



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/083  
UNDT/GVA/2018/084  
UNDT/GVA/2018/085  
Order No.: 128 (GVA/2018)  
Date: 20 August 2018  
Original: English

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**Before:** Judge Teresa Bravo  
Judge Rowan Downing

**Registry:** Geneva

**Registrar:** René M. Vargas M.

CHAOUI, KALOTAY & RICHARDS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**ORDER  
ON RECUSAL**

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**Counsel for Applicants:**

Me Jean Didier Sicault

**Counsel for Respondent:**

HRLU/UNOG

## **Introduction**

1. By applications filed on 26 July 2018, the Applicants, based in Geneva and working for the United Nations Secretariat, request the rescission of the decision to implement a post adjustment change in the Geneva duty station which results in a pay cut.
2. The applications were registered under Cases Nos. UNDT/GVA/2018/083, UNDT/GVA/2018/084 and UNDT/GVA/2018/085, and assigned to one of the undersigned Judges, namely, to Judge Teresa Bravo.

## **Consideration**

3. As a preliminary matter, the Tribunal recalls that judges serving on the Dispute Tribunal, although not staff members of the Organization, are treated as such, being compensated in the same manner as staff members, with salaries and allowances equivalent to the D-2 level, following the recommendations of the Secretary-General to the General Assembly<sup>1</sup>.
4. As a result, the undersigned Judges' conditions of service are not independent of the United Nations staff salary system and, hence, are subject to the same modifications as those affecting staff members based in the Geneva duty station.
5. The undersigned Judges also receive a monthly post adjustment sum that has been affected by the Organization's decision to implement a reduction in the post adjustment amount.
6. This places the undersigned Judges in the same situation as the Applicants and other staff members in the Geneva duty station, and raises fundamental questions of conflict of interest and judicial independence.

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<sup>1</sup> See para. 83 of A/63/314, Administration of justice at the United Nations, Report of the Secretary-General, para. 30 of A/RES/63/253, General Assembly Resolution on the Administration of justice at the United Nations.

*Conflict of Interest*

7. Article 27(1) of the Dispute Tribunal's Rules of Procedure provides that:

1. The term "conflict of interest" means any factor that may impair or reasonably give the appearance of impairing the ability of a judge to independently and impartially adjudicate a case assigned to him or her.

2. A conflict of interest arises where a case assigned to a judge involves any of the following:

...

(c) Any other circumstances that would make it appear to a reasonable and impartial observer that the judge's participation in the adjudication of the matter would be inappropriate.

8. From the circumstances of this case, it is clear that any external and impartial observer would consider it inappropriate for the undersigned Judges to adjudicate over this matter.

9. Additionally, pursuant to art. 2(e) of the Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, adopted by the General Assembly in resolution A/RES/66/106, "[j]udges must disclose to the parties in good time any matter that could reasonably be perceived to give rise to an application for recusal in a particular matter".

10. In light of the foregoing, the undersigned Judges disclose to the parties that due to the nature of their conditions of service with the United Nations, they are personally affected by the reduction of the post adjustment sum in the Geneva duty station, thus placing them in a position of conflict of interest.

*Judicial Independence*

11. Article 4(8) of the Tribunal's Statute provides that "[a] judge of the Dispute Tribunal shall serve in his or her personal capacity and enjoy full independence".

12. Judicial independence is a status or a relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions. It comprises of three core characteristics: security of tenure, financial security and administrative independence.<sup>2</sup>

13. Judicial independence has become an overall international legal principle, consecrated in the majority of democratic countries as a fair trial right, at a constitutional level, and this also applies to the United Nations.

14. The Universal Declaration of Human Rights provides in article 10 that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal”. This provision on the right to a fair trial has become an accepted norm of customary international law that is binding not only on Member States but also on the Organization.

15. In 1985, the United Nations General Assembly endorsed the *Basic Principles on the Independence of the Judiciary*, which outlines the fundamental elements of the independence of the judiciary.<sup>3</sup> These basic elements include:

#### **Conditions of service and tenure**

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

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<sup>2</sup> See Justice Le Dain’s words in *Valente vs. The Queen*, [1985] 2 SCR 673 at 687 & 689.

<sup>3</sup> A/RES/40/32 and A/RES/40/146. The Principles were originally adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, August, 1985.

16. The inclusion of these “conditions of service”, in the context of a broader document regarding independence of the judiciary, is evidence that judges’ remuneration should be secured by law and not subject to administrative processes and interference because they are of a constitutional nature.

17. A panel of experts, including at least two United Nations experts proposed a set of principles to be applied as appropriate to *ad hoc* judges, *ad litem* judges and part-time judges, to international arbitral proceedings and to other exercises of international judicial power. These principles, among others, include norms on the conditions of service and remuneration of the judges working in the international tribunals:

#### **4. Service and remuneration**

4.1 Judges’ essential conditions of service shall be enumerated in legally binding instruments.

4.2 No adverse changes shall be introduced with regard to judges’ remuneration and other essential conditions of service during their terms of office.<sup>4</sup>

18. In Order No. 113 (GVA/2017) *Lloret Alcaniz*, the Judge was faced with an almost similar situation while handling a case of a staff member challenging the Organization’s decision to reduce her contracted salary. After making a finding of the existence of conflict of interest, the Tribunal made the following pronouncement:

If the judges of the Dispute Tribunal had their conditions of service determined independently, not having their remuneration linked to that of staff members, this matter would not have arisen. It is noted that independence is not for the benefit of the judges of the Dispute Tribunal, but rather for the benefit of those they serve. As Dickson CJ of the Supreme Court of Canada noted in *The Queen v. Beauregard*, [1986] 2 S.C.R. 56 at para. 30 “[t]he role of the courts as resolver of disputes, interpreter of the law and defender of the

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<sup>4</sup> See The Burgh House Principles on the Independence of the International Judiciary, drafted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals in Association with the Project on International Courts and Tribunals, [http://www.ucl.ac.uk/laws/cict/docs/burgh\\_final\\_21204.pdf](http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf)

Constitution requires that they be completely separate in authority and function from all other participants in the justice system”.

19. It is unfortunate that this situation persists and the judges of the Dispute Tribunal continue to be affected by decisions of the Organization on its staff members, owing to the fact that the judges lack separate and independently determined conditions of service. This, in effect, deprives the judges of the Dispute Tribunal of the “full independence” provided for in the Tribunal’s Statute.

20. The Chief Justice of Canada in *re Remuneration of Judges of the Provincial Court of Prince Edward Island*,<sup>5</sup> explained the importance of judicial independence in the following terms:

Judicial independence is valued, because it serves important societal goals it is a means to secure those goals. One of these goals is the maintenance of public confidence in the impartiality of the judiciary, which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal, served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.

21. Consequently, in the interests of the rule of law, transparency, impartiality and respect for the ethical principles that behove the judicial mandate, the undersigned Judges have no other option but to recuse themselves from the cases at hand.

22. Article 28(1) of the Dispute Tribunal’s Rules of Procedure, provides that:

A judge of the Dispute Tribunal who has or appears to have a conflict of interest as defined in article 27 of the rules of procedure shall recuse himself or herself from the case and shall so inform the President.

23. Recusal by judges is a matter of significance. It is unsatisfactory that should occur as a result of the very nature of the establishment of the Tribunal, a matter

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<sup>5</sup> Judgments of the Supreme Court of Canada, [1997] 3 SCR 3, at paras 9-10.

which has been previously drawn to the attention of the General Assembly and the Secretary-General.

**Conclusion**

24. In view of the foregoing, IT IS ORDERED THAT:

The present case shall be referred to the Judge President of the United Nations Dispute Tribunal pursuant to article 28(1) of the Tribunal's Rules of Procedure, informing her of the undersigned Judges' recusal.

*(Signed)*

Judge Teresa Bravo

Dated this 20<sup>th</sup> day of August 2018

*(Signed)*

Judge Rowan Downing

Dated this 20<sup>th</sup> day of August 2018

Entered in the Register on this 20<sup>th</sup> day of August 2018

*(Signed)*

René M. Vargas M., Registrar, Geneva