adopted by the Committee of Ministers of the Council of Europe (CoE) at the proposal of the Secretary General as part of an organization-wide administrative reform. New Staff Regulations also took effect on 1 January 2023, as a consequence of this reform.

The new Rules of Procedure carry over the fundamental aspects of the previous Rules, as they had been interpreted and developed in the Tribunal's practice. At the same time, they reflect the many changes introduced by the new Statute and adapt to the new requirements arising from it. The content of the Rules of Procedure was to a large extent

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<sup>13</sup> Nina Vajić, Chair of the Administrative Tribunal of the Council of Europe; Christina Olsen, Registrar of the Administrative Tribunal of the Council of Europe. The views expressed in this article are strictly personal.

shaped by the new Statute, due to the approach taken by the Committee of Ministers to regulate in detail most aspects of the procedure before the Tribunal. Building on the experience accrued under the previous rules, certain changes were introduced at the initiative of the Tribunal with the aim of streamlining the procedure.

During the revision of the Rules of Procedure, the Tribunal took care to consult the Council of Europe Administration and Staff Committee, so that their comments and concerns could be incorporated in the final version of the Rules. The Tribunal also drew wide inspiration from the Rules of Procedure in force for other international administrative tribunals.

## **New features**

### ***Anonymity***

A major change that is not reflected in the Rules of Procedure, yet was imposed on the Tribunal by the new Statute, is the rule on anonymization of judgments by default (Article 14.5 of the new Statute). While one might view this new rule as upholding the latest and most advanced standards in the field of data protection, it can be questioned whether it was appropriate to introduce such a rule by way of a statutory requirement instead of a decision taken by the Tribunal.

Whereas previously anonymization was granted at the discretion of the Chair based on criteria drawn from the European Court of Human Rights' (ECtHR) rules and

practice, it is now a formal requirement for the Tribunal to delete from its judgments any “information likely to permit a member of the general public to identify the appellant or any witnesses mentioned therein” (Article 14.5 of the Statute).

In application of this rule, the judgments and decisions of the Administrative Tribunal now refer to the appellants by their initials and omit any information likely to make them recognizable to the general public.

In addition, the Tribunal has, however, kept the previously established practice of allowing an appellant who wishes to benefit from a greater degree of anonymity to make a reasoned request to the Tribunal when the appeal is lodged. The request should specify – in the event that it is granted by the Chair – whether initials or a simple letter should be used to designate the appellant and whether gender should be disclosed.<sup>14</sup>

### ***Lodging of appeals***

It has become easier under the new rules to bring an action before the Tribunal, since an appeal may now be introduced electronically, at the appellant’s choice (Rule 9.3.c). Since, however, the Tribunal is not equipped with a secured electronic platform, it was not possible to do away with paper

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<sup>14</sup> Cf. webpage of the official internet website of the Administrative Tribunal of the Council of Europe at <https://www.coe.int/en/web/tribunal/anonymity>

completely, and the rules continue to require that a paper copy of the appeal be sent by registered mail within one week of sending the appeal by email (Rule 9.5).

In pursuance of the general rule, appellants must provide evidence that they have exhausted all internal remedies before appealing to the Tribunal. Under the new Staff Regulations, these remedies now include (1) a request for management review to the manager of the staff member who took the contested administrative decision; and after pursuing management review, (2) a formal complaint to the Secretary General. While the additional stage of managerial review has prolonged the timeline for appealing to the Tribunal in most cases, it is now possible to access the Tribunal directly – without having to go through internal remedies – when complaining about:

- the imposition of a disciplinary sanction, except for the “lightest” disciplinary sanction, namely the written warning,
- a decision taken by the Secretary General personally, or
- an administrative decision implementing a legislative measure of general character adopted by the Committee of Ministers, provided that the staff member has a direct and existing interest in challenging such a decision.

### ***Different stages of the proceedings***

The proceedings before the Tribunal continue to include a written procedure and a hearing. Under the former rules, the practice of the Tribunal was to hold a hearing whenever one of the parties so requested. The new rules (Article V.2 Statute) provide that “the Tribunal may, on its own initiative or at the request of one of the parties, decide to dispense with an oral hearing”. Drawing from the experience gained during the Covid 19 pandemic, it will be possible in the future for the Tribunal, if it so decides on its own initiative or at the request of one of the parties, to conduct a hearing by video-conference.

### ***Case processing***

The main novelty regarding the conduct of the written proceedings is that from now on, a single round of exchange of written pleadings will, in principle, be sufficient. Under the new rules (Article 10.4 of Statute and Rule 8 of the RoP), it will be for the Chair to decide, either on his or her initiative or on a reasoned request by the appellant, whether a second exchange of written submissions is necessary.

Another novelty is the introduction of a maximum number of pages for the written submissions of the parties (25 pages for the first round). In any event, the Tribunal maintains a margin of flexibility in this area since under Rule 27 of the RoP, it will

be possible for it to allow a party to depart from this requirement “if this departure from the rules does not affect the proper administration of justice”.

### ***Stay of execution***

The grounds on which a stay of execution of the decision complained of may be requested from the Chair of the Tribunal have been restricted. Whereas under the former rules, such a request was justified if the execution of the decision complained of was “likely to cause [the complainant] grave prejudice difficult to redress” (Article 59 old Staff Regulations), under the current rule (Article 14.8 new Staff Regulations) such a request is possible only “in cases of particular urgency where the implementation of the administrative decision would cause serious and irreparable damage to the staff member”.

### ***Friendly settlement of disputes***

The new rules recognize and codify the role that the Tribunal may play in encouraging friendly settlement of disputes. It is now “officially” acknowledged that the Tribunal may, at any time in the proceedings, on its own initiative, recommend that the parties enter into discussions for the purposes of reaching such a settlement (Article 13 of Statute - Rule 21 of the RoP). This practice was introduced by the Tribunal some years ago although without a clear legal basis.

### ***Execution of judgments***

The Secretary General's margin of discretion in deciding how to implement the Tribunal's judgment is wider under the new regulatory framework. Under Article 60.7 of the former Staff Regulations, the Secretary General could substitute the payment of financial compensation for the enforcement of the judgment only with the approval of the Tribunal.

The rule (Article 16.2 of the new Statute) now provides that the Secretary General can decide whether it would be in the interests of the Organization "to take the measures that the judgment would entail" or whether "compensation shall be paid to the appellant *in lieu*" of taking such measures. The Tribunal retains the power to fix the amount of *in lieu* compensation. In principle, this amount should not exceed the equivalent of two years of the appellant's remuneration; however, the Tribunal may "in exceptional circumstances and when it considers it justified, order the payment of a higher amount of compensation", stating reasons for such an order.

### ***Requests for interpretation, revision, execution***

While the rule concerning the final and binding nature of judgments remains unchanged, appellants may nevertheless submit new types of requests to the Tribunal once a judgment has been issued on their appeals (Article XVII of the Statute).

These include requests for:

- interpretation of a judgment in the event of uncertainty as to its meaning or scope,
- revision of a judgment in the event of the discovery of facts which might by their nature have a decisive influence on a judgment already given, or
- execution of a judgment, if the Secretary General fails to execute a judgment within a reasonable time.

The new RoP regulate in detail the modalities to be followed when submitting such requests and provides a dedicated form to this end.

## **Conclusion**

The reform of the regulatory framework of the Council of Europe undoubtedly confirmed the role of the Administrative Tribunal within the dispute settlement mechanism of the Organization. It upheld the position of the Tribunal in several ways, for instance by recognizing that the Tribunal may, at any time and on its own initiative, encourage the parties to a dispute to seek solutions for an amicable settlement; that it may decide on its own initiative not to hold a hearing, even in cases where both parties have asked for it; that a single round of exchange of written pleadings might suffice; and that limits may be placed on the number of pages for the written submissions of the parties.

At the same time, however, it can be noted that the new Statute interferes to a certain extent with the exercise of the Tribunal's powers. This raises the question of the appropriate balance which must at all times be maintained between the Organization's power to regulate the functioning of the Tribunal and the necessary independence of a judicial body.

The choice of the Committee of Ministers as the regulator of the Statute of the Tribunal was contrary to the stated objective of administrative reform. The resolution of the Committee of Ministers approving the Staff Regulations was reduced to the strict minimum, i.e. the basic principles governing the employment relationship between the Organization and its Staff, in order to delegate to the Secretary General the power to decide on the detailed arrangements for the implementation of the reform.

On the other hand, the Resolution of the Committee of Ministers approving the Statute of the Tribunal takes the opposite approach. It is very detailed – much more so than the previous Statute – and therefore unnecessarily limits the Tribunal's competence to decide on the specific modalities of its own procedure. One can hope, however, that the idea behind such an approach was not to creepingly gain control over certain aspects of the Tribunal's functions, thus limiting the scope of its autonomy.

## The usefulness (or not?) of pre-litigation (administrative review, etc.)

Carlos Suarez<sup>15</sup>

### **Phase précontentieuse**

J'ai été recruté comme traducteur au Secrétariat international (SI) en 1994. Je suis représentant du personnel depuis 2004. J'ai été président du Comité du personnel du Siège de 2006 à 2016, et je suis vice-président de la Confédération des Comités du personnel civil depuis 2014. Je suis pleinement détaché de mes fonctions de traducteur depuis 2006. Je remercie les organisateurs de m'avoir invité à prendre la parole à cette tribune, je pense être le seul orateur à ne pas avoir fait des études de droit.

Le président de notre Tribunal administratif (TA) insiste depuis toujours pour que les cas soient traités et réglés à la source, afin d'éviter des recours devant le TA. Je partage entièrement ce point de vue.

Je m'intéresse depuis toujours à la phase précontentieuse - recours hiérarchique et réclamation, avec ou sans constitution d'un comité de réclamation - notamment parce

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<sup>15</sup>Vice-president of the Confederation of NATO Civilian Staff Committees since 2016, and former President of the NATO HQ Staff Committee between 2006 and 2016.

que les représentants du personnel y jouent souvent un rôle actif.

En 2017, j'ai présenté aux représentants des administrations des organismes OTAN, lors d'une réunion d'un groupe de travail du Comité mixte de consultation (JCB), une analyse de toutes les décisions du TA depuis sa création en juillet 2013, en me concentrant sur la phase précontentieuse. Les conclusions que j'avais tirées alors étaient les suivantes :

- non-respect des délais de procédure dans certains organismes, surtout au SI, où il arrive que les délais de traitement des dossiers soient anormalement longs ;
- sous-utilisation générale des comités de réclamation, voire non-utilisation des comités de réclamation dans la plupart des organismes, en particulier à la NSPA ;
- rejet quasi systématique des réclamations, même dans les rares cas où un comité de réclamation est constitué et formule des recommandations favorables aux plaignants.

Pour préparer mon intervention d'aujourd'hui, j'ai refait le même type d'analyse sur les 51 dernières sentences du TA par ordre numérique, depuis 2020, et le constat final n'est guère différent de celui posé en 2017.

En ce qui concerne le non-respect des délais pour répondre aux recours hiérarchiques et aux réclamations, on constate

de très nets progrès en ce qui concerne les premiers, mais hélas les mêmes difficultés concernant les secondes, le problème étant, encore et toujours, pour l'essentiel, le SI.

Dans les 51 affaires analysées, il y a eu constitution d'un comité de réclamation dans 12 cas seulement :

- 1 à l'EMI – recours ensuite rejeté par le TA
- 2 à la NCIA – les deux recours ont ensuite été rejetés par le TA
- 9 au SI – dans deux cas, le comité de réclamation a exprimé des considérations favorables au plaignant, et le TA a donné raison aux requérants ; dans un cas, le comité de réclamation a recommandé le rejet de la réclamation tout en formulant des critiques sur le traitement du cas par le SI, et le TA a accordé une compensation financière pour dommages moraux.

Comme en 2017, on constate que même lorsqu'un comité de réclamation est constitué et que celui-ci formule des recommandations favorables aux plaignants, le chef d'organisme rejette la réclamation.

Comme en 2017, pas le moindre comité de réclamation à la NSPA (les effectifs à Capellen sont désormais supérieurs à ceux du SI), où les chefs d'organisme semblent prendre beaucoup de décisions eux-mêmes, ce qui est très étonnant, et où on observe que des recours hiérarchiques sont, simultanément, requalifiés en réclamations et rejetés, dans la

même lettre du chef d'organisme, ce qui prive les plaignant de la possibilité de demander la constitution d'un comité de réclamation.

On a la sensation très nette que la NSPA, premier de la classe en nombre de recours (17) et dernier de la classe en nombre de condamnations (5) par le TA (devant le SI, 16 recours et 4 condamnations), fait tout pour pousser ses agents devant le TA.

10 des 16 recours contre le SI portaient sur des matières ayant une portée générale (salaires, pensions et système de sécurité sociale de l'OTAN). Dans le même temps, la NSPA a dû traiter 17 recours, dont seulement deux portaient sur une matière ayant une portée générale (création d'un barème propre au Luxembourg). Donc, en réalité, 6 recours pour le SI - même nombre que pour NCIA (le plus grand organisme en termes d'effectifs) – mais 15 pour la NSPA. Il s'agit clairement d'une anomalie statistique.

Lorsque j'ai présenté mon analyse en 2017, je me suis heurté à une réaction assez défensive de la part des représentants des administrations de l'OTAN. Mais les faits sont têtus. Aujourd'hui, je m'adresse à un public plus vaste et j'espère que mon message ne sera pas seulement écouté poliment, mais entendu.

Je pense qu'il est grand-temps d'engager une réflexion sur la phase précontentieuse, qui semble ne pas donner les résultats escomptés.

Le président du TA s'étonne souvent du grand nombre d'affaires qui se terminent devant le TA de l'OTAN, par rapport à d'autres organisations internationales. D'après les informations que j'ai pu recueillir auprès des représentants du personnel dans tous les organismes OTAN, il est rare qu'un cas soit résolu au stade du recours hiérarchique ou de la réclamation. Même limitée aux seuls cas qui finissent devant le TA, mon analyse porte donc sur un échantillon extrêmement représentatif de la réalité. La conclusion est évidente : l'écrasante majorité des affaires ne se règle pas durant la phase précontentieuse, mais devant le TA.

### **Coordination**

En réalité, il ne reste pas grand-chose de coordonné au sein de la Coordination.

Ni les barèmes, pour cause de faisabilité budgétaire appliquée de façon différente dans les six Organisations Coordonnées et d'introduction de l'échelle unique des salaires uniquement à l'OTAN. Ni les nouveaux régimes de pension : à l'OTAN, sur un total d'environ 7 000 agents civils, il en reste à peine mille dans le régime coordonné. Ni les modalités d'application de certaines indemnités coordonnées.

En outre, la situation financière et la proportion des budgets consacrés aux frais de personnel sont très différentes entre les Organisations Coordonnées. C'est ce qui explique qu'à l'OTAN, la clause de faisabilité budgétaire est très largement virtuelle. Le personnel a obtenu gain de cause devant la Commission de recours de l'OTAN les deux fois où le Conseil de l'Atlantique Nord a essayé d'appliquer cette clause, car l'enveloppe salariale représente un pourcentage infime de toutes les dépenses de l'OTAN, et les ajustements annuels de rémunérations représentent un pourcentage encore plus infinitésimal.

L'éventuelle création d'un tribunal unique/commun poserait aussi des questions purement pratiques : où siègerait cette juridiction, qui choisirait ses membres, comment seraient-ils rémunérés ? Les Organisations Coordonnées arriveraient-elles aisément à se mettre d'accord sur ces points ?

**[English] The usefulness (or not?) of pre-litigation  
(administrative review, etc.)**

Carlos Suarez<sup>16</sup>

**Pre-litigation phase**

I was recruited as a translator in the International Staff (IS) in 1994. I have been a staff representative since 2004. I was President of the Headquarters Staff Committee from 2006 to 2016, and I have been Vice-President of the Confederation of NATO Civilian Staff Committees since 2014. I have been entirely freed from my duties as a translator since 2006. I would like to thank the organizers for inviting me to speak; I think I'm the only speaker who hasn't studied law.

The President of our Administrative Tribunal (AT) has always emphasized that cases should be handled and resolved at the source, so as to avoid appeals being brought before the AT. I fully agree with this viewpoint.

I have always been interested in the pre-litigation phase – administrative review and complaint, with or without the convening of a Complaint Committee – especially since the staff representatives often play an active role in it.

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<sup>16</sup> Vice-president of the Confederation of NATO Civilian Staff Committees since 2016, and former President of the NATO HQ Staff Committee between 2006 and 2016.

In 2017, during a meeting of a Joint Consultative Board (JCB) working group, I presented to representatives of the NATO Administrations an analysis of all the decisions made by the AT since its creation in July 2013, focusing on the pre-litigation phase. My conclusions at the time were as follows:

- non-compliance with the procedure time limits in some bodies, especially the IS, where it sometimes takes an unusually long time for cases to be handled;
- general under-utilization of Complaint Committees, or even non-utilization of Complaint Committees in most bodies, in particular the NSPA;
- almost systematic rejection of complaints, even in the rare cases where a Complaint Committee is convened and makes recommendations in the claimant's favour.

To prepare for today, I have done the same type of analysis again, this time of the AT's 51 most recent judgments in numerical order, since 2020, and my findings are hardly any different to those in 2017.

As regards non-compliance with time limits for responding to requests for administrative review and complaints, we can see marked progress for the former but unfortunately the same difficulties for the latter, the problem still lying, in the main, with the IS.

A Complaint Committee was convened in just 12 of the 51 cases analysed:

- 1 in the IMS – appeal later dismissed by the AT;
- 2 in the NCIA – the 2 appeals were later dismissed by the AT;
- 9 in the IS – in 2 cases, the Complaints Committee's findings were favourable to the claimants, and the AT found in favour of the appellants; in 1 case, the Complaint Committee recommended rejecting the complaint, but at the same time criticized the way the case had been handled by the IS, and the AT awarded financial compensation for non-material damages.

As in 2017, we can see that even when a Complaint Committee is convened and makes recommendations in the claimant's favour, the Head of Body rejects the complaint.

