The Development and Effectiveness of International Administrative Law

On the Occasion of the Thirtieth Anniversary of the World Bank Administrative Tribunal

Edited by

Olufemi Elias

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PART IV

ISSUES OF EFFECTIVENESS AND LEGITIMACY

CHAPTER FIFTEEN

DESIRABLE STANDARDS FOR THE DESIGN OF ADMINISTRATIVE TRIBUNALS FROM THE PERSPECTIVE OF DOMESTIC COURTS

Gregor Novak & August Reinisch

A. Immunities and the Right to a Fair Trial

The nearly absolute understanding of the scope of immunities granted to international organizations[1] has been challenged by constitutionalist approaches since at least the 1990s.[2] It was generally argued that international organizations should no longer be considered exempt from effective mechanisms to ensure their accountability and legitimacy with

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[1] *See* generally F. Kirgis Jr., *International Organizations in Their Legal Setting*, 2nd edn. (West Publishing Co., 1993); A. Reinisch, *International Organizations before National Courts* (Cambridge University Press, 2000); H.G. Schermers and N. Blokker, *International Institutional Law*, 4th edn. (Martinus Nijhoff, 2003); C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edn. (Cambridge University Press, 2005); P. Sands and P. Klein, *Bowett's Law of International Institutions*, 6th edn. (Sweet and Maxwell, 2009); J. Klabbers, *An Introduction to International Institutional Law*, 2nd edn. (Cambridge University Press, 2009).

[2] G.R. Watson, "Constitutionalism, Judicial Review, and the World Court", *Harvard International Law Journal* (1993) 1; M. Cottier, "Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts", 9 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (1999) 432; C. Walter, "Constitutionalising (Inter)national Governance. Possibilities for and Limits to the Development of an International Constitutional Law", 44 *German Yearbook of International Law* (2001) 192; J. Weiler and M. Wind (eds.), *European Constitutionalism beyond the State* (2003); A. Slaughter, *A New World Order* (2004); M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework Analysis", 15 *European Journal of International Law* (2004) 915; A. von Bogdandy, "Constitutionalism in International Law: A Proposal from Germany", *Harvard International Law Journal* (2005) 223; J. Klabbers, "Straddling Law and Politics: Judicial Review in International Law", in R. St. J. MacDonald and D.M. Johnston (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, 2005) 809; B. Kingsbury and R. Stewart, "Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations", in S. Flogaitis (ed.) *International Administrative Tribunals in a Changing World* (Esperia Publications, 2008) 193; A. Reinisch, "Comments on a Decade of Italian Case law on the Jurisdictional Immunity of International Organizations", 19 *Italian Yearbook of International Law* (2009) 101; A. Reinisch, "Privileges and Immunities", in: J. Klabbers (ed.), *Research Handbook on the Law of International Organizations* (2011) 132.

respect to individuals, groups or society at large. With respect to accountability, it was reasoned that the immunity from suit accorded to international organizations could only be justified if adequate and effective alternative accountability mechanisms were available to affected persons. Initially, these included most obviously staff members because they were the first group of individuals directly affected by acts of international organizations. The idea of linking immunities to the availability of adequate and effective alternative means of dispute settlement emerged first in the jurisprudence of the German Federal Constitutional Court[3] and was later succinctly expressed by the European Court of Human Rights (ECtHR) in *Waite and Kennedy* in 1999.[4] Subsequently, this reasoning found its way into a number of other domestic court decisions. This led to a development towards abandoning the traditional view of the immunity of international organizations, according to which courts merely decided on the basis of the applicable immunity provisions without considering the human rights impact thereof. Thus, the human rights-based notion of access to justice or related rules of customary international law as well as principles derived from domestic constitutional law relating to the right to a judicial determination of one's rights came to play an increasingly important role for international organizations and administrative tribunals themselves as well as for domestic courts when deciding on whether to grant immunity from suit to international organizations especially in employment disputes.[5] However, given the variety of international organizations and the diversity of domestic legal systems the approaches taken by domestic courts to address the dichotomy between immunities and due process concerns have been different.

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[3] *See infra* note 61.

[4] *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13; A. Reinisch, "Case of Waite and Kennedy v. Germany, Application No. 26083/94; Case of Beer and Regan v. Germany, Application No. 28934/95, European Court of Human Rights, 18 February 1999", 93 *American Journal of International Law* (1999), 933; P. Pustorino, "Immunità giurisdizionale delle organizzazioni internazionali e tutela dei diritti fondamentali : le sentenze della Corte europea nei casi Waite et Kennedy e Beer et Regan", 83 *Rivista di diritto internazionale* (2000) 132; *Waite and Kennedy*, Application No. 26083/94, European Court of Human Rights, 18 February 1999, [1999] ECHR 13; Reinisch, op. cit., *supra* note 1; A. Reinisch and U.A. Weber, "The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement", 1 *International Organizations Law Review* (2004) 59.

[5] *See* A. Reinisch, "The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals", 7 *Chinese Journal of International Law* (2008) 285.

The challenge to the immunities of international organizations on human rights grounds was generally seen to follow from the fact that states increasingly began to employ international organizations to govern society, rather than merely to coordinate state behaviour. This seemed exemplified by the co-existence of relatively strong means of legal protection within highly integrated organizations such as the EC/EU as compared to other more inter-governmental organizations.[6] Thus, in the context of his study on "Targeted Sanctions and Due Process",[7] Fassbender pointed out that the EU was endowed with far-reaching powers which led to a system of judicial protection against EU acts by and large equivalent to the protection offered in the EU's member states at a domestic level and in which established standards of due process are generally complied with. Fassbender concluded that the general rules of customary international law on judicial protection and due process could not be deduced from the law and practice of the European Union alone as the direct effect of Union law still constituted "a unique feature unparalleled in the law of other international organizations".[8] However, in the context of disputes between international organizations and their staff, the degree of powers or the pervasiveness of an international organization's activities do not seem to be particularly decisive. This can be concluded from the fact that the employment of staff by international organizations is a universal phenomenon[9] since nearly all kinds of international organizations employ staff. It is further highlighted by the early emergence of staff dispute resolution mechanisms within international organizations.[10] Staff disputes are always related to activities directly affecting individuals and thus may engender human rights issues.

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[6] The link between stronger legal protection for individuals and the degree of powers granted to an organization could also be seen to follow from other reasons, such as the need to secure legitimacy or to assuage the fears of individual member states engaging in an organization enabling majority decision-making.

[7] B. Fassbender, "Targeted Sanctions and Due Process. The responsibility of the UN Security Council to ensure that fair and clear procedures are made available to individuals and entities targeted with sanctions under Chapter VII of the UN Charter", Study commissioned by the United Nations Office of Legal Affairs – Office of the Legal Counsel, 20 March 2006 (final), available at: http://www.un.org/law/counsel/Fassbender_study.pdf (retrieved in April 2011).

[8] Ibid, at para. 4.6.

[9] Amerasinghe noted in observing the increase in the employees of the World Bank that the "international civil servant has become an increasingly ubiquitous and active figure on the international stage". See C.F. Amerasinghe, *The Law of the International Civil Service*, Volume I, 2nd edn. (Oxford University Press, 1994) 4.

[10] The League of Nations created an administrative tribunal to settle disputes between itself and its civil servants already in 1927.

A central argument against domestic courts lifting the immunity of international organizations e.g. based on human rights concerns was expressed early on in *Broadbent v. OAS* where the D.C. Court of Appeals stated that

> [a]n attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability or the organization to function effectively.[11]

This rationale was also echoed in comparable decisions dealing with the issue of immunities of international organizations and their relationship to the existence of legal remedies for individuals or legal entities. For instance, in *Waite and Kennedy*, the ECtHR pointed out

> that the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments.[12]

However, when examining the admittedly scarce jurisprudence of domestic courts it cannot be overlooked that cases of a denial of immunity did not in fact lead to the "uniformity in the application of staff rules or regulations" having been undercut or to "unilateral interference" in the strict sense of the term. This can be concluded from two observations. Firstly, most courts have pointed to some basic considerations of human rights relating to due process rights as generally relevant, even when they have upheld immunity. That is, these courts refrained from engaging in what could be deemed to go beyond the judicial function but nevertheless pointed to considerations of justice, in some cases resorting to the decision on costs so as not to skew their result further in disfavour of the plaintiff.[13] In contrast, where "zealous" courts have in fact denied immunity, it will be argued that they have applied a basic core of arguably universal procedural human rights guarantees. Therefore, in those cases, the interference could not be said to have been "unilateral" in the sense of being entirely "without the agreement of the others". Moreover, in those cases

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[11] *Broadbent v. OAS*, D.C. Court of Appeals, 628 F.2d 27, 35 (D.C.Cir. 1980).
[12] *Supra* note 4, at 63.
[13] *See infra* text at note 86.

where immunity was denied, such as most prominently in *Siedler v. WEU*,[14] the respective decision was upheld on last appeal only to the extent that domestic labor law provisions were not held to be applicable in accordance with the general principle of law providing for the primacy of directly applicable provisions of international law over provisions of domestic law.[15] As will be revealed by a more in-depth discussion of the relevant case law below, in the light of this jurisprudence it can be said that the risk of denying immunities as expressed in *Broadbent* and implied in *Waite and Kennedy* and similar decisions has so far not materialized where courts have actually denied immunity to international organizations. Other courts, which have been more restrained, have nevertheless pointed to the evident dichotomy between human rights and immunities but refrained from denying immunity basically on what can be interpreted as separation of powers grounds.

