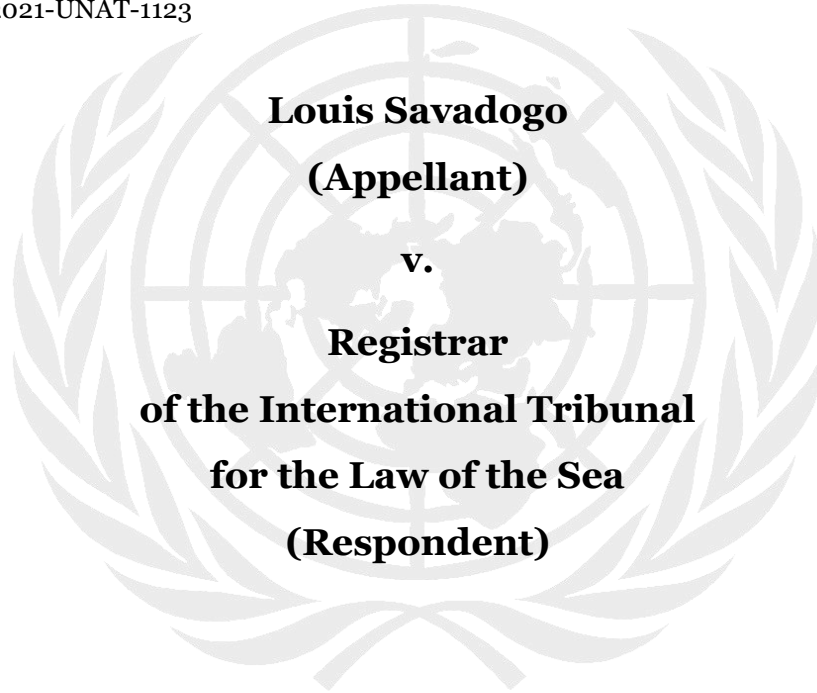




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2021-UNAT-1123



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

JUDGMENT

Before:	Judge Martha Halfeld, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2020-1441
Date:	25 June 2021
Registrar:	Weicheng Lin

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

JUDGE MARTHA HALFELD, PRESIDING.

1. Mr. Savadogo, a staff member at the P-4 level, contested the decision to cancel the recruitment procedure and readvertise a post for which he had applied. The Registrar of the International Tribunal for the Law of the Sea (ITLOS) decided to accept the recommendations of the Joint Appeals Board of ITLOS (JAB), which found that the decision to terminate the recruitment process and readvertise the post was lawful and there was no violation of due process. Mr. Savadogo appeals.

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 Agreement between the United Nations and ITLOS executed on 13 July 2010 (the UN-ITLOS 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 UN-ITLOS Agreement and Article 2(10) of the Statute of the United Nations Appeals Tribunal (the Statute).

Facts and Procedure

3. Mr. Savadogo joined ITLOS as a Legal Officer at the P-4 level on 1 April 2001. This case arose from the advertisement by ITLOS of the position of the Head of Legal Office/Senior Legal Officer and its subsequent decision to cancel the recruitment procedure for, and readvertise, the same position.

4. On 8 May 2017, ITLOS placed a vacancy announcement (VA/2017/003) for the post of Head of Legal Office/Senior Legal Officer at the P-5 level on ITLOS's website. For the post, 37 candidates, including Mr. Savadogo, applied.

5. On 6 October 2017, the President of ITLOS, upon the recommendation of ITLOS' Committee on Staff and Administration, approved the shortlist of candidates for the post. Mr. Savadogo was included in the shortlist as one of four candidates in "Group priority No. 1", listed in an alphabetical order.

6. On 26 October 2017, the shortlisted candidates were invited to sit a written test and take part in an interview on 23 November 2017. But the written test and the interviews were rescheduled to 17 January 2018, due to the inability of Mr. Savadogo to participate on 23 November.

7. A dispute ensued between Mr. Savadogo and the ITLOS Administration, with the former demanding the re-establishment of the shortlist in order of priority, and not in an alphabetic order, and the suspension of the recruitment process, and the latter refusing to suspend the recruitment process.

8. On 29 December 2017, Mr. Savadogo filed a request for administrative review of the decision by ITLOS' Head of Personnel not to suspend the recruitment process. On 15 January 2018, the Registrar of ITLOS (Registrar) informed Mr. Savadogo of the results of the administrative review. He decided to reject Mr. Savadogo's request, as, in his view, the procedure in the recruitment process was in conformity with the applicable rules. Mr. Savadogo did not take further action.