As in 2017, there has not been a single Complaint Committee in the NSPA (staff numbers in Capellen are now higher than in the IS), where the Heads of Body seem to take a great number of decisions themselves, which is very surprising, and where we find that requests for administrative review are simultaneously recategorized as complaints and rejected in a single letter from the Head of Body, leaving the claimant unable to ask for a Complaint Committee to be convened.

One gets the distinct feeling that the NSPA, top of the class in terms of the number of appeals (17) and bottom of the class in terms of the number of orders against it (5) by the AT (beating the IS: 16 appeals and 4 orders), does everything it can to push its staff members before the AT.

Of the 16 appeals against the IS, 10 concerned general issues (salaries, pensions and NATO social security system). At the same time, the NSPA faced 17 appeals, only 2 of which concerned general issues (creation of a Luxembourg-specific scale). So in reality, 6 appeals for the IS – same number as for the NCIA (the biggest body in terms of staff numbers) – but 15 for the NSPA. This is clearly a statistical anomaly.

When I presented my analysis in 2017, the reaction from the representatives of the NATO administrations was quite defensive. But the facts cannot be denied. Today I am speaking to a broader audience and I hope that my message will not only be listened to politely, but heard.

I think it is high time we had a discussion about the pre-litigation phase, which does not seem to be giving the expected results.

The President of the AT is often surprised by the large number of cases that end up before the NATO AT, in comparison with other international organizations. According to the information I have been able to gather from staff representatives in all NATO bodies, it is rare for a case to be

resolved at the administrative review or complaint stage. Even when limited only to cases that end up before the TA, the sample I have analysed is highly representative of the reality. The conclusion is obvious: the overwhelming majority of cases are resolved before the AT rather than during the pre-litigation phase.

### **Coordination**

In reality, very little within the Coordination is still coordinated.

Not the scales, because affordability is applied differently in the six Coordinated Organizations and NATO has been the only one to introduce a single salary spine. Nor the new pension schemes: at NATO, of a total of around 7,000 civilian staff, barely a thousand are in the coordinated regime. Nor the way certain coordinated allowances are implemented.

In addition, the financial position and the proportion of budgets devoted to staff costs differ greatly between the Coordinated Organizations. Which explains why at NATO, the affordability clause is for the most part virtual. Staff won their case before the NATO Appeals Board on both occasions that the North Atlantic Council tried to apply this clause, because the salary envelope represents a tiny percentage of all NATO expenditure, and the annual salary adjustments represent an even smaller percentage.

The potential creation of a single/joint tribunal would also pose practical questions: where would it sit, who would choose its members, how would they be remunerated? Would the Coordinated Organizations struggle to agree on these points?

## Coordination – consultation

Michael Groepper<sup>17</sup>

Early in July 2020, I wrote a letter to the members of the Appeals Boards of ECMWF and EUMETSAT and of the Administrative Tribunal of ESA pointing out that we were going to be faced in all three tribunals with a major number of problematic cases to be summarized as “Pension Cases”. These cases would mainly involve a new system of adjusting pensions to inflation rather than to salaries. The new system was adopted by the six Coordinated Organizations (Council of Europe, ECMWF, ESA, EUMETSAT, NATO and OECD). A few months later, several appeals were lodged against the implementation of the new system, mostly by pensioners, but also by some active members and by some representatives of the Staff Association. The claimants mainly asserted violation of the procedure, of their acquired rights, of the non-retroactivity principle and of the duty of care.

In my letter, I stressed that the impact of the decisions in these cases was all the more important as more than one organization had committed to the staff and the pensioners to

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<sup>17</sup> Chair of the EUMETSAT Appeals Board, Chair of the Administrative Tribunal of the European Space Agency (ESA) and also of the Appeals Board of the European Centre for Medium-Range Weather Forecasts (ECMWF). He is also a former Judge at the German Federal Administrative Court.

apply the decisions to all people concerned (even those who did not appeal), thus giving our judgments an *erga omnes* effect.

Of course, my main concern was that the six Appeals Boards (or Administrative Tribunals, respectively) might come to diverging and even conflicting decisions on the same legal questions when applying the same coordinated legal rules. I think it goes without saying that this would be highly undesirable. It would undermine the authority of the Appeals Boards (Administrative Tribunals) and the trust in efficient legal protection. However, there is no statutory mechanism available to ensure uniform jurisprudence. Therefore, early in September 2019 in Athens I started discussing the matter with my colleagues on the three other Administrative Tribunals (COE, NATO, and OECD) who shared my concern. We agreed that we could only exchange our views and try to come to common solutions on the basis of informal consultation.

I was indeed fully aware that this was a risky undertaking. When discussing the matter with other Chairs I could of course only submit my personal view. I could not and I would not prejudice my colleagues on the Administrative Tribunal and the Appeals Boards, and I had to take utmost care not to jeopardize the independence of the respective tribunals and of their members.

In the following years, in the Administrative Tribunal of ESA and the Appeals Boards of ECMWF and EUMETSAT, the following types of cases were decided:

1. appeals by pensioners with and without children;
2. appeals by active staff members with and without children;
3. appeals by Staff Associations claiming that the internal consultation procedure was violated;
4. claims for damages due to overpayment of past pension contributions.

In the three tribunals, all the appeals were dismissed. The main reason was that the way the pensions were to be adjusted was not part of the acquired rights of pensioners. The tribunals only recognized that pensioners were entitled to receive a pension which safeguarded the purchase value and thus safeguarded their quality of life when they became pensioners.

As to active staff members, no tribunal acknowledged the admissibility of their cases since they had not yet reached an acquired right to a pension but had a mere expectation of receiving such a pension once they fulfilled the material conditions.

The Administrative Tribunal of ESA and the Appeals Boards of ECMWF and EUMETSAT likewise found that the same applied to appeals against the abolition of the entitlement to

the education allowance. Such entitlement would only be abolished for staff members reaching pensioned status after 2030, or even later, and the tribunals did not accept that these people had an actual interest in receiving an answer to the question, when actually it was completely open whether they would ever reach the status of pensioners in eight years.

Some claimants based their appeal on the allegation that as active staff members they had paid pension contributions calculated on the old adjustment system and that they had, thus, accrued a right to receive pensions which would continue to be adjusted in accordance with the old system. The three tribunals rejected this allegation, pointing out that contributions to pension funds are not aggregated as a sort of treasury belonging to the single staff member or pensioner, and that there is no equivalence between contributions paid by active members to pension funds and the pension which they receive later. This is confirmed by the fact that the contribution rate cannot be based on the length of entitlement to a pension since individual life span is unforeseeable.

As to lessons learned, the pension cases were a good example of the necessity and the usefulness of informal contact between international tribunals faced with cases which are to be decided on the basis of identical legal provisions (like in coordinated matters). As expected, two of the main issues would be the question of acquired rights and the admissibility of appeals brought in by active staff

members. None of the six Appeals Board or Administrative Tribunals of the six Coordinated Organizations has come to deviating results in this respect. The need for consultation may show up again in the future when pension cases on the abolition of the education allowance may be brought before these tribunals.

## Accelerated procedures

Michael Groepper

Any one of us is aware that sometimes we have cases before us where we cannot see any sense in hearing them orally because the questions of fact or law are rather simple, and nothing requires a discussion with the parties beyond the exchange of written documents. Organizing a hearing would serve the sole purpose of giving the parties the conviction that their case would be taken seriously.

In some of our procedural provisions we have no possibility to decide such a case without an oral hearing, unless the parties expressly agree to it.

As a German judge, I remember that the German courts envisaged the same situation 45 years ago. At that time German administrative tribunals were hopelessly overloaded. In 1978, a new provision was introduced into the administrative procedural code introducing the so-called *Gerichtsbescheid* (Court Order) providing that the administrative court may decide without an oral hearing if its members come to the unanimous conclusion that the matter does not present any particular difficulties of a factual or legal nature and that the facts have been sufficiently established. The parties were to be heard before. The *Gerichtsbescheid*

had the same effect as a normal decision; however, the losing party has the possibility to either appeal the decision in the next instance or to ask for an oral hearing in the same instance. If an oral hearing takes place, the court may refer to its reasoning in the *Gerichtsbescheid* if it upholds the decision which it made before; otherwise it would make a new judgement, setting aside the *Gerichtsbescheid*.

Contrary to what might be expected, the *Gerichtsbescheid* proved to be a very effective instrument to cope with the heavy workload of the administrative courts. A great majority of *Gerichtsbescheid* became final and binding because the parties, after having read its reasoning, came to the conclusion that the decision was correct and that an appeal or a request for an oral hearing would not lead to another decision.

My own experience shows that a well-considered and consistently reasoned *Gerichtsbescheid* is likely to be accepted by the parties and thus the case may be settled without an oral hearing.

In 2022, the procedural rules applicable in the EUMETSAT Appeals Board were amended, and I had the privilege to be asked by the administration to work on the draft amendments and to present my own ideas. I took the opportunity to present my idea for introducing something like the *Gerichtsbescheid* into the new procedural rules, with the effect that the

procedural rules in EUMETSAT now provide in Article 5 an accelerated procedure.

Here is the wording of the provision:

**Article 5 Accelerated Procedure**

*applicable from one July 2022 until today*

1. If the Appeals Board considers at any stage of the procedure that an appeal does not raise particular difficulties of a factual or legal nature and that the facts of the case are sufficiently established, the Board may notify the Parties that it intends to take a decision on the appeal without hearing.
2. Both Parties may submit written comments on the decision of the Appeals Board to apply the accelerated procedure, within two weeks of their notification under paragraph 1 of this Article.
3. Within one month of their notification of the decision of the Appeals Board on the appeal under the accelerated procedure, either party may request the organisation of a hearing. In that event, the written procedure shall resume where it left off upon the Board's notification under paragraph 1 of this article and a hearing shall take place.
4. Following the hearing, the Appeals Board may either confirm its decision taken under the accelerated procedure or take a new decision.

Meanwhile, two decisions in the EUMETSAT Appeals Board were taken by way of the accelerated procedure. Both decisions have become final without an oral hearing.

## **Harassment Panel II**

Chaired by Judge Thomas Laker<sup>18</sup>

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<sup>18</sup> Judge of the NATO Administrative Tribunal since 2022. He also serves as Judge in the Council of Europe (since 2021), the European Bank for Reconstruction and Development (since 2020), the United Nations Relief and Works Agency for Palestine Refugees in the Near East (since 2019) and as Chairperson of the Panel of Adjudicators of the Organization for Security and Co-operation in Europe (since 2016), as well as Chairperson of the Joint Appeals Board of the International Tribunal for the Law of the Sea (since 2011).

## NATO's harassment policy and claims procedures

Joan Powers<sup>19</sup>

Since the term “#MeToo” started to be used in 2017 to draw attention to the seemingly pervasive problem of workplace harassment, many organizations were prompted to review their existing policies to see if they were adequate to address this problem. NATO was among these organizations and, in 2018, it undertook a review and revision of its then-existing harassment policy, which dated from 2013.

This exercise took into account a benchmarking of best practices as reflected in the harassment policies in comparator international organizations, which showed considerable commonality between the policies in these organizations. It also involved extensive consultations with stakeholders within NATO about the existing policy and how it needed to be updated and strengthened.

The resulting NATO policy (which is entitled “NATO Policy on the Prevention, Management and Combating of Harassment,

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<sup>19</sup> Joan Powers was retained by NATO as an independent consultant to review the 2013 version of its harassment policy and recommend proposed revisions. This project resulted in the NATO Policy on the Prevention, Management and Combating of Harassment, Bullying and Discrimination in the Workplace that was formally approved in November 2020. The views expressed herein are the personal views of the author and do not necessarily reflect the views of NATO.

Bullying and Discrimination in the Workplace”) was adopted in November 2020 and now applies across all NATO bodies.

The following comments provide an overview of the main features of the NATO Policy.

Main features of the NATO policy: Substantive aspects

### **Definitions**

A key objective of the NATO policy was to underscore the importance of maintaining a respectful workplace, free of harassment, bullying and discrimination, and make clear that every staff member has a role and responsibility in this regard. This shared obligation is embedded in the standards of conduct in the NATO Code of Conduct regarding professionalism, which call upon staff not to engage in harassment and discrimination in the workplace and not to tolerate those who do so.

Another important aspect was to bring home the message of “zero tolerance” for harassment and other improper behaviour, through clear definitions and real-world examples. It was important that the policy explain what is meant by terms like “hostile work environment”, “harassment”, “bullying”, “mobbing”, “sexual harassment”, and “abuse of authority”. These are not just abstract legal concepts – they concern interpersonal behaviour. Therefore, it was considered important not only to define these terms, but also to provide

concrete examples of what they mean in practice. As in other harassment policies, the NATO policy makes clear that the key element is the impact of unacceptable behaviour on others rather than intention of the perpetrator (who may not realize the effect that their behaviour is having on others).

Also, it is sometimes difficult to separate “harassment” from behaviours that simply reflect poor management skills or miscommunication, so providing a yardstick through examples can be useful. In this regard, the NATO policy contains a caveat, like that found in other policies, making clear that disagreements over work performance or other work-related issues are not harassment as such. It is expected that managers may have to deliver tough messages on performance, assignments, meeting deadlines, etc., and the policy makes this distinction, as long as the message is delivered in a respectful and professional manner.

### **Accountability**

The NATO policy explicitly emphasizes staff awareness, prevention and accountability – particularly on the part of managers, who are expected to be role models and exemplary in their own behaviour, and to deal pro-actively with inappropriate behaviour that they witness or learn about. Another important feature is that managers are expected to follow up after a matter is concluded in order to restore a normal workplace environment to the extent possible, as the resolution of a harassment complaint, particularly if there is a

formal investigation, can be traumatizing for everyone in the work unit.

## **Monitoring**

The policy also covers improved monitoring and systematic reporting of cases, including with respect to follow-up actions. The underlying idea was that it is impossible to review the effectiveness of a policy based purely on anecdotal information and haphazard data collection; there needs to be some type of system of reporting and case management, so that the policy may be periodically reviewed and revised as appropriate to ensure that it remains fit for purpose.

### Main features of the NATO policy: Procedural aspects

The NATO policy sets out the resources and channels (both non-contentious and formal) available to staff to resolve a complaint or concern about improper workplace conduct that they either experience personally or witness.

In terms of the options for those who feel that the workplace is becoming intolerable, the challenge at NATO – as in every organization – is to overcome the “culture of silence” and encourage a “speak-up culture”. It has been observed that, for staff who are targets of inappropriate behaviour, “suffering in silence” is all too pervasive, and can lead to serious problems including burnout and anxiety. Staff are often reluctant to have a formal inquiry launched against the

offending party; in many cases, they simply want the offensive behaviour to stop. It is widely recognized that in most situations early resolution of concerns is best, before the behaviour is repeated or even intensifies.

### **Non-contentious resolution**

As a result, the NATO policy tries to encourage early and non-contentious resolution of concerns, and offers multiple channels and resources to staff in order to achieve this.

- Several NATO bodies have designated so-called Persons of Confidence, a network of peers who can provide confidential advice and guidance to colleagues.
- NATO has established an Ethics Office, which is available to provide confidential advice to NATO civilian staff.
- Staff may raise issues of workplace conduct with their supervisor (unless, of course, he/she is the offending party), Human Resources or Staff Committee representatives.
- Some interpersonal disputes may be amenable to mediation. But this is not always the case, particularly if the behaviour in question involves an alleged abuse of authority.

Ultimately, the victim “owns” their own complaint – the policy allows them to decide whether and how to proceed with respect to how best to address their concerns.

## **Formal complaint process**

If non-contentious resolution is not successful in resolving the matter, the NATO policy allows for formal complaints to be made, either by the victim or even by those who witness improper behaviour. There is no time limit for lodging a formal complaint, although it is recognized that older claims may be difficult or impossible to fully investigate to the requisite evidentiary standard, given the passage of time, absence of reliable witness testimony or documentary evidence, etc.

As contemplated in the policy, a formal complaint of harassment, bullying or discrimination will normally trigger a fact-finding inquiry. The resulting inquiry must be thorough, objective and fair, in terms of providing due process for both the victim and the alleged offending party. From the victim's perspective, the issue is whether the Organization complied with its duty of care towards staff, in terms of providing a safe and respectful workplace; if not, the victim may be entitled to relief such as monetary compensation or other types of remedial action.

Accordingly, the conduct of a formal inquiry must take into account not only the procedural safeguards to be accorded to the alleged offender (who may be subject to disciplinary measures up to and including termination of employment as a consequence of the inquiry), but also the rights of the alleged victim in the process, given the Organization's duty of care to its staff. Unlike other types of alleged staff misconduct,

interpersonal misconduct is complicated by the fact that it also involves one or more complainant(s)/victim(s) as well as the alleged offender, and both parties are entitled to certain procedural protections as a result. In particular, the Organization is expected to ensure not only that the alleged offender has an opportunity to be heard and respond to the charges against him/her, but also that the victim or complainant has an opportunity to present their side of the story and/or comment on the sufficiency of the evidence-gathering process.

With respect to the conduct of a fact-finding inquiry, NATO does not currently have the in-house investigative capacity to handle cases of alleged improper workplace behaviour, but it maintains a roster of individuals who are qualified to do so, and is thus able to draw on them as needed to perform this function.

Under NATO's Civilian Personnel Regulations, the disciplinary findings and related disciplinary measures imposed in staff misconduct cases may be challenged before a Complaints Committee (the internal advisory appeals body in a NATO body)<sup>20</sup> and ultimately before the NATO

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<sup>20</sup> Article 61 of the NATO Civilian Personnel Regulations and Articles 4 and 5 of Annex IX to those Regulations set out *inter alia* the right of staff members, consultants, temporary staff and retired staff members to submit a written complaint challenging an administrative decision, including decisions imposing a disciplinary sanction or other outcome with respect to staff misconduct. Such decisions will initially be reviewed by the Complaints Committee for the NATO body in question,

Administrative Tribunal, which is empowered to issue final and binding judgments.

### Conclusion

The NATO policy is well within the mainstream of the comparator public international organizations in terms of both substance (i.e. definitions of improper workplace behaviour) and processes (both non-contentious and formal) for addressing complaints and concerns regarding workplace harassment, bullying and discrimination. However, for any organization, no matter what its mission is, no policy on its own can provide a failsafe solution; there needs to be a holistic response that combines awareness and accountability in order to foster a respectful workplace environment, which is part of the organization's duty of care towards its staff.