The following overview attempts to look for answers in the jurisprudence of domestic courts to the question of which specific minimum criteria for the design of administrative tribunals are seen as desirable or necessary and whether these criteria may be deemed universal, i.e. whether courts apply a common standard. Firstly, an overview of the human rights standards informing the decisions of domestic courts in the context of labour relations of international organizations and their staff is useful in order to examine whether a universal minimum standard has generally been observed and what it consists of. Secondly, it is useful to analyse what standards domestic courts have actually applied to administrative tribunals. Finally, after a conclusion from the perspective of domestic courts, it is imperative to see the "big picture" allowing for putting the role of domestic courts in perspective alongside various other factors influencing the design of administrative tribunals. On that basis, one may venture certain recommendations for the design of administrative tribunals that not only conform to the standards of domestic courts and general human rights standards, but also indirectly contribute to the legitimacy of international organizations, which is assumed to be desirable given the range of tasks and functions that such organizations increasingly must fulfil.

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[14] *Siedler v. Western European Union*, Brussels Labour Court of Appeal (4th chamber), 17 September 2003, *Journal des Tribunaux* 2004, 617, ILDC 53 (BE 2003). Subsequent references to paras. in judgments or decisions included in the Oxford Reports on International Law in Domestic Courts (ILDC) relate to the numbering provided in that database (available at http://ildc.oxfordlawreports.com).

[15] *See infra* text at note 36.

B. The Right to a Fair Trial

The protection of procedural due process[16] has been called the "foundation stone for 'substantive protection' against state power"[17]. Moreover, in the context of administrative procedures, it has been contended that "fair treatment in the sense of treatment according to [authoritative standards] constitutes an important and irreducible aspect of justice".[18] In the above-mentioned study on targeted sanctions and due process, Fassbender, drawing on treaty and constitutional law provisions of various treaties and national constitutions as well as their interpretation by courts, observes differences relating, *inter alia*, to the extent of the right of access to the courts, the types of disputes subject to fair trial rights, the application of fair trial rights to administrative procedures, the independence and impartiality of a tribunal and legitimate restrictions of fair trial rights in what is called the public interest.[19] Nevertheless, Fassbender concludes that

> [n]otwithstanding the [...] differences in the definition of due process rights, it can be concluded that today international law provides for a universal minimum standard of due process which includes, *firstly*, the right of every person to be heard before an individual governmental or administrative measure which would affect him or her adversely is taken, and *secondly* the right of a person claiming a violation of his or her rights and freedoms by a State organ to an effective remedy before an impartial tribunal or authority. These rights are widely guaranteed in universal and regional human rights treaties. They can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the ICJ Statute.[20]

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[16] Where immunities of international organizations would lead to a total exclusion from procedural guarantees in staff disputes and particularly where discrimination or harassment issues would be pertinent, they could also be seen as offending the dignity of the affected staff members. In this context, even highly deferential courts, such as e.g. the tribunal in *Mukoro v. EBRD* point out that when interpreting the relevant rules granting immunity the severity of the disability suffered by a potentially aggrieved individual must also borne in mind (see *infra* text at note 100). However, this specific avenue of legal argument is not further pursued here. See in this context e.g. C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", 19 *European Journal of International Law* (2008) 655.

[17] R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford University Press, 2000) at 550.

[18] D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press, 1996).

[19] Fassbender, *supra* note 7, at 1.9.

[20] Ibid, at 1.17.

In addition to the decisions of domestic courts when they decide to acknowledge or deny immunity from suit, various other actors may also be relevant in shaping the law. These include primarily the states parties to the constituent instruments of international organizations, international organizations themselves through their secondary instruments or the respective administrative tribunals through their case law. Specifically, the rules governing employment relationships to international organizations may include staff employment contracts, staff rules and regulations, internal orders, circulars, handbooks and practices of the IO, the constituent instruments of the relevant IO or of a specific tribunal. These rules may also extend to general principles of law or principles of administrative law as developed in the case law of administrative tribunals or the ICJ that are recognized either by the IO or competent administrative tribunals[21] or are considered as binding *ipso facto* on states and international organization under customary international law or general principles of law.

Thus, many factors shape the system applicable to the staff of international organizations in significant ways and play an important role in developing the applicable standards. However, domestic courts are unique in that their decisions question the applicable system itself and are enforceable on the domestic level subject to the respective domestic court's willingness to assume enforcement jurisdiction. This chapter attempts to examine whether the challenge posed by domestic courts is in fact as destabilizing as may seem at first sight and whether certain standards can be discerned from the jurisprudence of domestic courts. As will be demonstrated, the latter may provide guidance for the design of administrative tribunals. It can be summarized that the risk of exceedingly divergent or "zealous" domestic decisions has not materialized as yet. At the same time, domestic courts do point to a certain minimum standard that can inform the design of administrative tribunals. However, particularly in light of evolving conceptions of human rights and due process, merely aspiring to this minimum standard is most likely not the solution for administrative tribunals. Instead, arguments of legitimacy of international organizations militate in favour of a particularly high standard of due process when it comes to employment disputes involving international organizations.

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[21] For the case of the WBAT see P. Hansen, "The World Bank Administrative Tribunal's External Sources of Law: A Retrospective of the Tribunal's First Quarter-Century (1981–2005)", *6 The Law and Practice of International Courts and Tribunals* (2007) 1.

C. The Perspective of Domestic Courts

The growing importance of the availability of access to some form of dispute settlement as a human rights imperative imposed by Article 6 of the European Convention on Human Rights (ECHR)[22] was reflected in a number of different domestic court decisions in Europe dealing with disputes between international organizations and usually former or prospective staff members.

In *Siedler v. Western European Union* (*WEU*),[23] the leading case in this regard, a Belgian appellate court found that the internal procedure for the settlement of employment disputes within the WEU[24] did not offer the guarantees necessary to secure a fair trial. After pointing out that in *Waite and Kennedy*, the ECtHR had not examined whether the available means offered by the European Space Agency (ESA) satisfied all the guarantees involved in the notion of a fair trial as derived from Article 6(1) ECHR,[25] the appellate court elaborated on the concept of fair trial. It found that the guarantees under Article 6(1) ECHR included *inter alia* the right of access to an independent and impartial tribunal established by law and the right for a claim to be heard equitably. The latter was seen to imply particularly the equality of arms, the contradictory principle, the giving of reasons for a judgment, the right to appear in person and the right to a public procedure within a reasonable time-limit.[26] The appellate court went on to elaborate on the notion of a tribunal within the framework of the ECHR. Particularly, the court referred to the autonomous meaning of the term in the ECHR context. As important elements, the court stressed the independence of the tribunal in relation to the executive, the parties as well as to the legislature and interest or pressure groups as well as a guarantee of a judicial procedure. Moreover, a tribunal needed to be competent to issue

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[22] COE 'Convention for the Protection of Human Rights and Fundamental Freedoms' (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[23] *Supra* note 14.

[24] The WEU was "effectively closed" in 2010, see Western European Union, "Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty – Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain and the United Kingdom", Brussels, 31 March 2010, available under: http://www.assembly-weu.org/ (retrieved in April 2011). ("The WEU has therefore accomplished its historical role. In this light we the States Parties to the Modified Brussels Treaty have collectively decided to terminate the Treaty, thereby effectively closing the organization, and in line with its article XII will notify the Treaty's depositary in accordance with national procedures").

[25] *Supra* note 14, at para. 54.

[26] Ibid, at para. 55.

enforceable decisions on substantive issues following an organized procedure and must have been established by law at least with regard to its basic principles which could enable the executive to establish more detailed rules.[27] With regard to publicity, the appellate court mentioned acceptable exceptions to a public hearing, but found that no exceptions for the publicity of decisions was tolerable since decisions had to remain verifiable as to their conformity with the exigencies of law and justice.[28] Examining the WEU's Appeals Commission, the Belgian appellate court preliminarily concluded that this internal body was properly vested with a jurisdictional role competent to settle a dispute in an adversarial manner, to announce the annulment of a challenged decision brought before it should the event arise, to order the organization to repair the damage caused by a challenged decision and to reimburse costs.[29] However, the appellate court found fault in the fact that no provisions regarding the implementation of the Appeals Commission's decisions existed. Moreover, the appellate court stated that the public character of the debates was not guaranteed as the hearings of the Appeals Commission were secret, that the publication of the decisions was not guaranteed and that the appointment of the Commission's members for a period of two years was entrusted to an intergovernmental council. In the appellate court's view, the latter was seen to carry the risk of linking the members of the Commission too closely to the organization since it violated permanence as a necessary precondition of the notion of independence. Moreover, no provision existed to permit challenges concerning the impartiality of individual members.[30] As the procedure provided by the WEU personnel statute thus did not offer all the guarantees inherent in the notion of fair trial, with some of the most important conditions being flawed, the court finally concluded that the limitation on access to the normal courts by virtue of the jurisdictional immunity of the WEU was incompatible with Article 6(1) ECHR.

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[27] Ibid, at para. 56.

[28] Ibid, at para. 58.

[29] Ibid, at para. 59 ("The WEU appeals commission was properly vested with a jurisdictional role competent to settle a dispute, to announce the annulment of a challenged decision brought before it should the event arise, and to order the organization to repair the damage caused by a challenged decision and to reimburse the costs (art 59). The adversarial character of procedure is guaranteed. However, there is no provision as regards the implementation of its decisions").

[30] Ibid, at para. 60 ("On the other hand, the public character of the debates is not guaranteed—the hearings of the appeals are secret indeed (art. 57)—nor is the publication of the decisions guaranteed (art. 5). The designation of members is assigned to an intergovernmental Council, which appoints members of the Commission for a period of two years").

On 21 December 2009, the Court of Cassation delivered its decision in *Siedler* as well as in two other cases relating to the immunity of an international organization pursuant to a staff dispute.[31] In *WEU v. Siedler*[32] the Court of Cassation dealt with three points raised by the WEU. The Court, in reference to *Waite and Kennedy*, firstly reiterated the guarantees of fair trial provided by Article 6(1) ECHR. While acknowledging that the right of access to a tribunal was not absolute, the Court nevertheless found that access of an individual to a tribunal could not be restricted in a way or to a degree that would compromise the substance of his or her right.[33] Moreover, exceptions to Article 6(1) ECHR could only be reconciled with Article 6(1) ECHR if they had a legitimate aim and if they were proportionate with regard to the means and aims. After establishing that the grant of immunities pursued a legitimate aim, since it was an indispensible means for the good functioning of international organizations whose activities should not be interfered with by a state, the Court passed to the issue of proportionality, which it found could only be evaluated on a case by case basis. The Court contended that in order to examine whether Article 6(1) ECHR had been breached, it was necessary to examine whether the affected individual had other reasonable means to effectively protect the rights guaranteed to him or her under the ECHR. Generally, the Court also held that when determining whether an international organization may invoke immunity in light of Article 6(1) ECHR, the judge could not limit himself or herself to merely acknowledging that the instruments establishing the Appeals Commission qualified it as independent but instead needed to examine whether the appeals procedure was effectively independent.[34] Consequently, the Court of Cassation approved the legal qualification made by the appellate court, particularly quoting the appellate court's finding that the mode of appointment of the members of the Appeals Commission and the short duration of their mandate entailed the risk that its members would be too closely tied to the organization and emphasising that the inability to remove the Commission's members was a necessary corollary to the notion of independence.[35] However, the appeal

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[31] *General Secretariat of the ACP Group v Lutchmaya,* Final appeal judgment, Cass Nr C 03 0328 F; ILDC 1573 (BE 2009), 21 December 2009; *General Secretariat of the ACP Group v BD,* Final appeal judgment, Cass nr C 07 0407 F; ILDC 1576 (BE 2009), 21 December 2009.

[32] *Union de L'Europe Occidentale contre S. M.*, Cour de cassation de Belgique, 21 December 2009, Arrêt, N° S.04.0129.F.

[33] Ibid. at p. 20.

[34] Ibid. at p. 21.

[35] Ibid. at p. 21 and p. 22.

raised by the WEU was granted insofar as it concerned the application of domestic provisions of labor law. The Court of Cassation held that these were not applicable in the concrete case in light of the general principle of law providing for the primacy of directly applicable provisions of international law over provisions of domestic law.[36]

Similarly, in *Lutchmaya v. General Secretariat of the ACP Group*[37] a Belgian appellate court had decided to deny immunity based on the reasoning that an international organization could only invoke its immunity in domestic proceedings provided that the plaintiff had access to other reasonable means to protect his or her rights guaranteed by Article 6(1) ECHR. In contrast to *Siedler v. WEU* the lack of any complaints mechanism whatsoever made the court's task easier. Moreover, the Court found that the reasoning of the ECtHR in *Waite and Kennedy* was also applicable to the immunity from execution, since execution was seen to form an integral part of a fair trial. An appeal by the ACP Group Secretariat led to a decision of the Court of Cassation rendered on the same date as the *WEU v. Siedler* cassation decision.[38] Therein, the Court of Cassation upheld the appellate court's judgment, which had given precedence to Article 6(1) ECHR over the relevant seat agreement. The Court again essentially referred to the jurisprudence of the ECHR and stressed that it was necessary to examine whether the person against whom immunity from execution was invoked had other reasonable means to effectively protect the rights guaranteed to him or her by the Convention.[39]

It has been argued that the two first instance and appellate decisions in *SA Energies Nouvelles et Environnement (ENE) v. Agence Spatiale Européenne (ESA)*[40] should be construed as a "correction to the possibly excessively liberal decision"[41] in *Siedler v. WEU* on the ground that the ESA's "ombudsman"[42] procedure had been held by the Belgian Courts to constitute a

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[36] Ibid. at p. 23.

[37] *Lutchmaya v. General Secretariat of the ACP Group,* Appeal decision, Journal des Tribunaux 2003, 684; ILDC 1363 (BE 2003), 4 March 2003.

[38] *Supra* note 31.

[39] Ibid. at p. 19.

[40] *SA Energies Nouvelles et Environnement v. Agence Spatiale Européenne*, First instance decision, Journal des tribunaux 2006, No 6216, 171; ILDC 1229 (BE 2005), 1 December 2005; *SA Energies Nouvelles et Environnement v Agence Spatiale Européenne,* Appeal judgment No. 2011/2013, 2006/AR/1480, ILDC 1729 (BE 2011), 23 March 2011.

[41] Ibid. ILDC headnote, analysis by C. Ryngaert, at 7.

[42] ESA's Industrial Ombudsman is involved in the contractual relations between the prime contractor and the subcontractors, since the Ombudsman's tasks include the facilitation of the resolution of disputes between prime contractors and subcontractors by submitting recommendations. See Terms of Reference of the ESA's Industrial Ombudsman (ESA Unclassified) 13 January 2009.

reasonable alternative means of legal protection. However, besides the fact that *Siedler v. WEU* and the similar *L. v. ACP Group Secretariat* have been upheld by the Belgian Court of Cassation in a decision subsequent to the first instance decision in *ENE v. ESA*, already a closer look at the content and context of *ENE v. ESA* leads to the conclusion that assuming a "backlash"[43] is exaggerated. Thus, before holding that the ESA's ombudsman procedure and a direct claim by the subcontractor ENE against the two contractors "CESI" and "RWE" may be an alternative reasonable means of legal protection, the first instance court had pointed out that ENE was only a sub-contractor of CESI or RWE and ESA did not have the power to impose on its prime contractors the choice of the latter's subcontractors.[44] Whereas it may be true that the court implied that the ombudsman procedure would constitute a "reasonable alternative means",[45] it remains a material fact of the case that ENE had other means of legal protection at its disposal against the entities that were in fact in the primary position to exercise power over ENE, namely CESI and RWE.[46] Moreover, that the ESA ombudsman procedure was acceptable in the present case does not lead to the conclusion that any "ombudsman" procedure in any context would constitute a "reasonable alternative means" in the light of Article 6(1) ECHR, even if this could be argued. Therefore, even if the Court of Cassation should confirm the first and second instance decisions in *ENE v. ESA*, this would not lead to the conclusion that a fundamental change in the approach of Belgian courts to the issues decided in e.g. *Siedler v. WEU* has occured.

In *Illemassene v. OECD*, the French Court of Cassation[47] upheld the decision of a Paris appellate court which had examined the design of the OECD's administrative tribunal and found that it did not violate the French conception of the international *ordre public* and that therefore, the OECD was entitled to benefit from immunity from jurisdiction. Specifically, the Court of Cassation referred to the findings of an appellate court relating particularly to Articles 16 and 22 of the Personnel Statute of the OECD. The latter had established an administrative tribunal whose three

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[43] *See* C. Ryngaert, "The Immunity of International Organizations Before Domestic Courts: Recent Trends", 7 *International Organizations Law Review* (2010) 121–148, 138.

[44] *Supra* note 40, at para. 40.

[45] Ibid. at para. 45.

[46] ENE's claim was based on the allegation that the main contractors CESI and RWE had wrongly failed to select it to carry out a contract for the benefit of ESA.

[47] *Illemassene v. OECD,* Cour de cassation, Chambre Sociale, N° de pourvoi: 09-41030, 30 November 2010.

judges were to be appointed by the Council, an organ composed of OECD member state representatives for a term of three years. The judges were to be selected from persons other than the organization's staff among persons highly qualified in labor law or in the area of labor relations or public officials and were to exercise their functions with impartiality and complete independence. The appellate court had established that the hearings of the tribunal were public unless otherwise decided *ex officio* or at the request of the parties, that the dates of sessions were published on a list available to agents, delegations, and to the OECD's personnel association and that the tribunal's decisions were to be rendered in writing. Moreover, the Court pointed out that the OECD had not adhered to the ECHR but had, nevertheless, for the purposes of the regulation of labour disputes provided a means of juridical nature including guarantees of impartiality and equity from which it concluded that the procedure instituted by the organization was not contrary to the French concept of the international *ordre public*.[48] As to the substantive requirements it employed, they were similar to those used by the Belgian appellate court. While the reference of the Court to the French *ordre public* does not appear to add to coherence to the decision of other domestic courts, the standards it applies can be deemed to be universal.

In *African Development Bank v. X*[49] the French Court of Cassation held that the African Development Bank could not invoke immunity from jurisdiction in a lawsuit brought by a former employee, since at the time of his dismissal no body competent to consider disputes of this kind had been set up within the organization. This made it impossible for a staff member to approach a court eligible to decide on his or her claim and to exercise a right based on the international *ordre public*.[50] This constituted, in the Court's view, a denial of justice, which established jurisdiction of French courts where a link to France existed. This link

[48] Ibid.

[49] *African Development Bank v. Mr X*, Appeal judgment, Appeal No 04-41012; ILDC 778 (FR 2005), 25 January 2005.

[50] Ibid. at para. 3 ("However, the African Development Bank cannot invoke immunity from jurisdiction in a lawsuit from an employee who it dismissed, as at the time of the events it had not set up within the organisation a court competent to consider disputes of this kind, making it impossible for a party to approach a court eligible to find on his claim and to exercise a right that falls within international public policy, constituting a denial of justice, which establishes jurisdiction for the French courts if a link with France exists"). Moreover, the Court confirmed that a link to France could be based on the nationality of the person concerned, which meant that the appellate court did not act *ultra vires* in holding that the French court was competent to consider the dispute.

was established on the basis of the plaintiff's nationality in the present case.

Fundamental principles of the domestic constitutional order appeared also in *Pistelli v. European University Institute* (*EUI*),[51] a case in which an Italian appellate court accepted immunity of the respective international organization as long as it ensured jurisdictional protection of like situations before an impartial and independent judge, even if based on procedures and criteria different from those found in the domestic legal order.[52] The court held that in such cases no violation of the "cardinal principles" of the Italian Constitution had occurred and that there was no reason not to apply the respective convention granting immunity. The appellate court found that the EUI had provided for a body for settling disputes which was a truly judicial body rather than merely an internal decision-making body. For the appellate court, this could be deduced from the fact that the selection of the members of the Committee from a list compiled by an international judicial organ satisfied the requirements of independence and impartiality. This Committee was considered as equivalent to the ECJ. Additionally, the Court of Appeals pointed out that since the EUI had been created by member countries of the EU in order to promote the importance of European cultural heritage, its constitutional traditions as well as its institutions it could not be based on a convention that was contrary to cardinal values of European "institutionality and its *ius cogens*".[53]

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[51] *Pistelli v. European University Institute*, Appeal judgment, No 20995; ILDC 297 (IT 2005), Guida al diritto 40 (3/2006) (in Italian), 28 October 2005.

[52] Ibid. ILDC translation, at 14.1 ("However, the situation is different for a convention which only excludes such disputes from Italian courts, while nevertheless ensuring the jurisdictional protection of the same situations before an impartial and independent judge, even if chosen with procedures and criteria other than those in national legislation. In this case there is no violation of the "cardinal principles" of our Constitution and no reason not to apply the convention, in the form of the ratifying law").

[53] Ibid. ILDC translation, at 14.2 ("The provision in the convention (art 6(5)(c)) under which the statute must define the mechanism for the resolution of disputes between the Institute and the beneficiaries of the statute, has been enacted as, once internal claims have been exhausted the interested party can take disputes to a Commission, whose members are chosen by the High Council from a list compiled by an international judicial organ. The provision of the Convention appears sufficient to draw the conclusion that the instrument for settling disputes was envisaged as excluding national jurisdiction, and not as a mere internal remedy. In any event, definitive confirmation is provided by Annex 2 of the same Convention, where it states that *the provisions of Article 6(5)(c) do not prevent the High Council from designating the Court of Justice of the European Communities, after consultation with the President of that Court, as the body appointed to settle disputes between the*

Echoing its previous jurisprudence in *Colagrossi v. FAO*,[54] *Carretti v. F.A.O.*[55] and *Pistelli v. EUI*,[56] the Italian Court of Cassation held in *Drago v. International Plant Genetic Resources Institute* (*IPGRI*)[57] that the immunity granted to an international entity did not raise doubts of constitutional legitimacy when the convention that exempted certain situations from Italian jurisdiction nevertheless ensured judicial protection of like situations before an impartial and independent judge, albeit chosen according to different procedures and criteria from those found in the domestic legal order.[58] The Court went on to note that at the relevant time no possibility

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Institute and its staff. The possibility of substituting the competence of the Committee with the Court of Justice of the European Communities definitely reveals the intention for the procedure not to be merely an interim remedy, following which is the possibility of access to jurisdictional protection, but rather the exclusive jurisdictional means of settling disputes with staff") and at 14.3 ("These matters therefore make it possible to refute the statement in decision 149/1999, which formed the basis for that decision, that a merely internal decision-making body had been provided as an alternative or optional remedy to State justice. As has been noted, the body for settling disputes is a truly jurisdictional body. The selection of the members of the Committee from a list compiled by an international judicial organ of international legal organisations satisfies the requirements of independence and impartiality for the body charged with resolving disputes between staff and the Institute, a body, as has been said, which is considered equivalent to the Court of Justice of the European Communities. Besides, the Institute was created by member countries of the European Union in order to promote the importance of European cultural heritage and its constitutional traditions, as well as its institutions; it could not therefore be founded on the basis of a convention that contrasted with a cardinal value of European institutionality and its *ius cogens*, a value enshrined by Article 6/2 of the Treaty on the European Union (as amended by the Treaty of Amsterdam: Official Gazette 6.7.1998, no. 155, ordinary supplement)—read in connection with Article 6 of the ECHR and Article 46(d) of the EU Treaty (see also Article 14, agreement on civil and political rights)—and by Article II-47/2 of the Charter of Fundamental Rights of the European Union").

[54] *FAO v. Colagrossi,* Court of Cassation s.u., 18 May 1992, no. 5942, RDIPP 1993, 400.

[55] *Carretti v. FAO*, Court of Cassation s.u., 23 January 2004, no. 1237, AC, 2004, 1328.

[56] *Pistelli v. IUE,* Court of Cassation s.u., 28 October 2005, no. 20995.

[57] *Drago v. International Plant Genetic Resources Institute* (IPGRI), Final appeal judgment, n 3718 (Court of Cassation, All Civil Sections); ILDC 827 (IT 2007); Giustizia Civile Massimario, 2007, 2, 19 February 2007.

