UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2021-UNAT-1148

Margaret Mary Fogarty, Robert Sheffer, Monia Spinardi, Astrid Dispert & Minglee Hoe

(Respondents)

v.

Secretary-General
of the International Maritime Organization

(Applicant)

JUDGMENT ON APPLICATIONS FOR INTERPRETATION

Before:	Judge Martha Halfeld, Presiding Judge Graeme Colgan Judge Kanwaldeep Sandhu Judge John Raymond Murphy Judge Dimitrios Raikos Judge Sabine Knierim Judge Jean-François Neven
Case Nos.:	2021-1588 & 2021-1589
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Respondents:	Jordan Howells representing Ms. Fogarty; Ms. Spinardi self-represented; Alex Haines representing Mr. Sheffer, Ms. Dispert and Ms. Hoe
Counsel for Applicant:	Dorota Lost-Sieminska

JUDGE JOHN RAYMOND MURPHY WRITING FOR THE FULL BENCH.

1. The Secretary-General of the International Maritime Organization (IMO) has filed two applications for interpretation in respect of a series of judgments that this Tribunal has issued since 2019 disposing of appeals filed by the current or former IMO staff members. For reasons set out below, we dismiss these applications for interpretation.

Facts and Procedure

2. IMO based in London, United Kingdom, has its own internal justice system. Its structure and procedure are set forth in Article XI of IMO's Staff Regulations and Rules 111.1 and 111.2 of IMO's Staff Rules. An IMO staff member wishing to contest an administrative decision must first write to the Director of IMO's Administrative Division, requesting a reconsideration of the decision. The Director, Administrative Division, is required to first try to resolve the dispute through a dialogue with the staff member. If the dispute is not informally resolved within four weeks, the staff member can submit a written request to IMO's Management Evaluation Panel for a management evaluation of the contested decision. If s/he is not satisfied with, or does not receive, the outcome of the management evaluation, the staff member can appeal the contested decision to IMO's Staff Appeals Board (SAB).

3. The SAB is established by IMO's Secretary-General to advise him in any appeal by staff members against an administrative decision, alleging non-observance of their terms of appointment, including all pertinent regulations and rules, or against a disciplinary action. It consists of 15 Members in three panels: a panel of five Chairmen; a panel of five Members appointed by IMO's Secretary-General; and a panel of five Members elected by the Staff.

4. The SAB is not a standing body. It is established *ad hoc* when IMO receives an appeal. An *ad hoc* SAB has three members with one member selected from each of the three panels. After completing its work, the *ad hoc* SAB submits to the IMO Secretary-General a report, which should provide a written record and a written decision providing reasons on the facts and the law, and must include the *ad hoc* SAB's recommendation advising the IMO Secretary-General as to how he should dispose of the appeal. The IMO Secretary-General then takes a decision in light of the *ad hoc* SAB's recommendation within four weeks of receipt of its report.

5. On 8 February 2010, IMO and the United Nations concluded an Agreement (the UN-IMO Agreement) with the intention of IMO submitting to the jurisdiction of the United Nations Appeals Tribunal (Appeals Tribunal or UNAT) in terms of Article 2(10) of the Statute of the Appeals Tribunal, which reads:

> 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.

6. As discussed more fully later, IMO has had some difficulty in interpreting and understanding the purpose, scope and application of Article 2(10) of the Statute of the Appeals Tribunal. It may assist then at the outset to explain its provisions again.

7. The Statute of the Appeals Tribunal was enacted by the General Assembly of the United Nations. It confers upon the UNAT specific statutory powers to hear appeals from different first instance tribunals. It is clear from all the provisions of the Statute that the UNAT is constituted as an appellate tribunal. Like all appellate bodies, its purpose and function are to hear appeals against decisions rendered by lower, first instance tribunals. An appeal is based on the record of evidence that served before the lower tribunal. Only in the rarest of exceptional cases (as contemplated in Article 2(5) of the Statute of the Appeals Tribunal) will the UNAT admit additional evidence that was not before the first instance tribunal.

8. The essential idea is that all the evidence and argument will be presented before the first instance tribunal which will then render a decision or judgment. The role of the appellate body is then normally not to re-hear the evidence, admit additional evidence or, without more, to provide an opportunity for the case simply to be argued again. Rather, the appellate body has to determine on the record of evidence that served before the first instance tribunal whether the decision of the first instance body was tainted or vitiated by: i) a jurisdictional error; ii) a procedural error; iii) an error of law; or iv) an error of fact, resulting in a manifestly unreasonable decision. In order to carry out its functions, the appellate body needs two things: i) a full and complete record of the evidence that served before the first instance tribunal; and ii) a decision/judgment from the first instance tribunal which sets out coherently the findings of fact and the findings of law upon which its reasons for decision are based. Without a record and without a decision/judgment setting out the findings and reasons an appeal will not be possible.

9. Thus, the clear purpose of Article 2(10) is to confer on the UNAT a special jurisdiction. The provision aims to give the UNAT an authority to make decisions in relation to specialized agencies in addition to its general jurisdiction to hear and determine appeals from the decisions of the United Nations Dispute Tribunals and those of the Standing Committee of the United Nations Joint Staff Pension Board.

10. In keeping with the practical requirements of the task the Appeals Tribunal is mandated to perform, the appellate jurisdiction of the Appeals Tribunal conferred by Article 2(10) may be extended to a specialized agency such as IMO only if the following jurisdictional facts or conditions precedent are established: i) a special agreement must be concluded between the agency and the Secretary-General of the United Nations to accept the terms of the jurisdiction, *consonant with the present statute*, and binding it to the judgments of the UNAT; ii) the agreement will only be binding if the agency utilizes a neutral first instance process; iii) the neutral first instance process must include a written record of all evidence adduced before it; iv) the neutral first instance process must include a written decision; and v) the written decision of the neutral first instance process must provide reasons (findings of fact and law upon which the result is based). The special power conferred by the General Assembly on the UNAT to deal with cases from specialized agencies, therefore, can only be exercised lawfully if the pre-conditions or conditions precedent set by

the General Assembly have been met. The UNAT cannot assume any power or act except in accordance with the jurisdiction conferred upon it by the General Assembly.

11. Article 2(10) concludes with the provision that if the UNAT decides within its powers to remand the case for additional findings of fact, if it determines that further findings of fact are necessary, such remand shall be to the first instance body constituted by the agency to hear the application by the staff member against the decision of which is the subject of appeal.

12. The UN-IMO Agreement includes a representation that IMO "utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law". However, as became evident from the evidence presented in various appeals involving IMO, the decision of IMO's first instance process in terms of its Staff Regulations and Staff Rules (SRSR) was not in substance a decision but was in fact and in law advisory and recommendatory.

13. This unfortunate jurisdictional "disqualifier" is reflected in IMO's SRSR. Article XI of the SRSR governs appeals from the SAB of IMO to this Tribunal. Rule 111.1(a) constitutes the SAB as a "neutral first instance process that includes a written record and a written decision providing reasons, fact and law". Rules 111.1(gg) – (jj), however, indicate that the SAB does not have decision-making power but only recommendatory power. These rules read as follows:

> (gg) The Staff Appeals Board shall adopt its report by majority vote, and submit it to the Secretary-General. The report shall provide a written record and a written decision providing reasons, fact and law, and shall include the Board's recommendation. Votes on the recommendation shall be recorded, and any member of the Board may have his or her dissenting opinions included in the report.
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> (hh) The Staff Appeals Board shall submit its report to the Secretary-General within four weeks after receiving all written submissions and hearing all oral statements concerning the issues before it. The Board may, however, extend this time limit in exceptional circumstances. The report shall take the form of the template set out under the Staff Appeals Board guidelines.
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> (ii) The final decision on the appeal shall be taken by the Secretary-General within four weeks following receipt of the Staff Appeals Board's report, and shall be communicated to the staff member, together with a copy of the Board's report. The

> Secretary-General's decision and a copy of the Board's report shall also be transmitted to the Staff Committee, unless the staff member objects.
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> (jj) To enable staff members to exercise their right to make application to the United Nations Appeals Tribunal (UNAT), the Chairman of the Staff Appeals Board shall, at the request of the staff member, communicate the Board's report to him or her, if the Secretary-General has not made a decision upon the report within four weeks after the date on which the report was submitted.

14. Hence, in terms of these provisions, the ultimate decision in IMO's internal process is made by the Secretary-General of IMO. He is not a neutral first instance process. He is a party (the respondent) in the application brought by the staff member. In the premises, the internal process of IMO does not result in a decision by a neutral first instance process, with the consequence that the UNAT has no jurisdiction to hear an appeal from IMO. And this is the point that requires emphasis and needs repeating. The UNAT cannot render a decision in an appeal from IMO unless the preconditions set by the General Assembly have been complied with. As discussed later, there appear to have been some attempts by IMO to achieve compliance with the requirements of Article 2(10) of the Statute of the Appeals Tribunal, but on the evidence presented in various appeals from IMO it remains unclear to the Appeals Tribunal whether the relevant jurisdictional facts have been fulfilled and it is incumbent on IMO to show with appropriate evidence that they have been.

15. Five judgments of the Appeals Tribunal involving IMO are relevant to the present applications for interpretation: *Sheffer* 2019-UNAT-949; *Spinardi* 2019-UNAT-957; *Dispert & Hoe* 2019-UNAT-958; *Patsy Bello* 2020-UNAT-1074; and *Margaret Mary Fogarty* 2021-UNAT-1117.

16. The judgments of the Appeals Tribunal handed down in 2019 will be referred to as the *Spinardi et al.* Judgments. Mr. Sheffer, Ms. Spinardi, Ms. Dispert and Ms. Hoe are staff members of IMO. They individually requested upward reclassification or upgrade of their posts, but their requests were rejected. They appealed to the SAB in 2018. But the SAB found that the contested decisions had been taken in accordance with the established procedures on classification of posts, and the SAB recommended to the IMO Secretary-General that their respective posts remain at their current levels. The IMO Secretary-General accepted the SAB recommendations and informed those four IMO staff members of his decisions to keep their posts at their current grades. The four IMO staff members filed separate appeals against the

IMO Secretary-General's decisions in light of the SAB's recommendations to the Appeals Tribunal.

17. In the *Spinardi et al.* Judgments, the Appeals Tribunal was not satisfied that the jurisdictional pre-conditions of Article 2(10) of the Appeals Tribunal Statute, in particular the requirement of a decision by a neutral first instance body, had been established and thus remanded the cases to the SAB to resolve the jurisdictional question. The *Spinardi* Judgment summarizes the reasoning that underlined the Appeals Tribunal's decisions to remand as follows:[1]

> … There are fundamental problems with the manner in which the IMO has dealt with Ms. Spinardi's claim for reclassification of her role and with the form of the decision made by the Secretary-General of the IMO. We are concerned that the "decision" appealed from does not appear to conform to the Respondent's jurisdictional requirements under Article XI of its Staff Regulations and Rules. Rule 111.1(a) (Consideration of an Appeal by the Staff Appeals Board) provides that the SAB, as the "first instance neutral process", must provide a "written record" and a "written decision" providing reasons, fact and law. Rule 111.1(b) provides that in cases such as this where the appeal is against an "administrative decision" taken in response to advice received from a technical body such as the Classification Committee, the appeal is to be "limited to the decision taken in response to the advice".
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> … Article XI of IMO's Staff Regulations and Rules is based on the terms of the Agreement between the United Nations and the IMO, which took effect on 1 July 2009 extending the jurisdiction of the Appeals Tribunal to the IMO and in turn, to Article 2(10) of the Statute of this Tribunal, which governs our jurisdiction and powers.
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> … As we understand it, the Secretary-General of the IMO says (and the Staff Regulations and Rules specify) that the SAB is the neutral element in that first instance process. However, even if what was issued by the SAB was a "decision", it was nevertheless only advisory or recommendatory. It gave advice to the Secretary-General of the IMO, who cannot himself be regarded as a neutral part of the process. That is because he is both the employer's representative and the original decision-maker appealed against by Ms. Spinardi. Even if the Respondent's decision is understood to incorporate the SAB's conclusions, or the SAB's recommendation is to be regarded as the decision appealed against, that is also problematic. That is because although the SAB's recommendation may be said, arguably, to include a "written record", it does not provide "reasons, fact and law" as to why Ms. Spinardi was unsuccessful in her claim to have her position regraded.

[1] *Spinardi v. Secretary-General of the International Maritime Organization*, Judgment No. 2019-UNAT-957, paras. 24-27 & 29 (internal footnote omitted).

> … We are not satisfied that these essential elements are present to have constituted a decision by the Respondent and therefore to allow us to consider and decide Ms. Spinardi's appeal.
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> … Therefore, to ensure compliance with the jurisdictional requirements of the IMO's Regulations and Rules, we remand the matter of the appeal to the IMO SAB under Article 2(10) of this Tribunal's Statute. Ms. Spinardi's appeal to the SAB must be reconsidered and decided by a neutral process that produces a written record of the decision-maker's decision, which record includes reasons for that decision, a statement of the relevant facts (about the classification questions) and of the relevant law (affecting those classification questions).

18. The reasoning contains two minor errors of no consequence. Firstly, the remand was in terms of Article 2(3) read with Article 2(10) of the Statute of the Appeals Tribunal - not Article 2(10); and, secondly, the intention of the remand was to afford the SAB an opportunity to ensure compliance with the jurisdictional requirements of Article 2(10) of the Statute of the Appeals Tribunal, not the SRSR of IMO. Hence, the purpose of the remand was for the SAB to establish on appropriate evidence the factual and legal basis of its jurisdiction to render a written decision that might be subject to an appeal to the UNAT in terms of Article 2(10) and to render an appropriate decision on the jurisdictional question accordingly.

19. In *Bello*,[2] the staff member contested before the SAB the decision to place her on sick leave against her wishes and the decision to categorize and record sick leave as service incurred for her injury in 2013 but to not recognize her injury in 2016 as service incurred. The SAB issued its report on 17 January 2020, in which it found that the decision to place Ms. Bello on sick leave had been taken in accordance with the correct procedure, that all her sick leave had been properly calculated and recorded, and that the IMO Administration had timely provided her with information about the procedure to be followed. The SAB dismissed Ms. Bello's appeal.

20. On 21 January 2020, the SAB report was forwarded to Ms. Bello, along with a notification as follows:

[2] *Patsy Bello v. Secretary-General of the International Maritime Organization*, Judgment No. 2020-UNAT-1074.

> Recent jurisprudence of the United Nations Appeals Tribunal (see *Spinardi v. Secretary-General of IMO*, Judgement No. 2019-UNAT-957) means that the current rules applying to the proceedings of the Staff Appeals Board had to be slightly adjusted. Please note that, contrary to previous practice, you will not receive a final decision from the Secretary-General [of IMO]; instead, the attached report by the Staff Appeals Board, which is transmitted to you today, constitutes the final decision. Both you and the Secretary-General [of IMO] can appeal this decision to the United Nations Appeals Tribunal within 90 calendar days of receipt of this decision.

21. On 22 May 2020, Ms. Bello appealed the SAB decision to the Appeals Tribunal. IMO filed the Respondent's Answer on 28 July 2020.

22. On 30 July 2020, the IMO Secretary-General announced to all IMO staff members that IMO would undertake a complete review of the SRSR of IMO in order to ensure that IMO's system complied with recent UNAT jurisprudence.

23. The IMO Secretary-General also announced that pending the completion of the review exercise, which was likely to take time, IMO would partially suspend Staff Rules 111.1 (gg) and (ii) so that the SAB would no longer make recommendations to him regarding the cases before it. Instead, the SAB would serve as a neutral first-instance body and issue decisions in respect to the case, which would be binding on both the staff member and the Organization. The IMO Secretary-General additionally announced that the SAB composition would be changed so that external experts would be appointed as Chair of the SAB as and when it was constituted.

24. In Judgment No. 2020-UNAT-1074 dated 30 October 2020, the Appeals Tribunal dismissed Ms. Bello's appeal and affirmed the SAB decision. The Appeals Tribunal noted:[3]

> The IMO, mindful of the decision of this Tribunal in Judgment No. 2019-UNAT-957, *Spinardi v. Secretary-General of the IMO*, has changed its procedure to ensure compliance with Article 2(10) of the Appeals Tribunal Statute. The SAB no longer merely makes a recommendation. It acts as neutral first instance body and takes a decision providing reasons and making findings of fact and law.

[3] *Ibid.*, footnote 1.

25. This finding was based entirely upon a submission by the IMO in the answer that its appeals processes had been changed "following the UNAT judgments" so as to be in compliance with Article 2(10). The submission was not contested by Ms. Bello and the Appeals Tribunal was not called upon to pronounce on the legality of the changes effected by the Secretary-General of IMO to give effect to the *Spinardi et al* Judgments. A subsequent challenge by counsel in *Fogarty* based on a fuller picture of the evidence, however, revealed that IMO may have been optimistic in its assessment of the legality of the changes made.

26. Ms. Fogarty appealed to the SAB against a decision of IMO's Advisory Board on Compensation Claims holding her illness not to be service incurred. On 28 April 2020, the SAB issued its report dismissing her appeal and confirming that her illness should not be considered as service incurred. Ms. Fogarty appealed the SAB's determination to the Appeals Tribunal. In addition to various other points, counsel for Ms. Fogarty submitted that the Appeals Tribunal did not have jurisdiction in that at the time the SAB took its decision regarding Ms. Fogarty, in April 2020, the SRSR conferred no power on the SAB to make a decision. It only had advisory and recommendatory powers. Moreover, counsel intimated that the decision of IMO (taken in July 2020 after the SAB had issued its report) to "partially suspend" the applicable rules was ineffective because the Secretary-General of IMO had no power to partially suspend or amend the Staff Rules and the amendment did not operate retrospectively.

27. In its Judgment in *Fogarty*, the Appeals Tribunal explained that it was not possible on the evidence and arguments presented by counsel for Ms. Fogarty to determine whether it had jurisdiction to hear the appeal. In paragraphs 29-30 of its Judgment, the Appeals Tribunal stated:[4]

> … This Tribunal is sympathetic to the point of view of the Secretary-General of the IMO. But unfortunately the facts do not disclose whether he had the power to amend the powers of the SAB retrospectively (through partial suspension or otherwise) to permit the SAB to make a decision rather than a recommendation or, more pertinently, by subsequent fiat to convert a recommendation made by the SAB on 28 April 2020 into a decision

[4] *Margaret Mary Fogarty v. Secretary-General of the International Maritime Organization*, Judgment No. 2021-UNAT-1117, paras. 29-30.

> … The requirement of authority is a fundamental precept of the constitutional principle of legality. The first principle of administrative law (and of the rule of law) is that the exercise of power must be authorised by law. It is central to the conception of the constitutional order that administrators in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. Whether the Secretary-General of the IMO has the power to amend the Staff Regulations and Rules is a mixed question of law and fact. He either has the power or not. The source, nature, conditions precedent and extent of that power (if it in fact exists) will be questions of law.

28. Later in the Judgment, the Appeals Tribunal concluded:[5]

> … In the final analysis, the difficulty remains that at the time it made its report, in April 2020, the SAB did not have the power to take a decision in relation to Ms. Fogarty's appeal that was appealable to this Tribunal. The question arising, as explained, is whether its recommendation has now retrospectively been converted by the action of the Secretary-General of the IMO to a decision. Alternatively, it may be argued that the SAB has the power to re-visit its earlier recommendations and to convert them to decisions as a consequence of the Secretary-General of the IMO's administrative or regulatory action of 30 July 2020. If the SAB does not have such power, either because the decision of the Secretary-General of the IMO was an invalid exercise of the power of amendment, was not retroactive, or the SAB is *functus officio*, the SAB has only advisory powers, and the logical consequence of the argument made by counsel for Ms. Fogarty is that her appeal may not be receivable by this Tribunal.
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> … *The evidence and submissions on record are insufficient to determine these issues*. As the resolution of these questions is likely to impact on other appeals from the IMO (besides that of Ms. Fogarty), it will be prudent to remand the decisive jurisdictional questions to the SAB (in terms of Article 2(3) of the Appeals Tribunal's Statute) for proper ventilation on full facts with more thorough legal argument. The question for determination by the SAB is whether it had, or now has, the jurisdiction/power to take a decision (rather than make a mere recommendation) in relation to Ms. Fogarty's appeal.

29. The purpose of the remand was straightforward. It directed the SAB to set out findings of fact and law to support its assumption of jurisdiction to make a decision. The SAB needs to elucidate the factual and legal basis of its jurisdiction to render a decision when the express language and context of the Staff Rules in their present form give it no power,

[5] *Ibid*., paras. 35-36 (Emphasis added).

jurisdiction or right to do anything but make a recommendation. It may be that the SAB does indeed have a factual and legal basis for its assumption of jurisdiction to render a decision. However, it still needs to make the case. The Appeals Tribunal in *Fogarty* had insufficient information before it to decide the issue.

30. The issue goes beyond procedural irregularity; it is a fundamental question of jurisdiction. It was not possible for the Appeals Tribunal to determine on the facts whether the decision in relation to Ms. Fogarty was lawful and thus whether the Appeals Tribunal had jurisdiction to hear and determine an appeal in relation to any decision. Thus, the necessity for a remand. The SAB is required to consider the evidence and arguments and to make appropriate findings explaining to the Appeals Tribunal the basis of its jurisdiction to make a decision.

31. On 24 July 2021, the IMO Secretary-General filed two applications for interpretation, one (registered as Case No. 2021-1588) in respect of Judgment No. 2021-UNAT-1117 (*Fogarty*) and the other (registered as Case No. 2021-1589) in respect of the *Spinardi et al.* Judgments. Ms. Fogarty and Ms. Spinardi filed individual comments on 27 August 2021 and 4 August 2021, respectively. Mr. Sheffer, Ms. Dispert and Ms. Hoe filed joint comments on 27 August 2021.

Submissions

The IMO Secretary-General's Submissions

32. The IMO Secretary-General requests clarity and assistance in the interpretation of the various judgments involving IMO.

33. IMO interpreted the *Spinardi et al.* Judgments as having rendered the relevant IMO Staff Rules in respect of the advisory role of the SAB void forthwith and having granted the SAB the decision-making power with an immediate effect. The SAB interpreted the Appeals Tribunal's remand of those cases as, effectively, a direct instruction to the SAB to issue a decision instead of a recommendation. The issuance of those judgments, the Secretary-General of IMO submits, relying on the judgment of the Appeals Tribunal in *Kasmani*,[6] rendered the relevant IMO Staff Rules void. On the basis of that understanding of

[6] *Kasmani v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-064.

the *Spinardi et al.* Judgments, the SAB began to issue final decisions and not recommendations. But in *Fogarty*, the Appeals Tribunal appeared to disagree to the SAB's interpretation, as it seemed to say that the IMO Secretary-General should have amended Staff Rule 111.1 (gg) and (ii) before the SAB continued operating. Consequently, the SAB believed it derived its authority to issue final decisions from those UNAT decisions. The IMO Secretary-General requests advice about whether his understanding is correct.

34. In paragraph 25 of the *Fogarty* Judgment, the Appeals Tribunal stated that the efforts by the IMO Secretary-General to adopt interim measures including suspending the operation of parts of Staff Rule 111.1 and appointing external experts as Chair of the SAB "may be a sufficient means of prospectively bringing the internal processes into line with the requirements of Article 2(1) of the Appeals Tribunal's Statute". The IMO Secretary-General is seeking clarification of the UNAT's instruction and asks whether any additional reform of IMO's internal justice system is required.

35. The IMO Secretary-General clarifies that while he has the power to amend Staff Rules, he must seek the approval of the Council, the legislative body of IMO, for the budget to implement the Staff Rules, as the reform of IMO's justice system will have major cost implications.

36. The IMO Secretary-General is requesting that the UNAT clarify the meaning of its reference to the "constitutional principle of legality" and the "rule of law" in paragraph 30 of the *Fogarty* Judgment. He seeks clarification about the effect of the UNAT's decisions on IMO's regulatory framework, when they do not leave room for regulatory discretion, and asks what authority the Appeals Tribunal has over the SAB.

37. In paragraphs 36 and 37 of the *Fogarty* Judgment, the Appeals Tribunal remanded the jurisdictional questions to the SAB. As the SAB is established *ad hoc* when an appeal is received, the Secretary-General of IMO asks whether the *Fogarty* case should be remanded to the original SAB or the SAB established under the current interim procedures with an external expert as Chair.

38. Finally, the IMO Secretary-General requests that the first sentence of paragraph 17 of the *Fogarty* Judgment, which was an erroneous summary of his answer, be replaced to read: "The Secretary-General of the IMO submits further that the SAB found that the illness was not directly caused by her work – meaning that it was not service incurred."

Comments of the Staff Members

39. Ms. Fogarty submits that IMO has misunderstood the meaning of *Kasmani*[7] when it asserted that the *Spinardi et al.* Judgments directly changed IMO's written law. The Appeals Tribunal does not write the laws of the organizations over which it exercises jurisdiction. Where a provision is adjudicated unlawful, it is so from the date on which the judgment is rendered, and it falls on the organization's appropriate body to amend the offending provision to make it lawful. There is no "tension" between *Spinardi et al.* and *Kasmani.*

40. IMO ignored or failed to understand that, after the *Spinardi et al.* cases were remanded to the SAB, IMO must first amend the SRSR or take interim measures before the SAB considered the remanded cases. When the SAB decided the *Fogarty* case, IMO had neither changed the law nor taken any interim action. There is also no "tension" between *Spinardi et al.* and *Bello*, as Ms. Bello did not know to challenge the lawfulness of the SAB and the Appeals Tribunal naturally took IMO's representations at face value.

41. Ms. Fogarty maintains that the issue as to whether an interim memorandum issued by the IMO Secretary-General may be capable of changing the Staff Rules is a matter for legal argument, but it has not yet been argued in her case, because the contested decision was taken by the old recommendation-making SAB, before the interim measures were promulgated. The fact that this remains a live issue is not the fault of the Appeals Tribunal or the staff members who bring cases, but of IMO, which has had to make legislative changes since 2019.

[7] *Kasmani*, *op cit*. Judgment.

42. Ms. Fogarty stresses that, in respect to the question as to which SAB the Appeals Tribunal should remand the IMO cases, IMO was required to make changes to the SAB composition because the original SAB was not lawful. As it was not fit for the purpose then, the original SAB is not fit to be resurrected now.

43. Ms. Fogarty finally requests the Appeals Tribunal award costs in the amount of £1,500 against IMO pursuant to Article 9(2) of its Statute for its misrepresentations to the UNAT and the unnecessary cost those misrepresentations have put on her in appealing to the Appeals Tribunal and responding to IMO's application for interpretation.

44. Ms. Spinardi attaches two decisions issued by the SAB on her remanded case, one dated 30 June 2021 and the other dated 28 July 2021. According to Ms. Spinardi, the SAB, which was reconstituted fulfilling the jurisdictional requirements of neutrality, ordered a reclassification of her post within two months of 30 June 2021 by a differently constituted Classification Committee. She requests that the Appeals Tribunal take note of those SAB orders during the review of the IMO Secretary-General's application for interpretation.

45. IMO has filed the application for interpretation in order to know whether the decision-making nature of the SAB starts from the date of the *Spinardi et al.* Judgments or a later date. It is an error for IMO to assert that the *Spinardi et al.* Judgments changed its internal law with a "direct effect". IMO confuses "taking effect immediately on the date the judgments are rendered" with "direct effect". The Appeals Tribunal can declare IMO's internal rules and regulations unlawful and order it to correct the offending provision(s), but it cannot "directly" amend an IMO law. From the moment the *Spinardi et al.* Judgments were issued, IMO was under a legal duty to correct its unlawful internal justice system. The unlawfulness perpetuated until and unless IMO corrected that illegality. Because IMO refused to amend, or at least suspend, Staff Rules 111.1 (gg) and (ii), the cases of *Fogarty* and *Bello* as well as *Barbato* were heard by an unlawfully constituted SAB, and were decided by the lay IMO staff members without any legislative change to the internal system or legal authority.

46. IMO continues to resort to a tactic of delay in an attempt to starve out staff members. Mr. Sheffer was successful in his case before the lawfully constituted SAB in 2021, but IMO has lodged an appeal with the Appeals Tribunal contesting that SAB decision in Mr. Sheffer's favor. IMO refuses to accept any findings that go against the Organization and uses the

available procedure to avoid having to act on the remedy ordered by Judge Meeran, Chair of the newly constituted SAB. IMO has still not refunded the legal costs of Mr. Sheffer, Ms. Dispert and Ms. Hoe following the *Spinardi et al.* Judgments, or Mr. Sheffer's costs following his successful case thereafter.

47. In the *Bello* case, the Appeals Tribunal was misled and took IMO's words at face value that IMO had changed its procedure. At the time of *Bello*, the procedure had not been changed. Indeed, not even an interim memorandum existed.

Considerations

48. In terms of Article 10(6) of the Statute of the Appeals Tribunal, the judgments of the Appeals Tribunal are final and without appeal, subject to the provisions of Article 11, which provides, in Article 11(3), that either party may apply to the Appeals Tribunal for an interpretation of the meaning or scope of the judgment. Article 25 of the Rules of Procedure of the Appeals Tribunal requires the Appeals Tribunal to decide if any such application for interpretation is admissible and, if so, to issue its interpretation.

49. Following our jurisprudence, an application for interpretation will be admitted only if the meaning or scope of a judgment is unclear or ambiguous.[8] Interpretation is only needed to clarify the meaning of a judgment when it leaves reasonable doubts about the will of the Tribunal or the arguments leading to a decision. But if the judgment is comprehensible, whatever the opinion the parties may have about it or its reasoning, an application for interpretation is not admissible.

50. In *Kasmani,* the Appeals Tribunal, after commenting on the nature and purpose of applications for interpretation, held that an application for interpretation is not receivable if its actual purpose is to contest a final judgment or to obtain comments on that judgment. It is only admissible if the wording of the judgment is not sufficiently clear, owing to ambiguity or incoherence, such that a party might, in good faith, be unsure of the meaning or scope of that judgment.

[8] *Clemente v. United Nations Joint Staff Pension Board*, Judgment No. 2020-UNAT-997, paras. 8-13.

51. The applications of the IMO Secretary-General disclose some misunderstanding and, in some respects, seek legal advice. It is not the role of the Appeals Tribunal to offer legal advice to parties who appear before it. Its function is to render decisions in contested disputes as defined on the pleadings in a particular appeal.

52. The Judgments of this Tribunal in *Spinardi et al.* and *Fogarty* are clear, unambiguous and of narrow effect. In both instances, the Appeals Tribunal merely directed the SAB to render lawful decisions and to explain the factual and legal basis upon which it acted.

53. That IMO and the SAB may be uncertain about the legal provisions authorising the actions of the SAB does not justify an application for interpretation. These are matters for legal advice. In the final analysis, the defects in the internal legal framework exposed by the litigation call for new effective Staff Regulations and Staff Rules to be formulated and enacted in terms of IMO's applicable power of amendment.

54. The first question raised by the Secretary-General of IMO in relation to *Fogarty* is whether the Appeals Tribunal considers that the SAB did not have power to take a decision even though it was instructed to do so by the Appeals Tribunal in *Spinardi et al.* The short answer to that question is that the Appeals Tribunal does not know. That is why it remanded the matter to the SAB. The question can only be answered when the SAB provides the Appeals Tribunal with its reasons setting out its findings of fact and law on the question of its jurisdiction. As counsel for Ms. Fogarty contends, the issue remains a live controversy that requires evidence, argument and determination by the SAB in accordance with the decisions of the Appeals Tribunal remanding the issue to the SAB.

55. Relying on *Kasmani*, the Secretary-General of IMO suggests that the *Spinardi et al.* Judgments rendered the relevant Staff Rules void and removed the power of the Secretary-General of IMO to make a decision with an immediate effect. In the application for interpretation in relation to *Spinardi et al.*, he asks whether the *Spinardi et al* Judgments result in the SAB acquiring a power to take a decision from the instruction of the Appeals Tribunal. The Judgments in *Spinardi* et al. or *Fogarty* do not set aside any of the Staff Rules; nor do they order the SAB to assume a power it otherwise did not have. The Appeals Tribunal merely directed the SAB to act with appropriate authority and to clarify the basis of its jurisdiction.

56. The Secretary-General's reliance on *Kasmani* is misplaced. Besides stating the principles applicable to applications for interpretation, the Appeals Tribunal in *Kasmani* solely clarified that its judgments generally take effect immediately on the date they are rendered. The obligations imposed on the administration by a judgment are executable on the date it receives notice; on that same date, it may also exercise any rights conferred on it by the judgment. This pronouncement has no immediate relevance to a judicial direction to the SAB to determine whether it has jurisdiction to make a decision rather than a mere recommendation. The direction to the SAB to do what is legally necessary to comply with the jurisdictional requirements conferred no rights or additional powers on the SAB or the Secretary-General of IMO.

57. Moreover, it is more than doubtful that the Appeals Tribunal has power to set aside any provision of the SRSR or that its judgments may impliedly amend them. In terms of Article 9 of the Statute of Appeals Tribunal, the Appeals Tribunal may only rescind an administrative decision, order specific performance or grant compensation. It may also decline to receive an appeal in terms of Article 7 of the Statute of the Appeals Tribunal where it is not competent to hear and determine the appeal. *Kasmani* is not authority for the proposition that judgments of the Appeals Tribunal impliedly amend the Rules and Regulations of an entity. As just said, it held only that judgments of the Appeals Tribunal take effect and are executable immediately. That finding is of no relevance at all in relation to the question of whether the SAB has jurisdiction to take a decision when the SRSR appear to limit it to making a recommendation. If regulatory measures are required to empower the SAB to take action which engages the appellate jurisdiction, then the relevant body or functionary of IMO with the requisite authority must do the necessary to enable the SAB to render a decision rather than a recommendation.

58. There is no inconsistency between *Fogarty* and *Spinardi et al.* In *Spinardi et al.*, the Appeals Tribunal expressly stated that it was remanding the matter "to ensure compliance with the jurisdictional requirements". It directed that the appeals to the SAB be decided by a neutral first instance process that produced a written decision. In *Fogarty*, the Appeals Tribunal (with more evidence at its disposal regarding the attempts by IMO to achieve compliance) directed the SAB to make the necessary factual and legal findings (in light of the steps taken by the Secretary-General of IMO) to sustain its claim that its action was a decision and not a recommendation. There is no ambiguity or uncertainty in either

judgment, or any conflict between them. With all due respect, the fact that IMO faces difficulty on how best to amend its internal law to comply with the requirements of legality does not justify an application for interpretation. The Secretary-General of IMO is essentially seeking comments on the judgment under the guise of an application for interpretation; something the Appeals Tribunal expressly proscribed in *Kasmani*.

59. The Secretary-General of IMO maintains that, in *Bello*, the Appeals Tribunal accepted that the SAB no longer made a recommendation but a final decision. The issue of the power of the SAB to make a decision was not pertinently raised or argued in *Bello*. The Appeals Tribunal proceeded on the basis of an undisputed factual assertion (which may yet prove to be correct) and an evidential presumption of validity (*omnia praesumuntur rite esse acta*) which assumes that administrative and quasi-judicial decisions are in compliance with the principle of legality until determined otherwise. The question of legality was raised squarely on the pleadings for the first time in *Fogarty*. The Judgment in *Fogarty* clearly and unambiguously explicates the nature of the difficulty in a manner that requires no further interpretation.

60. Be that as it may, it remains open to the SAB, when dealing with the question remanded to it in *Fogarty*, to make the argument that the orders of the Appeals Tribunal rendered certain of the SRSR void and nugatory even though no pronouncement concerning the legality of the Staff Rules was made in either judgment. Such an argument could conceivably be made, but before making it, IMO would be well advised to seek expert legal advice on whether it is sustainable on the facts and on the law. As said but worth repeating, there is nothing in the judgments pronouncing on the legality of the SRSR. Both judgments merely bring into question the legality of the "decisions" of the SAB and direct that the jurisdictional bases of the decisions be clarified. There is no ambiguity, uncertainty or irreconcilable conflict on the question remanded or the reasons for the remand that justifies an application for interpretation.

61. The Secretary-General of IMO refers to paragraph 25 of the Judgment in *Fogarty*, in which it is stated that his efforts to amend the SRSR "may be a sufficient means of prospectively bringing the internal processes into line with the requirements of Article 2(1) of the Appeals Tribunal's Statute". He asks for clarity on what is meant by "may be sufficient" and wants advice on whether any additional reform of IMO's internal justice system is required. These too are matters for legal advice. Whether the mentioned steps taken by the

Secretary-General of IMO are sufficient may yet prove to be contentious and disputed in a future appeal or in the determination of the remanded jurisdictional question. The comment in paragraph 25 of the *Fogarty* Judgment merely contextually frames the jurisdictional problem of decisions taken by the SAB any time before the Secretary-General of IMO issued the memorandum purporting to suspend the relevant SRSR. The steps taken may or may not be sufficient in respect of future decisions by the SAB, depending on whether they accord with the principle of legality. No ambiguity or uncertainty flows from the comment requiring further interpretation.

62. The Secretary-General of IMO recognizes that he may not have the power to amend the IMO Staff Rules retrospectively – although that may be open to debate. As stated in paragraph 34 of the *Fogarty* Judgment, there may be no objection to retrospective amendments that are procedural in nature or benefit all staff members. But once again, that is a matter on which the Secretary-General of IMO could perhaps seek legal advice. Insofar as there are legal restraints or limitations on his power in terms of the SRSR to make amendments, no amendment will be legally effective until the power of amendment is exercised in compliance with those restraints or limitations. As discussed, the assumption by the Secretary-General of IMO that the SAB acquired legal authority from the judgments of the Appeals Tribunal is at best doubtful, though, as said, he and the SAB are free to make the argument when they address the jurisdictional question remanded to the SAB for determination. What the Secretary-General of IMO may not do is seek to argue the remanded jurisdictional issue in an application for interpretation. Unresolved matters of legal debate are not ambiguities or uncertainties in a judgment that require interpretation.

63. In paragraph 7 of the application for interpretation in relation to the *Fogarty* Judgment, the Secretary-General of IMO makes the following observation:

> In paragraph 30, the [Appeals] Tribunal refers to the principle of legality and the rule of law. In the absence of a constitutional document expressly prescribing the powers of UNAT as the judiciary and the Secretary-General [of IMO] as the legislator, it is difficult to understand what exactly the [Appeals] Tribunal means. The [Appeals] Tribunal refers to the fact that administrators are constrained by law. The SAB is not an administrator; it is the judiciary. The Applicant seeks clarity on the effect of the [Appeals] Tribunal's decisions on the Organization's regulatory framework when a judgment does not leave room for regulatory discretion. Further, clarity is sought on UNAT's authority vis-à-vis the SAB.

64. This observation, again with the greatest of respect, displays a measure of conceptual confusion that may lie at the heart of these unmeritorious applications for interpretation and probably accounts for the decision to bring them. The reasoning discloses elemental errors about the nature of the dispute resolution system, a failure to grasp the principle of legality and a misapprehension of the jurisdictional problem facing the SAB.

65. First of all, the UNAT, as explained, has only the powers conferred upon it by General Assembly in the Statute of the Appeals Tribunal. Its authority in relation to the SAB is to hear appeals against its decisions (not its recommendations) and to determine whether there has been a jurisdictional, procedural, legal or factual error and, if so, to grant any relief which, in its discretion, it is empowered by the Statute to grant. The authority of the SAB to make a decision is determined by the SRSR enacted by the appropriately empowered rule-maker (the Secretary-General of IMO, the Council or whosoever else).

66. Secondly, the principle of legality, derived from the doctrine of the rule of law, is an elemental principle that underpins the basic proposition that the exercise of power must be lawful. Unlawful exercises of power are ordinarily not countenanced by courts and tribunals. Administrators (like the Secretary-General of IMO) have no inherent powers. Every incident of power (such as the power to amend the SRSR) must be inferred from a lawfully empowering source, in this case some internal legislative instrument of IMO.

67. The SAB has no power to amend the legislative document that authorizes it to make recommendations or merely to decide that its recommendations henceforth will be decisions. It is an administrative tribunal with quasi-judicial powers to determine appeals by staff members in relation to decisions affecting their rights. The law-making authority to establish and delineate its jurisdiction vests elsewhere. It too may exercise no power and perform no function beyond that conferred by the law (the SRSR). At risk of repetition, the express provisions of the SRSR confer upon the SAB a power to make a recommendation not a decision. If the SAB acts without legislatively authorised power its action will violate the principle of legality. Again, exercises of power must be authorised and exercised lawfully. As stated unambiguously in paragraph 30 of the *Fogarty* Judgment, the requirement of authority is a fundamental precept of the principle of legality.

68. The jurisdictional question for determination (which the Secretary-General of IMO appears not to grasp) is whether a power has been lawfully exercised by him or some other body to amend the SRSR (in accordance with the principle of legality) so as to confer on the SAB a power to make a decision in future disputes and through its retrospective application has converted previous and pending recommendations to decisions. If not, there is no "decision" in *Fogarty* and *Spinardi et al.* and the Appeals Tribunal will not have jurisdiction in terms of Article 2(10) of its Statute – a jurisdictional defect that most probably will be very easily cured by a retrospective amendment properly formulated and enacted on the basis of sound, professional, expert, legal advice.

69. In the *Fogarty* Judgment, the Appeals Tribunal remanded the jurisdictional question to the SAB directing it to make findings of fact and law backing its assumption of authority to make a decision rather than a mere recommendation. The Secretary-General of IMO has requested clarity as to which SAB the matter was remanded. The answer is plain enough: the SAB that made the purported decision. There is no ambiguity or uncertainty at all in that regard. The fact that the SAB panels are constituted on an *ad hoc* basis does not change that. It is obvious from the Judgment that the intention is for the body that took the decision to explicate the jurisdictional basis upon which it did so.

70. The Secretary-General of IMO has pointed out an error in paragraph 17 of the *Fogarty* Judgment which incorrectly records his submission as follows: "The Secretary-General of the IMO submits further that the SAB did not err in finding that Ms. Fogarty's illness was directly caused by her work - meaning that it was service incurred." The statement is obviously incorrect. The Secretary-General of IMO in fact submitted that the SAB did not err in finding that the illness "was *not* directly caused by her work - meaning that it was *not* service incurred". Article 11(2) of the Statute of the UNAT provides that clerical errors or errors in a judgment arising from any accidental slip or omission may be corrected by the Appeals Tribunal, either on its own motion or on an application of any party. The Registry is accordingly directed to amend the error in paragraph 17 of the *Fogarty* Judgment to reflect the submission of the Secretary-General of IMO correctly.

71. With regard to the question of costs, in terms of Article 9(2) of the Statute of the Appeals Tribunal, the Appeals Tribunal may only award costs where a party has manifestly abused the appeals process. While the applications for interpretation may be misplaced, they do not constitute a manifest abuse. The different judgments introduced a measure of

nuanced legal debate which led to understandable confusion. In the circumstances, an award of costs is not justifiable.

Judgment

72. The applications for interpretation are not admissible and are dismissed.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)	*(Signed)*	*(Signed)*
Judge Halfeld, Presiding Juiz de Fora, Brazil	Judge Colgan Auckland, New Zealand	Judge Sandhu Vancouver, Canada
(Signed)	*(Signed)*	*(Signed)*
Judge Murphy Cape Town, South Africa	Judge Raikos Athens, Greece	Judge Knierim Hamburg, Germany

(Signed)

Judge Neven
Brussels, Belgium

Entered in the Register on this 19th day of November 2021 in New York, United States.

(Signed)

Weicheng Lin, Registrar