This responsibility inevitably means that there will be an increase in the number of investigations, disciplinary decisions, and cases brought before appeal boards and administrative tribunals, whether by the perpetrators who are disciplined or the complainants who are disappointed by the outcome. But the ultimate objective is to put an end to the

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under a peer review process, which will make its recommendation on the matter to the Head of the NATO body ("HoNB"). See Appendix 3 to Annex IX of the CPR, Implementing procedures applicable to Complaints Committees. The final decision taken by the HoNB may then be reviewed by the NATO Administrative Tribunal.

“culture of silence” that has allowed harassment and bullying to go unchecked, and give staff the trust and confidence that the Organization stands behind its commitment to zero tolerance.

## Judicial review of harassment cases

María-Lourdes Arastey Sahún<sup>21</sup>

*“If an elephant has its foot on the tail of a mouse, and you say that you are neutral, the mouse will not appreciate your neutrality.”*

Desmond Tutu

Thank you very much, Judge Laker, dear Thomas.

Allow me to express my satisfaction at being part of this anniversary of the NATO Administrative Tribunal.

Many thanks to its President, Judge de Cooker, and to its Members, Judges Touvet, Trebilcock, Karatari Köstü and Laker, and to its Register Ms Maglia.

I am particularly excited to return here today to meet Chris de Cooker, Laurent Touvet and Laura Maglia, with whom I had the opportunity to experience the historic moment of the birth of this Tribunal, together with Judges Crook and Vassilopoulos.

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<sup>21</sup> Judge of the Court of Justice of the European Union since 2021 and President of its Fifth Chamber since 2024. She also served as Judge of the NATO Administrative Tribunal (2013-2021).

The analysis of judicial review in harassment cases could take up more than one session.

My intervention will focus on some aspects which could be considered as essential points for the competent administrative tribunals when dealing with disputes between international organizations and their staff.

This brief analysis is based on the data obtained from two of these tribunals: the NATO AT and the Court of Justice of the EU – although as far as the latter is concerned, it should be pointed out that most of the case law is concentrated in the first instance, in what is now known as the General Court.<sup>22</sup>

I. - The first element necessary to address the question of the role of the international administrative tribunals is that of **defining harassment itself**.

We can say that until 2019 there was not a general or universal legal notion. The ILO Violence and Harassment

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<sup>22</sup> Some particular features of the EU staff:

- Disputes between EU staff and the institution, agency or body are dealt with inside the judicial system of the EU. It goes without saying that the EU is not a classic international organization and that, from certain points of view, it could be closer to the structures of the states. It has its own jurisdictional organization in which, of course, the civil servants' conflicts are also resolved.
- The above-mentioned judicial structure is posed by two different jurisdictions acting at consecutive levels of the procedure – first instance for the General Court, and appeal for the Court of Justice. The EU staff benefits from this two-level system.

Convention (No. 190)<sup>23</sup> and its accompanying Recommendation (No. 206) are the first international labour standards to provide a common framework to prevent, remedy and eliminate violence and harassment in the world of work, including gender-based violence and harassment.

Article 1(1) (a) of the Convention No. 190 provides the first international definition of labor violence and harassment. It refers to the “range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.”

Up to now, even if we could end up establishing a series of defining features that, to a greater or lesser extent, coincide, it was a notion that necessarily stemmed from the regulatory framework of each organization.

Thus, for EU staff, the concept of psychological harassment is defined, in Article 12 a(3) of the Staff Regulations, as meaning “any improper conduct that takes place over a period, is repetitive or systematic and involves physical behaviour, spoken or written language, gestures or other acts

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<sup>23</sup> [https://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190)

that are intentional and that may undermine the personality, dignity or physical or psychological integrity of any person”.

Article 12 of the NATO Civilian Personnel Regulations establishes the duties, incompatibilities and proprietary rights of members of the staff. In particular, pursuant to Article 12.1.4:

Members of the staff shall treat their colleagues and others, with whom they come into contact in the course of their duties, with respect and courtesy at all times.

(a) They shall not discriminate against them on the grounds of gender, race or ethnic origin, religion or belief, age or sexual orientation.

(b) They shall not harass, bully or otherwise abuse another staff member.

Article 12.1.5 adds that “The Head of the NATO body may establish local implementation policies in application of this article”.

Harassment was defined in the NATO policy on the prevention and management of harassment, discrimination and bullying in the workplace (ON(2013)0076), updated in 2020, as “any improper and unwelcome visual, verbal, non-verbal or physical repetitive behaviour or conduct, that might be expected or perceived to unreasonably interfere with an individual’s working performance, or which creates an

intimidating, hostile or offensive work environment, or causes personal humiliation or embarrassment to a staff member”.

In both systems, the respective tribunals have delimited the key elements of this notion. Coincidences can be detected in the task of specifying the parameters governing the concept. The following decisions serve as examples:<sup>24</sup>

- The classification of harassment is subject to the condition that it be sufficiently objective, in the sense that an impartial and reasonable observer, endowed with normal sensitivity and placed in the same conditions, would consider it to be excessive and open to criticism (judgment of 16 May 2012, AF/Commission, F-61/10, p. 88-91; and of 16 May 2012, Skareby/Commission, F-42/10, p. 63, 65).
- There is no need for intention from the perpetrator; the victim’s perception is sufficient.

Certainly the conduct, words, acts, gestures or writings referred to in the Staff Regulations must be of a voluntary nature, which excludes conducts occurring accidentally. However, there is no requirement that such conduct, words, acts, gestures or writings must have been committed with the intention of harming the personality, dignity or physical or mental integrity of a person.

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<sup>24</sup> Decisions of the EU Courts are identified by “F” for former Civil Service Tribunal, “T” for current General Court or “C” for Court of Justice.

In other words, moral harassment may occur without the harasser having intended, by his or her actions, to discredit the victim or deliberately to degrade the latter's working conditions. What is required is that the harasser's actions, if committed voluntarily, have objectively led to such consequences (Judgment of 9 March 2010, N/Parliament, F-26/09). Thus the legislation in no way makes the malicious intent of the alleged harasser a necessary element in the definition of psychological harassment (Judgment of 11 July 2013, Tzirani/Commission, F-46/11).

In the same vein, the ILOAT has also stated that for there to be moral harassment, it is not necessary that such "an intention [that of intimidating, to intimidate, insult, harass, denigrate, discriminate against or humiliate a colleague]" be proven. "However, behaviour will not be characterized as harassment or mobbing if there is a reasonable explanation for the conduct in question [...]. That said, an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken" (Judgment no. 2524 of 1 February 2006, recital 25).

However, although the feelings of the person who claims to be the victim of harassment are an important element, these feelings must nevertheless be objective in nature. The said person cannot rely on his or her precarious state of

psychological and physical health to establish a violation of psychological harassment.

Consequently, the negative remarks of a hierarchical superior cannot be regarded as offensive in the absence of other elements (Judgment of 12 December 2012, Cerafogli/ECB, F-43/10).

- Events taken in isolation do not constitute harassment and bullying (NATO AT Judgment of 15 March 2021, Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291).

Psychological harassment must be understood as a process that necessarily takes place over time and presupposes the existence of repeated or continuous acts (Judgment of 5 June 2012, Cantisani/Commission, F-71/10; of 17 September 2014, CQ/Parliament, F-12/13; and of 26 March 2015, CW/Parliament, F-124/13).

- Disagreement on work performance or on another work-related issue is not normally considered harassment (e.g. downgrading the staff member's rating because of disagreement).
  - The fact that a colleague who has in the past made statements depicting the behaviour of the staff member concerned in a negative light sits on a selection board responsible for assessing his abilities cannot be considered to be moral harassment (Judgment of 26 March 2015, CW/Parliament, F-124/13).

- An assessment of a civil servant's performance by a superior, even if critical, cannot in itself be classified as harassment (Judgment 28 of June 2016, FV/Council, F-40/15).
- While it cannot be ruled out that imposing a prolonged work overload on a civil servant may, in certain circumstances, constitute psychological harassment, the fact remains that the conditions laid down in the regulation must nevertheless be met (Judgment of 16 May 2012, AF/Commission, F-61/10).
- A civil servant's negative opinion of a colleague and the fact of informing the hierarchy of grievances relating to the time worked by the said colleague do not in themselves constitute moral harassment (Judgment of 12 December 2012, Cerafogli/ECB, F-43/10).
- The improper or unwelcome behaviour must be intended to undermine the personality, dignity or physical or psychological integrity of a person (Judgment of 13 July 2018, Curto/Parliament, T-275/17, p. 76).
- Instead, the following situations are considered to be harassment:
  - The conduct of a hierarchical superior who directly and repeatedly gives instructions to staff who report to one of his immediate subordinates, without giving them prior warning, is likely to lead to the loss of the latter's

credibility and may be classified as psychological harassment (Judgment of 11 July 2013, Tzirani/Commission, F-46/11).

- It is not admissible to deny the existence of psychological harassment on the ground that the behaviour of a superior is not directed specifically at one person but at an undefined number of officials (Judgment of 11 July 2013, Tzirani/Commission, F-46/11).
- The theory that there is no harassment if the harasser acts under pressure from a member of the institution, and therefore as an intermediary, is not acceptable (Judgment of 2 June 2016, Bermejo Garde/EESC, F-41/10 RENV).

II. - The second essential element of the judicial review relates to the **management of the distribution and assessment of evidence**:

Should tribunals follow a strict observation of the principle *actor incumbit probatio*, that the burden of proof for the facts is on whoever asserts them?

A civil servant who claims to have been the victim of psychological harassment is required to provide *prima facie* evidence of such harassment.<sup>25</sup>

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<sup>25</sup> For Article 12a(2) of the Staff Regulations, relating to the protection of an official who considers himself to be the victim of harassment, to

But an absolute shift of the burden of proof seems controversial. Could we apply the mechanism foreseen in the context of discrimination? For some authors,<sup>26</sup> this solution is not transposable to the context of harassment since it would be difficult to establish its existence based on a simple presumption, with the resulting disciplinary consequences for the person thus found guilty of harassment.

Hence the claimant's allegation of the existence of psychological harassment is not sufficient to establish that any act adopted by the hierarchy is unlawful. The person concerned must still demonstrate the impact of the conduct constituting psychological harassment on the content of the contested measure (Judgments of 24 April 2017, HF/Parliament, T 584/16, p. 92, and of 24 February 2010, Menghi/ENISA, F 2/09, p. 69).

However, the approach changes when facing the legality checks of the acts of an organization which allegedly has not acted adequately on indications or serious suspicions of

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apply in support of a claim for annulment of a decision of the administration, the person concerned must provide even a *prima facie* case that the contested decision constitutes, in whole or in part, a measure of retaliation against him. In that regard, the fact that an official had asked to be appointed to the post of head of unit and that the appointing authority had not acceded to that request, the official having been reassigned from a post of adviser to another post of adviser, was not sufficient in itself to characterize the contested decision as a retaliatory measure against the person concerned (Judgment of 19 June 2014, BN v Parliament, F-157/12, p. 67, 70).

<sup>26</sup> S.Van Raepenbusch, *Le juge face au harcèlement moral dans le cadre du contentieux de la fonction publique européenne*.

harassment. In its Judgment of 9 December 2008, Q/Commission, F-52/05, p. 209, the EU Civil Service Tribunal wrote: “the importance and seriousness of the facts alleged by the applicant in her request for assistance revealed, if not the existence of psychological harassment, at least a ‘suspicion of psychological harassment’ within the meaning of the Memorandum of 2003 on psychological harassment and required the Commission to take, even before carrying out an inquiry and ascertaining the reality of her complaints, measures to ‘move [her] from [her] post’”.

It is sufficient for the staff member claiming the protection of his or her institution to furnish *prima facie* evidence of the reality of the attacks to which he or she claims to be subjected. If such evidence is provided, it is for the institution in question to take appropriate measures, in particular by having an administrative enquiry carried out, in order to establish the facts giving rise to the request for assistance, in cooperation with the person making the request (Judgment of 24 April 2017, HF/Parliament, T-570/16, p. 46).

Therefore, once initial evidence has been provided, the administration must carry out an examination of whether to open an administrative investigation and must be able to prove this. As a result, the judge must also mitigate the burden of proof to some extent if he or she finds that there is a serious presumption in favour of the agent.

### III. - The **request for assistance and the experts' reports**

In the NATO system, having received the request for assistance, the Administration shall open an enquiry conducted by an independent and qualified expert.

Pursuant to Article 24 of the EU Staff Regulations, "1. The Union shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties".<sup>27</sup>

The EU Civil Service Court has compared the request for assistance to the claim for damages indemnity, in respect of which it has established the requirement of a reasonable time limit to raise whose claim. To denounce validly moral harassment, the tribunal accepted the term of five years, although this period starts from the date of the last accredited act of the harasser (Judgment of 5 June 2012, Cantisani/Commission, F-71/10).

In the case of allegations of psychological harassment, the obligation to provide assistance under Article 24 of the Staff Regulations entails, in particular, a duty on the part of the

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<sup>27</sup> Although Article 24 of the Staff Regulations is designed primarily to protect EU officials against attacks and ill treatment by third parties, the obligation to provide assistance envisaged by that provision also exists where the perpetrator of the acts referred to therein is another EU official (Judgment of 14 December 2000, Verheyden/Commission, T-213/99, p. 26)

administration to examine seriously, promptly and confidentially the request for assistance in which psychological harassment is alleged and to inform the applicant of the outcome (Judgment of 19 December 2019, ZQ/Commission, T-647/18, p. 56).

According to settled case law inside the EU system, the judicial review of the measures taken by the administration to which a request for assistance has been made is limited to the question whether the institution concerned acted on valid grounds, in particular that it kept within reasonable limits and did not use its discretion in a manifestly erroneous manner (Judgment of 25 October 2007, T-154/05, Lo Giudice/Commission, p. 137). In that regard, it is sufficient for one of the grounds put forward by the appointing authority to be valid and sufficient for the decision to be lawful (Judgment of 14 April 2011, F-113/07, Šimonis/Commission, p. 69 and 70).

However, in determining the measures which it considers appropriate to establish the reality and scope of the alleged facts, the institution must also take care to protect the rights of the persons implicated in a request for assistance and liable to be the subject of an investigation (Judgment of 19 December 2019, ZQ v Commission, T-647/18, p. 58).

With regard to the timing for this obligation, the NATO Administrative Tribunal has noted that the NATO policy does not specify a period for requesting assistance from the

administration when a staff member considers that they have been a victim of harassment or bullying. However, the lack of a time frame should not be considered as suggesting, in itself, that the principle of legal certainty is not adhered to when a request for assistance is submitted to the Administration. This principle means that there must be a time limit on challenges to the Administration's actions (NATO AT judgment of 15 March 2021, Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291).

Along the same lines, the EU General Court has stated that compliance with a time limit, which must be reasonable, is required in all cases where, in the absence of legal provisions, the principles of legal certainty or the protection of legitimate expectations prevent the organization and the persons involved from acting without any time limit, thereby risking jeopardizing the stability of acquired legal situations (Judgment of 8 February 2011, Skareby/Commission, F-95/09).

The reasonability of the time frame has to be assessed by the Tribunal depending on the indications contained in the regulations and on the conduct of the parties (NATO AT Judgment of 15 March 2021, Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291).

The EU General Court considered that the organization did not act with the necessary speed by waiting two months to open the administrative investigation and one more month to

inform the interested party (principle of reasonable time) (Judgment of 3 October 2019, DQ e.a./Parliament, T-730/18).

As for the fulfilment of the obligation of the organization to assist the member of its staff, it is considered as fully satisfied with the appointment of an external expert. Hence it is for the tribunal to assess whether the external expert conducted the adequate investigation and the organization remained consequent with his/her findings. In its Judgment of 21 November 2017, Case No. 2017/1106, the NATO AT concluded that the requested assistance had been effectively provided since an external expert was duly appointed and the administration was consequent with the expert's findings. The Tribunal adds that it cannot analyze elements that had not been explicated in the appellant's initial claim.

Consistent with that, the NATO AT considers that the Administration cannot deviate from the conclusions of the experts' reports unless it can be demonstrated that those conclusions are based on factual findings that are clearly wrong and require further investigation. If the administration fails to consider the conclusions, it must provide an adequate explanation for this (Judgment of 15 March 2021, Joined Cases Nos. 2019/1284, 2019/1285 and 2019/1291).

One relevant aspect of the assistance and preliminary proceedings consists in the safeguarding of the alleged victim

of harassment, namely his/her right to be heard,<sup>28</sup> in accordance with the principle of sound administration.<sup>29</sup>

This right to be heard does not entail an obligation to disclose to the claimant the records of the witness hearings prior to the adoption of the decision at issue. However, the person who lodged a complaint of harassment is entitled, in order to be able effectively to submit his or her observations to the institution concerned before it takes a decision, to receive a summary, at the very least, of the statements made by the person accused of harassment and the various witnesses heard during the investigation procedure, and such a summary must be disclosed while respecting, if necessary, the principle of confidentiality (Judgment of 4 April 2019, OZ v EIB, C-558/17 P, p. 57). Hence whenever records of witness hearings are taken into account by the organization for the purpose of adopting the decision, it is important that the claimant be given the opportunity to state his or her position on those records provided that he/she respects legitimate expectations as regards confidentiality, which must therefore be balanced against the right to be heard (Judgment of 25 June 2020, HF/Parliament, C-570/18 P, p. 63 and 63).

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<sup>28</sup> Judgment of 4 June 2020, SEAE/De Loecker, C-187/19 P, p. 66-75.

<sup>29</sup> Art. 41 Charter of Fundamental Rights.

## **Final remarks**

The aspects addressed are only a part of many others that give rise to conflicts in matters of harassment.

It occurs to me that issues such as those that may be linked to the harasser's right to defence could be left for another occasion and a more detailed, in-depth examination.

The same could be said of the issues derived from the extrajudicial conflict resolution procedures and their subsequent impact on judicial litigation, not to mention the not always easy question of reparation of the damage and restitution of the rights of the victims.

Finally, we cannot forget that the situations that are at the base of these conflicts are characterized by the ease with which they generate a multiplicity of claims and lawsuits, increasing victimization and the legal complexity of the interrelationships between different controversies.