9. On 17 January 2018, Mr. Savadogo sat for the written test and interviewed first with the Registrar and the Deputy Registrar, and then with the President of ITLOS and the Registrar. But on 12 March 2018, the Registrar informed Mr. Savadogo that none of the candidates had been selected for the P-5 position, and that the post would be readvertised in due course.¹

10. On 12 April 2018, Mr. Savadogo requested a review of the Registrar's decision of 12 March to cancel the recruitment procedure and to re-advertise the P-5 post. His request was rejected on 11 May 2018 on the ground that it was time-barred.

11. On 8 June 2018, Mr. Savadogo lodged a complaint with ITLOS' Conciliation Committee against the Registrar's decision to terminate the recruitment procedure and readvertise the P-5 position. The conciliation efforts having failed, Mr. Savadogo filed an application with the JAB, on 3 May 2019.

¹ On 1 June 2018, ITLOS readvertised the same P-5 position. Mr. Savadogo applied, was short-listed, was invited for a written test and an interview, but was eventually not selected. He launched a separate appeal process (first the request for administrative review, then the Conciliation Committee and finally the JAB). According to Mr. Savadogo, that appeal is still pending before the JAB.

12. On 25 May 2020, the JAB issued its report. Under the section “Conclusions and Recommendations”, the JAB concluded that the Registrar’s decision to terminate the recruitment process and readvertise the P-5 post was lawful and that there was no violation of due process.

13. In a letter dated 3 June 2020, the Registrar advised Mr. Savadogo that she had “decided to accept the recommendation of the JAB” pursuant to paragraph 11 of Annex VI of ITLOS’ Staff Regulations.

14. Mr. Savadogo appealed the Registrar’s decision in light of the JAB’s recommendation to the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) on 31 August 2020. On 29 October 2020, the Registrar of ITLOS filed an answer to the appeal.

Submissions

Mr. Savadogo’s Appeal

15. Mr. Savadogo questions the “suitability and competence” of the JAB to issue recommendations, rather than the first instance decisions, to the Registrar, who cannot be considered as a neutral party, in the present case, especially in view of the UNAT recent decision in *Dispert & Hoe*.² ITLOS’ internal justice system is entirely comparable to that of the International Maritime Organization. Consequently, the same reasoning in *Dispert & Hoe* should apply to the present case. In the interest of procedural economy, Mr. Savadogo requests that the Appeals Tribunal review and decide on the merits of his case, as remanding his case to the JAB will further delay the fair resolution of his legitimate concerns.

16. On the merits, Mr. Savadogo submits that the JAB and the Registrar erred in i) considering the applicable selection criteria had been met during the recruitment process, ii) failing to fully and fairly consider his experience and qualifications, and iii) considering the decision to terminate the recruitment process entirely discretionary, which was not based on any legal grounds or justified by a full and fair consideration of the candidates.

² *Dispert & Hoe v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-958.

17. Mr. Savadogo requests that the Appeals Tribunal find that as a result of the decision to terminate the recruitment process and readvertise the P-5 post, ITLOS failed to give his candidacy a full and fair consideration and violated his due process rights. Mr. Savadogo requests that the Appeals Tribunal award him equitable compensation in line with the UNAT jurisprudence, reasonable moral damages and reasonable legal costs incurred.

The Registrar's Answer

18. The Registrar requests that the Appeals Tribunal dismiss the appeal in its entirety.

19. Referring to Mr. Savadogo's argument that the reasoning in *Dispert & Hoe* should apply to his case, the Registrar submits that the UNAT Judgment No. 2019-UNAT-958 is binding only on the parties to that case. In the context of ITLOS, the UN-ITLOS Agreement of 13 July 2010 recognizes that the JAB makes recommendations and the Registrar takes decisions in staff appeals. The Appeals Tribunal, in the past three judgments disposing of appeals from the ITLOS staff members, did not take issue with the roles of the JAB and the Registrar in ITLOS' system of staff appeals.³

20. Nonetheless, the Registrar states that she agrees with Mr. Savadogo that the Appeals Tribunal should decide on the merits of the case and not remand the case.

21. The Registrar then provides the background information about ITLOS and its rules applicable to recruitment. On merits, the Registrar submits that the JAB did not make any error of fact or of law. Mr. Savadogo frequently reproduces the arguments that he already made to the JAB, but regularly fails to engage with the findings of the JAB and does not offer precise arguments in support of his claims.

³ Citing to *Nagayoshi v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2015-UNAT-498, *Savadogo v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2016-UNAT-642, *Mizerska-Dyba v. Registrar of the International Tribunal for the Law of the Sea*, Judgment No. 2018-UNAT-831.