[58] Ibid. ILDC translation, at para. 6.5 ("In accordance with such criteria, in its case law, the Court of Cassation, All Civil Sections, has taken the view that the immunity granted to an international entity does not raise doubts as to constitutional legitimacy when the convention that transfers those situations away from Italian jurisdiction nevertheless ensures jurisdictional protection of the same situations before an impartial, independent judge, albeit chosen according to procedures and criteria other than those in national legislation: see Cassation, All Civil Sections, no 5942, 18 May 1992, and no 1237, 23 January 2004, in relation to the referral to the Administrative Tribunal of the International Labour Organisation (ILO) of proceedings brought by FAO employees against their employer for the protection of their rights; see also Cassation, All Civil Sections, no 20995/2005 cit., in relation to the enactment of the statute of the European University Institute through the provision of an instrument for resolving disputes before an appropriate committee (which does not

of appeal to the ILOAT had been possible due to the restricted jurisdiction *ratione temporis* of the latter. At the same time, the organization's internal rules provided that disciplinary measures were to be re-examined by a body known as the Appeals Committee, which was also to consider appeals of a non-disciplinary nature. However, this merely constituted an internal remedy which did not provide judicial protection under the required standard. Specifically, the internal rules expressly excluded the possibility of that body examining appeals relating to the expiry of an employee's contract of employment. Consequently, an employee possibly did not have access to judicial protection before an independent organ. This preclusion of any form of judicial protection of the organization's employees led the court to conclude that the IPGRI could not rely on its immunity and that the respective dispute fell within the jurisdiction of Italian courts.[59]

In a 2006 staff dispute case,[60] the German Federal Constitutional Court drew on its reasoning in *Hetzel v. EUROCONTROL*[61] where it had affirmed that German courts lacked jurisdiction over employment disputes between EUROCONTROL and its officials and held that the organization's immunity before German courts did not violate minimum requirements of the rule of law as protected by the German Basic Law because the exclusively competent ILOAT provided an adequate alternative remedy.

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merely constitute an internal remedy, in part because the competence of such a committee may be substituted by that of the European Court of Justice)").

[59] Ibid. ILDC translation, at 6.6 ("Indeed, it is self-evident that it was not until January 2001 that the IPGRI joined the ILO and the jurisdiction of the Administrative Labour Tribunal, to which therefore the dispute could not be referred, given that this organisation's rules provide for the inadmissibility of appeals centred on rights whose facts predate membership of the body. The body's internal rules (known as the Personnel Policy Manual) state that disciplinary measures are to be re-examined by a body known as the Appeals Committee, which may also consider appeals of a non-disciplinary nature. This merely constitutes an internal remedy, which does not provide jurisdictional protection in the aforesaid sense. It should nevertheless be noted that this Manual (para. 144.02) expressly excludes the possibility of that body examining appeals relating to the expiry of an employee's contract of employment ("action based on expiration of an appointment by its own terms is not disciplinary in character, nor may such action form the basis of grievance")").

[60] German Federal Constitutional Court, 2 BvR 1458/03, 3 July 2006, Absatz-Nr. (1–25), available at: http://www.bverfg.de/entscheidungen/rk20060703_2bvr145803.html (retrieved 10 January 2011).

[61] *Hetzel v. EUROCONTROL*, Federal Constitutional Court, Second Chamber, 10 November 1981, 2 BvR 1058/79, BVerfG 59, 63; NJW (1982), 512, DVBl (1982), 189, DÖV (1982), 404. See also on the background of *Hetzel v. EUROCONTROL* and the related case of *Strech v. EUROCONTROL*, A. Bleckmann, *Internationale Beamtenstreitigkeiten vor nationalen Gerichten* (Duncker & Humblot, 1981); I. Seidl-Hohenveldern, *Die Immunität internationaler Organisationen in Dienstrechtsstreitfällen* (Duncker & Humblot 1981).

Analysing the ILOAT procedure in the context of a complaint arising from a dispute between the European Patent Office (EPO) and certain members of its staff concerning the right to unrestricted access to an internal e-mail system by members of the Staff Union of the EPO, the court reiterated the general criteria required for a constitutional complaint based on an allegation of a structural legal protection deficit in the case of international organizations. The court pointed out that it had already established that the EPO's system of legal protection essentially corresponded to the standard of the Basic Law. The court pointed out that pursuant to Article 13(1) of the European Patent Convention (EPC)[62] employees and former employees of the EPO had the right to apply to the ILOAT after the exhaustion of the internal complaint procedure. The court found that the proceeding before the ILOAT was independent of the EPO's internal complaints procedure. Moreover, the ILOAT decided on the cases it was seized with based on legally determined competences and in the framework of a legally ordered procedure exclusively in accordance with legal norms and principles. Its judges were obliged to independence and impartiality pursuant to Article III of the ILOAT Statute.[63] Accordingly, the court determined that the status and the procedural principles of the ILOAT satisfied both the international minimum standard of elementary procedural justice as well as the minimum requirements for the rule of law of the Basic Law. Therefore, the court concluded that plaintiffs had not substantiated their claim that a structural lack of legal protection existed.[64]

In the context of another staff dispute concerning the EPO, the German Federal Constitutional Court reiterated[65] that the system of legal protection offered by the EPO essentially corresponded to the standard required under German constitutional law.[66] Particularly, the court pointed out that the members of the EPO Boards of Appeal were materially and personally independent. At least one member must have been qualified to be a judge. The procedure was seen as committed to the principles of the rule of law.

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[62] Convention on the Grant of European Patents (signed 5 October 1973, entered into force 7 October 1977) 1065 UNTS 199.

[63] Statute of the Administrative Tribunal of the International Labour Organization (adopted 9 October 1946).

[64] *Supra* note 60, at para. 23.

[65] German Federal Constitutional Court, 4 April 2001, *Entscheidung im Verfahren über die Verfassungsbeschwerde des Herrn S. gegen die Entscheidung der Beschwerdekammer in Disziplinarangelegenheiten des Europäischen Patentamts vom 17. November 1999,* 2 BvR 2368/99, Absatz-Nr. (1 – 23), available at: http://www.bverfg.de/entscheidungen/rk20010404_2bvr236899.html (retrieved 10 January 2011).

[66] Ibid. at para. 20.

The court further positively remarked that the appeals procedure was judicial and completely separate from the first instance and was independent. Particularly, the Enlarged Board of Appeal,[67] which is competent to decide on points of law of fundamental importance, had developed certain principles *inter alia* enshrined in the Convention on the Grant of European Patents' (EPC)[68] common provisions governing procedure.[69] The court further pointed out that the Boards of Appeal have themselves applied these principles consistently and that the Enlarged Board of Appeal and the Boards of Appeal have together ensured that proceedings before the EPO were in accordance with the rule of law.[70] The court also noted that the Enlarged Board of Appeal had also ensured the independence of the first instance decision-makers and formed the principles of an oral hearing, the right to be heard as well the principle of decision-making on the basis of recognized evidentiary principles. The court further pointed out that with regard to the EPO's European Qualifying Examination comprehensive jurisprudence from the Disciplinary Board of Appeal of the EPO, which had been established by the Administrative Council on the basis of Article 134(8)(b) of the EPC, existed[71] in which procedural requirements from the perspective of equal treatment pursuant to Article 14 of the ECHR had also been considered. In the case at hand, the plaintiff was unable to show that the legal protection offered against decisions concerning the EPO's European Qualifying Examination "generally and evidently" breached the standard required by the Basic Law. Therefore, the court decided to dismiss the complaint. Furthermore, the court held that it was questionable whether domestic jurisprudence relating to qualifying examinations of all kinds, which plaintiff had invoked in its favour, could be generalized. Moreover, the criteria applied in that context, particularly relating to the requirement for giving reasons to examination decisions, were not considered to have expressed structural elements of fundamental rights protection intended by the Basic Law also to be applicable to supranational organization such as the EPO at the time of the decision.[72]

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[67] Article 112 (1) of the EPC (see *infra* note 68).

[68] Convention on the Grant of European Patents (signed 5 October 1973, entered into force 7 October 1977) 1065 UNTS 199.

[69] Articles 113 seq. of the EPC.

[70] *Supra* note 65, at 21.

[71] See Regulation on the Establishment of an Institute of Professional Representatives before the European Patent Office (OJ EPO 1997, 350) and the changes of 07.06.2002 (OJ EPO 2002, 429 ff) and of 17.06.2004 (OJ EPO 2004, 361).

[72] *Supra* note 65, at para. 22.

In the context of a another constitutional complaint based on a dispute between the EPO and a member of its staff,[73] the German Federal Constitutional Court found that the complainant did not show that the legal protection offered against decisions relating to the EPO's European Qualifying Examination "generally and evidently" breached the standard required by the Basic Law. The court added that the alleged mistakes of the disciplinary chamber in the application of the rules on examination and authorization, if they had any merit, were not weighty enough to confirm doubts that the level of the fundamental rights protection guaranteed by the Basic Law had been structurally undermined.[74]

More recently, in a constitutional complaint concerning legal protection against acts of the European Patent Office,[75] the German Federal Constitutional Court reiterated its previous jurisprudence holding that constitutional complaints against supranational acts are *a priori* inadmissible if the complainant did not show that the organization generally and evidently did not guarantee those procedural safeguards relating to fundamental rights that were required by the Basic Law.[76] The court pointed out that a constitutional complaint could not be considered as substantiated without a deeper examination of the internal possibilities of appeal, the applicable procedural rules and the jurisprudence of the appeals tribunals. Finally, the court stated that a closer examination was unwarranted in the case before it since it has already determined that the EPO's legal protection system essentially accorded with the requirements of the Basic Law. In this context the court again particularly pointed to the existence of an appeals procedure with independent members of the appeals chamber and the existence of procedural standards developed in the jurisprudence

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[73] German Federal Constitutional Court, 28 November 2005, *Entscheidung im Verfahren über die Verfassungsbeschwerde des Herrn D. gegen die Entscheidung der Beschwerdekammer in Disziplinarangelegenheiten des Europäischen Patentamts vom 17. Januar 2003*, 2 BvR 1751/03, Absatz-Nr. (1 – 14), available at: http://www.bverfg.de/entscheidungen/rk20051128_2bvr175103.html (retrieved 10 January 2011).

[74] Ibid. at para. 11.

[75] German Federal Constitutional Court, 27 April 2010, *Entscheidung in dem Verfahren über die Verfassungsbeschwerde der Firma P. gegen die Entscheidung der Beschwerdekammer des Europäischen Patentamtes vom 6. Juli 2007*, 2 BvR 1848/07, 2 BvR 1848/07 vom 27.4.2010, Absatz-Nr. (1 – 23), available at: http://www.bverfg.de/entscheidungen/rk20100427_2bvr184807.html (retrieved 10 January 2011). On previous challenges against acts of the EPO see also A. Reinisch, "Decisions of the European Patent Organization Before National Courts", in: A. Reinisch (ed.), *Challenging Acts of International Organizations Before National Courts* (Oxford University Press, 2010), 137–156.

[76] Ibid. at para. 19.

of the appeals chamber.[77] Thus the German Federal Constitutional Court, while vigilant, is generally deferential and requires plaintiffs to substantiate allegations of a clear breach of essential human rights standards.

Also US state and federal courts have generally considered staff disputes concerning international organizations to fall outside the scope of their jurisdiction. A prime example thereof is *Mendaro v. The World Bank*,[78] the leading US case on employment disputes concerning the International Bank for Reconstruction and Development (IBRD). The applicable provision in the IBRD's constituent document is unclear with respect to whether the Bank should enjoy immunity in respect of employment issues.[79] The D.C. Court of Appeals, however, interpreted the provision to permit only suits in respect of external affairs of the Bank, thus holding the Bank immune from suits in employment disputes. According to the court in *Mendaro*, the IBRD's members only intended to waive the organization's immunity from suit with respect to its

> debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from employees' suits arising out of internal administrative grievances is not necessary for the Bank to perform its functions, this immunity is preserved by the members' failure expressly to waive it.[80]

With regard to employment disputes, the Court expressly held that "the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory".[81]

In another US case concerning a dispute between the World Food Program (WFP) and one of its employees this approach was maintained.

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[77] Ibid. at para. 21. See also German Federal Constitutional Court, 2 BvR 2253/06, 27 January 2010.

[78] *Mendaro v. The World Bank*, 717 F.2d 610 (D.C.Cir. 1983).

[79] Art. VII Section 3 of Articles of Agreement of the International Bank for Reconstruction and Development, Washington, D.C., 27 December 1945, 2 UNTS 134 ("Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. […]").

[80] *Supra* note 78, at 615.

[81] Ibid.

Thus, in *Bisson v. United Nations and ors*[82] the claimant had argued that, like the UN, the WFP had waived its immunity by failing to provide an appropriate mode of settlement for her dispute. Specifically, she claimed that the Staff Compensation Plan (SCP) provided no mechanism for compensating general damages and, thus, the remedies available under the SCP were inadequate. The first instance judge had noted that the remedies available under the SCP were similar to most state worker's compensation schemes, which also excluded recovery for pain and suffering. He concluded that Bisson's dissatisfaction with the compensation policy did not make the policy inadequate and did not constitute waiver of immunity, quoting *Mendaro v. World Bank*.[83] Bisson claimed that the UN's and WFP's failure to provide for appropriate modes of settlement denied her rights under the International Covenant on Civil and Political Rights (ICCPR).[84] However, the court held that this objection lacked merit since Bisson's right to "self-determination" was not implicated in this case as she was not seeking redress from political or civil oppression, but rather recovery of damages for allegedly tortuous conduct. Moreover, even if the rights addressed by the ICCPR were involved, the ICCPR did not create any judicially enforceable individual rights before US courts and was thus unenforceable.[85]

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[82] *Bisson v United Nations and ors*, Decision on a report and recommendation of a US Magistrate Judge, Case no 06-6352 (SDNY 2008); ILDC 889 (US 2008), 11 February 2008. Bisson had been reimbursed by the WFP's Staff Compensation Plan (SCP) for medical, hospital, and other expenses directly associated with her injuries and had also been offered compensation in the amount of $104,000 for permanent partial incapacity which he incurred in the course of her employment for the World Food Programme (WFP). She claimed general damages stemming from the defendants' gross negligence and intentionally tortuous conduct.

[83] "[E]mployee dissatisfaction with the efficacy of the administrative remedy is insufficient to dissolve the immunity of international organizations". *Mendaro v. World Bank*, *supra* note 77.

[84] International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[85] *Supra* note 82, at 25 ("When the Senate ratified the ICCPR in 1992, it declared that "Articles 1 through 27 of the Covenant are not self-executing". 138 Cong. Rec. S4781-01, S4784 (Apr. 2, 1992). Moreover, "the ICCPR came with attached Reservations, Understandings, and Declarations declaring that the ICCPR is not self-executing. This declaration means that the provisions of the ICCPR do not create a private right of action or separate form of relief enforceable in United States courts". Guaylupo-Moya v. Gonzales, 423 F.3d 121, 137 (2d Cir. 2005); see also Igartua De La Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam), cert. denied, 514 U.S. 1049 (1995) (noting that the ICCPR does not give rise to "privately enforceable rights under United States law"). Therefore, even if Bisson has rights under the ICCPR that are implicated here, this Court cannot enforce them").

Also Canadian courts were faced with requests to deny immunity of international organizations in employment related disputes. In *Trempe*[86] a former employee of the International Civil Aviation Organization (ICAO) raised claims for a considerable amount *inter alia* against the ICAO Council as well as the ICAO staff association. Trempe had been employed as a "distribution clerk". His original employment contract of 27 June 1990 was to end on 12 October 1990 and provided, *inter alia,* that the provisions of the ICAO Service Code applicable to permanent staff was not applicable to his contract due to its short duration. Subsequently, the contract was prolonged during 1991 and 1992. On 25 January 1991, the ICAO informed its personnel that the ICAO Secretariat had decided that all contracts of non-permanent staff were to be amended to the effect that the ICAO Service Code was applicable to them. On 6 November 1992, the ICAO Secretary General informed Trempe that his contract would terminate and was not to be renewed as of 30 December 1992. On 13 November 1992, the Chief of the Personnel Branch told Trempe that the number of general service staff had to be reduced. Later on, Trempe discovered that a temporary Distribution Clerk had replaced him and that a vacancy notice had been issued for his the post. On 20 January 1993, Trempe thus appealed to the ICAO Secretary General with the request that the decision regarding his contract be reviewed. The Secretary General denied his request based on the delayed submission of his appeal.[87] Trempe pointed to the action of the Chief of the Personnel Branch and alleged a denial of his legitimate right to defend himself.[88] Subsequently, Trempe requested to be granted

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[86] *Trempe v L'Association du personnel de l'OACI* et al. *And Trempe v. Conseil de L'OACI* et al., Cour Supérieure, District de Montréal, Nos. 500-05-061028-005 and 500-05-063492-019, 20 November 2003.

[87] Ibid. quoted at 17 ("At the time, [Chief of the Personnel Branch] spoke with you on 13 November 1992, it was intended to keep the post vacant. However, later on it was decided to fill the post again and a temporary Distribution Clerk was recruited because the supervisors did not express an interest to rehire you. Although the terms of your temporary appointment dated 30 December 1991 (see paragraph 9 of the letter of temporary appointment of 3 July 1990) exclude the Staff Regulations and Rules concerning the appeals procedure, I would have been prepared to consider a request from you to allow you to do so if such a request had been submitted to me within the prescribed time limit [...], i.e. within one month of the time you received notification of the decision in writing on 6 November 1992. Since you did not meet this deadline, I am not prepared to consider your request").