We are dealing with a topic that, although later than in the sphere of national systems, has experienced an increase in terms of complaints and judicial response. Consequently, the international administrative tribunals have an important role ahead of them in the configuration of their jurisprudence.

## ILOAT and harassment cases

Dražen Petrović<sup>30</sup>

International organizations are often under the influence of the societies where they have established their offices. As most of the headquarters of international organizations are based in the global West, societal issues of importance in those countries have an unavoidable effect on the international organizations based therein, with these organizations addressing them in their internal legal systems. However, international organizations sometimes lag behind their immediate social surroundings.

One such issue is harassment. Many international organizations initially introduced rules on the prevention and handling of harassment very timidly. However, once this was done, the existence of internal rules, procedures and policies on harassment, combined with the attendant public focus on this issue, inevitably triggered claims of staff members alleging harassment. This, in turn, generated an increased number of harassment-related arguments before the Administrative Tribunal of the International Labour

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<sup>30</sup> Registrar of the Administrative Tribunal of the International Labour Organization (ILOAT); Associate Member of the Institut de droit international (IDI). The views expressed herein are those of the author and do not necessarily reflect the views of the International Labour Organization or its Administrative Tribunal.

Organization (ILOAT) and resulted in a rich corpus of the case law. Cases before the ILOAT may involve either an issue of harassment solely – brought by a potential victim of harassment who has not obtained satisfaction internally, or by an accused harasser whose behaviour was sanctioned by the organization – or can be raised in the context of other administrative procedures creating prejudice to the complainant, such as the non-extension of contract or a non-selection for a post, where the staff members allege that harassment influenced administrative decisions that they are challenging.

What will follow below is a very selective presentation of the ILOAT case law. It is based on the author's personal understanding of the relevant judgments, and does not represent any official views of the ILOAT.

The case law of the ILOAT identifies three types of harassment: moral harassment (or simply harassment), sexual harassment and institutional harassment.

The definition of the first two categories is not provided by the Tribunal, but is to be found in internal rules of each organization. As the Tribunal held in Judgment 4253, consideration 11, quoting its prior case law, “[i]n order to determine whether harassment is established, the Tribunal will refer to the Organization's definition of harassment”. A serious challenge for the Tribunal is that there are almost 60 different definitions, as applicable law, and these definitions

may vary in several points and may contain lacunae which need to be addressed by the Tribunal.

Nevertheless, the Tribunal has developed, over the years, an abundant case law establishing some elements of harassment that should be common to all definitions. For example, in Judgment 4253, consideration 5, the Tribunal stated that “harassment may involve a series of acts over time (see Judgments 2067, consideration 16, and 4034, consideration 16) and can be the result of the cumulative effect of several manifestations of conduct which, taken in isolation, might not be viewed as harassment (see, for example, Judgments 3485, consideration 6, and 3599, consideration 4), even if they were not challenged at the time when they occurred (see, for example, Judgment 3841, consideration 6).”

Indeed, while some definitions of harassment in internal rules may state that the harassment can be caused by a single act, in practice harassment normally involves a series of acts. The alleged victim may not be immediately aware of the underlying pattern, and only with the passage of time and with several manifestations of a particular conduct can a person concerned qualify that conduct as harassment. It is important to emphasize that what matters is the perception of the alleged victim. As the Tribunal held in Judgment 4541, in consideration 8, “the main factor in the recognition of harassment is the perception that the person concerned may

reasonably and objectively have of repeated acts or remarks liable to demean or humiliate her or him”.

The ILOAT insists on one point: for the harassment to be found, the intent of the perpetrator is not relevant (see, for example, Judgment 3400, consideration 7).

Definitions in internal rules which require intent result from misunderstandings of what harassment in international organizations means and how organizations should approach it. What differentiates the procedure in international organizations from those in civil actions before national courts is that that the procedure does not oppose the alleged victim and the alleged perpetrator. Although the origin of a harassment claim may involve an interpersonal conflict, the organizations should not treat it as such. It is always a claim by an official addressed to the organization as an employer. Therefore, even if the alleged victim names in a claim the author of the harassing behaviour, the focus of the procedure cannot immediately switch to the alleged perpetrator.

Some internal procedures oblige a potential victim to identify the alleged perpetrator(s), and the procedure then focuses on establishing misconduct. If, ultimately, the misconduct is not proven in accordance with the standard of proof required by the Tribunal, namely beyond reasonable doubt, the organizations conclude that the harassment has not occurred. Since the burden of proof is on the person making the allegation, such a procedure would require that a potential

victim proves beyond reasonable doubt that the harassment happened. This is totally wrong.

What organizations forget in such cases is that they have a duty to ensure a harassment-free, safe and adequate working environment. The alleged victim does not primarily accuse another person but rather accuses the organization of not providing such an environment. The duty of the organization is to address this claim and respond to it. The response does not depend on the result of possible disciplinary action that may be taken against an alleged perpetrator.

When dealing with such a situation in a particular organization caused by the wording of its rules and the way in which it was interpreted by the Administration, the ILOAT, in a plenary session involving all its seven judges, adopted Judgment 4207. In consideration 14 of this important judgment, the Tribunal explained the following:

“A claim of harassment and a report of misconduct based on an allegation of harassment are distinct and separate matters. A claim of harassment is a claim addressed to the organization the resolution of which only involves two parties, the organization and the reporter of the harassment. In contrast, a report of alleged misconduct, based on an allegation of harassment, triggers the Appendix G procedures, a process that is directed at the culpability of the staff member in question and potentially the imposition of a disciplinary measure. In this process, the two parties are the

organization and the staff member in question. In this process, the reporter of the misconduct, a potential victim of the harassment, is a witness and not a party in the proceedings.”

In practice, this means that the organization can acknowledge the reality of the harassment and take measures in favour of the victim, but that there would be insufficient evidence to condemn the alleged perpetrator for it. The main reason is that a different standard of proof applies to the two situations.

The question of the standard of proof applied by the ILOAT has caused some heated debates. The United Nations Appeals Tribunal specifically stated that it does not apply this standard of proof in disciplinary cases (see Judgment No. 2011-UNAT-164). However, this is very much a common law debate and lawyers from the civil law tradition have difficulties understanding it. The ILOAT itself has said that the standard of proof is proper to its own case law and should not be compared to standards used in various national systems (see Judgment 4478, consideration 10).

To return to the issue under review, the standard of proof for a person alleging harassment is not that of “beyond reasonable doubt”. It is “a less onerous standard” (Judgment 4207, consideration 20), which could ostensibly be a “balance of probabilities”. Thus, the standard of proof for an official to prove that she or he may reasonably and objectively perceive a conduct as harassment is not so high. In any case, the

offended official is not entitled to ask for the punishment of another official. Formulating the charges and imposing disciplinary sanctions on officials is the exclusive prerogative of the executive head.

In contrast, an organization must prove beyond reasonable doubt that an official is the harasser, and hence committed misconduct, to be able to impose an appropriate disciplinary sanction, which may involve a dismissal. This is a reasonable requirement, because the Administration has several means at its disposal to undertake the fact-finding in order to prove the charges it has put forward. Zero-tolerance policies, to which most of organizations adhere, cannot be used as an excuse to lower the evidentiary stands. They rather mean that all allegations have to be taken seriously and investigated, but not that each accused person must be automatically sanctioned. Misconduct would need to be proven beyond reasonable doubt.

In the case of allegations of sexual harassment, where there may not be immediate witnesses, the ILOAT may look at the overall situation and come to the conclusion that an organization was wrong in not recognizing the existence of sexual harassment (see Judgment 4207, consideration 21). It is not uncommon to look beyond the content of a particular harassment claim in order to establish a pattern of behaviour. In Judgment 3640, adopted by all seven judges of the Tribunal, it is stated that “in the context of an inquiry into a

sexual harassment complaint, it is by no means abnormal that the investigations conducted with a view to ascertaining the truth of the statements contained in the complaint should be widened to encompass other similar behaviour on the part of the alleged harasser. In fact, that is often the best means of corroborating the allegations of the complainant in an area where [...] it may be impossible to produce material evidence.”

The approach that it is not necessary to identify the perpetrator of harassment and to bring accusations against such a person is even more obvious in the case of institutional harassment. The ILOAT has defined it as “a long series of acts and omissions evidencing mismanagement which have compromised a complainant’s dignity and career prospects” (Judgment 3315, consideration 22, and 3250, consideration 9). There are many situations in which an official cannot understand why some things are happening to her or him – being moved from one place to another, often without explanation, justification, etc. In such cases, it is not obvious who are the specific persons behind the hostile conduct, and in fact one gets impression that it is the Administration as a whole. In such cases, there is a ground to allege institutional harassment.

What, therefore, are the respective obligations of those involved in the harassment? First of all, “that an international organization has a duty to provide a safe and adequate working environment for its staff members and that given the

serious nature of a claim of harassment, an organization has an obligation to initiate the investigation itself. [...] [T]he investigation must be initiated promptly, conducted thoroughly and the facts must be determined objectively and in their overall context” (Judgment 4344, consideration 3). Whether or not there is a formal claim of harassment, any Administration becoming aware of a situation that could be characterized as harassment has an obligation to initiate an investigation. This comes within the zero-tolerance policy (sometimes understood incorrectly as an obligation to punish all persons accused of harassment).

However, an obligation also exists for a potential victim. Many officials wait until the end of their contract or close to retirement before claiming to have been a victim of harassment over a long period of time. In Judgment 4034, in consideration 12, the ILOAT stated that “[a]lthough the Organization is obliged to investigate any incidents that might constitute harassment, the employee must nevertheless report those incidents **in good time** so as to allow the Organization to fulfil its duty.” (Emphasis added).

At the end of the investigation, the result may be twofold. The person who made the harassment claim has the right to be provided with the response to the claim irrespective of whether the harassment has been established in an investigation. In the case of a negative finding, the official concerned has the right to challenge that determination in the

internal appeal process and ultimately before the Tribunal. In a case where the finding is affirmative, the organization has to make sure that the harassment stops, take administrative measures (such as separating administratively the persons involved) and/or award compensation for any injury. In both cases, the claimant, the potential victim, has the right to receive the report of investigation (see, for example, Judgments 4547, consideration 3, 4541, consideration 4, 4217, consideration 4, 3965, consideration 9, 3831, consideration 17 and 3347, considerations 19 to 21), possibly redacted to preserve interests of the third parties, such as witnesses (see, in particular, Judgments 3732, consideration 6 and 3640, considerations 19 and 20).

The concept that any harassment is the primary fault of the organization has another consequence: the liability to provide reparation for harassment is always on the organization, not on the alleged perpetrator (see Judgment 3170, consideration 33). The reparation is due even if it is not specifically provided for in the internal rules (see Judgment 4602, consideration 14).

The victim cannot, however, claim as remedy the punishment of the harasser, as a form of satisfaction. This arises from the principle that an official cannot claim a sanction against another official (see Judgment 4512, consideration 6). While this may not be emotionally satisfactory, it is perfectly understandable from a legal standpoint: only the executive

head can make the charges and impose a disciplinary sanction on a staff member. This is a discretionary right to be exercised in the interest of the organization. The executive head should be convinced that the disciplinary charges can be proven beyond reasonable doubt. The organization should therefore be careful not to bring charges where it is not able to meet this evidentiary standard. Otherwise, the whole process may result in an unfavourable public perception of the Administration to tolerate harassment.

## **Remedies Panel III**

Chaired by Judge Seran Karatarı Köstü

## Remedies

### Seran Karatari Köstü<sup>31</sup>

Distinguished Guests, Esteemed Colleagues, Ladies and Gentlemen,

As the old Latin maxim *ubi jus ibi remedium* goes, where there is a right, there is a remedy. It is a well-known principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss. Despite its broad definition in English, during the course of this panel, the term "remedy" will refer to the substantive remedies such as reparation, rather than procedural remedies relating to the right of access to a court.

As a result of annulment of decisions in administrative cases, the two general forms of reparation awarded by international administrative tribunals are mainly reinstatement and compensation. However, the question of what constitutes a "meaningful remedy" is controversial in some specific cases, particularly when it comes to restoring an employee's legal situation that existed before a wrongful termination or dismissal.

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<sup>31</sup> Judge of the NATO Administrative Tribunal (since 2021) and Judge-rapporteur at the Council of State of Türkiye (since 2006).

The annulment of a decision of termination of employment entails, in principle, the reinstatement of the staff member in his/her last position, or in an equivalent position if this is materially impossible. For such legal disputes, reinstatement is an important remedy since it sends a strong message to the employer that wrongful acts will not be tolerated, and promotes a culture of accountability and good governance within the organization.

Besides this fact, the feasibility of such reinstatement would likely depend on the specific circumstances of each case. In some cases, reinstatement may not be feasible when the nature of the appellant's medical condition prevents him/her from returning to work. It may also not provide a meaningful remedy and may create unnecessary tension and conflict when there has been a breakdown in the employment relationship. In this context, there might be a breakdown in trust between the parties, or a risk of further harm or conflict between the parties in cases of discrimination or harassment. At that point, to decide on "meaningful remedy" becomes a complex issue that requires careful consideration of a wide range of legal and practical factors specific to each case, including also the fact that the remedy must be expeditious and enforceable by the competent authorities.

In this regard, Article 6.9 of Annex IX to the NATO Civilian Personnel Regulations (NCPR) provides:

#### 6.9 Award of remedies

6.9.1 If the Tribunal concludes that the appeal is well founded in whole or in part, the Tribunal may grant, in whole or in part, the remedies sought by the appellant, including annulment of such decisions of the Heads of NATO bodies as are contrary to the contracts or other terms of appointment of the staff member concerned or to the relevant provisions of NATO regulations governing personnel, and specific performance of an obligation such as a pay increase, promotion, transfer or reinstatement of employment, and the payment of monetary relief. It may also order the NATO body to pay compensation for the injury resulting from any irregularity committed by the Head of the NATO body.

6.9.2 Nevertheless, where the Head of NATO body concerned or, as regards those bodies to which the Paris Protocol applies, the Supreme Commander concerned, affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained.

According to the above-mentioned provisions and the practice of the NATO Administrative Tribunal, the normal effect of the annulment of a decision is to restore the parties to the *status quo ante*; annulment of the decision should therefore lead to reinstatement.

However, that is not the case when the respondent invokes Article 6.9.2 of Annex IX to the NCPR to affirm that the execution of an annulment decision would give rise to substantial difficulties and to ask not to reinstate the staff member. In this regard, the appellant's submissions seeking reinstatement must be set aside and the Tribunal shall instead determine the amount of compensation to be paid to the appellant for the injury sustained.

It is worth noting that OECD Administrative Tribunal has recently issued a remarkable Judgment No. 101 for a case in which the applicant asks the Administrative Tribunal to annul the Secretary-General's decision to terminate her appointment and for modification of this decision for unsatisfactory performance. To discuss this judgment and the concrete circumstances of the case as well as the perspective of the OECD Tribunal, Ms. Louise Otis, the President of OECD AT, is here with us and she will be giving a presentation on "Reinstatement or what? OECD AT Judgment No. 101".

Following that, I am delighted to present you Ms Laure Levi, the Partner Lawyer of Lellemand Legros & Joyn, with her presentation “Recours indemnitaire vs. recours d’annulation”.

Finally, I would like to take this opportunity to emphasize the importance of recognizing and implementing the decisions of international administrative tribunals. It is crucial not only for upholding respect for the rule of law but also for safeguarding the credibility and reputation of international organizations, given that their staff perform functions of an international character in the common interest of the States Parties to those organizations.

## Reinstatement or what? OECD AT Judgment No. 101

Louise Otis<sup>32</sup>

Dear Chris, dear all,

Thank you for the opportunity to address this audience today in the margins of the 10th AT anniversary conference.

This panel is entitled “Remedies” and I would like to introduce the issue of the annulment of a decision when a termination of contract is tainted by a procedural flaw.

On 31 October 2022, the OECD rendered its Judgment in Case 101. The case deals with the appellant’s request for annulment of the termination of her appointment based on unsatisfactory performance and after several years of service.

The appellant joined the Organization in 2002, holding posts in various directorates and for nearly 15 years in the last assignment, until the termination in 2020.

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<sup>32</sup> President of the NATO Administrative Tribunal since 2023, President of the Administrative Tribunal of the Organization for Economic Co-operation and Development (OECD). She is also Member of the Panel of Independent Reviewers for the Administrative Review of the Asian Infrastructure Investment Bank (AIIB) and deputy judge of the Administrative Tribunal of the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT).

For several years the appellant's quality of work had been always good/very good but between 2012 and 2020 she experienced performance difficulties which gradually worsened to the point where the Organization implemented a Performance Improvement Plan (PIP). Several solutions were also offered to the appellant but these did not enable her to remedy to the shortcomings pointed out by her supervisors.

At the end of the six-month period under the PIP it was concluded that the performance remained unsatisfactory. The appellant's manager proposed a three-month extension, following which the final PIP report further concluded that the performance was unsatisfactory.

The OECD Secretary-General terminated the appellant's contract under the terms of the Staff Regulations for unsatisfactory service.

The appellant requested referral to the Re-evaluation Commission, to which the Organization agreed. The appellant's contract was terminated on 18 December 2020. The Re-evaluation Commission rendered its conclusion on 17 February 2021, unanimously concluding that the grounds of unsatisfactory performance should stand.

The appellant put forward four pleas (the performance was evaluated accordingly to a PIP procedure that was flawed as premature; a legal error was committed concerning the basis of the decision to terminate her appointment; essential points

including the successful overall career were not considered; breach of duty of care). The Tribunal dismissed the four pleas.

However, the Staff Association put forward a procedural flaw, not mentioned by the appellant, i.e. that the decision to terminate her appointment had been taken before the opinion of the Re-evaluation Commission was issued, in breach with the Staff Regulations.

The Tribunal analysed what must be established for this procedural flaw to entail the annulment of the decision to terminate the appointment: i.e. whether the flaw stems from an error that is sufficiently serious and obvious to have had a decisive effect on the outcome of the dispute.

The Tribunal held that in this case, the procedural flaw did not have a sufficiently decisive effect on the outcome of the dispute as to invalidate the contested decision. The procedural irregularity had no effect on the decision to terminate the appointment. Annuling the termination in order to refer it back to a Re-evaluation Commission would have no decisive effect on the outcome of the dispute, other than to generate a new procedure without any regard to the proportionality of resources and means employed, which is a principle applicable in national and international law.