Considerations

Preliminary matter – competence of UNAT

22. There appears to be a contradiction in Mr. Savadogo's arguments. While he claims that the Appeals Tribunal does not have jurisdiction over the present case, due to the absence of requirements linked to the ITLOS' internal justice system, he also requests this Appeals Tribunal to determine the case on the merits. In her answer to the appeal, the Registrar of ITLOS supports Mr. Savadogo's request to not remand the case to the JAB and to examine the merits of the claim.

23. The fundamental and preliminary question, however, is whether the structure and functioning of the ITLOS internal justice system meet the necessary requirements referred to by Article 2(10) of the UNAT Statute, which provides as follows:⁴

... The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, inter alia, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. *Such special agreement may only be concluded if the agency, organization or entity utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.* In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

⁴ Emphasis added.

24. In turn, the UN-ITLOS Agreement establishes in its Preamble the extension of the competence of this Tribunal to ITLOS with respect to applications alleging non-compliance with the terms of appointment or contracts of employment of staff members of the Registry of ITLOS, provided that ITLOS utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.

25. This last statement, however, is not compatible with the provision stipulated in Article 2(5) of the UN-ITLOS Agreement, which states that the decision of the “neutral first instance” is taken by the Registrar of ITLOS on the recommendation of the JAB. The provision reads as below:⁵

For the purposes of determining the receivability of an application pursuant to Article 7 of the Statute of the Appeals Tribunal, an application shall be receivable if filed within 90 days of receipt by the applicant of the *decision taken by the Registrar of the International Tribunal on the recommendation of the Joint Appeals Board* or, in the absence of a decision of the Registrar, within 90 days following a period of 14 days after receipt, by the Registrar, of the report of the Joint Appeals Board.

26. Thus, the JAB issues a *recommendation* and the *Registrar* takes the decision. This means that the ultimate decision-maker is the same person who has issued the contested administrative decision. Moreover, in the present case, the Registrar’s decision issued on 3 June 2020, which is under appeal, provided no reason for the decision to accept the recommendation of the JAB. This process cannot be accepted as a “neutral first instance process that includes a written record and a written decision providing reasons, fact and law”, which is an essential requirement to establish the competence of the Appeals Tribunal.

27. It could be argued that the JAB, as a matter of fact, decided on the matter, playing the role of the neutral first instance. Nevertheless, according to Staff Regulations of ITLOS (Consolidated 2018), the function of the JAB is merely advisory, and not decision-making. Indeed, regulating the Appeals’ process, Article XI of Staff Regulations of ITLOS provides, in relevant parts, the following:

Regulation 11.1

- (a) There is hereby established a Conciliation Committee, consisting of three staff members of the Registry selected as follows:

⁵ Emphasis added.

- (i) one member designated by the Registrar;
 - (ii) one member elected by the Staff Committee or, if it has proved impossible to form that Committee, one member elected by the staff as a whole, by simple majority; and
 - (iii) a charman chosen by the above two members or, if there has been a failure of agreement between them, designated by the President of the Tribunal
- (b) Each member of the Conciliation Committee selected in accordance with paragraph (a) shall have an alternate selected in the same manner, who shall sit in the even of it being impossible for the full member to do so for the reasons set forth in paragraph (c) or for any other compelling reason, such as ill-health.
- (c) Members of the Conciliation Committee and their alternates may not deal with any case in which they have previously taken part, in whatever capacity, or the decision of which could be of direct concern to them.
- (d) The term of office of the members of the Conciliation Committee and their alternates shall be three years. In case of a casual vacancy, a member shall be selected as soon as practicable for the remainder of the predecessor's term; the selection shall be made in the manner prescribed above for the original selection. A member shall hold office until replaced but, though replaced, shall finish any case with which that member may have begun to deal before the replacement, provided that the member remains a staff member of the Registry.
- (e) A staff member of the Registry may lodge a complaint with the Conciliation Committee:
- (i) against an administrative decision alleging non-observance of that member's contract or of that member's terms of employment, the words "contract" and "terms of employment" comprising all provisions of these Regulations, and of the texts referred to therein, as may have been in force at the time of the alleged non-observance; or
 - (ii) Against any disciplinary actions taken against that member.
- (f) The Conciliation Committee shall hear the staff member and the Registrar and endeavour to settle the matter by way of conciliation in accordance with the applicable provisions of annex V.
- (g) In case of failure to achieve conciliation, the administrative decision or disciplinary action may be the subject of an application to the Joint Appeals Board in accordance with the conditions set out in regulation 11.2 and the provisions of annex VI.
- (h) In the event of difficulty in the application of this regulation and of annex V, the Tribunal will decide.