[88] Ibid. quoted at 18 ("I would like to draw your attention on the point that the misrepresentation of the facts by C/PER concerning the non-requirement of my post for 1993, as reported in my letter of 20 January 1993, explains why I did not appeal to you in due time. [...] But it has to be mentioned that the opportunity to justify myself about the unfair supervisor's report has never been given to me. It implies, for the one hand, that my legitimate employee's right to defend myself against the arbitrary has been denied and on the other hand, my application for a future post vacancy may not be favorably considered").

the right to appeal to the UNAT. His request was dismissed by the ICAO Secretary General. On 27 April, the Appeals Commission recommended to the Secretary General to accept the complaint by Trempe despite the delay. However, the Secretary General did not accept this recommendation. On 19 August 1994, Trempe directly submitted his appeal request to the UNAT. The UNAT decided on 21 November 1995 that the Secretary General's refusal to grant the possibility of appeal to Trempe fell within the former's discretion.[89] When seized by the matter, the domestic Superior Court of Montréal first established that all the defendants enjoyed immunity, referring in this context *inter alia* to *Miller v. Canada*,[90] *Procureur general du Canada v. Lavigne* et al.,[91] *Broadbent v. Organization of American States*,[92] *Mendaro v. World Bank*[93] and distinguishing the case at hand from state immunity with a reference to *Rhita El Ansari v. Morocco* et al.[94] Additionally, the Court addressed the complaint raised by Trempe relating to a violation of his fundamental rights. The Court stated that it appeared that Trempe's attempt to appeal internally had been rejected due to the lateness of his request and that his case was not heard on its merits by any appellate body. Trempe submitted that his fundamental rights had been breached since he had not been heard by an independent and impartial tribunal. This, he alleged, had caused his "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"[95] under domestic law to be violated, since this right also encompassed the provisions of the ICAO seat agreement relating to security. After not having been heard in accordance with the fundamental principles of justice, Trempe alleged, his psychological security had been negatively affected. The Court found that

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[89] UNAT Judgment No. 726, Case No. 809: *Trempe v. Secretary General of the International Civil Aviation Organization*, 21 November 1995, UN Doc. T/DEC/728. ("[i]f the Chief of the Personnel Branch – and this has not been confirmed – gave inaccurate information to the Applicant, that was wrong. Nevertheless, in the circumstances, the Secretary General was within his rights in concluding that there was no justification for waiving the time-limit").

[90] *Her Majesty The Queen in Right of Canada v. Miller*, Appeal to Supreme Court, (2001) 1 SCR 407, ILDC 179 (CA 2001) 2001 SCC 12 (CanLII), 1 March 2001.

[91] *Procureur general du Canada v. Lavigne* et al., *Québec Court of Appeal*, Receuil de Jurisprudence du Québec 405 [1997]. Also quoted in UN, United Nations Juridical Yearbook 2003, UN Doc. ST/LEG/SER.C/41, p. 600.

[92] *Broadbent v. OAS*, D.C. Court of Appeals, 628 F.2d 27, 35 (D.C.Cir. 1980).

[93] *Mendaro v. World Bank*, *supra* note 78.

[94] *Rhita El Ansari v. Morocco* et al., 1980 U.S. App., LEXIS 21563.

[95] Section 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Trempe's claim was not justified since the question had already been decided by the Canadian Supreme Court. In that case it was held that

> it is clear that the right to personal security does not protect the individual against the ordinary tension and anguish that a person of reasonable sentiment would feel following a governmental act. If the law would be interpreted in such a broad fashion, innumerable governmental initiatives could be contested on the basis of a violation of personal safety [...].[96]

After concluding that this dictum of the Supreme Court was applicable to the case at hand, the Court concluded that Trempe's constitutional argument lacked basis, also in view of the alleged breach of "fundamental freedoms" without, however, going into a detailed examination thereof. However, when addressing the issue of costs, the court used its discretion and decided in favour of Trempe. After finding that both the amounts claimed by Trempe and the statutory fees would be equally "ridiculous", the Court reasoned why Trempe should not be obligated to pay costs. Firstly, the Court considered the fact that Trempe was not represented by counsel, and secondly, it found that the context of the case was, at the least, peculiar.[97] The Court concluded that Trempe would have normally had the right to be heard on the merits of his complaint, but that his complaint was rejected merely on a question of a delay which seemed at the least subject to debate since it had in fact been caused by the organization. The Court rhetorically asked how Trempe could possibly have made a claim for revision on time and answered rather vaguely that the only thing that could be said was that everything appeared worthy of discussion and was ambiguous.[98] Finally, the court stated that it was not competent to decide on the decisions made by the ICAO Secretary General and the UNAT, but that the facts of the case could be considered by the Court when deciding on costs. Moreover, the Court held that while the appeal might have been bold, it was not frivolous, since Trempe's seemed to have been the victim of an injustice and a citizen should always have the right to address the tribunals of his country. Likewise, the Court mentioned that the General Procurator had intervened in the matter in favour of the ICAO, using Canadian public funds against a citizen without means.[99] This amounted, in the Court's eyes, to an unequal relation of power which finally led the Court to reject the appeal without costs. While this decision

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[96] Originally in the French language, *supra* note 86, at para. 93.
[97] *Supra* note 86, at para. 99.
[98] Ibid. at para. 105.
[99] Ibid. at paras. 106 to 110.

did not question immunity of the ICAO, the stance of the court when deciding on costs is noteworthy; it concluded that Trempe was possibly the victim of an injustice and found that the intervention by domestic authorities in favour of ICAO's immunity resulted in an unequal relation of power.

In the United Kingdom, domestic employment tribunals were confronted with staff disputes involving international organizations. *Mukoro v. EBRD*[100] was based on a complaint against the EBRD alleging unlawful racial discrimination after Mr. Mukoro had made a number of unsuccessful approaches to the Personnel Department of the Bank seeking employment. In the appellate judgment, the London Employment Appeal Tribunal upheld the EBRD's immunity, but maintained in its general comments that:

> As immunity from suit and legal process conferred on foreign States, diplomats, international organizations and their officers may produce severe disabilities for individuals in respect of fundamental rights, it can only be justified by an overriding public policy or interest.[101]

Thus, in such cases immunity could be justified

> on the ground that it is necessary for the fulfilment of the purposes of the Bank, for the preservation of its independence and neutrality from control by or interference from the host state and for the effective and uninterrupted exercise of its multi-national functions through its representatives.[102]

In addition to these criteria, the Tribunal also pointed out that when interpreting the relevant rules granting immunity the severity of the disability suffered by a potentially aggrieved individual must also borne in mind.

In *Jananyagam v. Commonwealth Secretariat*, an international organization,[103] a London Employment Appeal Tribunal was faced with an allegation of sex discrimination which had occurred in the course of an arbitration proceeding between a company through which Jananyagam had contracted with the Commonwealth Secretariat and the company. The Tribunal found that since the alleged discrimination took place at a time when Jananyagam was represented by counsel and before a

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[100] *Mukoro v. EBRD*, Employment Appeal Tribunal, Appeal No. EAT/813/92, 19 May 1994.
[101] Ibid. at p. 7.
[102] Ibid.
[103] *Miss Jan Jananyagam v. Commonwealth Secretariat*, Employment Appeal Tribunal, Appeal No. UKEAT/0443/06/DM, 12 March 2007.

quasi-judicial body the arbitration was deemed to have given her the opportunity of bringing her sex related allegation, and its detriment to her, immediately to the attention of the arbitral panel. She thus had the reasonable opportunity of raising her complaint and having it determined in accordance with Article 6 ECHR. Moreover, the case provided the opportunity for the Tribunal to look at whether rights of the Commonwealth Secretariat could be impaired by a denial of immunity. The Tribunal noted that "supporting [Jananyagam's] right now to complain to an employment tribunal about that act of discrimination may involve interfering with the Article 6 rights" of the Commonwealth Secretariat, as another party to the arbitration.[104] Again, as in *Mukoro v. EBRD,* the Tribunal pointed out that in assessing the disproportionate effect of a restriction on allowing proceedings in an individual case, regard must be had to the "extent of the disadvantage suffered in practical terms by the party restricted". The Tribunal found that "permitting the Commonwealth Secretariat to claim immunity if it should choose to do so is wholly proportionate to the disadvantage which the exercise of those rights had upon the Claimant in the present case". On a policy note, the judge concluded that "[i]f the real villain of the piece is the 1966 Act itself [...] the remedy has to be a direct challenge to the Act itself", and such a challenge was "inappropriate in the present proceedings".[105]

In *Bertolucci v. EBRD*[106] a London Employment Appeal Tribunal was to decide on an allegation of sex discrimination by a former employee of the EBRD based *inter alia* on EC law. While upholding the EBRD's immunity from suit as in *Mukoro v. EBRD*, the tribunal stressed that many signatories to the establishment agreement setting up the EBRD had not been members of the EC and that the Bank probably carried on operations and established a presence in non EC countries. Therefore, the Court concluded that it seemed

> wholly anomalous that simply because the Bank has chosen to set up its headquarters in the United Kingdom the national courts should be under an obligation to ensure that members of the staff have a right to an effective remedy to enforce and protect their rights under European Community law [...]. [107]

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[104] Ibid. at p. 17.