Considering the lack of care, the Tribunal established that the Organization showed a lack of care and that the formal flaw

together with the excessive delay of the Re-evaluation Commission gave rise to compensation for moral damages.

Let me now turn to some other principles of administrative law stemming from this judgment.

### **Limited review of discretionary decisions**

It is important to specify the standard of review applicable to disputes relating to the evaluation of an official's performance in international administrative law.

The case law of international organizations applies a substantially uniform standard of review in recognizing the very broad discretion of international organizations in this regard. A limited standard of review is the principle applicable to a performance evaluation justifying the non-renewal of an appointment.

This standard has been adopted consistently by the ILOAT.<sup>33</sup> In a case where the complainant was seeking reinstatement in the Organization, the ILOAT affirmed that “the assessment of an employee's merit during a specified period involves a value judgement and it cannot substitute its own opinion for the assessment made by the competent bodies of the qualities, performance and conduct of the person concerned. The Tribunal will interfere only if a decision was taken in breach of applicable rules on competence, form or procedure,

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<sup>33</sup> ILOAT Judgments 3378, 4462, 4543, 4169, 4010, 3268, 3039, 4713, 4564.

if it was based on a mistake of law or of fact, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority.”<sup>34</sup>

The Council of Europe AT stressed the importance of enforcing internal institutional regulations using the lenses of general principles of law, stating that that “it is not for the Tribunal to substitute its own judgment for that of the Administration. Nevertheless, it has a duty to ascertain whether the disputed decision was taken in accordance with the Organisation’s regulations and the general principles of law to which the legal systems of international organisations are subject”.<sup>35</sup>

The World Bank AT and the African Development Bank AT took the same position. The first considered that the termination of service due to unsatisfactory performance could have a proper legal basis only if both substantive requirements and procedural guarantees were respected, and would not substitute its judgement to Bank’s management.<sup>36</sup> The second affirmed that it was not in its power to substitute the assessment of the competent authority with its own, albeit retaining the power to control that mistakes of facts would not been done.<sup>37</sup>

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<sup>34</sup> ILOAT Judgement 4840.

<sup>35</sup> COE AT Judgment No. 744/2024.

<sup>36</sup> WB AT Judgment No. 437.

<sup>37</sup> AfDB AT Judgement N. 2004/02.

The NATO AT confirmed such judicial approach taken by other ATs. For example, Case No. 2021/1326 reaffirmed its sound jurisprudence<sup>38</sup> according to which “a discretionary decision is subject to limited review only. The Tribunal can only interfere with a decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was abuse of authority. It had also constantly held that it would not substitute its own view for the Organization’s assessment in such cases”.

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<sup>38</sup> See Case No. 2014/1019: The function of the Tribunal is limited to reviewing the formalities of the competition to assess any error that may have resulted in violations of appellants’ rights (2019 NATO AT Annual Report); Case No. 2016/1083: The Tribunal recalled that it can only interfere with a non-selection decision if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority (2016 NATO AT Annual Report); Case No. 885: The Tribunal concurred with the principle, reflected in the jurisprudence of other international administrative tribunals, that a decision in the exercise of discretion is subject to only limited review by a tribunal. The Tribunal held that the procedure followed by the NATO body was regular, and that respondent had exercised its discretion reasonably in deciding that appellant had not demonstrated suitability for continued employment. The Tribunal further concluded that the decision not to confirm appellant in his appointment was not based on a manifest error of appraisal, did not constitute an abuse of power, and was not disproportionate (2013 NATO AT Annual Report).

## **Procedural integrity**

Even though the breach of the principle of good administration or duty of care could lead to a procedural irregularity, not every procedural flaw justifies the annulment of a decision.

In the present case the refusal by the administration to allow the staff member to file an application with the Re-evaluation Commission might have constituted a serious error. This did not occur – the Commission was established according to the appellant's wishes, but it submitted its report after four months instead of two. According to the regulations, the two-month period is not mandatory since the text provides for its extension. The staff member was also heard by the Commission, maintaining the adversarial principle.

With regard to the Secretary-General's decision of termination being subject to the prior submission of the Commission's report, it could have been an error but the texts of the OECD regulations were ambiguous. The notice to proceed with the termination of the appointment had already been served before her request for referral to the Re-evaluation Commission. The ambiguity of the texts made it not possible to speak of a flagrant and indisputable violation.

Finally, Case 101 did not concern an unsatisfactory performance decided solely by a manager: the Re-evaluation Commission was asked to review a comprehensive

evaluation process, and the Tribunal benefited from detailed and consistent evidence, heard seven witnesses and concluded that the Secretary-General's decision was not affected by any reviewable error concerning the substance of the case. Moreover, the report of the Re-evaluation Commission confirmed the assessment and established that no error was made that would justify modifying the conclusions of the Secretary General.

The procedural irregularities, however, might give rise to damages. For example, in a case of the Asian Development Bank, the AT held that “the failure to follow a fair and reasonable procedure, and these administrative errors and irregularities, vitiated the process by which the Applicant's performance was assessed in order to rank him in relation to his colleagues. The Applicant's substantive right to a fair and objective performance evaluation has been infringed, and for that he is entitled to equitable compensation assessed by the Tribunal”.<sup>39</sup>

### **Proportionality of resources and means employed**

An important factor the OECD considered was the resources the organization can put in place and the necessities of the management to fulfil the mandate of the international organization.

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<sup>39</sup> ADB AT Decision No. 9.

Some statutes of international organizations provide for the possibility of reinstatement, some others not, and in certain situations a reinstatement would not practically be feasible or desirable.

For example, the ILOAT, in Judgment No. 4850, affirmed that reinstatement would be impracticable in view of the administrative difficulties and in view of the time that had elapsed since his termination. Again, in its Judgment 4588, either reinstatement or reassignment of the complainant was impracticable because there was no other substantive function that she could have performed. The same consideration could be reached because of unit restructuring.<sup>40</sup>

The Asian Development Bank AT assessed the contract re-arrangement as permissible “only if they have a clear functional justification and rationale in the exigencies of management and the nature of the job in question, and are subject to limitations based on norms of good administration”.<sup>41</sup>

In Case 101, annulling the termination decision to generate a new procedure would have unnecessarily burdened the organization. It is the view of international tribunals that they shall be mindful as well of the financial resources which are

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<sup>40</sup> AfDB AT Judgment N. 2004/09.

<sup>41</sup> ADB AT Decision No. 24.

allocated to international organizations. Access to such financial resources, determined by member states, is a recurring source of concern, critical to the development of international organizations and their ability to fulfil their mandates. For these reasons, an effective and efficient management of resource allocation is a matter that international tribunals bear in mind when considering decisions relating to this area.

## Recours indemnitaire vs recours en annulation

Laure Levi <sup>42</sup>

Je tiens avant tout à remercier les organisateurs de cette journée d'étude de m'avoir invitée à participer à cette dernière.

C'est un honneur de contribuer à cette journée et de fêter ainsi les 10 années du Tribunal administratif de l'OTAN.

Le sujet qu'il m'a été demandé de d'examiner trouve une illustration dans un jugement récent du Tribunal administratif de l'OTAN le jugement n° 2022/1336, FB/SI, du 9 novembre 2022.

Ce jugement soulève les questions importantes de l'articulation entre le recours en annulation et la demande indemnitaire, des conditions dans lesquelles des faits ou décisions non contestés par un recours en annulation peuvent, ou ne peuvent pas, être pris en compte dans une action indemnitaire ou dans une plainte pour harcèlement.

Ainsi, les événements passés, qui n'ont pas été contestés à l'époque, sont-ils uniquement pertinents pour l'établissement de la caractéristique d'un comportement ou peuvent-ils être – aussi - pris en compte pour établir les dommages et intérêts.

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<sup>42</sup> Avocat au Barreau de Bruxelles

Ces questions interrogent évidemment le principe de sécurité juridique mais aussi la compétence du juge.

Rappelons l'objet et les faits du recours qui a conduit au jugement dans l'affaire n° 2022/1336.

Le requérant entre au service de l'OTAN en 2003 comme garde de sécurité. Une réorganisation de l'unité de protection rapprochée est décidée et cette réorganisation prend la forme de la mise en place de quatre équipes, chacune chapeauté par un team leader.

Le requérant n'est pas promu comme team leader. Cette décision de non promotion de décembre 2010 n'est pas contestée. Il n'y aura pas davantage de contestation d'une décision en 2013 de ne pas promouvoir le requérant à un autre emploi de team leader ou d'une dernière décision de ne pas le nommer à nouvel emploi créé au sein de chaque équipe.

Différents événements ont lieu qui conduisent le requérant à se plaindre de faire l'objet de discriminations. Par ailleurs, une enquête administrative est ouverte le concernant. Le requérant est placé en congé de maladie qui sera « converti » en une mise en invalidité avec effet au 1<sup>er</sup> janvier 2021.

Pendant son congé de maladie, le requérant soumet au Secrétaire général une demande visant à l'ouverture d'une enquête pour harcèlement. Une enquête est ouverte mais conduit l'enquêtrice à conclure à l'absence de preuve de

harcèlement ou de discrimination (tout en recommandant une meilleure gestion des ressources humaines dans le service).

Les recommandations d'absence de harcèlement ou de discrimination sont entérinées par l'autorité compétente. Le requérant les conteste par la voie de la procédure interne et par ailleurs, par acte séparé, il demande réparation en raison de sa non promotion comme team leader en 2013.

La décision d'absence de harcèlement, discrimination ou brimade est confirmée et est ensuite contestée devant le Tribunal.

Dans un premier temps, le Tribunal va considérer que la demande indemnitaire visant le préjudice résultant de l'absence de promotion en 2013 est irrecevable car visant l'illégalité d'une décision ancienne de 6 ans. Elle est ainsi « prescrite » (“time-barred”).

*“The principle of legal certainty precludes administrative decisions from being challenged indefinitely. The same goes for the financial consequences arising from such decisions. If that were not the case, every administrative decision could be challenged over very long periods of time; anyone could get around the deadline for submitting an appeal by making a claim for compensation solely based on the supposed illegality of a decision for which annulment can no longer be requested” (point 40 du jugement).*

Toutefois, le recours est recevable en ce qu'il vise la décision refusant de reconnaître un harcèlement, une situation de discrimination ou de brimade même si certains des faits invoqués remontent à quasi 10 ans. « *Yet harassment can be brought to light by an accumulation of incidents or the repetition of abusive behaviour, some of which may date back a long time. Requiring each incident to be challenged within a short time frame would make it impossible to observe an accumulation of incidents over a long period, which is often characteristic of harassment*” (point 42).

Ainsi, si le principe de sécurité juridique ne permet pas de remettre en cause indéfiniment, par la voie indemnitaire, des décisions qui n'ont pas été entreprises par la voie de l'annulation, ce principe ne saurait s'opposer à la prise en compte desdites décisions au titre des éléments pertinents pour apprécier l'existence d'une situation de harcèlement, de discrimination ou de brimade.

Cette jurisprudence est partagée par les autres tribunaux administratifs

Ainsi, en droit de l'Union, le principe de sécurité juridique constitue un principe général. Ce principe vise à garantir la prévisibilité des situations et des relations juridiques relevant du droit de l'Union. Il requiert ainsi l'application stricte de la réglementation de l'Union concernant les délais de procédure. Le respect strict des délais de procédure répond

également à la nécessité d'éviter toute discrimination ou tout traitement arbitraire dans l'administration de la justice <sup>43</sup>.

C'est au titre de ce principe qu'un fonctionnaire ou un agent ne peut se ménager une nouvelle ouverture des délais en introduisant auprès de l'autorité compétente, au lieu d'une réclamation contre la décision faisant grief, une demande indemnitaire <sup>44</sup>.

De même, un agent ne saurait remettre en cause de façon incidente la légalité d'un acte individuel, annulable, mais qui n'a pas été attaqué dans les délais organisés par le statut des fonctionnaires. Conclure à l'inverse permettrait une remise en cause indéfinie d'actes entraînant des effets de droit, serait inconciliable avec les principes régissant les voies de recours instituées par le statut et porterait atteinte à la stabilité de ce système ainsi qu'au principe de la sécurité juridique dont celui-ci s'inspire <sup>45</sup>.

Il est également de jurisprudence que dans tous les cas autres que ceux pour lesquels le législateur a défini un délai ou l'a explicitement exclu, le respect d'un délai raisonnable est requis. A nouveau à l'aulne du principe de sécurité juridique, et du principe de protection de la confiance légitime,

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<sup>43</sup> Arrêt de la Cour du 20 mai 2021, Dickmanns/EUIPO, C-63/20 P, EU:C:2021:406, point 53

<sup>44</sup> Arrêt de la Cour du 4 février 1987, Pressler-Hoeft/Cour des comptes, 302/85, EU:C:1987:58, point 5

<sup>45</sup> Arrêt du Tribunal de première instance (« TPI ») du 29 février 1996, Lopes/Cour de justice, T-547/93, EU:T:1996:27, point 128.

les institutions et les personnes physiques ou morales ne peuvent agir sans aucune limite de temps, risquant ainsi, notamment, de mettre en péril la stabilité de situations juridiques acquises.

Ainsi, la critique, au-delà d'un délai raisonnable, d'un fait générateur d'un dommage causé par une institution dans le cadre de ses relations avec ses agents affecte la sécurité des relations juridiques avec ses agents et expose le budget de ladite institution à des dépenses attachées à un fait générateur trop éloigné dans le temps. Le principe de sécurité juridique requiert dès lors que les agents présentent dans un délai raisonnable leurs demandes en indemnité à la suite d'un dommage qui leur aurait été causé par l'Union dans le cadre de leurs relations avec celle-ci. Il incombe au juge de l'Union de fixer, compte tenu des circonstances de l'espèce, la durée du délai raisonnable pour présenter une demande en indemnité<sup>46</sup>.

Dans un jugement du 24 février 2009<sup>47</sup>, le TA de l'OCDE ne s'est, étonnamment, pas référé au délai raisonnable à respecter par le demandeur en indemnité dans l'absence d'un délai explicitement défini par le statut.

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<sup>46</sup> Arrêt du Tribunal du 14 décembre 2011, Allen e.a./Commission, T-433/10 P, EU:T:2011:744, point 26.

<sup>47</sup> M/Secretary General, affaire n° 63.

*« Mais d'une part, c'est un principe procédural bien établi que les forclusions ne peuvent se présumer et doivent résulter de dispositions explicites ; il appartiendra à l'Organisation, si elle s'y croit fondée, de modifier les textes pour faire préciser le délai dans lequel le Comité doit être saisi. D'autre part et en tout état de cause, les demandes de Mme M. ne tendent pas à l'annulation de décisions anciennes telles que les refus opposés à ses demandes de promotion, mais à la réparation pécuniaire du préjudice qu'elle prétend avoir subi du fait de ces décisions. L'article 22 du statut du personnel dispose que le Tribunal « peut également condamner l'Organisation à réparer le dommage résultant d'une irrégularité commise par le Secrétaire général ». La résolution du Conseil ne fixe pas de délai pour les demandes tendant à la réparation de telles irrégularités et il est normal qu'un tel délai ne commence pas à courir dès la première irrégularité dont un agent peut avoir été victime ».*

Il sera compris que la demande indemnitaire avait été introduite dans un délai raisonnable de la dernière irrégularité invoquée par la requérante<sup>48</sup> et que cette dernière visait un

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<sup>48</sup> De sorte que le préjudice était continu, à l'instar d'un cas de harcèlement. C'est également au titre d'un comportement continu que le Tribunal administratif de l'OIT a déclaré le recours de Mme C.C. recevable, la requérante ayant toutefois agi « dans les temps » à la suite d'une décision de refus de promotion (jugement n° 2706, considérant n° 2 « *En particulier, la circonstance que la requérante n'aurait pas systématiquement contesté l'ensemble des décisions défavorables prises à son égard à compter de sa mutation en date du 11 mars 2003 ne saurait en tout état de cause faire obstacle à ce que*

comportement de l'OCDE et non à obtenir le bénéfice qu'elle aurait pu retirer d'un recours en annulation.

Il convient en effet de rappeler la distinction entre, d'une part, une demande indemnitaire visant à réparer le préjudice d'un acte attaqué et, d'autre part, une demande indemnitaire visant à réparer le préjudice résultant d'un comportement. Il faut ainsi vérifier si le dommage dont la réparation est demandée résulte d'un acte faisant grief ou d'un comportement de l'administration dépourvu de tout caractère décisionnel. Dans le premier cas, il appartient à l'intéressé de saisir, dans les délais impartis, l'autorité compétente conformément aux règles organisant la procédure de recours interne. Dans le second cas, la procédure administrative doit débiter par l'introduction d'une demande visant à obtenir un dédommagement, et se poursuivre, le cas échéant, par un recours administratif ou une réclamation dirigée contre la décision de rejet de la demande <sup>49</sup>. Il en sera ainsi lorsqu'un agent ne recherche pas l'annulation d'un acte déterminé mais vise exclusivement la réparation du préjudice causé par une série de fautes ou d'omissions qui, en l'absence de tout effet juridique, ne peuvent être qualifiées d'actes faisant grief. Dans ce cas, la procédure administrative doit commencer par

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*l'intéressée demande une indemnisation pour les préjudices qu'elle estime avoir subis et conteste en outre la décision lui refusant la promotion qu'elle sollicite »).*

<sup>49</sup> Arrêt du TPI, 28 mai 1998, W./ Commission, aff. jointes T-78/96 et autre, EU:T:1998:112

une demande de l'intéressé invitant l'administration à réparer les préjudices allégués. Cette articulation procédurale, prévue par le statut des fonctionnaires de l'UE, n'est toutefois pas prévue par le Règlement du personnel civil de l'OTAN (« RPC »). Toutefois, les chefs d'organismes OTAN s'attachent en principe à répondre à ces demandes, leur décision de refus constituant alors une décision attaquable.

La solution dégagée par le TA de l'OTAN dans le jugement n° 2022/1336 est celle retenue par le juge de l'UE dans un jugement quasi contemporain (arrêt du 30 mars 2022, KF/Banque européenne d'investissement (« BEI »), T-299/20<sup>50</sup>).