Regulation 11.2

- (a) There is hereby established a Joint Appeals Board (the “Board”).
- (b) The function of the Board is to consider applications against
 - (i) an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;
 - (ii) an administrative decision imposing a disciplinary measure.
- (c) Such applications may be filed by:
 - (i) Any staff member of the Registry.
 - (ii) Any former staff member of the Registry.
 - (iii) Any person making claims in the name of an incapacitated or deceased staff member of the Registry.
- (d) Applications to the Board may only be made in case of failure to achieve conciliation through the Conciliation Committee.
- (e) The Board shall be composed of three members who are selected as follows:
 - (i) one staff member of the Registry designated by the Registrar;
 - (ii) one staff member of the Registry elected by the staff as a whole, by simple majority; and
 - (iii) one member who will serve as a Chairperson chosen by the above two members. The Chairperson need not be a staff member. In case of failure of agreement between the above two members, the Chairperson will be designated by the President of the Tribunal.
- (f) Each member of the Board selected in accordance with paragraph e shall have an alternate selected in the same manner. The alternate shall sit in cases where the member is unable under paragraph (g) or is absent for any other reason. The alternate of the Chairperson shall act as Chairperson in the absence of the latter.
- (g) Members of the Board and their alternates shall not serve in the Board in relation to any application in which they have previously been involved, in whatever capacity, or which is of direct concern to them or members of their families who are staff members.
- (h) The term of office of the members of the Board and their alternates shall be three years. Members may be re-selected.
- (i) In case of a vacancy, a member shall be selected as soon as practicable for the remainder of the predecessor’s term; the selection shall be made in the manner prescribed above for the original selection.

- [(ii)] A member shall hold office until replaced. Though replaced, a member shall continue to fully participate in any case he or she had been involved during his tenure, provided that he or she remains a staff member of the Registry.
- (j) The Registrar, in consultation with the Staff Committee, shall designate a Secretary of the Board, who shall be a staff member of the Registry. The Secretary shall assist the Board and prepare a written record of the proceedings which shall be subject to review and final approval by the Board.
- (k) The Board shall
- (i) establish its own rules of procedure;
 - (ii) hear the applicant and the Registrar in accordance with the applicable provisions of annex VI;
 - (iii) adopt and submit a report with its recommendations to the Registrar for a decision, in accordance with the applicable provisions of annex VI.
- (m) If the applicant does not agree with the decision of the Registrar or if the Registrar has not taken a decision on the recommendation within 14 days after receipt of the report, the applicant may submit an appeal to the United Nations Appeals Tribunal in accordance with its Statute within the time limit referred to in article 2, paragraph 4, of the agreement between the International Tribunal for the Law of the Sea and the United Nations extending the competence of the United Nations Appeals Tribunal to the International Tribunal for the Law of the Sea.

Annex V

Proceedings before the Conciliation Committee

1. A staff member of the Registry who wishes to lodge a complaint under regulation 11.1, paragraph (e), shall first address a letter to the Registrar requesting a review of the administrative decision or disciplinary action complained of. The letter must be sent within 30 days of the date on which the staff member received notification or became aware of the decision or action.
2. (a) The staff member may proceed with a complaint if the Registrar, in writing, rejects in whole or in part the request, or if no reply is received by the staff member within 30 days of the date on which the member's letter was received by the Registrar.

(b) The complaint shall be in writing and shall be lodged by the staff member with the Conciliation Committee within 30 days of receipt of the Registrar's reply, or, if there is no reply within 30 days of the date on which the staff member's letter was received by the Registrar, with the next 30 days.
3. In case of disciplinary action, the staff member may lodge a complaint with the Conciliation Committee either in conformity with paragraphs 1 and 2 or within 30 days of the date on which the member received notification or became aware of the action complained of.

4. When lodging a complaint the staff member shall send a copy to the Registrar. Within 30 days of receiving the copy, the Registrar shall send a reply in writing to the Conciliation Committee and, at the same time, a copy to the staff member. The Chairman of the Committee shall ensure that those copies have in fact been received by the addressees.

5. As soon as practicable after receiving the Registrar's reply, the Conciliation Committee shall endeavour to conciliate between the parties and shall hear them for that purpose. In the event of a successful conciliation, it shall record the agreement of the parties in a Minute. In the event of failure, it shall draw up a report summarizing the procedure followed, the arguments of the parties and the recommendations made by the Committee during the proceedings. That report shall be transmitted to the Registrar and to the staff member. By virtue of regulation 11.1, paragraph (g), and within the time-limit indicated in annex VI, the staff member shall be entitled to submit an application to the Joint Appeals Board.

