UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2009/039/ JAB/2008/080 UNDT/NY/2009/117
Order No.:	59 (NY/2010)/Rev.1
Date:	26 March 2010
Original:	English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

BERTUCCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

RULING ON PRODUCTION OF DOCUMENTS

Counsel for applicant:
Francois Loriot

Counsel for respondent:
Susan Maddox, ALS

Introduction

1. This case concerns the legality of a selection process for the post of Assistant Secretary-General (ASG) in the Department of Economic and Social Affairs (DESA). The applicant was a staff member who responded to a Galaxy advertisement. He was short-listed but not selected. The history of the matter is sufficiently set out in my reasons for Order No. 40 (NY/2010) and it is not necessary to set out again. The applicant had sought, during case management by the Dispute Tribunal, access to certain documents claimed to be relevant. The respondent submitted that the documents were necessarily irrelevant on the ground that the Secretary-General's decision appointing an ASG was comparable to that of a head of state appointing cabinet level officials who is accountable politically but not judicially, so that the Secretary-General's decision here was "not justiciable" and, since "the decision is not one that is open to challenge", the documents could not be relevant. It was also submitted that, at all events, the documents were privileged from production. I gave a comprehensive explanation as to why these submissions were without merit and ordered production in the following terms –

> 1 The respondent is to produce to the Tribunal by close of business Friday, 5 March 2010 the documents considered by the Selection Committee, the records of the deliberations of the Committee and any communication by it to the Secretary-General together with the documents prepared by officials in the EOSG relating to the appointment of the ASG/DESA.
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> 2 I will then determine what parts, if any, should be disclosed to the applicant and under what conditions. Before granting access, if any, the respondent will be notified of those parts intended to be disclosed and invited to make a confidential submission giving particular reasons why, it is contended, access to an identified part should not be granted.

2. On 7 March 2010 the respondent filed a submission stating that it declined to produce the documents requested, for the reasons set out in its previous submissions. No stay of my order was sought, nor was there any suggestion that the Order was a

judgment within the meaning of art 11.3 of the Dispute Tribunal's Statute, which states that, "[i]n the absence of … appeal … [judgments] shall be executable following the expiry of the time provided for appeal in the Statute of the Appeals Tribunal", namely 45 days (art 7(1)(c)). (The Dispute Tribunal's Statute will be referred to as DTS and the Appeals Tribunal's Statute as ATS.) The matter was set down for further hearing on 8 March 2010, in which I gave an *ex tempore* ruling. This ruling has been published and it is unnecessary to set out again here. I referred to several judgments of the UN Administrative Tribunal which stated in unequivocal terms the legal obligation of the parties, the respondent in particular, to obey the orders of the Tribunal. The Administrative Tribunal did not discuss the legal consequences of disobedience except in respect of particular cases and then only in relation to the evidentiary result of the non-admission of the material illegally not produced. Of course, the legal context for these decisions is very different from the present, in that the Administrative Tribunal was sitting on appeals from the decision of the Secretary-General following a determination of a Joint Appeals Board. This Tribunal sits at first instance.

3. I pointed out that the requirement that orders made by the Tribunal be obeyed, especially those relating to the evidence to be produced at the trial, is not only essential to the integrity of the administration of justice but also the right of the applicant to a fair hearing.

4. In my reasons of 8 March, I outlined what I understood to be the common law approach to situations where a party is in defiance of an order of the court. Although this is a contempt at common law, the crucial point is not whether the Tribunal has powers in respect of contempt (as to which, see *Abboud* UNDT/2010/001) but whether it has jurisdiction to deal with the consequences of the disobedience of its own orders by controlling its own procedures. In my opinion, there is only one possible to answer to this question: the Tribunal must possess this inherent jurisdiction. I pointed out that this jurisdiction cannot depend upon the common law, but on the very character of the Tribunal itself as a legal entity exercising a

jurisdiction reposed in it for specified purposes, here under its Statute. I concluded that a party who has wilfully disobeyed a direct order of the Tribunal is not entitled to appear in the Tribunal to advance its case, nor to call any evidence whilst that party remains disobedient and until that disobedience has been purged.

5. I mentioned that there was a further question, namely, whether the respondent was entitled to appear in *any* proceedings before the Tribunal whilst it is in wilful disobedience of an order of the Tribunal? I decided to reserve the question for the time being but intimated my view that the respondent could not be permitted to say, in effect, that it cares about outcomes in different cases differently and only complies with orders where it wants to defend a case, since I did not think that either the Tribunal or staff members could properly be subjected to such a process.

6. The applicant in the case in respect of which the order for production had been disobeyed (that is, UNDT/NY/2009/039/JAB/2008/080)—the first case) had another case (the second case) in the Tribunal which had been ordered to be heard with the first case because of certain interconnected facts. The applicant gave evidence in the first case and, when he testified as to certain facts relevant to the second case, counsel for the respondent sought to be heard. As it happened, both cases were identified as subject to my previous orders concerning both the production of documents and the respondent's right to appear. Counsel for the respondent argued that the cases were separate and that the respondent's failure to produce documents which were relevant to the first case should not preclude the respondent's representation in the second case.

7. I gave a second *ex tempore* ruling on 8 March in which I made the following points, summarized here –

> (i) The respondent was in wilful disobedience of an order to produce certain relevant documents to the Tribunal, as a consequence of which he was not entitled to be heard in respect of the first case, with the question whether he would be heard in any other case reserved. The first and second cases were

ordered to be heard together. This gave rise to the need to consider the question of appearance in the second case.

(ii) The answer to the contention made on the respondent's behalf, that a denial of appearance would undermine the administration of justice, is that the respondent is not being denied the *opportunity* to be heard but his own actions have the effect of excluding him, which can be corrected by obedience to the Tribunal's orders.

(iii) It would entirely undermine the authority of the Tribunal if the respondent could continue to invoke its jurisdiction in cases where there were no orders to which he objected, but was indifferent to what occurred in cases where there were orders he decided he would disobey. It would leave the Tribunal and staff members in the position that they would never know whether the Tribunal's orders would be complied with or not despite the undoubted legal obligation to obey the Tribunal's orders.

8. Accordingly, I ruled that the Secretary-General would not be heard in the second case and he should take fair notice that, if his counsel seeks to be heard in other cases before me, my present inclination was that, until the disobedience of the Secretary-General was purged by producing the documents ordered to be produced, accompanied by an apology to the Tribunal and an undertaking not to disobey an order again, the respondent would not be entitled to appear, before me.

9. I also pointed out that the fundamental purpose of the Tribunal's orders as to excluding involvement in the proceedings was not to punish the respondent, but to make clear that the respondent does not get to decide which orders he will comply with and which he will ignore. I noted that there was no other way the jurisdiction and integrity of the Tribunal can be upheld. In my view, the refusal constituted an attack on the rule of law embodied in the Statute of this Tribunal. I stated that the Secretary-General could either comply with the rule of law, or he could defy it, but it

should be understood that, if he defies it, he cannot expect that the Tribunal will be prepared to listen to what might be said by him or on his behalf.

10. On 9 March 2010, Case No. UNDT/NY/2009/022/JAB/2008/037 (*Islam*) (unrelated to the *Bertucci* cases) came on for hearing before me. I brought counsel's attention to my two rulings in the first and second *Bertucci* cases. I agreed to the request of counsel for the respondent for time to enable him to discuss the issues with relevant persons in order to resolve the matter if possible and adjourned the case. I was later informed that inconclusive discussions were continuing. I therefore decided to allow the case to proceed for the rest of the day along normal lines, giving the respondent's counsel leave to tender evidence on the *voir dire* if he wished, with a determination as to its being accepted to be made at a later time. The hearing was not completed by the end of the day and the case was adjourned.

11. At the close of the day's proceedings, I ordered that the officer who made the decision that Order No. 40 (NY/2010) would not be complied with was to appear before me at 10 am, Wednesday, 10 March 2010. On the morning of 10 March 2010, I was informed in writing by the Chief of the Administrative Law Section (ALS), Office of Human Resources Management (OHRM), and a Legal Officer that the officer would not be appearing before the Tribunal as ordered. I required that counsel for the respondent appear before the Tribunal to explain this further disobedience.

12. At the hearing of 10 March 2010, Counsel for the respondent informed me that the grounds for non-appearance of the officer were the same as those contained in the submissions originally made in support of the contention that the documents sought to be produced in the first case should not be required, submissions that I had already rejected as without merit in my ruling requiring production to the Tribunal. Furthermore, as I pointed out, those submissions concerned documents and had nothing to do with the order requiring attendance of the officer who had decided that they would not be produced. When this was pointed out to counsel, she simply repeated the submission and would not further elaborate. Counsel conceded that it

was not submitted that the order to attend was made without jurisdiction, nor was it submitted that my order was invalid. To my surprise, it appeared on further questioning that the identity of the individual concerned was not known to counsel and she did not know whether my order had actually been brought to that person's attention. She told me that it had been conveyed to her "bosses" and she had no further information. I had mistakenly assumed that my order requiring attendance, which was made whilst counsel for the respondent was in the Tribunal, would have been brought to the attention of the officer concerned. After reiterating some general points about the necessity for the Tribunal to vindicate the integrity of its own proceedings, in light of the new information that cooperation with the Tribunal by counsel could not be assumed, I ordered the respondent within twenty-four hours to supply the name and contact details of the officer who made the decision to disobey the order made by the Tribunal to produce the documents identified in the Tribunal's ruling in the first case (Order No. 46 (NY/2010)). I directed counsel to convey my order to the decision-maker, she informed me that she needed to "talk to her bosses" and could only convey my order "through my hierarchy". I informed counsel, "Your bosses should understand that, if my order is not obeyed, I will expect a person to appear tomorrow morning to explain why. It is the professional obligation of a lawyer to convey decisions of the court to the client. I expect that obligation to be fulfilled. If there is a question about whether it is fulfilled or not, I will expect an explanation." Counsel's superior, the Chief, ALS/OHRM, was in the Tribunal at the time.

13. Before the hearing on 11 March, a submission was received in the Registry bringing to my attention that Notices of Appeal had been filed on 10 March with the UN Appeals Tribunal in respect of Orders No. 40, 42, 43, 44 and 46 (NY/2010). Counsel for the respondent submitted that, in accordance with art 7.5 of the ATS, execution of the specified orders was stayed.

14. Following the hearing on 11 March I delivered a further ruling as follows –

> This action should be seen in context. Despite five appearances so far, counsel for the respondent did not intimate that any appeal was contemplated. Had it been under contemplation, it would have been an easy step to have sought a stay from the Tribunal to permit due consideration to be given to the question. Moreover, in respect of the order requiring attendance of the responsible officer, counsel for the respondent explicitly declined to submit either that it was made without jurisdiction or erred in law. And the question in issue is not complicated, either in law or in fact. However, the path chosen was simply to disobey the orders of the Tribunal. This strongly suggests that the appeal is not *bona fide* but a procedural device to avoid obedience or at least delay it.

I pointed out that, significantly, the suspension under art 7.5 of the ATS (assuming it to apply) did not deal with the problem of past disobedience and noted that the legal situation is clear beyond debate: an order made by the Tribunal must be obeyed, whether it is legally in error or not. Accordingly, until it is reversed on appeal or stayed, it is extant and compliance by the party to whom it is directed is an undoubted legal obligation. I explained that, at the time of the respondent's refusal to obey, the orders were relevantly valid and that a suspension under art 7.5 of ATS could only operate prospectively. Thus, even though if (and I did not necessarily accept that this was so) the Tribunal's orders were presently not executable, this could not change the fact that they were disobeyed at a time when there can be no doubt that they were executable. As I put it, the suspension cannot turn obedience into disobedience.

15. On 11 March, two counsel for the respondent again appeared before me. The Tribunal was informed that counsel was unaware of the identity of the officer but had informed her "bosses" of the order. When asked who her "bosses" were, she said she was not authorized to give their names, which could be ascertained from the organizational chart. Her junior reiterated the lack of authorization, despite the direction of the Tribunal. It was submitted that a notice of appeal against all five orders had been filed and that, accordingly, they were stayed under art 7.5 of the ATS and, hence, the Tribunal had no power to order identification of the mentioned "bosses".

16. It was further submitted that the Tribunal has no jurisdiction in relation to contempt or to ensure the enforcement of its orders or otherwise to order its proceedings in response to the refusal of the Secretary-General to obey its orders. Although the respondent had filed a notice of appeal, no grounds had been stated and the respondent did not intend to do so until the 45th day following the order since it was not bound to and the final grounds were, at all events, presently being researched and were unknown.

17. Counsel informed the Tribunal that the possibility of seeking a stay from the Tribunal of the order was not considered and that it was decided that the only way to deal with the order was to disobey it whilst consideration was given to the question of appeal, in respect of which there was a 45 day period available before the time for appeal expired. The application of art 11.3 of the DTS (hereafter referred to simply as art 11.3) was then raised, for the first time, as an answer to the question whether the original, or any, orders were executable at the time of the disobedience. I deal with the possible application of this provision later on in this ruling but I should point out that when I was informed of the respondent's attitude to the orders, there was no suggestion that this was a reflection of the time limit in art 11.3: it was perfectly clear that the respondent was stating that the order would not be obeyed, at whatever time. It is not surprising, therefore, that no reference to a stay for 45 days was made, since it was never intended to obey the order.

18. It is regrettably necessary to refer to one additional matter arising out of the written submission of counsel for the respondent, in which counsel "reiterates the great respect the Secretary-General has for the administration of justice as embodied by the system of justice which came into effect on 1 July 2009 and the judges of the Dispute and Appeals Tribunal". On questioning, it appeared that this submission, purporting to be made on the instructions or, at least, authorized by the Secretary-General was not, in fact, made on either basis but was a mere advocate's flourish. I am unable to understand how counsel could have thought that such a statement might be made consistently with proper notions of professional integrity. I do not know if

counsel were told to make this statement or if counsel invented it themselves but, if the former occurred, counsel should understand that they are not mere mouthpieces of their client, still less of whatever official is giving them their instructions in this case. If the latter, it is grossly improper for counsel to make statements attributed to their client but not actually made by the client. These matters follow both from the distinction between a profession and a job and the necessary relationship of implicit trust between Bench and Bar. Counsel owe the Tribunal an apology and I expect it to be forthcoming without prevarication.

19. At the close of the hearing, I ordered the respondent to make submissions in writing by 15 March as to the legal effect of the Notices of Appeal and the legal consequence, if any, for the unidentified parties who chose not to comply with the Orders. Following legal arguments, which are dealt with below, counsel submitted in the submission of 15 March that "all sanctions against the respondent in this matter as well as matters … [UNDT/NY/2009/117 and UNDT/NY/2009/022/JAB/2008/037] be lifted … [and that the] Tribunal desist from any further proceedings in this matter pending the outcome of its appeals of the Orders".

Can there be an appeal against an order?

20. On 15 March those written submissions were produced. Counsel first submitted that the respondent has the right to appeal against the orders pursuant to art 2 of the ATS, that the Dispute Tribunal exceeded its jurisdiction, erred on questions of law and erred in procedure in such a manner that compliance with the Dispute Tribunal's orders would affect the decision of the case, and cause irreparable harm to the respondent. It was further submitted that "judgment" in art 2 of the ATS applies to interim or interlocutory decisions of the Dispute Tribunal and, consequently, such decisions are stayed pending decision by the Appeals Tribunal pursuant to art 7.5 of the ATS. The submission adopted the distinction articulated in the Oxford Dictionary of Law between an interim or interlocutory judgment, defined as a decision as to a particular issue prior to the trial of the case, and a final judgment, which finally

disposes of the case, and argued that, since the word "judgment" in both Statutes was not qualified, it should be understood as comprising both kinds of judgment.

21. A problem with the definition of "judgment" adopted by the respondent is that it clearly does not cover all interlocutory orders, such as orders for production of documents. An order for production is not an interim judgment on the issues in the case in the sense in which that phrase is used in the Dictionary cited. It seems clear that the phrase is meant to denote decisions as to issues in the case leading to the ultimate or final judgment. An order for production is not a judgment in this sense. This does not dispose of the question whether an interlocutory order, such as an order for production, is a judgment within the Statutes; it simply means that the authority cited rather tends against the respondent's argument than in its favour. The respondent also contends that the issue must be decided as a matter of substance, not form and cites the varying language used by the Tribunal for decisions which are not final decisions. This submission is correct: the issue is one of substance and not form and the name that a decision happens to have been given is immaterial. I return to this question later in this judgment.

22. The respondent also submitted that it is significant that the appeals in respect of suspensions of action and interim measures are specifically prohibited (pursuant to arts 2.2 and 10.2 of the DTS), arguing that this suggests that all other decisions are appealable "judgments". Reference is also made to the width of the orders able to be made by the Appeals Tribunal under art 2.3. Finally, it was submitted that the Dispute Tribunal does not have jurisdiction to determine whether any judgment is capable of being appealed, citing art 2.8 of the ATS.

23. So far as art 11.3 of the DTS is concerned, no action can be taken by the Dispute Tribunal, it is argued, to enforce an order until the expiration of 45 days from the day it was made.

The consequences of disobedience of an order

24. At all events, it is submitted by the respondent, no wrongdoing may be attributed in the assertion of an absolute privilege. This argument is without merit. Of course, the *assertion* of a legal argument is not wrongdoing. But that is to miss the point: the wrongdoing is to disobey an order because the party thinks that the Tribunal erred in law (or fact for that matter) in making the order. The legal obligation to obey the order does not derive from its legal correctness, since this is a matter for the Tribunal and not any party to determine, and the mere fact that the argument is that the Tribunal has no jurisdiction to make the order does not change this fundamental point. The Tribunal undoubtedly has jurisdiction to determine its jurisdiction: see art 2.6 of DTS.

25. The respondent refers to a decision of the UN Administrative Tribunal (*Robinson* (1952) UNAT 15) as authority for the proposition that the question of disclosure of privileged documents is a matter for the Secretary-General and the Tribunal has no power to order such production. Robinson was refused renewal of his contract. He claimed that the true reason for so doing was that he had been an active member of the staff association. The respondent denied that this was the reason but declined to disclose the reason, saying that because of an "obligation of confidence" it was not considered "that he should *on his own initiative* place before the Tribunal" relevant facts underlying the decision "in view of the confidential nature of certain of these facts" (italicized in original). The second justification was that a statement of the reason given on the respondent's "own initiative would imply an abandonment of his clear legal position relating to the non-renewal of contracts". The Tribunal held that the applicant had a legal right to be given the reason and went on to discuss the effect of the claimed confidentiality of certain facts, pointing out that the claim could not influence the Tribunal's judgment and it was for each party to decide what evidence to produce or not to produce in their cases. It said that that it did "not feel it is proper for it to take the initiative where the Secretary-General's obligation of confidence is involved" and when the Secretary-General "[did] not, *of*

his own initiative, produce such information and evidence, despite a number of *requests* by the Tribunal that a clear statement should be made, the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence" (italics added). The Tribunal went on to hold that the failure to adduce the reasons for non-renewal was contrary to the applicant's right of association (which implied a right to the reasons) and this entitled the applicant to relief.

26. There are several obvious and quite fundamental differences between *Robinson* and the present case: first, *Robinson* did not involve *documents* but obtaining a statement of reasons; second, the information had been *requested*, not ordered to be produced; third, the Tribunal declined to act on its *own initiative*, as distinct from on the application of the applicant. The statement of principle relied on by counsel for the respondent self-evidently refers to the consequences of a party declining to lead evidence in its own case and goes no further than stating the trite proposition that it is for each party to decide what evidence they will or will not rely on. I have not overlooked that the Rules of Procedure of the former UN Administrative Tribunal provided, in art 10.1, for the President, in his own initiative, or at the request of a party to "call upon the parties to submit additional written statements or additional documents". Although the succeeding sentence reads, "The additional documents shall be furnished in the original or in properly authenticated form", this appears to refer to the form in which the material is to be provided, rather than the obligation to comply with the call. It is far from clear from the article itself whether the "call" does impose a binding obligation and the absence of the conventional terms "require" or "order", I think, are significant and strongly indicate that no binding obligation is created. At the same time, I do not know whether, in practice, "calls" for documents were regarded as orders and obligated the party to comply. The judgment, as I read it, indicates that no "call" was made, having regard to the reference to "requests" and absent any mention of "call"; furthermore, it is clear that the President declined to exercise his own initiative to call for production. Accordingly, it seems to me that this judgment, as I mentioned above, does not deal

with the nature of the obligation to produce a document following a legally binding requirement (whether named a "call" or an "order") and certainly does not do so in terms that make it authoritative.

27. It is also submitted that *Calvani* UNDT/2009/092 is authority for the proposition that the only sanction for refusal to comply with an order for production is that adverse inferences may be drawn against the refusing party. That judgment does not state such a proposition, nor does it imply it. It merely states that "the Tribunal must draw consequences from such refusal". This says nothing about whether or not there are other consequences arising from the disobedience.

28. Counsel points to art 10.8 of the DST as providing "that the Secretary-General is the ultimate authority when it comes to ensuring accountability of staff members of the United Nations". It is submitted that it follows that "the sensitive administrative and diplomatic issues that arise in the management of the United Nations consonant with the responsibility that is vested in the Secretary-General to protect the Organization and the obligation that the Tribunal has to search for the truth in individual disputes, an appropriate limitation must be placed on the authority of the Tribunal to order production of sensitive material", again citing *Calvani*. I will not waste time attempting to prove a negative. That judgment does not deal with, let alone discuss, this so-called responsibility. Nor does it suggest that the jurisdiction of the Tribunal to order the production of documents is limited in the way suggested. The argument of privilege is dealt with in my reasons for order and the explanation for concluding that it lacks merit may be found there. Article 10.8 has nothing whatever to do with the present question. It deals with matters that arise in the course of a case requiring some further action to be considered.

29. The UN Administrative Tribunal itself authoritatively stated on a number of occasions, as I set out in my Order No. 42 (NY/2010), that it would not accept the legitimacy of disobedience of its orders and that it was not for the Secretary-General to decide what would be provided and what would not: see, for example, *Durand*

(2005) UNAT 1204; *Alves* (2005) UNAT 1245. The reform of the system of the administration of justice has not increased the powers of the Secretary-General. He was not then a judge in his own cause and is not now. The DTS in art 9 gives power in unqualified language to require the production of documents –

> [9] 1. The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.
>
> [9] 2. The Dispute Tribunal shall decide whether the personal appearance of the applicant or any other person is required at oral proceedings and the appropriate means for satisfying the requirement of personal appearance.

The necessity for production is therefore for the Tribunal and not for the Secretary-General to determine. The Rules of Procedure provide for confidentiality (art 18.4) –

> The Dispute Tribunal may, at the request of either party, impose measures to preserve the confidentiality of evidence, where warranted by security interests or other exceptional circumstances.

There is no reservation to the Secretary-General of any power to withhold documents required to be produced or to unilaterally determine the issue of confidentiality. Indeed, both the Statute and the Rules are manifestly inconsistent with the implication of any such power.

30. It is worth making the additional point that it has nowhere been suggested that the Secretary-General has actually made any decision at all in connection with this case. Moreover, counsel flatly refused to inform the Tribunal of the identity of the responsible official. The submission that a proper basis for refusing to comply with the Tribunal's order derives from the "responsibility that is vested in the Secretary-General to protect the Organization" when, in fact, the decision in question was not made by the Secretary-General but by some anonymous official of whatever rank who refuses to be identified or to take any responsibility for it amounts to the assertion that this claimed overriding discretionary protective power is reposed in any official who happens to decide he or she will do so, at the same time remaining

unidentified. This cannot be correct. And protect from whom? The Dispute Tribunal? Such an argument is completely unacceptable. Moreover, there has been no suggestion that the documentary material here ordered to be produced in fact contains any sensitive information at all. Counsel for the respondent has argued that, since it involved the appointment of an ASG, it must necessarily be confidential to ensure that those advising the Secretary-General do so frankly and without needing to be concerned about disclosure. I dealt with this argument in the reasons for the previous orders. The argument now made seems to rely on the power to protect sensitive material, of the existence of which there is not the slightest evidence or even assertion.

31. It is further contended that what are said to be the competing responsibilities of the Secretary-General and the Tribunal can be adequately resolved by leaving the Tribunal to make adverse findings in appropriate cases. I have already stated why this is not an adequate response. Most importantly, it is simply not correct to describe the responsibilities as competing. It is the responsibility of the Secretary-General to obey the orders of the Tribunal. Moreover, the contention ignores completely the right of the applicant to have produced to the Tribunal, pursuant to the DTS, all the relevant material. As to the consequences of disobedience, in respect of the particular case, the Secretary-General cannot require the applicant to be put to proof of his or her case and at the same time withhold evidence that is relevant to that case and, accordingly, judgment must be given *by default* to the applicant. In respect of compensation, the Tribunal must draw all available adverse inferences, since the Secretary-General cannot be permitted to profit from his disobedience.

32. However, in my view, these outcomes are insufficient to deal with disobedience of an order to produce, since they are confined to the outcome of a particular case and do not vindicate or protect the jurisdiction of the Tribunal from the abuse of its proceedings that disobedience entails. As a matter of fundamental principle it cannot be proper that a party who defies the jurisdiction of the Tribunal can seek to take advantage of it and, in this respect, that must affect every case in

which it seeks to do so until that disobedience is purged. This is not a matter of punishment, it is simply the logical consequence of refusing to acknowledge the jurisdiction of the Tribunal. Accordingly although it is quite correct to describe wilful disobedience of an order as contempt, the consequence of the Tribunal being unable to hear the Secretary-General at all until the disobedience is purged is not punitive but consequential and resort to notions of contempt is unnecessary.

33. Put in another way, a party cannot pick and choose which orders it will obey and which it will not, nor can it purchase the right to disobey by being willing to pay the price of losing the case in which, as it happened, the disobeyed order has been made. It may be that, in some cases, the party who does not wish to obey an order can simply decline to litigate, so that the question of obedience becomes moot. (Subject to proof of jurisdiction the applicant would in this event be entitled to a judgment by default.) However, if the documents are relevant for other purposes, for example, the assessment of compensation, then they still have to be produced.

34. For clarification, I should point out that complying with procedural rules preliminary to a hearing, such as by filing pleadings, does not involve seeking to invoke the jurisdiction of the Tribunal, nor does the conduct of case management hearings, although these actions are preparatory to such an invocation.

35. Counsel for the respondent have submitted that "the principle of contempt" does not exist in the practice of international administrative tribunals, citing *Kimpton* (1968) UNAT 115, *Fayache* (2004) UNAT 1200, *Gomes* (2005) UNAT 1228 and *Loriot* (2007) UNAT 1343.

36. The relevant passage from *Kimpton* is as follows –

> I. The Tribunal notes that, under article 10.1 of its Rules, the Respondent was requested to produce the application file of the Applicant.

> The Respondent limited himself to communicating to the Tribunal certain documents taken from this file without producing all the documents mentioned in the report of the Joint Appeals Board.
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> …
>
> The Tribunal draws attention to the fact that, under article 10, paragraph 2, of its Rules, cognizance of certain documents may be reserved to the Tribunal at the request of one of the parties and with the consent of the other parties. The Tribunal notes that the Respondent has not indicated his intention of availing himself of that provision in the present case.
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> In Judgment No. 15, the Tribunal made the following statement (paras. 24 and 25):
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> > "The Tribunal does not feel that it is proper for it to take the initiative where the Secretary-General's obligation of confidence is involved. It must clearly be for the Secretary-General to decide what information and evidence he places before the Tribunal which can be subject to test and counterargument by the Applicant. When Respondent does not, of his own initiative, produce such information and evidence, despite a number of requests by the Tribunal that a clear statement should be made, the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence.
> >
> > "The Applicant cannot be penalized because certain information is regarded by the Respondent as confidential and the Applicant has no opportunity either of knowing what the reason is or of challenging it."
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> The Applicant requests that, if the Respondent cannot show good reason for his refusal to produce the documents in question, the Tribunal should render a summary judgment against the Respondent and find for the Applicant.
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> The Tribunal points out that its Statute and Rules do not cover the case of "contempt of the proceedings". It is not therefore possible to accede to the Applicant's request.

37. I have already analysed the judgment in *Robinson* in sufficient detail to demonstrate that it did not deal with a requirement to produce documents, however cast. The adoption of its reasoning in *Kimpton* therefore suggests that the UN

Administrative Tribunal in that case accepted that its "requests" were not obligatory. This is reinforced by the way in which the applicant's argument was phrased, in the sense that it did not suggest that there was a breach of a legal obligation. Certainly the reference to "contempt" suggests some degree of disobedience, however. At the end of the day, the correct understanding of this judgment is so uncertain, it cannot be regarded as shedding any useful light on the problem here. This lack of utility is underlined by the lack of any discussion of the nature of the "contempt" referred to. The assumption that, absent a specific grant of jurisdiction in respect of contempt, there is no inherent power is certainly questionable. The power to deal with persons for contempt should be seen – and can reasonably so be seen – as inherent in the very notion of a court having jurisdiction to make binding orders, for the reasons explained in *Abboud* UNDT/2010/001 and which I do not need to repeat here. At all events, as I have said above, the question is not one of contempt, but of the necessity for the Tribunal to protect its own proceedings from abuse and its fundamental integrity as an institution administering justice.

38. In *Fayache*, the applicant submitted six applications to the Tribunal in respect of which a single judgment was rendered which addressed certain claims and rejected all others. The applicant then made a further application substantially repeating the claims in his original applications and contending that the Tribunal did not understand his maltreatment by the Administration, also making personal attacks against various officials of the Organization. Not surprisingly, the UN Administrative Tribunal declined to revisit the earlier applications. It then turned what it described as "the outrageous and improper allegations made against the Tribunal and its secretariat in the present Application", concluding that "the Applicant has demonstrably abused the process of administration of justice" and going on to say that "[as] it has no power to fine the Applicant, or otherwise hold him in contempt, it … will impose costs against the Applicant should further frivolous or abusive Applications be filed with the Tribunal". It is clear that the Tribunal was not, in its reference to contempt, considering the disobedience of its orders. Contempt

that is constituted by scandalizing a court, is altogether different. Since this kind of contempt is not in issue here, it is unnecessary to say more about it, although I would hazard the observation that, absent specific power being granted in the founding Statute, this type of contempt would likely not be within the jurisdiction of a Tribunal to deal with. However, the inherent power that I am considering is that which is necessary for protection and integrity of the Tribunal's undoubted jurisdiction to make legally binding orders. *Fayache* does not deal with this implied jurisdiction, at least directly. The qualification is necessary because of the UN Administrative Tribunal's adoption as correct of a lengthy passage from the decision of *In re Vollering (No 15)* (1999) ILOAT 1884, where the Administrative Tribunal of the International Labour Organization asserted "unequivocally that it possesses an inherent power to … [impose a costs penalty upon a complainant] as part of the necessary power to control its own process". The assertion of such an *inherent* power to control its own processes is precisely the same power which, in my view, is possessed by the Dispute Tribunal. *Fayache*, therefore, dealt with an abuse of the Tribunal's processes by an applicant's frivolous and vexatious claims. This case involves an abuse of the Tribunal's processes by a refusal to obey an order essential to a fair trial. Refusing the respondent's ability to invoke the Tribunal's jurisdiction at all whilst it is in a state of disobedience is merely the logical consequence of the due exercise of the Tribunal's inherent power to deal with its own processes to prevent their being abused.

39. In *Gomes*, the applicant requested the UN Administrative Tribunal to declare its previous judgment null and void and resubmitted, in its entirety, his case to be reconsidered. His application contained what the Tribunal described as "unfounded and unwarranted allegations of racism and discrimination made against the Tribunal and its secretariat", holding this to be an abuse of the process of the administration of justice which the Tribunal "will not tolerate". The Tribunal repeated that it had no power to fine or otherwise hold the applicant in contempt but threatened to impose costs if the conduct was to be repeated, citing its inherent power as asserted in

Fayache. This judgment does not take *Fayache* any further except to confirm the existence of the inherent power of the Tribunal to control abuses of process by ordering its own proceedings. *Loriot* is another case in which the Administrative Tribunal regarded the making of multiple applications in respect of issues that could be dealt with in one application as an abuse of process and of the internal justice system for the Applicant, and cited the approach in *Fayache* as applicable.

40. It will be seen, therefore, that insofar as these authorities deal with the issue of contempt, they do so only with a particular type of contempt, constituted by vilification or scandalizing of the Tribunal, which is not the kind of contempt involved here. But, whether the conduct here is contempt or not, it is conduct destructive of the due administration of justice and the Tribunal has inherent power to deal with it to protect its processes from abuse and maintain the integrity of its own jurisdiction. The only question then is what is necessary to be done by the Tribunal in respect of its own processes to vindicate its jurisdiction. For the reasons I have given, I do not see that it is sufficient to give judgment for the applicant in individual cases where, as it happens, the respondent has decided to disobey the Tribunal's orders.

41. Since this is not a case of punishing for contempt, the judgment of the European Court of Human Rights in *Kyprianou v. Cyprus* (2005, Application 73797/01) – where the relevant judges expressed their personal resentment at insulting remarks made by the accused to them – as to the finding of contempt and imposing sanctions by a court against whom the acts of contempt were directed is irrelevant. At all events, the orders here were orders of the Tribunal; the disobedience here is disobedience of the Tribunal.

42. It is lastly submitted that the Tribunal should not directly import "legal traditions from national jurisdictions, particularly where there are substantial differences of approach adopted by common law and civil law systems with respect to a particular issue". Since there is no explanation of the difference in approaches

between the common and civil law in dealing with disobedience with orders, this submission has no value. It follows from first principles that any judicial tribunal with the ability to make legally binding orders must possess inherent powers to control its own processes to protect its jurisdictional integrity, which follow necessarily from the very institution of the tribunal itself. Such a basic proposition does not depend on the national laws of States. As has been shown, the existence of such an inherent power has been asserted by the ILOAT and the UN Administrative Tribunal. The mere fact that the same situation is found in national courts is scarcely surprising, given the fundamental character of the rule and the essential logic that it embodies.

Can an order be appealed?

43. I now return to the effect of the provisions in the Statutes of the Dispute Tribunal relating to a stay and of the Appeals Tribunal relating to suspension of execution. There are two related issues here: the first is whether the Tribunal has jurisdiction to decide whether the orders made here are judgments for the purposes of those provisions; the second is, if there is jurisdiction, whether they are such judgments.

44. In my opinion, the Tribunal has not only the jurisdiction but the inescapable obligation to determine whether or not its proceedings are stayed. It is argued here on behalf of the respondent that they are stayed automatically; the applicant on the other hand seeks to continue the proceedings to finality. The effect of a decision to leave the matter to the Appeals Tribunal to decide is to grant a stay, the very lawfulness of which is in issue. Of course, the Appeals Tribunal – if the matter needs to be decided there – will have to exercise its own judgment about the matter. But that is what appeals entail. My considering whether the impugned order is a judgment for the purposes of determining whether the institution of an appeal has effected a stay is no more a preemption of the jurisdiction of the Appeals Tribunal than any other determination of law which might need to be reconsidered on appeal. Nor is it a

preemption of the jurisdiction of the Appeals Tribunal to consider whether art 7.5 of the ATS applies in the circumstances here to proceedings in the Dispute Tribunal which are at the time of the appeal still on foot. If it is necessary to do so, the provisions of art 2.6 of the DTS impose the duty on the Tribunal to decide "a dispute as to whether the Dispute Tribunal has competence under the present Statute". The same jurisdiction to determine its jurisdiction is given to the Appeals Tribunal under art 2.8. Furthermore, on either basis, art 2.8 of the ATS does not concern a question as to the effect of art 7.5 of the ATS which does not depend on whether the judgment, execution of which is claimed in the Dispute Tribunal to be suspended, is a judgment within the jurisdiction of the Appeals Tribunal. (I return to this question later in these reasons.) In my view, art 2.8 of the ATS does not exclude the jurisdiction of the Dispute Tribunal to determine whether proceedings before it have been stayed, even if to do so involves an interpretation of the Appeals Tribunal Statute. Art 2.8 is an inclusive power. Both art 2.6 of the DTS and art 2.8 of the ATS do no more than is conventionally done when creating statutory tribunals of limited jurisdiction, namely to give to each entity the jurisdiction to decide its own jurisdiction to avoid the logical impasse that arises when making a decision that, as to a particular matter, it had no jurisdiction to consider it.

45. The point of departure is, for obvious reasons, art 11.3 of the DTS. I set out the whole of art 11, since art 11.3 should be seen in context –

> **Article 11**
>
> 1. The judgments of the Dispute Tribunal shall be issued in writing and shall state the reasons, facts and law on which they are based.
>
> 2. The deliberations of the Dispute Tribunal shall be confidential.
>
> 3. The judgments of the Dispute Tribunal shall be binding upon the parties, but are subject to appeal in accordance with the Statute of the United Nations Appeals Tribunal. In the absence of such appeal, they shall be executable following the expiry of the time provided for appeal in the Statute of the Appeals Tribunal.

> 4. The judgments of the Dispute Tribunal shall be drawn up in any of the official languages of the United Nations, in two originals, which shall be deposited in the archives of the United Nations.
>
> 5. A copy of the judgment shall be communicated to each party in the case. The applicant shall receive a copy in the language in which the application was submitted unless he or she requests a copy in another official language of the United Nations.
>
> 6. The judgments of the Dispute Tribunal shall be published, while protecting personal data, and made generally available by the Registry of the Tribunal.

46. The question here is cast in the language of comparing an interlocutory judgment with a final judgment, but it should not be forgotten that the process which the respondent has declined to obey is an *order* for production. The nature of the process is important. Orders for production are made under art 9.1 of the DTS, where they are so described. They are not referred to as "judgments". Nor would it appear necessary that orders for production "state the reasons, facts and law on which they are based": invariably they do not since, plainly all that is necessary is that the order identify the documents required to be produced and the person which is obliged to produce them. It is not necessary that they should be translated or deposited in the archives, or made generally available by the Registry, though they should be provided to the parties. If the contention of counsel for the applicant be correct, however, all these apparently unnecessary requirements would be essential. Orders for production may be issued at the behest of a party to a person who is not a party – though, to be effective, that person would probably need to be an employee of the Organization. The parties to such an order are the person who applied for it and the person subjected to it. There is no real need to serve the other party in the case either with the application for the order or, for that matter, with the order itself and, thus, no sensible reason to apply art 11.5.

47. Moreover, on the respondent's contention, no order for production could have a shorter timescale for compliance than 45 days. It is no answer to this (as was submitted during argument) that it could voluntarily be obeyed more quickly. The

Tribunal would not – nor would any court – *require* compliance with an order except in accordance with the relevant law, and orders, by their very nature, are necessarily mandatory in accordance with their terms. Indeed the argument made by counsel for the respondent would apply not only to orders for production of documents but to *every* executory order, such as requiring witnesses to attend, the making of a request for particulars, the supply of particulars, submission of witness statements, making written submissions and so on. (Although I have referred to *executory* orders, all orders are actually executory, in the sense that it is part of the very notion of an order that it requires the person to whom it is directed to do or desist from doing some act or it changes an existing state of affairs, for example, rescinds a decision. The use of the adjective *executory* is therefore superfluous.) In many instances, the making of such an order occurs during a trial, as when there is an adjournment and witnesses are ordered to attend on the following day or particulars or information are required for the continuation of proceedings. The notion that none of these orders – both conventional and essential for effective case management – and which might well be cascaded could require things to be done before 45 days had expired after each one is so absurd as to lead ineluctably to the conclusion that art 11 and art 11.3 in particular cannot apply to executory *orders* at all, in particular orders to produce documents.

48. It is, of course, necessary to factor in – if these orders can be appealed – the time frames prescribed by the Appeals Tribunal's Rules of Procedure. Under art 7 and 9 of these Rules, the appellant has 45 days to appeal a decision of the Dispute Tribunal and the respondent has 45 days in which to file an answer. Consequently, three months could well elapse even before the appeal of an order is ready for hearing. Cases interrupted by appeals against procedural orders could therefore experience very substantial delays indeed, possibly years. It is impossible to accept that such a consequence was contemplated, let alone intended, by the General Assembly.

49. Not only, therefore, should the word "order" in art 9.1 of the DTS be given its usual meaning and distinguished from a judgment, but the word "judgment" in art

11.3 of the same Statute also be given its usual meaning and distinguished from an order. This construction not only reflects the ordinary and conventional legal meaning of the language used – and, presumably this was the sense in which it was intended to be used – but also this is the only sensible way in which these two provisions can be construed to avoid absurd consequences.

50. In this case an issue of relevance arose which was necessary to be determined before the order for production could be made. Typically questions of relevance and admissibility are determined by rulings and often reasons are given but are not usually regarded as essential for the validity of an evidentiary ruling. It seems to me that the mere fact that reasons, even extensive reasons, are given in justification of an order for production, does not make either the finding of relevance or the reasons a judgment for the purpose of art 11 of the DTS. Moreover, a ruling as to relevance is in no sense "executable" since it is clear that no party is required to do anything simply because certain evidence or material is found to be relevant, nor is any existing state of affairs affected. Accordingly, there is nothing "executable" to which the delay in art 11.3 of the DTS can attach.

51. What then are the judgments to which art 11 of the DTS refers? First, and most obviously, they are judgments that are actually so-called by the Statute. Thus a judgment on an application, as provided in arts 2.1, 2.5 and 2.7 of the DTS, is within this provision (but, for obvious reasons, is affected by art 11.3 only if it involves an executable element). A decision on an application to suspend an administrative decision is called a "judgment" in art 2.2 of the DTS which is why, as it seems to me, it is expressly provided that it is not subject to appeal since, having the character of a judgment, it would otherwise appear to fall both within art 11 of the DTS and art 2 of the ATS. The other provision relating to suspension is that described as an "interim measure" contained in art 10.2 of the DTS. Though this does not use the word "judgment', it gives temporary relief of a substantive kind, and it is not surprising that the prohibition of appeal was inserted, since otherwise it might be thought that, as appeal was specifically excluded in respect of a judgment of suspension under art 2.2,

if the same exclusion was not expressed here, a right to appeal might be implied despite its description as a measure rather than as a judgment.

52. It is significant, to my mind, that orders of the Tribunal made under art 10.5 of the DTS for rescission, specific performance or compensation are described as being "part of its judgment". As such, they are plainly within art 11 and, moreover, are also executable within art 11.3, since they either change a state of affairs (as with rescission) or require the respondent to do something (as with specific performance or compensation). Article 12 concerns revision of executable judgments by the Dispute Tribunal. It seems reasonably clear that a judgment in favour of the respondent would not be within this provision, since it would not contain an executable element. Furthermore, as it seems to me, it is only whilst the judgment is executable – as distinct from executed – that it may be revised. Following execution, the Tribunal is *functus officio* and revision for fresh evidence is no longer possible. This is not surprising since, if the only judgment within this provision is adverse to the respondent, once it has complied with the consequential orders, there is no point in being able to seek revision in addition to its right of appeal under the ATS.

Can interim or interlocutory judgments be appealed?

53. Article 12.3 of the DTS refers to *final* judgments, which alone may be the subject of an application for interpretation as to meaning or scope. This provision is relied on by counsel for the respondent for the argument that art 11.3 is not confined to final judgments. This approach seems to me to misunderstand the point of this provision. Once a final judgment is given, the Tribunal would, in the usual case, be *functus officio*, hence the need for a specific grant of extended jurisdiction. However, where an interim judgment is given, the Tribunal is *ex hypothesi* still seized of the case and there is no reason why the parties could not seek clarification of such a judgment by a conventional application.

54. This distinction is not necessary for the purposes of art 11 of the DTS and thus leaves open whether an interim judgment is within that provision, which depends upon whether such a judgment *can* be binding. The answer to this question is not symmetrical. If the judgment disposes of the case, as for example, by finding it not receivable, then it is a final judgment which disposes of all issues before the Tribunal, which is then *functus officio*. It is not an interim judgment at all. It renders the issues between the parties *res judicata*, so that they cannot, unless successfully appealed, be relitigated. Thus, it is final and binding. Suppose, however, the Tribunal decides that the application is receivable and it has jurisdiction to determine it. It must then go on to decide the case. This determination is not a binding judgment in any relevant sense, since it may at any time be relitigated before the judge who made it during the subsequent course of the proceedings. For example, some new evidence might arise that requires reconsideration or the judge might himself or herself reconsider the matter as the case proceeds. There is no question but that the judge has jurisdiction to decide that the earlier determination was mistaken. The judge who became aware of an error in a prior ruling, whether it was caused by a mistake or oversight of the judge or the parties, would not hesitate in my view to correct the error whilst he or she had the power to do so. This would otherwise be to give a final judgment that the judge knew to be appealably wrong. Thus it is both good sense and good law to recognize the power to vary or reverse previous rulings whilst the case is still on foot and the judge is not *functus officio*. In short, the decision cannot be regarded as creating a *res judicata* and either party can seek, quite properly, to revisit its correctness. It is probably more accurate to regard the determination as a provisional judgment, that is to say, it is subject to reconsideration up to the time that a final decision is made determining all the outstanding issues. Indeed, even a determination on liability may be revisited, if the interests of justice require, after it has been made and before final judgment is delivered. Of course, a provisional judgment will be binding on the parties in the sense that it will control, unless varied, the balance of the proceedings, but it is not binding in the sense that the judge cannot revisit it or is *functus officio* in respect of it. It is only *provisionally* binding by its very nature. The point about it

not creating a *res judicata* is that the parties are still able to seek variation or even reversal during the ensuing trial.

55. I have focused on the issue of a preliminary determination on the question of jurisdiction since, at first (see below for a subsequent development) the respondent argued that the application was not justiciable, apparently denying the jurisdiction of the Tribunal to determine the validity of the impugned administrative decision and arguing that, therefore, the documents sought must be irrelevant. I would certainly accept that, in deciding to the contrary, namely that the question was justiciable, I determined that the Tribunal, at least, had jurisdiction to determine whether the impugned decision was subject to consideration by the Tribunal and hence, in substance, jurisdictional. It should be noted that the respondent, however, never sought to argue receivability on the basis that the decision in question was not an administrative decision within the meaning of art 2 of the DTS and did not seek to raise the issue of jurisdiction as such. However that may be, it is crucial for present purposes to note that the reasons I gave for my orders, which concluded that the lawfulness of the decision in question was justiciable and capable of being considered by the Tribunal, in no sense constituted an *executable* judgment. That is to say, it did not require any action of any party. Certainly, the ensuing order for production was executable, but as will be seen below, an order to produce documents is not a judgment of any kind, interim, provisional or final. For completeness, perhaps I should mention – though I should think that this is obvious – a procedural order of this kind can always be varied or even reversed by the Tribunal on its own initiative or on the application of the parties up to the time of final judgment. Nor does such an order create any *res judicata* though, of course, it is legally binding on the party to whom it is directed.

56. From what I have said about the absurd and extremely inconvenient results that would follow from imposing on executory orders, in particular for production of documents, the delay prescribed by art 11.3 of the DTS, it should follow that the provision should be construed as not including such orders within the description of

judgments "subject to appeal in accordance with the Statute of the United Nations Appeals Tribunal". I have also pointed out that the other provisions of art 11 appear to be inconsistent with regarding orders as judgments within that article.

57. Since it is clear that the Statutes of the Dispute and Appeals Tribunals must be read together, it is necessary to consider whether, upon its proper construction, the Statute of the latter Tribunal would lead to a different outcome. In considering this question it is important to understand that the Statutes are coordinate instruments with neither, as it were, trumping the other. In effect, they must be construed as though they were together part of the same instrument. The first and most obvious point, is that, whilst there is no definition of judgment, there is no provision for appeal of any order of the Dispute Tribunal. In this respect, it is also important to note that appeal is available against a "judgment rendered" by the Dispute Tribunal. This language, interpreted in its ordinary meaning, excludes an order: first, an order is not, in ordinary language, a judgment; and, secondly, an order is not rendered, it is made. It seems to me that this is decisive on the point at issue here, namely whether the order for production is appealable.

58. Counsel for the respondent have not contended that the "judgment" here is the reasons for the issue of the order for production although it appears that it will be sought to contend in the appeal that the order was made in excess of jurisdiction (at least at first, but this has since changed, as to which see below) or pursuant to an error of law. However, of course, it does not follow that the reasons are the judgment under appeal, simply that the reasons (if flawed) show that the order was made in error. The question remains whether the order is a "judgment" within art 2.1 of the ATS. Under art 2.3 of the ATS the consequences of an appeal can be to "affirm, reverse, modify or remand the judgment". It is submitted that these consequences are not necessarily limited to final judgments. Be that as it may, the judgment to which these consequences can be applied must nevertheless be a judgment within art 2.1 of the ATS, which remains the controlling provision, a conclusion confirmed by art 7.1(a) of the ATS.

59. Where judgment has been reversed or modified (but not affirmed or remanded) under art 2.3, this article gives jurisdiction to make consequential orders which, in the event of a successful appeal by a staff member, requires orders to be made in accordance with art 9, which provides for the making of orders in identical terms to those able to made by the Dispute Tribunal in favour of a successful staff member. Plainly such orders could only be made in respect of a staff member's appeal against a *final* judgment. This might suggest that a judgment within art 2, liable to the outcomes in art 2.3 must be a final judgment and there are other indications that this is the intended affect of the ATS. The most important of these is that, whilst art 7.5 of the ATS suspends the *execution* of a judgment, it does not suspend the judgment itself. I discuss this provision in more detail below, but note here that it would be a very odd result indeed if a party could appeal a judgment which, because the Dispute Tribunal was still seized of the case, could be varied or even reversed at any time on that party's own application. It seems to me, therefore, that a judgment within art 2 of the ATS must be final in the sense that it creates a *res judicata* between the parties and the Dispute Tribunal is *functus officio*.

The effect of suspension of execution under the Appeals Tribunal Statute

60. On the assumption (contrary to my view) that an interim or provisional judgment in the sense in which I have used these terms, in particular a determination of relevance, can be appealed under art 2 of the ATS, that still leaves the effect of art 7.5 of the ATS to be considered. Although this has been referred to as imposing an automatic stay in respect of judgments under appeal, this is not an accurate summation of its effect. It provides that the "filing of appeals shall have the effect of *suspending the execution* of the judgment contested" (italics added). It does not provide that the judgment is suspended. Accordingly, where the decision is in effect declaratory, with nothing further to be done and no current situation to be changed, it does not have any work to do. A judgment that, for example, the Dispute Tribunal has jurisdiction because the decision in question is an administrative decision does

not have any executable element: it changes nothing; it requires nothing to be done by a party; it simply makes a finding of mixed fact and law that is foundational to the exercise of its jurisdiction. Accordingly, even if such a judgment were appealable (which, for the reasons I have already given, it is not) and appealed, art 7.5 of the ATS would not have anything to suspend, since an ensuing trial is not in any sense an execution of the judgment.

Recent developments

61. On 18 March 2010, a directions hearing was conducted to consider the future disposition of this case in the event that the respondent was permitted to call evidence. During that hearing counsel for the respondent clarified the meaning of the submission that had originally been made opposing the making of the production order and which, it was said, was the legal basis for refusing to obey the order once made. Counsel expressly resiled from the submission that the Tribunal had no jurisdiction to consider the lawfulness of the process by which the applicant was not appointed to the position of ASG. Counsel stated, "We agree that Mr Bertucci could bring the case he did, it was receivable" but that, given the width of the Secretary-General's discretion, almost any evidence would not be relevant. Counsel expressly conceded that a decision, if it were made, not to appoint the applicant was an administrative decision within the purview of the Tribunal's jurisdiction though, if the applicant's name had not gone forward from the interview panel – a matter which is in dispute (and as to which, as I pointed out in the reasons for the order, the respondent had taken contradictory positions) – the decision of the panel in this respect was not an administrative decision within the jurisdiction of the Tribunal to consider.

62. I mention this change of position because the issue of relevance was, as the matter had been originally put to me – or at least as I understood it, based on the explicit language of the written submission – inextricably tied up with the question of jurisdiction. Accordingly, even though the order for production depended on the

question of relevance, this in turn depended on the question of jurisdiction or – as the submission put it – justiciability. Since what is a judgment is a matter of substance and not form, it may have been reasonable to regard the reasons for production as comprising, at least in part, a preliminary judgment on the issue of jurisdiction. This, in turn, would have led to the need to consider whether it was a judgment within art 11.3 of the DTS and art 2.1 of the ATS. However, as the issue of jurisdiction has been removed by the concession of counsel for the respondent, it was not necessary for me to consider this difficult question. I should add for completeness and clarity that it was not submitted to me at any point by counsel for the respondent that my reasons for ordering production should be regarded as an interim judgment on the issue of jurisdiction and thus a judgment within art 7.1 of the ATS.

The orders for production and identification are not stayed

63. Article 11.3 of the DTS, considered alone, should be construed as not applying to orders for production of documents made under art 9.1 and this conclusion is confirmed by the proper construction of art 2.1 of the ATS. Since the order is not a judgment, it does not fall within the scope of art 7.5 of the ATS. It follows that the consequential order requiring identification of the official responsible for deciding that the order would be disobeyed is also not stayed or suspended.

64. Quite apart from the potential application of art 11.3 of the DTS and art 7.5 of the ATS, the Tribunal has inherent jurisdiction to stay the execution of its own orders, provided it is not *functus officio*. This necessarily follows from its undoubted power to vary, modify or even reverse its orders. A stay of execution is, in substance, a variation of the time specified in the order. Although a stay was not initially sought by the respondent despite its evident availability, I have considered in fairness whether in the present circumstances I should order a stay pending the outcome of the appeal. I do not do so for two reasons. A stay can only be justified for good reasons. Where the essential ground is that the order is subject to appeal, it is necessary to be persuaded that there are substantial grounds for appeal with significant prospects of

success, or that irreparable injury would be occasioned, as by destruction of the subject matter of the litigation, or there is some other good reason for doing so. Here, the respondent has not, it appears, yet put its grounds of appeal in final form and will not do so for some time. This is surprising. It may be naïve, but one would have thought that, before deciding to disobey an order of the Tribunal, careful consideration would first have been given to the legal questions involved and a clear conclusion drawn about its legality. That it appears now that the legal issues were not clearly articulated and understood is troubling. It suggests that legality was thought to be immaterial, or at least, not problematical. If they are the same as has been proffered to me, they are not substantial and do not have significant prospects of success. Although it is said that irreparable injury would result, this is not identified. If it means that the Tribunal would be placed in possession of sensitive and confidential material, that is scarcely irreparable, since confidentiality can be maintained by the Tribunal. Any other injury can be corrected by the Appeals Tribunal on the assumption, of course, that the appeal succeeds. Further, the identification of the relevant decision-maker is not an injury of any kind. The loss of the legal argument is scarcely irreparable, since (so the respondent contends) the orders can be appealed. Furthermore, so far as the Tribunal is concerned, this injury has already occurred. There are no other good reasons put forward.

65. Accordingly, there is no proper basis for the Tribunal to order a stay of its orders. At the same time, as indicated, I have directed the respondent to inform me as to the matters it would wish to rely on in relation to both the applicant's first case and his second case. That submission has come to hand on 24 March 2010 and I have yet to consider it. When I have done so, I will make a decision as to the manner in which these cases are to proceed.

66. I will issue a separate ruling in relation to the case of *Islam* UNDT/NY/2009/022/JAB/2008/037.

(*Signed*)

Judge Adams

Dated this 26th day of March 2010