Dans cette affaire, requérante avait soumis une plainte pour faits de harcèlement. Parmi les faits invoqués figurait la décision de ne pas prolonger son contrat. La requérante n'avait pas contesté cette décision. La BEI faisait valoir que comme la requérante n'avait pas attaqué cette décision de sorte que celle-ci revêtait un caractère définitif, il ne saurait être considéré qu'un acte légal peut être considéré comme abusif. Le Tribunal a souligné que le fait pour la requérante de ne pas avoir « *contesté la légalité de la décision de prolonger son contrat dans les délais impartis ne saurait impliquer que le Tribunal ne puisse pas tenir compte de cette décision dans son appréciation globale des éléments*

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<sup>50</sup> EU:T:2022:171

*susceptibles d'établir si le président de la BEI a commis une erreur d'appréciation en entérinant les conclusions formulées dans le rapport selon lesquelles aucun comportement constitutif d'un harcèlement n'avait été adopté à l'encontre de la requérante. En effet, et sans apprécier pour autant la légalité de ladite décision, les circonstances et les motifs de son adoption ont vocation à être pris en considération en vue d'examiner si les éventuelles conséquences négatives qu'ils pouvaient emporter pour la requérante peuvent, ou non être liés à un harcèlement (...) » (point 51).*

Le Tribunal va annuler la décision du président de la BEI rejetant la plainte pour harcèlement. Toutefois, il ne sera pas fait droit à la demande de réparation du préjudice matériel résultant de l'absence de renouvellement de ce contrat.

En effet, la requérante ne pouvait obtenir par la voie indemnitaire ce qu'elle avait omis de faire par la voie de l'annulation, la décision de non renouvellement de son contrat étant devenue définitive.

En revanche, la BEI sera condamnée à réparer le préjudice moral de la requérante.

Le TA de l'OTAN et le juge de l'UE partagent ainsi la même approche.

Je souhaiterais saisir l'occasion de cette contribution pour soulever la question de la demande indemnitaire comme garantie de l'efficacité des arrêts d'annulation.

L'hypothèse ainsi visée est celle d'une demande indemnitaire accessoire à un recours en annulation. Le préjudice dont il est demandé réparation est celui résultant de la décision dont l'annulation est recherchée.

Cette hypothèse est donc différente de celle couverte par le jugement n° 2022/1336, FB/SI, du 9 novembre 2022.

L'annexe IX du RPC expose quant au pouvoir de redressement du Tribunal ce qui suit :

*« 6.9 Pouvoir de redressement du tribunal*

*6.9.1 S'il conclut au bien-fondé de la requête, en tout ou en partie, le Tribunal peut accorder au/à la requérant(e) tout ou partie de la réparation demandée, en particulier l'annulation des décisions du chef d'organisme OTAN qui seraient contraires au contrat ou aux autres conditions d'engagement de l'agent concerné ou aux dispositions réglementaires de l'OTAN concernant le personnel, et l'exécution en nature d'une obligation comme l'octroi d'une augmentation de salaire ou d'une promotion, le transfert ou la réintégration de l'agent, ou le versement d'une indemnisation. Il peut également ordonner que l'organisme OTAN verse des dommages-intérêts en réparation du préjudice résultant d'une irrégularité commise par le chef d'organisme OTAN.*

*6.9.2 Toutefois, si le chef d'organisme OTAN ou, en ce qui concerne les organismes régis par le protocole de Paris, le commandant suprême concerné fait valoir que l'exécution*

*d'une décision d'annulation ou d'une obligation en nature est impossible ou soulèverait d'importantes difficultés, le Tribunal se borne à fixer le montant des dommages-intérêts à verser au/à la requérant(e) en raison du préjudice subi.*

*6.9.3 Si le Tribunal prononce l'annulation d'une décision litigieuse qui a fait application d'une règle, d'un règlement ou d'une autre décision de portée générale applicable à un membre du personnel ou à un membre du personnel retraité de l'OTAN, ou qui a fait produire effet à une telle disposition ou décision réglementaire que le Tribunal déclare, en tout ou en partie, illégale, la disposition ou décision en question ou la partie illégale de celle-ci ne peut plus être appliquée à des membres du personnel ou à des membres du personnel retraité de l'OTAN qui se trouvent dans la même situation. »*

Le RPC confère des pouvoirs importants au Tribunal. Ce dernier peut non seulement annuler, mais il peut également faire droit à une demande d'exécution en nature formulée par le requérant et condamner le défendeur au paiement de dommages et intérêts (de tels dommages et intérêts pouvant être la seule issue dans l'hypothèse où il est fait recours à l'article 6.9.2 de l'annexe IX du RPC). Enfin, une exception d'illégalité considérée comme fondée dans un contentieux individuel oblige l'OTAN pour l'ensemble des agents.

Cette compétence large du Tribunal administratif devrait conduire ce dernier à considérer disposer d'une compétence

de pleine juridiction quant aux contentieux indemnitaires, à l'instar du juge de l'Union.

Certes, le juge de l'Union dispose d'une base juridique explicite, à savoir l'article 91, paragraphe 1<sup>er</sup>, du statut qui dispose que « *Dans les litiges de caractère pécuniaire, la Cour de justice a une compétence de pleine juridiction* ».

Toutefois, une telle compétence est l'« outil » nécessaire à assurer l'effectivité des jugements d'annulation (qui s'inscrit du reste dans les garanties du procès équitable).

C'est ce que le juge de l'Union a souligné de façon particulièrement claire dans un arrêt du 14 décembre 2022, SU/AEAPP, T-296/21<sup>51</sup>.

La requérante contestait une décision de ne pas renouveler son contrat et la réparation des préjudices en résultant, dont la perte d'une chance d'avoir bénéficié d'un renouvellement.

Le Tribunal de l'Union a souligné que la compétence de pleine juridiction investit le juge « *de la mission de donner aux litiges dont il est saisi une solution complète. Cette compétence vise notamment à permettre aux juridictions de l'Union de garantir l'efficacité pratique des arrêts d'annulation qu'elles prononcent dans les affaires de fonction publique, de sorte que, si l'annulation d'une décision erronée en droit prise par l'AIPN ne suffit pas pour faire prévaloir les droits du*

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<sup>51</sup> EU:T:2022:808.

*fonctionnaire concerné ou pour préserver ses intérêts de manière efficace, le juge de l'Union peut, même d'office, lui accorder une indemnisation (...). Il peut faire usage de la même compétence lorsque la partie requérante ne peut tirer avantage de l'exécution des obligations découlant de l'annulation (...) » (point 79).*

Ainsi, l'indemnisation peut être décidée même en dehors de toute demande du requérant car ce qui guide le juge est de garantir l'efficacité pratique des arrêts d'annulation.

Le Tribunal va apprécier si la requérante peut faire valoir une perte d'une chance de voir le contrat renouvelé, laquelle perte doit être réelle et définitive pour donner lieu à réparation.

Quand la perte de chance est-elle réelle ? Le Tribunal indique qu'il faut se placer à la date à laquelle la décision de non-renouvellement a été prise et établir à suffisance de droit que la requérante a été privée non pas nécessairement du renouvellement de son contrat – qui est événement qui ne peut être prouvé - mais d'une chance sérieuse de le voir renouvelé. La conséquence en est un préjudice matériel consistant en une perte de revenus.

Quant au caractère définitif de la perte de chance, le Tribunal précise qu'il s'apprécie au moment où le juge statue, en tenant compte de toutes les circonstances de l'espèce, y compris des éléments postérieurs à l'adoption de l'acte illégal à l'origine du préjudice. L'obligation qui incombe à la

défenderesse de prendre les mesures les mesures que comporte l'exécution de l'arrêt d'annulation et, ainsi, anéantir les effets des illégalités constatées n'exclut pas nécessairement que la perte de chance de la partie requérante ayant obtenu l'annulation d'une décision la concernant soit définitive.

L'article 6.9 de l'annexe IX du RPC doit se concevoir, selon moi, dans la perspective de donner un effet utile aux jugements d'annulation.

L'article 6.9.1 comporte du reste deux phrases, la seconde (« *Il peut également ordonner que l'organisme OTAN verse des dommages-intérêts en réparation du préjudice résultant d'une irrégularité commise par le chef d'organisme OTAN.* ») n'étant pas subordonnée à une demande particulière du requérant.

Le Tribunal s'est certes déjà prononcé, de nombreuses fois, sur des demandes de réparation de préjudice résultant d'une décision dont l'annulation est recherchée.

Mais sa jurisprudence gagnerait, je pense, à se montrer plus « volontaire ».

Le contentieux de l'indemnité est central, non seulement comme voie autonome (et dans ce cadre, il ne saurait viser à contourner des délais devenus définitifs) mais également comme accessoire d'un recours en annulation (car il participe

à l'efficacité des jugements d'annulation même en dehors d'une demande du requérant).

## [English] Recours indemnitaire vs recours en annulation

Laure Levi <sup>52</sup>

First of all, I would like to thank the conference organizers for inviting me to take part.

It is an honour to contribute to this day and celebrate 10 years of the NATO Administrative Tribunal.

The subject I have been asked to examine can be illustrated with a recent judgment from the NATO Administrative Tribunal, Judgment no. 2022/1336, FB v. IS, of 9 November 2022.

This judgment raises the important questions of how the action for annulment and the action for compensation fit together, and under what conditions facts or decisions not challenged by an appeal for annulment can or cannot be taken into consideration in an appeal for compensation or in a harassment complaint.

So: are past events that were not challenged at the time only relevant for establishing the characteristics of a behaviour, or can they also be taken into consideration for establishing the damages to be awarded?

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<sup>52</sup> Member of the Brussels Bar.

This obviously raises the question of the principle of legal certainty but also that of the competence of the court.

Let's remind ourselves of the subject matter and facts of the appeal that led to the judgment in Case no. 2022/1336.

The appellant joined NATO in 2003 as a security guard. The decision was taken to reorganize the Close Protection Unit, with four teams being formed, each led by a team leader.

The appellant was not promoted to team leader. He did not challenge the December 2010 decision not to promote him. He also did not challenge a 2013 decision not to promote him to another team leader position, nor a further decision not to appoint him to a new role created within each team.

Various events took place that led the appellant to complain that he was the target of discrimination. In addition, he was made the subject of an administrative inquiry. The appellant was placed on sick leave that was converted into invalidity with effect from 1 January 2021.

While he was on sick leave, the appellant submitted a request to the Secretary General to initiate a harassment inquiry. An inquiry was accordingly carried out, yet the investigator did not uncover proof of harassment or discrimination (but made recommendations for better human resource management in that service).

The findings of no harassment or discrimination were validated by the competent authority. The appellant challenged them via the internal procedure and also, in a separate letter, made a claim for compensation for not having been appointed a team leader in 2013.

The decision that there had been no harassment, discrimination or bullying was confirmed and subsequently challenged before the Tribunal.

Firstly, the Tribunal considered that the claim for compensation as a result of the damage arising from the appellant's not being promoted in 2013 was inadmissible for being based on the alleged illegality of a decision from six years previously. It was therefore time-barred.

The principle of legal certainty precludes administrative decisions from being challenged indefinitely. The same goes for the financial consequences arising from such decisions. If that were not the case, every administrative decision could be challenged over very long periods of time; anyone could get around the deadline for submitting an appeal by making a claim for compensation solely based on the supposed illegality of a decision for which annulment can no longer be requested. (paragraph 40 of the judgment)

However, the appeal was admissible insofar as it was directed against the decision refusing to acknowledge

harassment, discrimination, or bullying even though some of the incidents cited dated back almost 10 years. “Yet harassment can be brought to light by an accumulation of incidents or the repetition of abusive behaviour, some of which may date back a long time. Requiring each incident to be challenged within a short time frame would make it impossible to observe an accumulation of incidents over a long period, which is often characteristic of harassment” (paragraph 42).

Therefore, although the principle of legal certainty precludes challenging indefinitely, with claims for compensation, decisions for which a claim of annulment has not been made, this principle does not mean the said decisions cannot be taken into consideration as relevant factors for determining whether there has been harassment, discrimination or bullying.

This case law is shared by the other administrative tribunals.

In EU law, the principle of legal certainty is a general principle that aims to guarantee the foreseeability of legal relations and situations covered by EU law. Thus, it requires the strict application of EU regulations on procedural time limits. Strict compliance with procedural time limits also reflects the

necessity of avoiding any form of discrimination or any arbitrary treatment in the administration of justice.<sup>53</sup>

It is under that principle that an official or member of staff may not contrive to cause time to run afresh by submitting to the appointing authority a request for compensation rather than a complaint against the decision adversely affecting them.<sup>54</sup>

Similarly, a staff member may not incidentally challenge the legality of an annulable individual act that was not challenged within the time frames set out in the Staff Regulations. This would otherwise equate to allowing acts with legal effects to be challenged indefinitely, would be incompatible with the principles governing the legal established by the Staff Regulations, and would impair the stability of that system and the principle of legal certainty by which it is guided.<sup>55</sup>

It is also settled case law that there is an obligation to act within a reasonable time in all cases except those where the legislature has expressly excluded or expressly laid down a specific time limit. The principle of legal certainty and the principle of legitimate expectations preclude institutions and natural or legal persons from acting without any time limits,

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<sup>53</sup> Judgment of the Court of 20 May 2021, *Dickmanns v EUIPO*, C-63/20 P, EU:C:2021:406, paragraph 53.

<sup>54</sup> Judgment of the Court of 4 February 1987, *Pressler-Hoeft v Court of Auditors*, 302/85, EU:C:1987:58, paragraph 5.

<sup>55</sup> Judgment of the Court of First Instance of 29 February 1996, *Lopes v Court of Justice*, T-547/93, EU:T:1996:27, paragraph 128.

thereby threatening to undermine the stability of legal positions already acquired.

Consequently, a challenge, beyond a reasonable time limit, to an event which resulted in damage caused by an institution in the context of its relations with its staff affects the certainty of legal relations between that institution and its staff, and imposes on the institution's budget costs arising from an operative event which occurred too long ago. The principle of legal certainty therefore requires that staff claiming compensation as a result of damage allegedly caused to them by the EU in the context of their relations with it must submit their claims within a reasonable period. It is for the EU judicature to decide on the length of the reasonable period for submitting a claim for damages, in the light of the circumstances of the case.<sup>56</sup>

In a judgment handed down on 24 February 2009,<sup>57</sup> the OECD Administrative Tribunal, astonishingly, did not refer to the reasonable time limit that the person requesting compensation must comply with in the absence of a time limit explicitly established by the regulations:

But first of all, it is a well-established procedural principle that time bars cannot be inferred and must result from express provisions; it is for the Organisation,

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<sup>56</sup> Judgment of the General Court of 14 December 2011, *Allen and Others v European Commission*, T-433/10 P, EU:T:2011:744, paragraph 26.

<sup>57</sup> *Mrs M v /Secretary General*, Case No. 63.

if it feels this to be justified, to amend the texts in order to specify a time limit for referring cases to the Board. Secondly, and in any event, Mrs. M. is not asking for old decisions, such as the refusals of her requests for promotion, to be annulled but for monetary compensation for the prejudice she claims to have suffered as a result of these decisions. Regulation 22 of the Staff Regulations provides that the Tribunal “may also order the Organisation to redress the damage resulting from any irregularity committed by the Secretary-General”. The Resolution of the Council does not lay down any time limits for requests for compensation of such irregularities and it is normal that any such time limit would not begin to run as from the first irregularity of which an official may have been the victim.

It is to be understood that the request for compensation was filed within a reasonable time frame from the last irregularity alleged by the appellant<sup>58</sup> and that the request was against a behaviour by the OECD and was not aimed at obtaining the

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<sup>7</sup> In which the damage was continuous, as in situations of harassment. It was also based on continuous behaviour that the ILO Administrative Tribunal found Ms C.C.’s appeal admissible, even though the appellant had acted within the deadline following a decision to deny promotion (Judgment no. 2706, consideration no. 2 “In particular, the fact that the complainant did not challenge each and every unfavourable decision concerning her as from her transfer on 11 March 2003 should not prevent her from seeking compensation for the injury she claims to have suffered and also challenging the decision to deny her the promotion she requests”).

means of redress she could have obtained by lodging an appeal for annulment.

There is a distinction to be drawn between a request for compensation to repair the damage caused by an appealable act on the one hand, and a request for compensation resulting from improper behaviour on the other. Thus, it is necessary to check whether the damage giving rise to a claim for compensation results from an act giving grounds for complaint or from behaviour from the administration that is not decision-making in nature. In the first case, it is up to the person in question to refer the matter to the competent authority, within the prescribed time frame, in line with the rules governing internal appeals. In the second case, the administrative procedure must start with a request for compensation, followed, if necessary, by a request for administrative review or an appeal against the decision to reject the request.<sup>59</sup> This shall be the case when a staff member is not seeking the annulment of a specific act but rather exclusively compensation for damage caused by a series of acts of misconduct or omissions which, in the absence of legal effect, cannot be qualified as acts giving grounds for complaint. In this case, the administrative procedure must start with a request from the person in question for the administration to compensate for the alleged

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<sup>59</sup> Judgment of the Court of First Instance of 28 May 1998, *W v Commission*, Joined cases T-78/96 and T-170/96, EU:T:1998:112.

damage. However, while this is set out in the EU Staff Regulations, it is not in NATO's Civilian Personnel Regulations (CPR). However, the Heads of NATO bodies make sure in principle to respond to those requests, with their decisions denying them then constituting appealable decisions.

The solution reached by the NATO AT in Judgment no. 2022/1336 is the same as the one reached by the EU judicature in a judgment handed down around the same time (Judgment of 30 March 2022, KF v European Investment Bank (EIB), T-299/20<sup>60</sup>).

In this case, the appellant lodged a complaint of harassment. One of the acts involved was a decision not to extend her contract, which the appellant had not challenged. The EIB claimed that as the appellant had not challenged that decision, meaning that it had become final in nature, it could not be found that a lawful act could be considered abusive. The Court emphasized the fact that the applicant did not "challenge the legality of the decision to extend her contract within the prescribed period does not mean that the Court cannot take account of that decision in its overall assessment of the evidence capable of establishing whether the President of the EIB made an error of assessment by endorsing the conclusions reached in the report that no acts of harassment

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<sup>60</sup> EU:T:2022:171.

had been committed towards her. Without assessing the legality of that decision, the circumstances of, and reasons for, its adoption may be taken into consideration in order to examine whether the possible negative consequences that they might have had for the applicant can be linked to harassment [...]” (paragraph 51).

The Tribunal annulled the EIB President’s decision rejecting the complaint of harassment, but did not award compensation for the material damage resulting from the non-renewal of the contract. This is because the appellant could not obtain through a request for compensation what she had failed to do through a request for annulment, as the decision not to renew her contract had become final.

However, the EIB was ordered to pay compensation for the non-material damage suffered by the appellant.

Therefore, the NATO AT and the EU court share the same approach.

I should like to take this opportunity to bring up the issue of claims for compensation as a guarantee of the effectiveness of decision-annulling judgments.

The scenario we are looking at is a claim for compensation ancillary to action for annulment. The damage for which compensation is claimed is the damage resulting from the decision for which annulment is sought.

This scenario is thus different from the one in Judgment no. 2022/1336, FB v. IS, of 9 November 2022.

Annex IX of the CPR provides as follows regarding the award of remedies by the Tribunal:

#### 6.9 Award of remedies

6.9.1 If the Tribunal concludes that the appeal is well founded in whole or in part, the Tribunal may grant, in whole or in part, the remedies sought by the appellant, including annulment of such decisions of the Heads of NATO bodies as are contrary to the contracts or other terms of appointment of the staff member concerned or to the relevant provisions of NATO regulations governing personnel, and specific performance of an obligation such as a pay increase, promotion, transfer or reinstatement of employment, and the payment of monetary relief. It may also order the NATO body to pay compensation for the injury resulting from any irregularity committed by the Head of the NATO body.

6.9.2 Nevertheless, where the Head of NATO body concerned or, as regards those bodies to which the Paris Protocol applies, the Supreme Commander concerned, affirms that the annulment of a decision or specific performance of an obligation is not possible or would give rise to substantial difficulties, the Tribunal

shall instead determine the amount of compensation to be paid to the appellant for the injury sustained

6.9.3 In cases where the judgment of the Tribunal includes annulment of the contested decision that applies or gives effect to a rule, regulation or other decision of general applicability to a staff member or a member of the retired NATO staff which the Tribunal declares to be invalid, in whole or in part, such rule, regulation or decision or invalid portion thereof may not thereafter be applied to similarly-situated staff members or retired NATO staff.

The CPR give significant powers to the Tribunal, which may not only annul a decision but also grant an appellant's request for specific performance of an obligation and order the respondent to pay compensation (with such compensation being the only outcome in cases where Article 6.9.2. of Annex IX to the CPR applies). Lastly, when it is found that there are good grounds for a plea of illegality in an individual case, this creates an obligation for NATO with regard to all staff.

This broad spectrum of power held by the Administrative Tribunal should lead to the latter's being considered as having unlimited jurisdiction for claims for compensation, just like the EU courts have.

The EU courts have an explicit legal basis, i.e. Article 91, paragraph 1, of the Staff Regulations of Officials, which

provides that *“In disputes of a financial character the Court of Justice shall have unlimited jurisdiction”*.

However, such jurisdiction is the necessary tool to guarantee the effectiveness of judgments ordering annulment of decisions (and is a guarantee of a fair trial).

This is what the EU General Court underscored in a particularly clear manner in a judgment of 14 December 2022, *SU v. EIOPA*, T-296/21.<sup>61</sup>

In that case, the appellant challenged a decision not to renew her contract and sought compensation for the resulting damage, including the lost opportunity to have her contract renewed.

The Court underscored that conferring unlimited jurisdiction on the Courts of the EU “entrusts them with the task of providing a complete solution to the disputes brought before them. That jurisdiction is intended *inter alia* to enable the Courts of the Union to guarantee the effectiveness of the judgments by which they annul decisions in staff cases, so that if the annulment of a decision adopted by the appointing authority which contains errors of law is not sufficient to assist the official concerned in enforcing his or her rights or to protect his or her interests effectively, the Courts of the Union may award compensation of their own motion [...]. It may avail itself of the same jurisdiction where the applicant cannot

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<sup>61</sup> EU:T:2022:808.

derive any actual benefit from the performance of the obligations arising from the annulment [...]” (paragraph 79).

Thus, compensation may be ordered even if the appellant had not made such a request, because what guides the courts is the need to guarantee the practical effectiveness of judgments ordering annulment of decisions.

The Tribunal has to assess whether the appellant can claim a loss of opportunity to have the contract renewed, which must be actual and definitive to give rise to compensation.

When is a loss of opportunity actual? The Tribunal states that it is necessary to refer to the date on which the non-renewal decision was taken and establish, to the requisite legal standard, that the appellant was deprived not necessarily of the renewal of her contract –an event whose occurrence cannot be proven – but of a genuine opportunity to have it renewed, with material damage consisting of loss of income.

As for the definitive nature of the loss of opportunity, the Court states that this is to be assessed at the time the court makes a ruling, taking into account all the circumstances of the case, including factors subsequent to the adoption of the unlawful act giving rise to the damage. The obligation on the respondent to take the necessary measures to implement a judgment annulling an act and thus to nullify the effects of the malfeasance found does not necessarily rule out the possibility that the loss of opportunity for the applicant who

has obtained the annulment of a decision concerning him or her is definitive.

In my view, Article 6.9 of Annex IX to the CPR must be considered from the perspective of giving useful effect to annulment decisions.

Article 6.9.1 comprises two sentences, the second (“It may also order the NATO body to pay compensation for the injury resulting from any irregularity committed by the Head of the NATO body”) not being subordinated to a specific request by the appellant.

While the Tribunal has already ruled on many occasions on claims for compensation for damage arising from a decision whose annulment is sought, its case law could be enriched, in my opinion, if it were more proactive.

Action for compensation is crucial, not only as a stand-alone means of recourse (in which case time limits that have become definitive must be abided by) but also as an ancillary means to action for annulment (as it increases the effectiveness of decisions of annulment, even if the appellant has not made a specific request to that effect).

## Compliance with and enforcement of IDB AT judgments

Giuliana Canè<sup>62</sup>

This article is based on the presentation given at the 10th anniversary celebration of the NATO Administrative Tribunal. It explores the significance of an amendment to its Rules of Procedure recently adopted by the Inter-American Development Bank Administrative Tribunal (IDB AT)<sup>63</sup>, namely the introduction of Article 28, dealing with petitions for compliance and aimed at enhancing the post-judgment enforcement process (in terms of both speediness and transparency).

The judgments of the IDB AT, like those of other administrative tribunals that do not provide for appeals, are final and binding on the parties to the case.<sup>64</sup> Internal dispute resolution mechanisms, including administrative tribunals established by international organizations to resolve private law disputes, should be adequate and effective. Such bodies help offset the judicial immunity conferred upon the institution by the member states to safeguard the independence of the

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<sup>62</sup> Executive Secretary at the IDB Group Administrative Tribunal (IDB AT).

<sup>63</sup> Rules of Procedure, available at <https://www.iadb.org/document.cfm?id=EZSHARE-2100739692-312>. The number of this article might be subject to change as New Rules of Procedure will enter into force.

<sup>64</sup> Article VIII (2) of the Tribunal Statute, available at <https://www.iadb.org/document.cfm?id=39458925>.

organization and prevent undue influence on the execution of its mandate. Without such immunity the organization would be susceptible to numerous lawsuits in local courts, potentially rendering its operations unfeasible.

However, for the system to function, the Administration must fully and promptly implement the Tribunal's judgments. It might be that the implementation of a judgment requires an adjustment to the internal system or is not welcomed by the Administration. It might also be that the Administration considers that it is in full compliance with a judgment whereas the other party considers the judgment only partially implemented.

To facilitate the completion of the judicial phase and avoid unnecessary extension of the litigation phase, the IDB AT considered reviewing the existing Rules of Procedure to streamline the enforcement process and address compliance more effectively.

In the last few years a practice began to emerge whereby parties were coming back to the Tribunal a few months after the judgment; one party would claim that the other was delaying or not fully complying with the judgment, and would seek further intervention by the Tribunal. Considering these instances, the Tribunal deemed it important to clarify the scope and timeline of its intervention.

The evolving demands of the Tribunal's caseload necessitate a deeper understanding of its composition and procedural developments, particularly as they relate to disputes over compliance. A notable increase in such claims was observed in 2022, followed by a decline in 2023, reflecting the effectiveness of strategic interventions. The increase also impacts the allocation of human and financial resources at the Tribunal, with 58% of the resources devoted to decisions related to disputes over compliance issued in 2022 and 2023 (Figure 1). This statistic is visually represented in the "Petitions for Compliance by year of decision," Figure 2, where 58% is indicated by two green bars. The adoption of Article 28, aimed specifically at enhancing compliance, helps to formalize the process, making it more systematic and predictable. This not only improves the Tribunal's ability to enforce its rulings but also increases the overall efficiency and transparency of the judicial process, ensuring that decisions are not only made but also effectively implemented and respected.

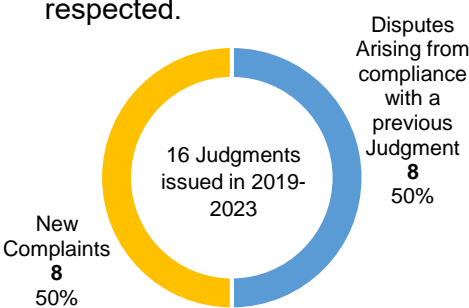


Figure 1 Judgments 2019–2023 by category

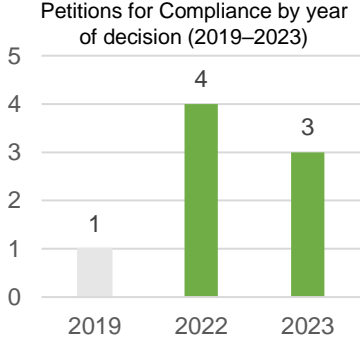


Figure 2 Petitions for Compliance by year of decision (2019–2023)

To fully understand the practical impact of these procedural changes, we have gathered data on the specific types of remedies the IDB AT has awarded. This detailed breakdown will highlight how the Tribunal addresses various aspects of employment disputes through its judicial decisions.

#### I. Overview of remedies and judicial trends

To fully grasp the effectiveness of the Tribunal's procedural enhancements, it is essential to consider the types of remedies it has awarded over the years and examine them in light of the petitions for compliance. Doing so not only highlights the diversity and complexity of the Tribunal's judgments but also sheds light on the subsequent challenges of compliance. Such insights are crucial as they underscore the critical link between the remedies awarded and the recurring disputes over their implementation, illustrating the profound impact of procedural rules like Article 28 on practical enforcement.

Figure 3, which outlines the remedies awarded by the IDB AT from 1981 to 2023, reveals a detailed picture of the Tribunal's approach to resolving employment disputes. The frequent

awarding of remedies in these cases underscores the Tribunal's essential role in enforcing IDB policies.

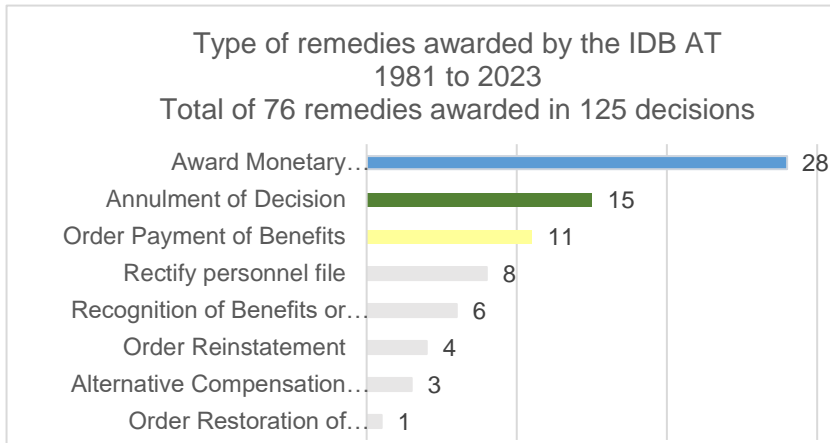


Figure 3 Remedies awarded by the IDB AT

Monetary compensation, noted as the most frequent remedy, with 28 instances, is typically based on the complainant's years of salary. Additionally, the "Order Payment of Benefits" category encompasses various specific benefits, including salary increases, merit adjustments, and contributions to savings plans. It also covers duty station benefits and reimbursement of travel expenses.

The Tribunal's ability to award multiple remedies within a single judgment not only underscores its commitment to justice but also showcases its ability to craft solutions that comprehensively address all aspects of the disputes it handles. This adaptability ensures that each resolution is not only thorough but also practically applicable, enhancing successful compliance. Each type of remedy brings its own

set of compliance challenges. For instance, remedies may go beyond the allocation of severance and notice payments to ensuring that tax implications are properly addressed, requiring detailed legal structures to ensure non-taxability and compliance with tax laws.

## II. Introduction and impact of Article 28

The IDB AT considered that a change in the Rules of Procedure could guide parties in the process on possible disputes over compliance with the original judgment.

In November 2022, Title V of the Rules of Procedure was amended; it now includes a new Article 28, which establishes:

- (i) A time limit of 90 days to: (a) comply with actions ordered by the Tribunal; and (b) notify the Tribunal of the actions taken by Parties;
- (ii) the procedure to follow in case of a dispute arising from compliance.

The full text of the Tribunal's amended Rules of Procedure in English is available.<sup>65</sup>

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<sup>65</sup> Rules of Procedure, available at <https://www.iadb.org/document.cfm?id=EZSHARE-2100739692-312>

## How it works? Process of Petition for Compliance



With these adjustments, the revised Rules of Procedure clarify the timeline for compliance and expected actions, ensuring parties are aware of their obligations. The 90-day window for reporting not only streamlines the process but also enhances clarity on the conclusion of the judicial phase, as parties need to confirm that the judgment has met with full compliance, thereby strengthening the overall effectiveness of the Tribunal’s decisions.

### III. Practice of non-compliance

The Tribunal’s commitment to fair and effective legal resolutions can be illustrated through several notable cases. These reflect the IDB AT’s dedication to safeguarding employees. Each case provides a unique insight into how the Tribunal navigates complex compliance issues, reinforcing its role as a critical arbiter in disputes that shape organizational practices and employee welfare.

For instance, in Case No. 80b<sup>66</sup> the IDB AT ruled against unreasonable interest charges for purchasing retirement plan credits, mandating the Bank to provide clear, updated terms within 30 days. The original judgment (Case No. 80)<sup>67</sup> allowed former long-term consultants to purchase past service credits under reasonable conditions, but the Bank's implementation had high costs and interest rates, de facto depleting the award of the Tribunal. Complainants returned, arguing these terms were unfair. Their petition was granted, showcasing the Tribunal's effective intervention to ensure that financial policies are fair and equitable, significantly upholding trust in the organization.

Also, Case No. 102<sup>68</sup> reflects the Tribunal's commitment to upholding fundamental employee rights, such as severance and notice payments. The Tribunal granted these payments under Staff Rule 325 due to the lack of statutory notice of termination, illustrating its commitment to protecting employee rights in wrongful termination cases. Moreover, the Tribunal ensured that complainant was not financially penalized for the compensation received by granting a

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<sup>66</sup> Case No. 80b Elba Agusti et al. v. IDB (2019) available at: <https://www.iadb.org/document.cfm?id=EZSHARE-2100739692-243>

<sup>67</sup> Case No. 80 Elba Agusti et al. v. IDB (2015) available at: <https://www.iadb.org/document.cfm?id=EZIDB0000580-2100739692-413>

<sup>68</sup> Case No. 102 – José Jesús Lovo Parrales v. IDB (Supplemental Order) (2022) Judgment of 19 May 2022, available at: <https://www.iadb.org/document.cfm?id=EZSHARE-2100739692-295>

petition for tax reimbursement. It also instituted legal safeguards against non-compliance, requiring a legal opinion on the non-taxability of the payments, thereby thoroughly securing the complainant's interests, and enhancing the enforcement of rights.

Lastly, in Cases No. 103<sup>69</sup> and No. 104<sup>70</sup> the Tribunal upheld fair treatment of employees and clear regulations. In Case No. 103 it granted pension contributions but denied compensation for medical insurance, ruling the latter a “use-it-or-lose-it” benefit. In Case No. 104 it reaffirmed a lump-sum repatriation allowance as per the Bank's Regulations and ruled that interest was due only from the judgment date to the payment date. These decisions underscore the Tribunal's commitment to legal limits and to safeguarding employee rights.

Internal justice systems in international organizations generally lack compliance tools and depend on administrations (management) to implement decisions. From a review of 12 different administrative tribunals, we find that explicit rules such as Article 28 are uncommon. Most tribunals rely on the inherent expectation of compliance with binding

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<sup>69</sup> Case No. 103 v. IDB (Supplemental Judgment III) (2023) available at: [CASE 103 - TD v. IDB Supplemental Judgment III.pdf](#)

<sup>70</sup> Case No. 104 Viviana Vélez-Grajales v. IDB (Supplemental Judgment II) (2023) available at:


<https://www.iadb.org/document.cfm?id=EZSHARE-2100739692-321>

judgments, underscoring the IDB AT's proactive approach to enhancing procedural clarity and accountability.

#### IV. Conclusion

The inclusion of Article 28 in the Rules of Procedure of the Inter-American Development Bank Administrative Tribunal marks a crucial enhancement for enforcing Tribunal judgments. This amendment addresses the need for swifter and more transparent compliance processes, establishing a 90-day deadline for compliance and clear dispute resolution procedures.

Overall, Article 28 significantly boosts the Tribunal's capacity to ensure decisions are effectively implemented, strengthening its role as a decisive and authoritative body for resolving disputes and setting a standard that enhances justice and accountability within the organization.



**Regulatory and discretionary decisions**  
Panel IV

Chaired by Judge Anne Trebilcock

## **(In)direct appeals against regulatory decisions and the possible impact of the work of the International Law Commission on international administrative tribunals**

Anne Trebilcock<sup>71</sup>

### I. Indirect appeals against regulatory decisions

Most international administrative tribunals take jurisdiction of cases only once an organization's decision to adopt a general rule has directly affected an individual appellant. The reason lies in the wording of their statutes. The underlying rationale is the governance architecture of the particular organization.

To take an example: an organization engages in a review of its pay scales. It announces the changes to staff and informs them that the new rates will go into effect in six months. One month after that period has expired, staff receive their pay slips, and some see that they have been paid less. To mount a challenge, must a staff member wait until the rule has directly affected him or her as an individual, or can a claim be made against the new general rule once it has been

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<sup>71</sup> Judge of the NATO Administrative Tribunal since 2021 and its Vice-President since 2024. She is a former Vice-President of the Asian Development Bank (ADB) Administrative Tribunal, and has served as a neutral in dispute resolution in the European Bank for Reconstruction and Development and the International Federation of the Red Cross and Red Crescent Societies. She was also the Legal Adviser/Director of Legal Services at the International Labor Organization in Geneva.

announced? The majority of international administrative tribunals would take the former approach. The North Atlantic Treaty Organization Administrative Tribunal is among them.<sup>72</sup>

But the Administrative Tribunal of the International Monetary Fund (IMFAT) has a statute permitting it to engage in a direct review of a regulatory decision as well as to hear claims alleging its impact on an individual.<sup>73</sup> The European Bank for Reconstruction and Development Administrative Tribunal (EBRDAT) lacks authority to annul or rescind a regulatory decision, but may bring an issue to the attention of the Bank's Board of Directors.<sup>74</sup> And the African Development Bank Administrative Tribunal (AfDBAT) is empowered to issue an advisory opinion on any question of law, upon request of the Bank's Board of Governors.<sup>75</sup>

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<sup>72</sup> See North Atlantic Treaty Organization (NATO) Civilian Personnel Regulations (CPR), Article 61.3 on administrative review, mediation and complaint, and CPR, Annex IX, Articles 6.2.1 and 6.2.3, setting the framework for the extent of the powers of the NATO Administrative Tribunal.

<sup>73</sup> See Statute of the International Monetary Fund Administrative Tribunal, Article II, sections (1)(a) and (2)(a) and (b), available at <https://www.imf.org/external/imfat/statute.htm>, defining the Tribunal's competence and the terms "administrative act" and "regulatory decision."

<sup>74</sup> See the contribution of Joan Powers *infra*.

<sup>75</sup> Art. IV of the Statute of the African Development Bank Administrative Tribunal, available at

[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Statute%20of%20the%20Administrative%20Tribunal\\_1312.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Administrative-Tribunal/Statute%20of%20the%20Administrative%20Tribunal_1312.pdf).

The panel presentations on the EBRDAT by Joan Powers (Member of that Tribunal and former Deputy General Counsel of the IMF; text below), on the IMFAT by Celia Goldman (then its Registrar as well as a Judge on the European Stability Mechanism Administrative Tribunal) and on the AfDBAT by Abdoukader Dileita (its Executive Secretary) explored the rationales behind these provisions along with some nuances in their approaches. Their perceptive remarks formed the basis for an open debate.

As the discussion revealed, even in tribunals without such options, the situation may not be totally clear cut. Sometimes an international administrative tribunal will, to use Nassib Ziadé's phrase, entertain "challenges by stealth," where a tribunal has, in the context of an individual case, reviewed the legality of the rules themselves. In doing so, the tribunals have often invoked general principles of international administrative law.

While some see direct review as offering the advantage of achieving legal certainty more quickly, in such a setting tribunals may face tricky questions around separation of powers, standing, exhaustion of internal procedures, remedies, and the possible effects of individual decisions on other staff. Might the current work of the International Law Commission (ILC) provide some guidance to organizations about the scope of review of their administrative tribunals? The next section provides a glimpse into this question.

II. Is the ongoing work of the International Law Commission of interest to international administrative tribunals?

The International Law Commission (ILC) is the United Nations (UN) body of experts that is tasked with “the promotion of the progressive development of international law and its codification.”<sup>76</sup> Among its current agenda items is the “settlement of disputes to which international organizations are parties.” The ILC placed this topic, first proposed in 2016, on its programme of work in 2022, and it promises to be ongoing for several more ILC sessions.<sup>77</sup>

By the end of the ILC’s 75th session in August 2024, the Drafting Committee had adopted six draft guidelines on the topic as well as several titles which had been provisionally adopted by the ILC at the first reading stage.<sup>78</sup> The Special Rapporteur on this agenda item is August Reinisch, Professor

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<sup>76</sup> Statute of the International Law Commission, Article 1, para. 1 (1947, as amended), available at [www.legal.un.org](http://www.legal.un.org).

<sup>77</sup> For background on inclusion of the topic and its scope, see International Law Commission, 74<sup>th</sup> Session, First Report on the settlement of international disputes to which international organizations are parties, by August Reinisch, Special Rapporteur, UN Doc. A/CN.4/756 (3 February 2023). (The ILC later decided to drop “international” before “disputes”.)

<sup>78</sup> See Report of the International Law Commission 2023, UN Doc. A/78/10, pp. 36-51; Report of the International Law Commission 2024, UN Doc. A/79/10, pp. 17-28 (“ILC report 2024”), along with UN Docs. A/CN.4/L.983 (15 May 2023), A/CN.4/L.998 (10 May 2024) and A/CN.4/L.998/Add. 1 (29 May 2024).

of International Law at the University of Vienna, with support from memoranda by the UN Secretariat, which has sought the views of UN Member States and of international organizations. Only guidelines are foreseen as the final output, rather than a treaty or other binding instrument.

Part One is envisaged as an introduction, with draft Guideline 1 defining the scope of the draft guidelines, and draft Guideline 2 setting out the use of terms. Guideline 2 includes this definition in subsection (b): “‘Dispute’ means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial” (by an international organization, as defined in subsection (a)). Although this is wider in scope than the types of disputes coming before international administrative tribunals, it certainly includes them. Indeed, under subsection (c) on means of dispute settlement, “judicial settlement” is among those listed.

Part Two of a draft text aims at disputes between international organizations and between them and States. Part Three, which the Special Rapporteur has not yet brought before the ILC, is envisaged as addressing private parties’ disputes with international organizations.<sup>79</sup>

Although draft Guideline 3 in Part Two defines this Part’s scope as confined to disputes between international

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<sup>79</sup> ILC Report 2024, supra note 68, p. 6.

organizations and between them and States, the ILC reports relating to this Part have included references to the resolution of disputes between international organizations and their employees.<sup>80</sup> In this Part, draft Guideline 6 is of particular note; it states, “Arbitration and judicial settlement shall conform to the requirements of independence and impartiality of adjudicators and due process”.<sup>81</sup> In the explanatory text, the ILC has noted that “independence primarily refers to the relationship between an adjudicator and the parties or their counsel, thus demanding an absence of organizational, personal, financial, or other close connection to them...”.<sup>82</sup> This provision might pose a challenge to some international administrative tribunals.

In the ILC’s references in relation to impartiality, it has included the Code of Conduct of the UN Dispute Tribunal and the UN Appeal Tribunal,<sup>83</sup> as well as several Advisory Opinions of the International Court of Justice involving the Administrative Tribunal of the International Labour Organization.<sup>84</sup> The ILC has referred as well to various UN General Assembly Resolutions on the rule of law in this context.<sup>85</sup> So far, there has been no indication in relation to

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<sup>80</sup> See e.g. ILC Report 2024, *supra* note 68, pp. 26-27.

<sup>81</sup> *Ibid.*, p. 19.

<sup>82</sup> *ibid.*, p. 27.

<sup>83</sup> *ibid.* (at note 67).

<sup>84</sup> *ibid.*, p. 28.

<sup>85</sup> Including UN GA Resolution 67/1 of 24 September 2012 on the declaration of the high-level meeting of the General Assembly on the Rule of Law at the national and international level, and more recently,

any guidance on the possibility of direct appeals against regulatory decisions. Indeed, given the general nature of the guidelines, this may be unlikely.

The ILC's work on the settlement of disputes involving international organizations is very much work in progress. At this stage, it is too early to know whether this work on this topic will have a notable impact on the development of international administrative tribunals or not. But it is surely worth watching.

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the UNGA Resolution 78/112 of 7 December 2023, both cited in ILC Report 2024, *supra* note 68, pp. 26 and 115.

## Review of regulatory decisions: IMFAT Vs. EBRDAT approach

Joan Powers<sup>86</sup>

### Introduction

A review of the jurisprudence of various international administrative tribunals, including the Administrative Tribunal of the International Labour Organization and the World Bank Administrative Tribunal, shows that each has exercised the authority to review the legality of employment-related policies and rules, i.e., rules of general applicability. This reflects the fact that the policies establishing the employment framework of the organization are themselves part of the internal law of the organization. Although international organizations typically reserve the right to unilaterally change their employment rules (and this condition is accepted by staff as part of the terms of their employment), the manner in which the exercise of this rule-making authority has been reviewed by the international administrative tribunals has differed. These comments explore the different approaches taken by the respective administrative tribunals of the International Monetary Fund (IMF) and the European Bank for

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<sup>86</sup> The author is the former Assistant General Counsel of the IMF and is currently a member of the EBRD Administrative Tribunal. The views expressed herein are the personal views of the author and do not necessarily reflect the views of either the IMF or the EBRD.

Reconstruction and Development (EBRD), as provided in their governing instruments.

### **I. IMFAT and review of regulatory decisions**

By way of background, as of the mid-1980s, the IMF had only an internal appeals body (the Grievance Committee), which could make non-binding recommendations to the Managing Director on the resolution of an employment dispute with staff. There was no provision for judicial review by an administrative tribunal, including review of employment policies or similar provisions of general applicability as decided by the IMF Executive Board.

The establishment of the IMF Administrative Tribunal (IMFAT) in 1992 and its explicit authority to review regulatory decisions was prompted by a particular situation that arose in the context of the annual review of the compensation system. The IMF had an established methodology for annual adjustment of compensation system. The methodology had been endorsed by the Executive Board, and it had been applied each year as part of the compensation review, to produce an outcome that provided the basis for a proposed adjustment, which was to be formally approved by the Board.

However, in the course of an annual compensation review exercise, the Executive Board declined to approve the outcome produced by the methodology – although the methodology itself had not been amended – and instead

approved an *ad hoc* adjustment that deviated from the methodology.

This *ad hoc* approach raised questions as to whether the decision was consistent with the generally accepted principle of abiding by the rules unless and until the rules are changed (*tu patere legem quam fecisti*). But there was no way at the time to test the legality of decisions of general applicability affecting IMF staff at large, which typically involved adoption or modification of the employment policies and rules themselves.

In order to address this legal lacuna, a proposal for the establishment of an administrative tribunal was developed, with a view to ensuring that all administrative acts affecting the employment framework of staff, including rules of general applicability, would be subject to judicial review. Such authority would apply regardless of the governing organ responsible for adoption of the decision, as all such decisions must be consistent with the internal law of the organization, including generally accepted principles of international administrative law.

In this regard, staff could potentially be adversely affected by two types of decisions:<sup>87</sup>

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<sup>87</sup> This is explained in greater detail in the official commentary accompanying the approval of the IMFAT statute, which is available on the IMFAT website. See also Powers, "Reinventing the Wheel: The

- **individual decisions** applying or interpreting the employment policies in their individual cases; and
- adoption, rescission or modification of rules of general applicability, i.e. so-called “**regulatory decisions**”.

Accordingly, when the governing statute for the IMFAT was drafted, it defined the subject matter jurisdiction of the tribunal in terms of both types of decisions, i.e., “individual” and “regulatory”. In this regard, it was considered that regulatory decisions, although by definition they are discretionary in nature (as they involve the exercise of rule-making authority by the appropriate governing organ), must adhere to certain well-established principles of international administrative law, such as non-retroactivity, respect for acquired rights and/or fundamental terms and conditions of employment, and non-discrimination. However, this meant that further issues needed to be addressed, in particular when, how and in what manner regulatory decisions would be judicially reviewable. The approach taken in the IMFAT Statute was, and remains, unique.

First, the possibility of direct review of regulatory decisions was incorporated into IMFAT Statute, i.e., a rule-making decision by the governing organs could be legally challenged before the IMFAT within three months of its approval. In this regard, it was considered advantageous to allow such review,

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Establishment of the IMF Administrative Tribunal” (1994), published in *International Administrative Law* (de Cooker, ed.).

as it would enable the matter to be resolved promptly and create certainty as to whether the decision was lawful, even before it was applied to staff.

Moreover, the resulting judgment would automatically apply across the board to all similarly situated staff through annulment of the decision; there was no need for a *de facto* or *de jure* “class action” in order for the ruling to apply to all staff. The Statute provides as follows:

- “If the Tribunal concludes that an application challenging the legality of a regulatory decision is well-founded, it shall annul such decision. Any individual decision adversely affecting a staff member taken before or after the annulment and on the basis of such regulatory decision shall be null and void.” (Art. XIV, Sec. 3)<sup>88</sup>

Second, it was also recognized that the legality of an individual decision (e.g., with respect to benefits or eligibility status for a benefit) may depend on the legality of the underlying rule or policy on which the decision is based. The IMFAT Statute also allows for the review of a regulatory decision at any time (no statute of limitations) in the context of reviewing a timely challenge to an individual decision.<sup>89</sup>

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<sup>88</sup> An example of such direct review of a regulatory decision is found in Elkjaer et al. (No. 2), IMFAT Judgment No. 2023-1. [https://www.imf.org/external/imfat/pdf/j2023\\_1.pdf](https://www.imf.org/external/imfat/pdf/j2023_1.pdf)

<sup>89</sup> The only exception to this jurisdictional authority is with respect to regulatory decisions that were approved before the establishment of the IMFAT in October 1992; such decisions are not subject to legal challenge.

An important distinction between direct review of a regulatory decision and (indirect) review in the context of reviewing an individual decision involves the remedies that may be prescribed by the IMFAT if it considers that the regulatory decision is invalid. In the context of a direct review, if the IMFAT concludes that a regulatory decision is unlawful, the decision will be annulled, and any individual decision taken on the basis of the impugned decision before or after the annulment will be null and void. In contrast, if a regulatory decision is found to be unlawful in the context of an individual decision, the individual decision will be rescinded (and the IMFAT may order other measures, including the payment of money). However, the authority to rescind applies only to the individual decision at issue, and not to staff at large; staff who may be similarly affected by the impugned regulatory decision must bring a timely action to obtain the same relief in their own situations.<sup>90</sup>

As of the time the IMFAT was established, the IMF Grievance Committee already had authority to review the interpretation/application of rules in individual cases and make a recommendation to IMF management in respect of the case. But in connection with the creation of an administrative tribunal with a broader scope of review, it was considered inappropriate, at least from a governance

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<sup>90</sup> The basis for this distinction is set out in Article XIV of the IMFAT Statute.

standpoint, to give the Grievance Committee authority to review regulatory decisions (as the panel is partly comprised of staff who may also be affected by these policies). Accordingly, the subject matter jurisdiction of the Grievance Committee was clarified to explicitly exclude review of regulatory decisions, as well as any decisions taken directly by the Managing Director (as he/she had already taken the decision that was being challenged).

As a result, in cases where a challenge to an individual decision rests solely on legality of underlying regulatory decision, the Grievance Committee lacks jurisdiction, and the matter will go directly to the IMFAT, without any prior exhaustion of administrative remedies.<sup>91</sup> However, if a case involves “mixed” questions as to both the application of an employment policy in the staff member’s individual case as well as the legality of the policy itself, only the first aspect may be considered by the Grievance Committee and, if the staff member remains dissatisfied with the outcome, then both aspects may be reviewed by the IMFAT.<sup>92</sup>

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<sup>91</sup> See e.g., Ms “G” and Mr “H” (Intervenor), IMFAT Judgment No. 2002-3 (involving the legality of a change to the policy on eligibility for expatriate benefits), available at [https://www.imf.org/external/imfat/pdf/j2002\\_3.pdf](https://www.imf.org/external/imfat/pdf/j2002_3.pdf)

<sup>92</sup> See Billmaier, IMFAT Judgment No. 2010-3 (challenging the framework for a downsizing exercise undertaken by the IMF in 2009 as well as the exercise of the organization’s right of refusal with respect to certain staff, including the Applicant, who had volunteered to separate), available at [https://www.imf.org/external/imfat/pdf/j2010\\_3.pdf](https://www.imf.org/external/imfat/pdf/j2010_3.pdf)

## II. EBRDAT and review of regulatory decisions

When the EBRD revised the framework for its administrative tribunal in 2006, the approach at the IMF with respect to review of regulatory decisions by the IMFAT was taken into account. The basic framework, i.e., authorizing the EBRD AT to review both individual and regulatory decisions, was adopted by the EBRD, but with two key differences. Unlike the IMFAT Statute, the Appeals Process governing the EBRD AT does **not** provide for either of the following:

- direct judicial review of regulatory decisions; or
- statutory authority for the EBRDAT to annul or rescind a regulatory decision that it considers to be unlawful.

When the EBRD Grievance Committee was transformed into the Administrative Review Committee (ARC) in early 2018, the ARC Directive explicitly excluded Regulatory Decisions from the scope of administrative review, including recourse to the ARC. At the same time, it stated that such Decisions may be “reviewed by the EBRD AT, in accordance with the Appeals Procedures.”

The referenced Appeals Process (in Sec. 8.03, which is entitled “Recommendations”) authorizes the EBRD AT, if it concludes that a regulatory decision is in breach of international administrative law, to request that its view and the reasons for it “be brought to the attention of the Board of

Directors”, and the President must comply with any such request.

However, this authority is not judicial in nature – the AT’s authority to ask that its views be communicated to the Board of Directors (but without any binding legal effect) is not equivalent to the power to annul, rescind or invalidate a regulatory decision. In short, the remedial powers of the EBRDAT with respect to regulatory decisions appear to be quite limited.<sup>93</sup>

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<sup>93</sup> Sec. 8.04(a) of the Appeals Process authorizes the EBRD AT “to grant remedies to rectify the Administrative Decision complained of and the adverse effect of the decision on the Appellant”. But it does not mention authority to order equitable relief in order to invalidate a regulatory decision, such as annulment or rescission.