Annex VI

Proceedings before the Joint Appeals Board [especially paragraphs 10 and 11]

1. A staff member of the Registry or any other individual referred to in staff regulation 11.2, paragraph (c), who wishes to make an application against an administrative decision or disciplinary action pursuant to staff regulation 11.2, paragraph (b), shall submit the application in writing to the Chairperson of the Joint Appeals Board (the "Board") within 60 days of the date on which the staff member received notification of the report of the Conciliation Committee prepared in accordance with annex V. The Chairperson of the Board shall within three working days following the filing of the application, transmit a copy of it to the Registrar and the members of the Board.
2. The Registrar shall submit a written reply to the Board within 30 days following the receipt of the copy of the application by him or her. The Chairperson of the Board shall within three working days transmit copies of the reply to the applicant and the members of the Board.
3. A complaint shall not be receivable by the Board unless the time-limit specified in paragraph 1 has been met or has been waived in exceptional circumstances, by the Board.
4. The meetings of the Board shall be convened by its Chairperson. The Board itself shall decide on questions of its competence.
5. In case of termination of a contract or other action on grounds of unsatisfactory performance, the Board shall not consider the substantive question of performance but only whether the termination of the contract or other action taken on ground of unsatisfactory performance has been motivated by prejudice or by some other extraneous factor.

6. The filing of an application under paragraph 1 shall not have the effect of suspending action on the contested decision. Pending the conclusion of the consideration of an application, the Board, under the circumstances of the case, may, upon request of the applicant, recommend to the Registrar the suspension of action on that decision. The Registrar's decision on the recommendation for suspension is not subject to appeal.

7. Proceedings before the Board shall be limited to the application and reply. Brief statements and rebuttals may be authorized by the Board, orally or in writing. Proceedings are carried out in any one of the working languages of the Tribunal.

8. Any applicant may arrange to have his or her application presented to the Board on his or her behalf by any person of his or her choice.

9. The Board shall have authority to call members of the Registry who may be able to provide information concerning the issues before it and shall have access to all document pertinent to the case.

10. Within seven working days following the conclusion of the proceedings, the Board shall, by majority vote, adopt its report to be submitted to the Registrar. Within five working days from the adoption of the report, the Board shall communicate the report to the Registrar and to the applicant[.] The report shall include a statement of reasons, fact and law, and the recommendations of the Board. The report shall also include a record of the proceedings. Votes on the recommendation shall be recorded, and any member of the panel may have his or her dissenting opinion included in the report.

11. Within 14 days following receipt of the report, the Registrar shall communicate his or her decision on the recommendation contained therein to the applicant. The Board shall also be informed of the decision.

28. As stated in *Webster*,⁶ the JAB simply provides advice or recommendations to the decision-maker, who has discretion to adopt the recommendations or ignore them.

29. In light of the above, the Appeals Tribunal cannot do as Mr. Savadogo has requested and the Registrar of ITLOS has agreed with, namely, apply the *Dispert & Hoe*⁷ reasoning to his case, but, instead of remanding his case to the JAB, review and decide on the merits of his case. This would undermine the authority of the Appeals Tribunal Statute, which establishes the premises upon which the competence of this Tribunal is based. As specified more recently in *Nguyen*,⁸

⁶ *Webster v. Secretary-General of the International Seabed Authority*, Judgment No. 2020-UNAT-983, para. 39.

⁷ *Dispert & Hoe*, *supra* note 2, paras. 17-21.

⁸ *Van Khanh Nguyen v. Secretary-General of the International Seabed Authority*, Judgment No. 2021-UNAT-1089, para. 28.

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.

30. Lastly, there is one more aspect to be addressed. The Appeals Tribunal is well aware that the present determination appears to overturn the previous *Savadogo* Judgment,⁹ in which the Appeals Tribunal accepted the ITLOS' internal justice system. This is because, in light of many similar previous judgments issued by different panels of this Tribunal, the current jurisprudential approach has evolved.¹⁰

⁹ *Savadogo*, *supra* note 3, paras. 36-39.

¹⁰ *Webster*, *supra* note 7; *Dispert & Hoe*, *supra* note 8; *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, paras. 24-29; *Sheffer v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-949, paras. 24-28.

Judgment

31. To ensure compliance with the jurisdictional requirements of the UN-ITLOS Agreement and Article 2(10) of our 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 for the decision.

Original and Authoritative Version: English

Dated this 25th day of June 2021.

(Signed)

Judge Halfeld, Presiding
Juiz de Fora, Brazil

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 13th day of July 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar