




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

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Judgment No. 2021-UNAT-1089



**Van Khanh Nguyen  
(Appellant)**  
v.  
**Secretary-General  
of the International Seabed Authority  
(Respondent)**

**JUDGMENT**

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Before:	Judge Dimitrios Raikos, Presiding Judge John Raymond Murphy Judge Sabine Knierim
Case No.:	2020-1408
Date:	19 March 2021
Registrar:	Weicheng Lin

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Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Alfonso Ascencio-Herrera

**JUDGE DIMITRIOS RAIKOS, PRESIDING.**

1. Ms. Nguyen appeals against a series of administrative decisions of the Secretary-General of the International Seabed Authority (ISA Secretary-General and ISA, respectively) taken upon the recommendation from ISA's Joint Appeals Board (JAB), concerning the payment to her, in connection with her resignation and separation from ISA, of: i) repatriation grant, ii) 28.5 days of accrued annual leave, iii) USD 1,069.42 as outstanding education grant, iv) a lump-sum amount of one-way air fare from Kingston, Jamaica, to Hanoi, Vietnam, for her and her dependents plus three-day accrued leave in compensation as travel time, v) USD 18,000 as relocation grant, vi) the non-removal allowance (NRL) at a monthly rate of USD 225 for 18.5 months (the duration of her shortened secondment to ISA), and vii) USD 20,000 in compensation for her time and efforts spent on appeal.

2. For reasons set out below, we find there is a structural concern regarding the JAB appeals process. We find that it does not comply with the terms of the Special Agreement between the United Nations and ISA executed on 11 February 2010 (the Special Agreement). As a result, we remand the matter to the JAB to ensure that the Appellant's case is dealt with in a manner that produces a written decision from a neutral first-instance process as required by the Special Agreement and Article 2(10) of the Statute of the United Nations Appeals Tribunal (the Statute).

**Facts and Procedure**

3. Ms. Nguyen joined the United Nations Population Fund (UNFPA) at Headquarters in New York, USA, in August 2014 as an Asset Management and Common Services Specialist at the P-3 level.

4. On 12 December 2017, Ms. Nguyen received a job offer of Finance Officer at the P-4 level from ISA in Kingston, Jamaica.

5. On 19 December 2017, an agreement called "the Memorandum of Inter-Organization Exchange (MIOE)" was raised for three parties: Ms. Nguyen, UNFPA and ISA, for Ms. Nguyen's secondment from UNFPA to ISA initially for two years, though, according to Ms. Nguyen, only the Director of the Office of Administrative Services (OAS), ISA, signed the MIOE.

6. Ms. Nguyen commenced her two-year secondment to ISA on 14 February 2018.
7. On 21 July 2019, Ms. Nguyen received a job offer from UNRWA.
8. Ms. Nguyen submitted a resignation letter to the ISA Secretary-General, who, on 6 August 2019, accepted her resignation to be effective 31 August 2019.
9. On 9 August 2019, UNFPA agreed to release Ms. Nguyen on secondment from UNFPA to UNRWA to be effective 1 September 2018, under the Inter-Organization Agreement. UNFPA also agreed to provide a one-way airline ticket for Ms. Nguyen and her dependents from Kingston to New York.
10. Effective 1 September 2019, Ms. Nguyen joined UNRWA on secondment from UNFPA. There was no break in service between the curtailment of her secondment with ISA and the commencement of her secondment with UNRWA. UNRWA paid for the travel of Ms. Nguyen and her dependents from Hanoi to Amman. In addition, UNRWA paid Ms. Nguyen USD 15,000 for relocation shipment and a lump sum and 30-day daily subsistence allowance (DSA) for Ms. Nguyen and 30-day 1/2 rate DSA for her dependents as settling-in-grant.
11. On 16 September 2019, the ISA Secretary-General rejected Ms. Nguyen's request for review of the decisions in respect of her separation entitlements.
12. On 15 October 2019, Ms. Nguyen submitted an appeal to ISA's JAB, requesting that the JAB order the payment to her, in connection with her resignation and separation from ISA, of seven items of her entitlements as detailed in paragraph 1 of this Judgment.
13. On 16 April 2020, the JAB issued a report, in which it rejected each and every claim made by Ms. Nguyen as either without merit or time-barred, after having reviewed her claims against the relevant provisions of the Inter-Organization Agreement and ISA's Staff Rules. The JAB decided not to recommend that the ISA Secretary-General review his decisions embodied in his communication of 16 September 2019 to Ms. Nguyen.

## **Submissions**

### **Ms. Nguyen's appeal**

14. Ms. Nguyen submits that, with the JAB report, ISA's neutral first instance process was completed in accordance with ISA's Rules constituting finalization of the procedures required for appeal to the Appeals Tribunal.

