4-1-2001

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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/cjil/vol2/iss1/21

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Judging with and Legal Advising in International Organizations

C. F. Amerasinghe*

"Some people become great, others just grate."

I. INTRODUCTION

The last 31 years of my life have been spent as an international legal adviser, an international "quasi-judge," and an international judge at the World Bank, the United National Administrative Tribunal, and the Commonwealth International Arbitral Tribunal. The experience covered not only the legal and judicial field, but also diplomacy, management of people, and absorbing equally the iridescence of "greatness" and the barbs of "graters"!

My early experiences in the legal department of the World Bank provided me with a solid foundation for my later work in the international administrative law field. While in the legal department, apart from my routine work, I dealt with such issues as expropriation, the developing law of the sea in the 1970s, and the development of the International Centre for Settlement of Investment Disputes ("ICSID"). Additionally, my academic work in the field served to supplement these professional endeavors.

* BA (with First Class Honours), LLB, PhD, LLD, Cambridge University; LLM, Harvard University; Member, Institut de droit international; Judge, UN Administrative Tribunal; Judge, Commonwealth International Arbitral Tribunal; Executive Secretary and Director, Secretariat, World Bank Administrative Tribunal; Senior Counsel, Legal Department, World Bank; Full Professor of Law, University of Ceylon, Colombo; Adjunct Professor of Law, Washington College of Law, American University; Senior Fellow, Trinity Hall, Cambridge University. The author received an appointment to the World Bank Legal Department specifically and expressly because of his high academic achievements and credentials, which included entering the record books of Cambridge University on his performance in the Classical Tripos Part I, in which he also achieved First Class Honours, being placed first in his first year law examinations and second in the final Law Tripos Part II examination, both with First Class Honours, winning several prizes and merit scholarships and studentships at Cambridge, including in 1964 the coveted Yorke Prize for a research work in law which was published as a book, and being a Research Fellow at Harvard Law School.

1. I was elected to a three-year term on the UN Administrative Tribunal commencing in 1997 and have opted out of standing for re-election for reasons which are reflected in the paper. I was elected as Judge for the Commonwealth International Arbitral Tribunal in November 1999.
Accordingly, not only was I able to develop my skills as an international lawyer and jurist, but I was also able to contribute practically and intellectually to the solution of problems, which helped me later in the World Bank Administrative Tribunal ("WBAT") and the United Nations Administrative Tribunal ("UNAT").

In the Legal Department of the World Bank (joined in 1970) where I later acted as Chief Counsel, I had some interesting special assignments. The routine work itself presented significant challenges concerning lending agreements for development projects. The World Bank often missed its true purpose, namely as a development agency for developing nations and not as a club primarily for the promotion of the interests of the few rich capital exporting countries. For example, in regard to a palm oil project, there was a feeling that the project should not jeopardize the interests of direct or indirect competitors among the capital exporting member-States. In principle, however, its justification lay solely in enabling the indigenous palm oil industry which provided labor and income opportunities sustainably to develop and flourish. In another case a project appraiser blindly tried to introduce high environmental standards which the borrower could never practically and economically have maintained because of the level of development of its economy and the expense involved. The reason for introducing the standards was that they were imposed in the appraiser’s (European) country. In both cases, however, the voices of the “graters” were stilled.

My experience with the special assignments was on the Law of the Sea, institutional law, and foreign investment law. My involvement in the UN Law of the Sea Conference from 1973 to 1981 as an adviser to the President of the conference was instrumental in bringing about, inter alia, a negotiated settlement of the problem of the regime of islands and archipelagos. The experience of that conference palpably brought into focus how skilled diplomacy by international lawyers could result in

2. The project in Malaysia was approved and the loan made with the palm oil component.
3. The project for industrial development in Mauritius was approved largely with a modified environmental protection covenant. In another project (Ports), after discussion, no environmental covenant was included. Available online at <http://www4.worldbank.org/sprojects/Project.asp?id=P001926>.
4. I wrote up my views on this subject soon after the UN Conference opened. See C. F. Amerasinghe, The Problems of Archipelages in the International Law of the Sea, 23 Intl & Comp L Q 539 (1974). The negotiated settlement took into account some of the article’s basic ideas but was mostly the result of extensive compromises reflected in Articles 46–54 of the UN Convention of the Law of the Sea ("UNCLOS") Treaty. The matter of the International Seabed Authority ("ISA"), which has subsequently been the principal impediment to ratification of the UNCLOS by the United States and some other States, also was of interest to the World Bank as a sponsor of developing countries. For the principles underlying the positions formulated at the early stages of the negotiations, see C. F. Amerasinghe, Basic Principles Relating to the International Regime of the Oceans at the Caracas Session of the UN Law of the Sea Conference, 6 J Marit L & Comm 213 (1975).
compromises and agreements in a world in which over 150 States had differing interests.\(^5\)

Between 1973 and 1978 I worked also on foreign investment disputes with ICSID. My work consisted in the exploration and clarification of confused areas, namely jurisdiction and submission to arbitration. I wrote an article for publication on jurisdiction,\(^6\) and prepared a like paper for the centre's users. I argued that an ICSID arbitral tribunal, like all international tribunals, was a *juge d'exception* (judge of exception) with *juridiction attribué* (assigned jurisdiction), so that jurisdiction had to be clearly established in each case, and existed only to the extent consented to by the parties. I also demonstrated that there were fairly well defined conventional limitations on the jurisdiction of an ICSID arbitral tribunal. By 1977, five of the six cases registered since 1968 had been withdrawn by agreement, while only one had been decided.\(^8\) Parties did not understand fully its jurisdiction and were reluctant to engage the centre partially because it lacked a clear understanding of jurisdictional issues. My studies helped clear the air.

Further, as ICSID was in its infancy at the time, neither foreign investors nor States knew how effectively to invoke the centre's jurisdiction. Several of my written works\(^9\) became basic in preparing the revisions of the "Model Clauses" which the centre published from time to time. Its work at this infant stage concentrated on jurisdictional matters and drafting of arbitration clauses. The work it had done helped engender more informed and effective jurisdictional references. The manner in which the centre was later invoked and the number of substantive awards given subsequently reflected the effectiveness of this work. The centre was, thus, propelled into a new era in the late 70s and early 80s when its use increased appreciably.

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5. The United States, among other States, has not yet ratified the convention which, nevertheless, has entered into force. The Chilean and Peruvian delegation and the Singaporean delegation were particularly influential.


7. See C.F. Amerasinghe, 47 Brit YB Intl L at 227 (cited in note 6).


An important special assignment of mine was to study and advise on the application of the World Bank's policy on expropriation of alien property. The principal expropriations of foreign enterprises which attracted the World Bank's attention at the time were the nationalizations of the US-owned International Petroleum Company ("IPC") in Peru (1969) and of the US-owned copper companies in Chile (1971). The issue was how did or should they affect the World Bank's lending policy vis-a-vis Peru and Chile. The World Bank formulated its policy in Operational Policy Statement ("OPS") No. 2.04 which stated that the World Bank would not lend to a member-State, if it found that the position taken by that State with respect to an alien's expropriated property was substantially affecting its international credit standing. Thus the question was how far international law was applicable in determining the impact of the expropriation on credit standing. I answered this in a memorandum which stated that the OPS, could only mean that the treatment would clearly be deemed to affect the credit standing of the host-State if the requirements of international law were not satisfied in regard to the treatment of the alien property upon expropriation. Accordingly, if those requirements were satisfied, there was a very strong rebuttable presumption that credit standing would be deemed unaffected.

In the case of Peru, the question was of the proper legal standard of compensation. I advised that international law required "appropriate" compensation (not necessarily "adequate" in the sense of "full" compensation) or a willingness to negotiate an offer or dispute. This view was in accord with the practice of States, the General Assembly resolution No. 1803 (XVII) of 1962, and the better opinion expressed in the authoritative writings of international jurists. The World Bank accepted this position finding in the case no circumstances warranting a conclusion that credit standing would be affected. The IPC finally entered into negotiations with Peru and the matter was soon settled. The IPC eventually accepted less than full compensation. In the case of Chile, the issue was whether local remedies had been exhausted in compliance with international law. I drew the General Counsel's

10. I had written extensively on the subject, principally, State Responsibility for Injuries to Aliens (Oxford 1967), as well as some contributions to international legal journals such as the Am J Int L, the Intl & Comp L Q, and ZAORV.

11. I dealt with and discussed the question of the quantum of compensation in my book, State Responsibilities at 121-68 (cited in note 10). I have now further discussed the matter in, Richard Lillich, ed, 3 The Valuation of Nationalized Property in International Law 91 (Virginia 1975), and in C.F. Amerasinghe, Issues of Compensation in the Taking of Alien Property in the Light of Recent Cases and Practice, 41 Intl & Comp L Q 22 (1992). It may be noted that the "Guidelines on the Treatment of Foreign Direct Investment," 2 Legal Framework for the Treatment of Foreign Investment 35 (World Bank 1992) in Title IV deals entirely and regrettably with "full compensation" as the standard of compensation, though admittedly it does not state explicitly that such standard is the only one. This approach failed to take account of the developments in the 20th century, particularly, of the law.
attention to certain failures on the part of the copper companies to seek proper remedies in the Chilean courts with a view to securing compensation, the remedies available not being clearly describable as "ineffective" according to international law. The Bank did not immediately determine that international law had been violated, and as a result, lending to Chile was not officially suspended. The copper companies and Chile entered into negotiations which later resulted in a settlement. In both cases the World Bank applied the current international law as a basic criterion for determining how its policy under the OPS was to be applied.

II. THE WORLD BANK ADMINISTRATIVE TRIBUNAL

In 1981, the Vice-President and General Counsel of the World Bank, Dr. Golsong, worked with the President of the Bank to appoint me as the first regular Executive Secretary and Director of the Secretariat of the World Bank Administrative Tribunal, established in 1980. Prior to this appointment I had worked on a few institutional matters while in the Legal Department, such as membership and immunities and privileges. The fifteen and one-half years in the WBAT enabled me to contribute not only to the advancement of respect for law and order in personnel relations in the World Bank, but also to the cultivation of a culture in the Bank for institutional and organizational law in a broad sense. The creation of the WBAT was largely due to Dr. Golsong and his respect for human rights. He certainly had a vision for the development of this needed organ in the World Bank—which became within a short time one of the more respected (after the UNAT) permanent international tribunals of its kind—and more generally for the development of institutional law.

This vision extended to the initial appointments to the tribunals' bench. The initial bench consisted of seven judges from different continents, legal systems, and parts of the world. Some of them had no experience with personnel disputes or international legal disputes of any kind. Among those appointed was a former President of the International Court of Justice, Dr. Jimenez d'Aréchaga. In those initial years, Dr. Jimenez d'Aréchaga (the first President of the WBAT for eleven years) helped make it what it became. My function was to provide judicial and legal advice and to assist by conducting and supervising research and otherwise aiding in

12. The law of local remedies had been discussed in a chapter in my work, State Responsibility at 169-199 (cited in note 10). A subsequent book treated the subject more comprehensively. See C.F. Amerasinghe, Local Remedies in International Law (Grotius 1990).


14. The fact that I had been earlier elected to the prestigious Institut de droit international was a factor in my election by Dr. Golsong to head the Secretariat of the WBAT.
the drafting of judgments. This involved me fully in the taking of judicial decisions and preparing judgments.

As for the members of the Tribunal, some judges were effective, while some were indeed disappointing. Many of the latter were from common law jurisdictions, and had no experience or education in international law or in administrative (particularly civil service) law, though they may have been high court judges or practitioners in their jurisdictions. It became quite clear that national judicial experience by itself, even at a high level, particularly in common law jurisdictions, did not qualify a lawyer to function effectively on an international court such as the WBAT (or for that matter, any international administrative court). Such judges were unable to draft the required judgments, brought with them irrelevant experience in trying national cases (often of a criminal nature), or were too set in their ways or unwilling to learn the law and techniques which were new to them. There certainly were exceptions, as some judges contributed to the tribunal’s development by seeking extensive help from the Secretariat in deciding cases. The help that the Secretariat gave was crucial.

There are considerable differences between the WBAT and courts composed of more than one judge in a national jurisdiction. The WBAT has always sought a consensus, and succeeded thus. In the twenty years of the tribunal’s existence, all judgments have been unanimous. However, on occasion a separate opinion, especially by one of the more informed and perceptive judges, may have been useful in elucidating reasoning which suffered from the overwhelming zeal for a consensus opinion. There were at least a couple of instances, in which one or two of the enlightened judges differed not only on the reasoning, but on the result, either completely or partially, yet went along with the majority in both reasoning and result because of the established tradition. I believe a separate opinion or a dissent is useful and can influence future decisions, if it is well reasoned or adds to the clarity of the majority opinion. The more effective judges were the ones who initially may have differed, whether in reasoning or result, and their individual opinions could have made a distinct positive contribution. On one occasion the first President took a line which was different from the majority on both reasoning and result, but deferred to the majority in order to have a consensus. If he had dissented and written an individual opinion, I believe the jurisprudence of the WBAT would have been richer and been influenced to take a more balanced course in the future, though the applicant would in any event have lost the case. Far from taking away from the impact of judgments which would remain the same, dissents, and particularly separate opinions, could lead to development of a better jurisprudence and greater care in evaluating evidence in the future.

The WBAT took some daring decisions in developing the law relating to the abuse of discretion in administrative decisionmaking, a subject at the heart of
International administrative law. It also used the experience of other International Administrative Tribunals ("IATs"), particularly the UN tribunal. The WBAT's interest in being scrupulously accurate in applying the general principles of international administrative law led to its support for efforts to compile the jurisprudence and authoritative academic opinion in the field. Both the published opinions of the WBAT and other IATs, as well as academic work on international administrative law, provide reference points for the development of the law.

Furthermore, during my tenure at the WBAT, I produced *The Law of the International Civil Service*, providing comprehensive coverage of IAT jurisprudence, an effort previously unattempted. This work has enabled the existing IATs to develop a consistent jurisprudence and demonstrated a broad interest that some of the WBAT judges had in promoting the efficacy and success of international organizations apart from their regular functions in adjudicating institutional personnel disputes. Better judges were keenly interested not only in the accuracy on the law of individual cases but in the preservation of consistency in international administrative law, application of the proper principles and the creation of a corpus of accessible knowledge on the jurisprudence of tribunals. There was clearly a special vital interest in the rule and efficacy of law.

As for method of operation, judgments were drafted by a rapporteur (usually a judge but sometimes not). In any case, the Director of the Secretariat and his office prepared the section of the judgment on the facts and contentions of the parties. This is all very different, I believe, from what happens in national jurisdictions, particularly the common law ones, and even where lawyers clerk for judges. But in the circumstances of a tribunal such as the WBAT, it made for maximum efficiency and ensured appropriate reasoning and accuracy.

So broad was the interest of the judges in international organizational matters, of which the personnel area was only one, that the first President in 1991 agreed to have a comprehensive book on the basic principles of international institutional law in general. Dr. Jiménez Aréchaga was aware of both my exposure to the institutional aspects of international organizational law when I was in the Legal Department and

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15. See, for example, *King v IBRD*, WBAT Decision No 131 (1993).
18. See *de Merode*, Decision 1, WBAT Decision No 1, 13 (1981).
my dealings with many institutional matters as Director of the Secretariat, apart from those in the personnel area. The result was that in my leisure I worked on and was able to produce a treatise on the institutional legal aspects of international organizations. 19

III. THE UN ADMINISTRATIVE TRIBUNAL

My three-year stint from 1998 to 2000 as a judge of the UNAT was really a further development of my work at the WBAT, though emphatically the judicial function was at the heart of the exercise.

In the UNAT the seven judges met in panels of three. The UNAT decided many more cases annually than the WBAT (more than fifty as compared with about ten on the average), with less assistance from the Secretariat because, apparently, the UN does not have the funds (among other things) to provide for the extensive support required by such a volume of work. As a result the judges had much more work. In principle, the system prevailing among the UNAT judges was the same as in the WBAT, namely that collegiality and consensus were the basic premises, but most of the work in drafting judgments was done by the rapporteur judge and other judges on the panel, rather than by the Executive Secretary and his office. The efficiency, skill, judicial acumen, legal knowledge, and even interest of the judges varied. Some were better rapporteurs than others, but there was always an interest in producing a coherent, well reasoned, accurate, and readable judgment. Citations were generally confined to the decided cases of the UNAT itself. Dissents and separate opinions are more acceptable than in the WBAT, but were still unusual. 20 The majority on the panel does its best to convince the third member, with success generally, and sometimes a fortunate judge in the minority persuades the other two to accept his solution. There has been no attempt to standardize the style of judgments, each rapporteur writing in his or her own style. Consequently, there is less emphasis on uniform style than on consistency and reasoning, which is as it should be.

19. See C. F. Amerasinghe, The Principles of Institutional Law of International Organizations (Cambridge 1996). I believe it is practically impossible for academics to understand fully international institutional law without practical experience in an international organization of some importance. I had been an academic for over eight years, with, additionally, a consulting practice in international law, and a Full Professor of Law, but without my practical experience my writing on international organizational law would not have been so effective, indeed, even possible.

20. See, for example, Quassem (2000) (Amerasinghe, dissenting) (dissenting on the quantum of damages while agreeing with the conclusion and reasoning on the merits); Al-Hafiz (2000) (Amerasinghe, concurring). No other individual opinions had been written during my tenure.
As a rule the judges are expected to speak both English and French, although this is not always the case. The few judges who have come to the Tribunal lacking a second language have still made great contributions.

The UNAT has in the last three years made some important pronouncements, particularly in the field of the exercise of discretionary powers in disciplinary matters. In the field of discipline we were careful to point out that the UNAT’s review power of decisions taken by the administration is fairly extensive, covering even the characterization of what may amount to misconduct and the appropriateness of a sanction in terms of proportionality. The recent decisions have clarified and formulated in well defined terms the scope of review in a sensitive area such as discipline, which hitherto had been approached in a rather cursory and confusing manner. No one will disagree that it is a matter of justice and fairness not only that a tribunal should use the proper criteria and standards in reviewing disciplinary decisions, but also that both staff members and the administration should have notice of their rights and responsibilities and the basis for them. A good example of a recent advance in the same area is the clarification of the law relating to the matter of the burden of proof and of evidence in the exercise of disciplinary powers by the administrative entity.

In other areas such as dismissal from service, promotion, transfer, and fixed-term contracts, the tribunal has developed the law applied hitherto, looking more closely at the parameters within which the administration should operate in exercising its discretion to take administrative decisions. In this important area of discretionary powers, which is sometimes troubled by confusion and vagueness, the UNAT has recently tried to be as specific and definite as possible in stating the law resulting from balancing the conflicting interests of the staff member in being treated with fairness and equity and of the administration in being able to run an efficient organization. This idea of recognizing, balancing, and possibly reconciling conflicting interests has recently been particularly emphasized.

21. During my tenure, the UNAT had three judges who were not bilingual—a US judge, the Irish judge and the Congolese Judge. The Congolese judge, Mr. Victor Yenyi, who knew no English when he came into the UNAT, took the trouble to learn the language and was later able to understand discussions in English, though he drafted in French. He was a very skilled judge, having great judicial acumen and knowledge of international and civil administrative law and in spite of his lack of English clearly made a great contribution to the Tribunal. The Irish judge, Mr. Kevin Haugh, in spite of his lack of French, also was a great contributor.

22. For cases clearly elaborating and stating the general principles applicable in disciplinary review cases, see Edongo (2000); Kiwanuka, UNAT Decision No 941; Shabour, UNAT Decision No 939; Al Arid, UNAT Decision No 932; Uggla, UNAT Decision No 898; Jhuti, UNAT Decision No 897, Augustine, UNAT Decision No 890.

23. See, for example, Edongo, para VI, Kiwanuka, para VIII, and Jhuti, para IV.

24. See the statement to the latter effect in Kiwanuka, para IV.

25. See, for example, cases cited in note 23 above.
The UNAT not only deals with more cases than the WBAT, but generally has to deal with somewhat more complicated and sensitive issues, particularly because of the variety of functions that the UN performs as compared to the World Bank and, rather surprisingly, because of the UN's impecuniosity. The WBAT generally heard bad cases because the good and borderline cases were settled prior to adjudication by the tribunal, the World Bank being a fairly wealthy organization that generated its own income. The result was that the vast majority (between 70 and 75 percent) of cases went against staff members. In the case of the UNAT, everything, whether of a minor or major nature, generally ends up before the tribunal, because the ability to settle is not so easily available on account of the lack of financial means. As a result, a large proportion (50 to 60 percent) of cases is decided in favor of staff members.

During my tenure in the UNAT there have been several landmark judgments handed down with respect to many international administrative law issues, such as the termination of service for unsatisfactory performance, disciplinary matters, and promotion. The tribunal began to realize that some of its earlier judgments were not adequately explicit and sufficiently clear in their reasoning. In several cases the tribunal discussed policy and principle before clarifying and applying law to the dispute before it. This has contributed to the richness of the tribunal's jurisprudence. Indeed, of late there have been more important and significant judgments given by the UNAT than were given by the WBAT during my tenure years, or perhaps in the first forty-eight odd years of the UNAT’s existence.

IV. CONCLUSION

There are many areas in which difficulties have been experienced in both tribunals (UNAT and WBAT) because judges failed to realize that the law applied was not any particular national law, a common denominator of national laws, the civil law, nor the common law, but that it was a unique system known conveniently as international administrative law. Nevertheless, it must also be conceded that the unique system is based on the French and continental European systems of civil administrative law (in particular, the law relating to the civil service) although not identical with them. Further there is a sufficient rapport and community among the various IATs for there to have developed a corpus of applicable common principles, though each organization may have its own specific laws which are primarily applicable. Most common law judges on IATs have problems with all these features, unless, perhaps, they happen to be public international lawyers, which enables them to develop a broader, so to speak, civil law and international organizational orientation. Often, the purely common law judges have tried to apply principles from the common

27. See de Merode at 13 (cited in note 18).
law which are not relevant. This is a drawback to the smooth and proper functioning of IATs.

My experience has been that unless a judge has had good exposure to public international law, administrative law in the civil system, or perhaps labor law in the common law system, it is difficult for him fully to appreciate the issues and subtleties of the law applied by IATs. For this reason a careful look needs to be taken at the qualifications required for being a judge of an IAT, such as the UNAT or the WBAT. Judicial or even legal experience, as such, the latter may be practical or academic, does not enable a judge to function efficiently on an IAT. Clearly, legal experience should be a basic requirement, judicial experience, however high, is not. On the other hand, general legal experience seems inadequate. A criminal lawyer as such, whether judge, practitioner, or academic, for example, would be a poor fit. It has become apparent that there must be, as a qualification, an added requirement of experience in public international law, administrative law (civil law system), or labor law, for example. Again while practical legal experience is desirable, academic legal experience is adequate, because it is to the extent that a judge is a jurist that there is sufficient basis for undertaking the judicial functions in an IAT. Perhaps an important fact is being a jurist, rather than simply a person with legal experience, given the exposure to the proper fields of law.

Most IATs, including the UNAT and WBAT, establish limited terms (for example, two, three or four years) which may be renewed. I have a problem with renewals as such. The point is that, unlike in the case of other tribunals and courts, the authority making the initial appointment and renewal is the respondent in every case. Does justice not only have to be done, but also seem to be done? Is there not an appearance that a judge already appointed may give decisions in favor of the respondent party in order to have his term renewed? Is there not a conflict of interest that is created by the possibility of renewal? For this reason, I would eliminate renewals and give judges of IATs a long single term, for example seven years.

I have already referred to dissenting and separate opinions. Apparently in civil law jurisdictions these are not countenanced. However, both help to inject caution and clarity for the future and improve the performance of international courts such as IATs rather than deprive the principal judgment of force. Apart from that, diversity of opinion is sometimes a healthy way of developing the law in the direction in which it should go.

28. The Statute of the UNAT did not specify qualifications at all. The December 2000 amendment to the Statute merely requires that the appropriate experience, including legal experience, be considered. The WBAT Statute requires qualifications as a competent international jurist or as a holder of high national judicial office. Neither of these is ideally complete, though legal experience is a minimum. Any other experience in high national or any other judicial office is not a necessity. The UN has just elected to the bench of the UNAT an African (Sudanese) with no legal experience or qualification!