[105] Ibid. at p. 18. The 1966 Commonwealth Secretariat Act is the statutory basis for the privileges and immunities at issue.

[106] *Bertolucci v. EBRD* et al., Employment Appeal Tribunal, Appeal No. EAT/276/97, 22 July 1997.

[107] Ibid. at p. 14.

Finally, in light of the allegations by Ms. Bertolucci, the Tribunal noted that "immunity from suit involves serious responsibility".[108]

D. Lessons Learned from Domestic Case Law for the Design of Administrative Tribunals

The jurisprudence examined above does not lead to the conclusion that, in the few cases where courts have been willing to deny immunities to international organizations, either the ensuing proceedings amounted to "unilateral interference"[109] or the "uniformity in the application of staff rules or regulations"[110] was undercut. Consequently, the main risk associated with denying immunity has so far not materialized where courts have actually denied immunity to international organizations or showed willingness to deny immunity under certain circumstances. It remains true that *firstly*, a risk of divergent decisions remains; *secondly*, unilateral interference cannot be excluded in the future; and *thirdly*, formal common minimum standards would provide more predictability for administrative tribunals, international organizations and their staff. However, it can be concluded that the destabilizing effect of domestic decisions has so far not been significant in view of the main argument against the "zealous" approach of domestic courts.

In this context, it may appear that the invocation of domestic standards, exemplified in the invocation of the French *ordre public*, the cardinal principles of the Italian Constitution or the essence of rights guaranteed under the German Basic Law, means that standards applied by domestic courts are not "universal" but rather "unilateral". However, that a standard is domestic does not imply that it is not also universal. In the decisions analyzed above, courts have applied standards which can be encompassed by a universal understanding of "due process". The invocation of domestic principles, in the present context, arguably merely serves to "domesticate" universal ones, i.e. to make them more easily applicable in the domestic legal order.

Nevertheless, the above case law also shows that regional differences are important. Thus, both Italian and UK courts have referred to the scope of members of the respective international organizations in order to

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[108] Ibid. at p. 16.
[109] *See supra* text at note 12.
[110] *See supra* text at note 11.

justify or to avoid the application of regional human rights standards, respectively. This may mean that regional differences could continue to be relevant just as they are among states. However, this fact alone is not able to detract from the observation that the applied standards may be deemed universal.

Without doubt the most far-reaching case in the present context remains *Siedler v. WEU*. It essentially entailed an analysis of whether Siedler had at her disposal reasonable alternative means in order to effectively guarantee her rights.[111] Several factors were highlighted by the Court of Cassation in the final decision: the effective, not merely abstract, independence of the internal dispute settlement body, the mode of appointment of its members and the duration of their mandates. Additional criteria, stressed by the appellate court, were the publicity of decisions, the power of the body to implement decisions and the possibility to challenge the impartiality of its members. Finally, the Court of Cassation concluded that even if immunity was to be denied, domestic provisions of labor law could not generally apply to the relationship between an international organization and its staff. Similar criteria are echoed in the French Court of Cassation's decision in *Illemassene* v. *OECD* even if there the Court found no violation of the relevant principles.

While one may question the specific outcome of a balancing of immunity and human rights in specific cases decided by Belgian, Italian and French courts, it cannot be denied that the standards they apply, focusing mainly on the existence of an effective remedy before an independent and impartial authority, are based on rights widely guaranteed in universal and regional human rights treaties. Even if the Court in *Siedler* invoked the "regional" ECHR, the standards it employed are universal and can hardly be construed as a unilateral approach, also in light of the fact that the Belgian Court of Cassation rightly concluded that domestic labour law remained inapplicable.

While the limited number of cases makes any generalization difficult, it is possible to distill a set of desirable standards that can guide states and

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[111] Based on *Waite and Kennedy*, the Belgian Court of Cassation noted that exceptions to the right to a fair trial were conceivable. However, they were not to lead to a restriction of that right in a way or to an extent that would compromise the substance of the right. Moreover, such exceptions were only justified if they pursued a legitimate aim and a reasonable relationship of proportionality between the means employed and the intended purpose existed. This question of proportionality needed to examined on a case-by-case basis and it was necessary to determine whether the affected person had reasonable alternative means at its disposal in order to effectively guarantee his or her rights.

international organizations with respect to the design of their administrative tribunals:

Firstly, it can be stressed that the criteria of "independence" and "impartiality" are central when it comes to assess the conformity of any administrative tribunal to the exigencies of the right to a fair trial. Independence must be effective and depends on a number of factors, particularly the mode of appointment or the duration of the mandate of a tribunal's members. It is not possible to conclude that from the view of domestic courts the duration of the mandate of an administrative tribunal's members of two years, as in the case in *Siedler*, *a priori* violates the notion of fair trial, even if this should be presumed also in light of the ECtHR jurisprudence. Rather, in practice, courts balance various factors in order to determine whether the examined mechanism is effectively "independent" and generally guarantees a fair trial. "Impartiality" requires the possibility to challenge the individual members of an administrative tribunal.

Secondly, on a more concrete level it can be concluded from the admittedly scarce case law that some form of complaints mechanism for employees which guarantees a judicial, organized procedure must exist. Its basic principles must be established by law. Access to such a mechanism, e.g. an administrative tribunal or appeals board, may not be restricted in a way that would compromise the substance of the affected individual's right. The tribunal or board must be composed of persons other than staff members, due regard being paid to their competence, independence and impartiality. The dates of hearings must be made public or made available to agents, delegations as well as to any personnel association of the respective international organization. Generally, procedural rules may differ from domestic ones as long as they enable the effective access to an independent and impartial decision-maker. The respective tribunal must have the competence to award effective remedies, e.g. to announce the annulment of a challenged decision, to order the organization to make good any damage caused and/or to reimburse any costs. Oral hearings should be granted whenever questions of fact are in dispute, especially in harassment cases or the like where the credibility of witnesses may be of cardinal importance. While a hearing does not necessarily need to be public, decisions must be published. Where several instances exists the appeals procedure must be completely separate from the first instance and fulfil the same fair trial guarantees as the first instance tribunal. Any limitations to such rights or guarantees must be necessary and proportionate.

Thirdly, it can be said that for a number of reasons even "activist" courts generally accept that international organizations' immunity should be generally upheld, for the well-known reasons mentioned above. This implies that the qualities of the available alternative mechanisms do not need to be as extensive as those sometimes found in domestic legal systems. However, the above-mentioned criteria can be said to constitute the most important notions and guarantees of a fair trial and must be maintained in any case, even disregarding any evolution in the understanding of the right to a fair trial. These criteria may be designated "cardinal principles" or "minimum requirements" of a respective constitution while in fact they are also widely, even universally, acknowledged principles that may not be undercut.

E. Conclusion

The minimum standards applied by domestic courts to disputes between international organizations and their staff should not obscure the fact that the design of administrative tribunals is shaped by a variety of factors. At the same time, a divergent development of domestic jurisprudence is conceivable.[112] Domestic courts are playing a legitimate role in observing certain minimum standards where they are not applying unilateral but rather universal standards and where they remain vigilant but not overzealous. Whether the common standards required by domestic courts will become more stringent or not, at least another additional argument, based on legitimacy, militates in favour of a particularly high standard of due process in the case of administrative tribunals. While the design of administrative tribunals mainly relates to the accountability of international organizations towards their staff, certain spill-over effects from the administration of justice in the staff area to other cases where the activities of international organizations impact on individuals is likely. In those contexts, relatively high standards of human rights protection will help organizations achieve legitimacy in areas where "non-electoral legitimation is fundamental".[113]

[112] Reinisch, op. cit., *supra* note 5.
[113] *See* Kingsbury and Stewart, op. cit., *supra* note 2, at p. 19.