15. Ms. Nguyen requests that the Appeals Tribunal order ISA to pay her the same items of payments as she requested the JAB.

16. Ms. Nguyen maintains that the Inter-Organization Agreement is not applicable to the present case, because ISA is not a signatory to the agreement, and also because the MOIE referring to the Inter-Organization Agreement does not show acceptance by all three parties and is therefore not enforceable. Consequently, her relationship with ISA was governed by the ISA Staff Regulations and Rules only.

17. Ms. Nguyen makes arguments as to why she is entitled to the specific entitlements as detailed in her statement of appeal.

### **The ISA Secretary-General's Answer**

18. The ISA Secretary-General requests that the Appeals Tribunal dismiss Ms. Nguyen's appeal in its entirety.

19. The ISA Secretary-General submits that the JAB decision constitutes a final decision of a neutral first-instance process in terms of the Statute of the Appeals Tribunal, and consequently the Appeals Tribunal has jurisdiction to hear the present case. Based on *argumentum a maiori ad minus*, the Appeals Tribunal also has jurisdiction to hear the present case, because both parties have agreed to submit their case to the Appeals Tribunal after the JAB completed its work.

20. On substance, the ISA Secretary-General maintains that Ms. Nguyen has failed to demonstrate how the JAB erred in fact or law in upholding his decisions and dismissing her claims for compensation.

### Considerations

21. As already held by the Appeals Tribunal in *Webster*,<sup>1</sup> the contested “decision” subject to appeal to the Appeals Tribunal, be it the JAB report or the ISA Secretary-General’s final decision in light of the JAB’s report, does not conform to the requirements of the Special Agreement that provides that the ISA “utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”.

22. Article 2(10) of the Statute similarly states that a “... special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law”.

23. Article 2(5) of the Special Agreement reiterates that an “application shall not be receivable unless the person concerned has previously submitted the dispute to the neutral first instance process provided for in the Staff Regulations of the Authority and the latter has communicated its opinion to the Secretary-General ...” Rule 11.1 of ISA’s Staff Rules provides that the JAB is established to “consider and advise the Secretary-General regarding appeals ...” Rule 11.2(o) provides that the “final decision on the appeal will normally be taken by the Secretary-General within 14 days after the [JAB] panel has forwarded its report ...”

24. The foregoing suggests that the JAB is the neutral first instance process. However, the JAB’s report is not a “decision” but an “opinion”; the JAB simply provides advice or recommendations to the ISA Secretary-General, who has discretion to adopt the recommendations or ignore them (as occurred with the JAB’s report of 16 April 2020). As indicated above, as the JAB’s report is a non-binding recommendation to the ISA Secretary-General, it is not a “decision” as contemplated by the Special Agreement.

25. The Special Agreement provides that it is the ISA Secretary-General’s decision resulting from the JAB’s report that is appealable to the Appeals Tribunal.

26. As pronounced, the Appeals Tribunal Statute requires that these special agreements establish a neutral first instance process and body to decide disputes and that the head of the organization (i.e., the ISA Secretary-General) whose decision is appealed cannot constitute

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<sup>1</sup> *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983.

that neutral body. As the Appeals Tribunal is the second level of appeals, we cannot conduct a review without a decision from a neutral first instance process. That is the case here.

27. Therefore, contrary to the ISA Secretary-General's submissions, we find that the Special Agreement and the resulting Staff Rules do not comply with the Statute and, consequently, we are unable to exercise our jurisdiction as a second level tribunal.

28. Further, we do not find merit in the ISA Secretary-General's submission that, based on *argumentum a maiori ad minus*, the Appeals Tribunal has jurisdiction to hear the present case, because both parties have agreed to submit their case to the Appeals Tribunal after the JAB completed its work. The jurisdictional parameters of the Appeals Tribunal's authority are exclusively prescribed in its Statute, which, as noted earlier, requires that the special agreements establish a neutral first instance process and body to decide disputes, which is not the case here. Accordingly, the jurisdictional power of this Tribunal, *ratione personae* and *ratione materiae*, cannot be established or extended unilaterally by the litigating parties through a procedural contract, expressly or tacitly agreed.

**Judgment**

29. To ensure compliance with the jurisdictional requirements of the Special Agreement and Article 2(10) of the Statute, we remand the matter to the JAB. The Appellant's appeal to the JAB should be reconsidered and decided by a neutral first instance process that produces a written decision and record that includes a statement of the relevant facts and law, with written reasons and analysis.

Original and Authoritative Version: English

Dated this 19<sup>th</sup> day of March 2021.

*(Signed)*

Judge Raikos, Presiding  
Athens, Greece

*(Signed)*

Judge Murphy  
Cape Town, South Africa

*(Signed)*

Judge Knierim  
Hamburg, Germany

Entered in the Register on this 19<sup>th</sup> day of April 2021 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar