

**INTERNATIONAL ADMINISTRATIVE TRIBUNALS
IN A CHANGING WORLD**

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Conference**

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IMMUNITIES AND OPERATIONAL BIASES:
GENERAL CONCLUDING REMARKS

SIENHO YEE*

It is a great pleasure for me and for us all, I believe, to have been here at the Conference. We have heard a great deal. We have heard from the Under-Secretary-General for Legal Affairs and the Under-Secretary-General for Management. We have heard from insiders including several members of the Tribunal. We have also heard from outsiders including professors and practitioners. We have learned a great deal, a great deal about the independence and powers of the international administrative tribunals, about access to justice and due process, and about accountability and administrative justice in the international civil service generally. As the presentations and discussions have been excellent, I shall not bore you with a detailed review of any of them. I shall try to draw some general inspirations from them and make some general remarks.

Indeed, as Professor Barboza said in his opening remarks, the Conference is being held at an auspicious time. This is an auspicious time because internally within the United Nations the UNAT is at a pivotal moment when the existing system is sun-setting and a new system will soon be ushered in. This is also an auspicious time because generally international law is perceived to be moving in a direction of co-progressiveness¹, with all-inclusiveness and advancements in ethical and moral terms as the main concern, while the record of progress of international organizations may be a mixed one. There is news about scandal after scandal, not to mention various other lesser issues. This situation is all the more less than ideal in the light of the expectation that international organizations are supposed to be the vanguard of progress in the international community. This situation

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¹ SIENHO YEE, *Towards an International Law of Co-progressiveness* (2004), 1-26.

has been described by one commentator as a "clash' of operational and normative activities of international institutions"². This indeed may prompt one to ask whether the international organizations practice what they preach.

Held at such a moment, this Conference is bound to give us much food for thought both regarding the immediate concerns with administrative justice and regarding general concerns with international justice. We know that in an imperfect world, there is a battle or, to put it more lightly, tension between peace and justice. Applied to our immediate concerns, it is the battle between effectiveness and justice. From the presentations, I can sense that the battle ground is on two fronts: immunities and operational biases in the system of international administrative justice. Each of these is of great importance.

Regarding immunities, international organizations and their staff are granted by treaties certain immunities from the jurisdiction of the courts of States members³, in order to promote the effectiveness of the organizations. As we know, immunities are always in tension with justice. The conflict between immunities and justice almost always results in disadvantages for justice. This state of affairs, in turn, results in attempts to remove the immunities of international organizations and/or to pursue reparation through lawsuits against States members of international organizations. The presentations made today demonstrate that within the context of the particular facts presented in the cases, the courts have allowed immunities if there is an internal justice system within an international organization which can be deemed a fair alternative to courts. The presentations were solid and I shall not repeat anything. So here lies the importance of the administrative justice system of international organizations. If this system is not strengthened, there may be one day when it is not considered as "a fair alternative to courts", leading to unpleasant results for the international organizations.

Furthermore, I believe the international system as a whole may be interested in three other issues. That is to say, these issues are not problems that

² SHUN-ICHI AGO, "Clash" of operational and normative activities of international institutions, in: LAURENCE BOISSON DE CHAZOURNES / VERA GOWLLAND-DEBBAS (eds.), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 745.

³ Non-State members of international organizations exist and their rights and obligations may be analogous to those of States members. For simplicity, I will deal with only States members.

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the administrative justice system itself can solve. The first issue is whether the scope of immunities of international organizations and their staff should be reduced. As we know, the immunities of international organizations are normally absolute and the functional immunity of the staff members is all-encompassing as long as a matter is within the scope of his or her function. Currently, there are some US cases⁴ in which the question whether functional immunity should be reserved for only the most important function - discretionary function, and not all and sundry functions was presented, although not yet finally adjudicated. This is an issue worth-considering.

The second issue is to what extent a State member should be responsible for acts and/or omission of an international organization. If so, a claimant can press his or her grievances against members of the organization, in order to go around immunities of the latter or other inconveniences. On this issue, there is an on-going debate in official bodies as well as in literature⁵ and I shall not rehash that debate here except to say that a mature system in the end should leave no injury uncompensated for.

The third issue is how to deal with third parties to an international organization. As the activities of international organizations increase, third parties to an international organization will assume greater importance in the future. To the extent that the immunities of international organizations are more or less a creature of treaty law, third parties have a greater claim to justice and may have an easier task in persuading courts to curtail the privileges of international organizations. As a result, it is important for the international organizations to properly deal with their relationship with third parties.

⁴ See, generally, *Rendall-Speranza v. Nassim*, 942 F.Supp. 621 (US D.D.C., 1996), reversed, *Rendall-Speranza v. Nassim*, 107 F.3d 913 (US D.C.Cir., 1997); *Broadbent v. Organization of American States*, 628 F.2d 27, 32-33 (US D.C.Cir.1980).

⁵ See generally, *Saddam Hussein v. Albania, et al.*, ECHR 2006, <http://www.echr.coe.int/Eng/Press/2006/March/HUSSEIN%20ADMISSIBILITY%20DECISION.htm>; International Law Commission, Draft Articles on Responsibility of International Organizations (provisionally adopted in 2006), 2006 Report, A/61/10, art. 29 and accompanying commentary; SIENHO YEE, The responsibility of States members of an international organization for its conduct as a result of membership or their conduct associated with membership, in: MAURIZIO RAGAZZI (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005, Martinus Nijhoff), 435-454; Institute of International Law, 66(ii) *Annuaire* (1996), 449 (http://www.idi-iil.org/idiE/rcsolutionsE/1995_lis_02_en.pdf).

Turning to the "operational biases", let me first explain what I mean by that term. "Operational biases" essentially are legal standards that embody a certain system-wide decision favoring or disfavoring one of the players in the system, often by setting up a certain threshold to be surmounted by one side or by tipping the balance at which the opposing sides are almost neck to neck. For example, the famous "*Chevron* deference"⁶ in US administrative law essentially favors reasonable administrative agency decision-making over judicial decision-making under some circumstances. That bias can be summed up roughly as "Where in doubt, rule in favor of the Administrative Agency".

The presentations made today have presented phenomena that can be recast as biases in the system. For example, the reluctance of the UNAT to hold that it has implied jurisdiction to enforce its own decisions, as discussed and criticized by Professor Stern⁷, in my view constitutes such an operational bias. It can be characterized as "Unless expressly provided for, the UNAT has no implied powers to deal with how to enforce its decisions". Interestingly, the UNAT itself appears to be taking a view opposite to that of the International Court of Justice in the *Reparation*⁸ advisory powers in order to effectively perform its functions. Another operational bias that has been discussed by more than one speaker is the decision not to award attorney's fees to the complainant except in extreme cases. Often this will make any success in litigation against an international organization a pyrrhic victory.

As we can see, both of these biases embody standards that favor the organizations against the individual, thus making the individuals bear the costs of the administrative justice system, particularly when it breaks down. A fair system, however, should be the other way around: the organizations should bear the costs of the justice system. We must remember that in any conflict between an individual and an international organization, the individual is almost always fighting at a great disadvantage. If an individual is made to bear the costs of the system, he or she has to bear them alone; if the organization is made to bear them, it can pass out the costs to a wide spectrum of players, making it easier for each to bear part of them. In the

⁶ *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (US Supreme Court 1984).

⁷ See BRIGITTE STERN, *The Implied Powers of UNAT in the Discharge of its Jurisdictional Function*, in this volume.

⁸ ICJ Reports 1949, 174.

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light of this and other factors, I would recommend that the operational biases be thoroughly reviewed, revised and improved upon for greater fairness.

These are my general observations about and, inspired by, the speeches, presentations, and discussions that I have heard today. Let us congratulate the speakers and the organizers on a successful Conference and let us hope the international administrative justice system will become fairer and fairer.